

DerivativesINSIGHT

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CFTC Staff Issues Extension of Time-Limited No-Action Relief to the Applicability of Transaction-Level Requirements to Activity in the United States and the CFTC Approves Request for Comment on Staff Advisory

On January 3, 2014, the Divisions of Swap Dealer and Intermediary Oversight (“DSIO”), Clearing and Risk, and Market Oversight of the US Commodity Futures Trading Commission (“CFTC”) issued an extension of the no-action relief provided in CFTC Letter No. 13-71 until September 15, 2014.

In footnote 513 of the CFTC Cross-Border Guidance¹, the CFTC stated that it believes a US branch of a non-US Swap Dealer (“SD”) would be subject to transaction-level requirements² because it has a strong supervisory interest in swap dealing activities that occur within the United States, regardless of the status of the counterparties. On November 14, 2013, in response to certain inquiries as to the applicability of transaction-level requirements, the DSIO issued CFTC Staff Advisory No. 13-69 (the “Staff Advisory”) with respect to certain swaps of non-US SDs if such swap is arranged, negotiated, or executed by personnel or agents of the non-US SD located in the United States. For more details on the Staff Advisory, please [click here](#) to view our prior Alert.

Subsequent to issuance of the Staff Advisory, non-US SDs raised further concerns that, in order to avoid market disruption for their non-US counterparties, additional time was necessary to allow them to organize internal policies and procedures in order to come into compliance with the transaction-level requirements. In response, on November 26, 2013, the CFTC granted time-limited no-action relief (CFTC Letter No. 13-71) to non-US SDs (whether or not an affiliate of a US person) until January 14, 2014 for compliance with (i) any applicable transaction-level requirement with respect to Covered Transactions³ that are *not with* a non-US SD; and (ii) if the Covered Transaction is *with* a non-US SD, any transaction-level requirement other than 23.503 (multilateral portfolio compression) and 23.504 (swap trading relationship requirements).

On January 3, 2014, this relief was extended to September 15, 2014.

Also, in light of the complex legal and policy issues involved, on January 3, 2014, the CFTC requested comments on (i) whether the Staff Advisory should be adopted as CFTC policy; (ii) in the view of commentators, whether transaction-level requirements should apply to

¹ Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) (“Cross Border Guidance”).

² Transaction-level requirements under the Cross Border Guidance include: (i) required clearing and swap processing; (ii) margining and segregation for uncleared swaps; (iii) trade execution; (iv) swap trading relationship documentation; (v) portfolio reconciliation and compression; (vi) real-time public reporting; (vii) trade confirmation; (viii) daily trading records; and (ix) external business conduct standards.

³ “Covered Transactions” are swaps between non-US SDs and non-US persons (that are not guaranteed affiliates or conduit affiliates of a US person) where the non-US SD is using personnel or agents located in the United States to arrange, negotiate, or execute such swaps.



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Covered Transactions with US persons who are not guaranteed or conduit affiliates of US persons; (iii) whether there should be any differentiation in treatment of swaps with non-US counterparties depending on the nature of the SD (i.e., whether it is a guaranteed affiliate or a conduit affiliate of a US person); (iv) to the extent a non-US SD must comply with transaction-level requirements, whether the non-US SD should be able to rely on a substituted compliance program and, if so, should substituted compliance be available for all transaction-level requirements or only specific requirements, and would the response be different depending on the nature of the counterparty (i.e., whether the non-US counterparty is a guaranteed affiliate or a conduit affiliate of a US person); (v) the meaning of “regularly” in the phrase “persons regularly arranging, negotiating, or executing swaps for or on behalf of an SD” and whether such persons are performing core, front-office activities of that SD’s swaps dealing business and, if not, what specific activities would constitute the core, front-office activities of an SD’s swaps dealing business and what characteristics or factors distinguish “core, front-office” activities from other activities; and (vi) the scope and degree of “arranging, negotiating, or executing” swaps as used in this context.

The comments are due within 60 days after publication of the notice in the Federal Register.

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