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The CFTC and the Division of Swap Dealer and Intermediary Oversight Publishes a Series of No-Action Letters, Q&As and FAQs

In the space of a few days in mid-October, the Commodity Futures Trading Commission (the "CFTC") published a number of Q&As and FAQs and the CFTC staff at the Division of Swap Dealer and Intermediary Oversight (the "Division") and the Office of General Counsel ("OGC") published several interpretative and no-action letters. Each publication addressed the implications of or provided clarity with respect to a number of rulemakings that were set to become effective on October 12, 2012. October 12, 2012 was a key date in the Dodd-Frank regulatory reform calendar, as this is the date upon which the joint CFTC and Securities and Exchange Commission (the "SEC") rules further defining key terms such as "swap" and "security-based swap" became effective and triggered the effectiveness of a number of other rules. We have briefly summarized each publication below.

Q&A—On Start of Swap Data Reporting

On October 10, 2012, the CFTC published a Q&A entitled "Q&A—On Start of Swap Data Reporting" (available here).

In the Q&A, the CFTC clarified how registration requirements of Swap Dealers ("SDs") and Major Swap Participants ("MSPs") will affect the actual date on which SDs and MSPs must first report swap data to a Swap Data Repository ("SDR"). The three compliance dates for reporting swaps to a global change to an SDR under Part 45 are October 12, 2012 (for credit and interest rate swap transactions in which the SDs and MSPs are a party), January 10, 2013 (for equity, foreign exchange and other commodity swap transactions for which SDs and MSPs are a party) and April 10, 2013 (for non-SDs/MSPs that are nonetheless required to report a swap transaction they execute with another non-SD/MSP). The Q&A aligns the Part 45 reporting requirements with the registration requirements for SDs and MSPs and addresses industry concerns as to the timing of when SDs/MSPs not yet registered would need to begin reporting.

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Reporting Swap Data

CFTC §1.3(ggg)(4)(i) provides that SDs exceeding either of the gross notional thresholds (the "*de minimis* threshold") after October 12, 2012 must either cease activities, or register as an SD with the CFTC no later than two months after the end of the month in which it exceeded the *de minimis* threshold. Such an SD will be deemed to be an SD on the earlier of (1) the date on which it submits its application for registration and (2) two months after the end of the month in which such SD exceeded the *de minimis* threshold. Accordingly, SDs must begin reporting as follows:

- For credit and interest rate swaps, an SD crossing the *de minimis* threshold between October 12, 2012 and October 31, 2012, must begin reporting on the date it submits its registration application, but in no case later than December 31, 2012. For SDs that do not cross the threshold in October 2012, such SD must begin reporting on the date on which the SD's registration application is submitted, but in no case later than the final day of the second month after the month in which the SD passes the *de minimis* threshold.
- For equity, foreign exchange and other commodity swaps, SDs crossing the *de minimis* threshold between October 12, 2012 and October 31, 2012 must report the swap data to an SDR on January 10, 2013. SDs passing the *de minimis* threshold after October, 2012, on (1) January 10, 2013, if the SDs registration application is submitted prior to or on January 10, 2013, (2) on the date the SD's registration application is submitted, if that date is after January 10, 2013, but before the final day of the second month after the month in which the SD passes the gross notional amount threshold or (3) on the final day of the second month after the month in which the SD passes the gross notional amount threshold.

CFTC §1.3(hhh)(3) provides that a person whose swap activities meet the MSP criteria in a fiscal quarter will not be deemed to be an MSP until the earlier of (1) the date on which it submits an application for registration or (2) two months after the end of that quarter. Accordingly, MSPs must begin reporting as follows:

- MSPs that meet the criteria in the fourth quarter of 2012 must begin reporting for all swaps on the date on which it submits a registration application, but in no case after February 28, 2013. An MSP that meets the criteria during a quarter in 2013 must report on the date on which it submits a registration application, but in no case after the last day of the second month following the end of the quarter in which the MSP first meets the criteria.

The definitions of SD and MSP do not affect the actual date on which swap data must first be reported by a reporting counterparty that is neither an SD nor an MSP. All swaps between two non-SDs/MSPs must be reported by the reporting counterparty by April 10, 2013.

Historical Swaps

The compliance dates for reporting historical swaps pursuant to Part 46 of the CFTC's regulations will be the same as for reporting new swaps pursuant to Part 45 of the CFTC's regulations. If a swap is entered into and executed after October 12, 2012 and subsequently, but before April 10, 2013, one of the counterparties becomes an SD, then the swap is reportable as a historical swap under Part 46.

Legal Entity Identifiers

Finally, with regard to obtaining and using Legal Entity Identifiers ("LEI[1]"), an SD and MSP must obtain an LEI on the first day on which they become an SD or MSP, but in no case later than April 10, 2013. Each non-SD/MSP counterparty subject to CFTC jurisdiction must also obtain an LEI prior to April 10, 2013. In any case, a counterparty must obtain an LEI by the compliance date applicable to it whether or not it is the reporting counterparty for any swaps. For historical swaps in existence after April 25, 2011, the reporting counterparty must obtain and report an LEI by the compliance date applicable to the reporting counterparty. In such cases, the non-reporting counterparty to a historical swap must obtain an LEI and provide it to the reporting counterparty within 180 days after the non-reporting counterparty's compliance date. For the avoidance of doubt, Parts 45 and 46 should be read together: a counterparty must obtain and use an LEI by the earlier of the dates applicable to it under Part 45 or Part 46.

1 Referred to as CFTC Interim Compliant Identifiers or CICIs pending establishment of the global LEI system

Frequently Asked Questions (FAQs) on the Reporting of Cleared Swaps

On October 10, 2012, the CFTC published an FAQ (found here) addressing questions related to determining the manner and content of reporting cleared swap transactions to registered SDRs, as governed by Part 45 of the CFTC's regulations ("Part 45"). The following is a summary of the key issues discussed in the FAQ:

Q: What are the applicable reporting provisions in Part 45 for cleared swap transactions?

A: A cleared swap must be electronically reported to an SDR both when the swap is initially executed (the "creation data") and over the course of the swap's existence (the "continuation data") and include three unique identifiers, as applicable: Unique Swap Identifiers ("USIs"), Legal Entity Identifiers ("LEIs") and Unique Product Identifiers ("UPIs").

Q: How will cleared swap transactions be reported to SDRs?

A: SDRs will accept data from the following entities that have an executed User Agreement with the SDR: (a) swap execution facilities ("SEFs"), (b) designated contract markets ("DCMs"), (c) derivatives clearing organizations ("DCOs"), (d) swap counterparties or (e) third-party service providers acting on behalf of any of these entities.

USIs must be assigned to the initial swap transaction(s) when executed (the "original swap"). A DCO that clears and novates an original swap should assign new USIs to the "resulting swaps" and link the original USI to the new USI(s) (a "transactional swap link"). USIs are not required for the aggregate new positions guaranteed by the DCO. All counterparties that face the DCO before and after the original swap is novated must be identified using a CFTC Interim Compliant Identifier ("CICI") or LEI.

Q: How would the reporting obligations of Part 45 apply to the reporting of a cleared swap?

A: The clearing of swaps requires the original swap between counterparties ("original swap") to be novated and extinguished and replaced by swaps between each counterparty and the DCO ("resulting swaps"). Part 45 provides the reporting obligations for the original swaps.

- The reporting obligations for original swaps vary depending on who the "Reporting Counterparty" is (as determined pursuant to Part 45.8), whether the swap was executed on or off-facility and whether it was accepted for clearing prior to the primary economic terms ("PET") data deadline.
- Original swaps executed before the Reporting Counterparty is required to report data pursuant to the compliance dates set forth in Part 45 will be reported as historical swaps and any resulting swaps will be linked back with their respective reported historical swap. Original swaps executed on or after the applicable compliance date for reporting will not be reported as historical swaps. For example, DCMs are required to report creation data for original swaps executed on or after October 12, 2012.
- *Once an original swap is accepted for clearing and extinguished by novation, the continued reporting obligations for the original swap are terminated.*
- Under Part 45, resulting swaps are required to be reported as follows:
  - the DCO must report PET data and confirmation data in a single report as soon as technologically practical after execution.
  - DCOs must also report daily trade data (with the applicable USIs), daily valuation data, swap position data for end-of-day processing, daily and final settlement prices with non-US dollar swap data provided with a US dollar equivalent, and, depending on the reporting approached used ("state data" or "life cycle event data"), all other continuation data must also be reported daily, on the day a life cycle event occurs, or on the second business day following a life cycle event. DCOs do not need to assign a separate USI for swap position data.
- Any corrections to any omissions or errors on previously reported swaps should also be reported by the DCO.
- Counterparties to the resulting swaps that are SDs/MSPs must also report valuation data daily.
- *DCOs have a reporting obligation for all cleared swaps irrespective of their characterization as a Reporting Counterparty.*

Q: What are the reporting obligations of a DCO for off-facility cleared swaps on October 12, 2012?

A: As of October 12, 2012, DCOs are required to comply with reporting provisions for credit swaps and interest rate swaps. Accordingly, DCOs must report the creation data (including PET data) and continuation data for resulting swaps from cleared credit swaps and interest rate swaps executed off-facility.

Q: Which party has the authority to select the particular SDR for purposes of cleared swap transactions?

A: The selection of an SDR for reporting purposes is determined, unless otherwise agreed by the counterparties and the DCO in the case of resulting swaps, by the counterparties to the original swap.

Q: May counterparties to a swap transaction (including a cleared swap) as part of the terms of such swap designate which counterparty will report the creation and continuation data (except for valuation data) to the SDR?

A: Yes. Part 45.9 allows registered entities and counterparties required to report to contract third parties to facilitate such reporting obligations.

Q: May a DCM, SEF or DCO that is also registered as an SDR or legally affiliated with an SDR require counterparties to use their "captive" SDR for reporting swap transactions?

A: No. SDRs are prohibited from tying or bundling their mandated SDR services with other ancillary services, such as their offering of trading or clearing services. Thus, a DCM or SEF as part of its offering or trading or clearing services cannot require that market participants use its affiliated or "captive" SDR for reporting.

Q: In connection with cleared swaps may DCOs, in meeting their obligation to report "continuation data" under Part 45, report swap position data to SDRs rather than transactional data?

A: Part 45.5(e) permits DCOs to report swap position data to SDRs in the same manner currently required for futures and options reporting to the Commission. USIs are required for transactional data on the trade date; however, a separate USI would not be required for position data. DCOs, however, should include a transactional swap link between the original swap and resulting or new swaps.

DCOs should also maintain records identifying each swap by USI and daily trade registers with detailed information including, but not limited to, any netting or compression events that took place on the trade date.

Q: Where must the resulting swap created through the clearing process be reported?

A: Part 45.10 requires that all swap data for a given swap be reported to a single SDR, which is the SDR to which the first report of required swap creation data is made.

Q: What are the obligations of the counterparties to a cleared swap to provide updated information if such swap is allocated after clearing by a counterparty to its "clients"?

A: Allocations by agents (such as asset managers) of a portion of a cleared swap to clients are treated as if the clients were the actual counterparties to the original transaction. Such agents must inform the swap's Reporting Counterparty within eight business hours after execution of the allocation. The Reporting Counterparty must then assign new USIs to each individual allocated swap, report them to the SDR and the SDR must "map" all the allocated swaps back to the original swap.

Request for Interpretation of the Definition of "Commodity Pool" Under Section 1a(10) of the Commodity Exchange Act (Letter No. 12-13)

Letter No.12-13 (available here) was published by the Division on October 11, 2012 and is addressed to the National Association of Real Estate Investment Trusts ("NAREIT"). Letter No. 12-13 responds to a September 2012 letter from NAREIT in which NAREIT requested that the Division interpret the definition of commodity pool in Section 1a(10) of the Commodity Exchange Act (the "CEA") to exclude certain REITs. Letter No. 12-13 addresses only "equity" REITS and not "mortgage" REITS and provides that REITs which primarily derive their income from the ownership and management of real estate and that use derivatives for the limited purpose of mitigating exposure to changes in interest rates or currency fluctuations are outside the scope of the commodity pool definition as long as the following criteria are met:

- The REIT primarily derives its income from the ownership and management of real estate and uses derivatives for the limited purpose of mitigating their exposure to changes in interest rates or fluctuations in currency.
- The REIT is operated so as to comply with all of the requirements of a REIT election under the Internal Revenue Code.
- The REIT has identified itself as an equity REIT in Item G of its last US income tax return on Form 1120-REIT and continues to qualify as such, or, if the REIT has not yet filed its first tax filing with the Internal Revenue Service, the REIT has stated its intention to do so to its participants and effectuates its stated intention.

For the purposes of Letter No.12-13, the Division refers to equity REITs as real estate investment trusts that hold income-producing real estate and engage in real estate management activities, including leasing and maintaining real estate, providing a variety of tenant services, and developing and redeveloping real estate. In NAREIT's original correspondence to the CFTC to which the Division refers in its Letter, NAREIT explained that the defining characteristic of an equity REIT is that it acquires and develops its own properties and must primarily operate these properties rather than immediately reselling them. NAREIT argued that because of this, equity REITs are not commodity pools but,

rather, operating companies. In support of this position, NAREIT stated that several other entities consider equity REITs to be operating companies, such as Standard & Poor's and the North American Industry Classification System, which is maintained by the US Department of Commerce to classify businesses for data collection, analysis and publication. In Letter No. 12-13, the Division seems to have been persuaded by this argument; the Division states in Letter No. 12-13 that a REIT that primarily derives its income from the ownership and management of real estate and that uses derivatives for the limited purposes of hedging is outside the definition of "commodity pool".

Request for Exclusion From Commodity Pool Regulation for Securitization Vehicles (Letter No. 12-14)

Letter No. 12-14 (available here) was published on October 11, 2012 and is addressed to both the Securities Industry and Financial Markets Association ("SIFMA") and the American Securitization Forum ("ASF"). It is a response to communications from ASF and SIFMA sent to the Division in August and October of 2012 seeking interpretation from the Division that operators of vehicles that issue asset-backed securities are not commodity pool operators or that, in the alternative, no action would be taken against such operators for failure to register with the CFTC as a commodity pool operator.

The Division declined to provide the requested interpretation, reasoning that it is required to determine whether a pooled investment vehicle is a commodity pool using a facts-and-circumstances approach. However, the Division agreed with SIFMA and ASF that certain securitization vehicles should not be included with the definition of commodity pool and that the operator thereof should not be included within the definition of commodity pool operator if the following criteria are met:

- The issuer of the asset-backed securities or mortgage-backed securities is operated consistent with the conditions set forth in Regulation AB or Rule 3a-7, whether or not the issuer's security offerings are in fact regulated pursuant to either regulation, such that the issuer, pool assets and issued securities satisfy the requirements of either regulation.
- The entity's activities are limited to passively owning or holding a pool of receivables or other financial assets, which may be either fixed or revolving, that by their terms convert to cash within a finite time period plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to security holders.
- The entity's use of derivatives is limited to the uses of derivatives permitted under the terms of Regulation AB, which include credit enhancement and the use of derivatives such as interest rate and currency swap agreements to alter the payment characteristics of the cash flows from the issuing entity.
- The issuer makes payments to securities holders only from cash flow generated by its pool assets and other permitted rights and assets, and not from or otherwise based upon changes in the value of the entity's assets.
- The issuer is not permitted to acquire additional assets or dispose of assets for the primary purpose of realizing gain or minimizing loss due to changes in market value of the vehicle's assets.

Securitization vehicles that satisfy the above criteria do not fall within the definition of commodity pool under Section 1a(10) of the CEA and are not included in Regulation 4.10(d). Therefore, the operators of such vehicles will not be required to register, or seek an exemption from registration, as a commodity pool operator. In light of the above criteria, it is unlikely that synthetic CLOs, market value CLOs and any securitization vehicle that is permitted to actively trade in and out of assets will be covered by the interpretative guidance set forth in Letter No. 12-14. Operators of the foregoing will need to seek determinations from CFTC staff on an individualized basis as to their CPO status.

Registration Relief for Certain Persons (Letter No. 12-15)

On October 12, the Division published Letter No. 12-15 (found here). CFTC rules require that introducing brokers ("IBs"), commodity pool operators ("CPOs"), commodity trading advisers ("CTAs"), futures commission merchants ("FCMs"), floor brokers ("FBs") and floor traders ("FTs") and their associated persons must register with the CFTC. IBs, CPOs, CTAs, FBs and FTs are collectively referred to herein as "Covered Entities". By virtue of new CFTC rules, or changes to existing rules, many more entities will be Covered Entities and required to register with the CFTC. In Letter No. 12-15, the Division acknowledges that some of these Covered Entities will be required to register solely because of their involvement with swaps ("Swaps Covered Entities") or because of the transition of certain contracts by Intercontinental Exchange, Inc. ("ICE") and the New York Mercantile Exchange ("NYMEX") to clearing as commodity futures and options transactions ("Futures Covered Entities") and grants time-limited relief from certain of the registration requirements.

Temporary Relief

Swaps Covered Entities and Futures Covered Entities and their respective associated persons were required to register with the CFTC on October 12, 2012 (i.e., the effective date of the rulemaking defining, among other things, the term "swap") or cease engaging in the relevant activities.

In Letter No. 12-15, the Division granted temporary relief from enforcement action to Swaps Covered Entities and Futures Covered Entities as long as the relevant entity files for registration as a Covered Entity on or before December 31, 2012 (the "Filing Date"). Such temporary relief is available to Swaps Covered Entities and Futures Covered Entities provided the following conditions are met:

- On or before the Filing Date, the Covered Entity files for registration with the National Futures Association (the "NFA").
- In the case of an IB, on or before March 31, 2013, the IB also files with the NFA a Form 1-FR-IB or Guarantee Agreement, in accordance with the requirements of applicable CFTC Regulations.
- In the case of FBs or FTs, on or before March 31, 2013, the FT/FB provides to the NFA documentation of its trading privileges on a designated contract market or swap execution facility, in accordance with the requirements of CFTC Regulation 3.11.
- On and after the Filing Date, the relevant Covered Entity makes a good faith effort to comply with the CEA and the CFTC's regulations applicable to its activities as an IB, CPO, CTA, associated person of any of the foregoing, associated person of an FCM, FB or FT, as if the person was in fact registered in such capacity. This final condition reflects the fact that registration is not instantaneous and the Division expects the relevant Covered Entity to comply with applicable laws and regulations while its registration is pending.

Statutory Disqualification

The CEA prohibits statutorily disqualified associated persons ("APs") from effecting swaps on behalf of SDs and MSPs. APs of SDs/MSPs are not required to register with the CFTC however, APs of Covered Entities are required to register. The NFA, as the body to which the CFTC has delegated registration oversight, uses its discretion to allow persons who are disqualified under Sections 8a(2) and 8a(3) of the CEA to register as APs of FCMs, IBs, CPOs and CTAs. To avoid disparate treatment between APs of SDs/MSPs and APs of FCMs, IBs, CPOs and CTAs, Letter No.12-15 permits statutorily disqualified APs of SDs/MSPs to register on the following basis:

- The SD or MSP must notify the NFA that the AP is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the CEA, and submit to the NFA information ("Disqualification Information") that identifies the person and the matter underlying the relevant statutory disqualification.
- Based solely on the Disqualification Information, the NFA will notify the SD or MSP whether or not the NFA would have granted the person registration as an AP.
- If the AP of the SD or MSP is effecting or involved in effecting swaps on behalf of the SD or MSP at the time the SD or MSP files a Form 7-R with the NFA, the SD or MSP must provide the notification and Disqualification Information to the NFA no later than 90 days following the date it files the Form 7-R.
- The SD or MSP may permit the person to effect or be involved in effecting swaps on behalf of the SD or MSP until such time as the NFA notifies the SD or MSP whether or not NFA would have registered the person as an AP. Following a notification by the NFA that it would not have registered the person as an AP, the SD or MSP may no longer permit the person to effect or be involved in effecting swaps on its behalf.
- Where the AP does not effect or is not involved in effecting swaps on behalf of the SD or MSP at the time the SD or MSP files the Form 7-R, the SD or MSP may not permit the AP to effect or be involved in effecting swaps on behalf of the SD or MSP prior to receiving notice from the NFA that the NFA would have granted the person registration as an AP.

Time-Limited No-Action Relief: Cleared Swaps in Agricultural and Exempt Commodities and Swaps Exchanged For Futures Not to Be Considered in Calculating Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception (Letter No. 12-16)

On October 12, 2012, the Division issued Letter No. 12-16 (available here) in response to requested relief from the obligation to include certain cleared swaps and swaps exchanged for futures referencing exempt commodities (such as energy commodities and metals) and agricultural commodities from the calculation of the aggregate gross notional amount of swaps connected with a person's swap dealing activity for the purpose of determining when and if a person is no longer entitled to rely on the *de minimis* exception from swap dealer registration. Pursuant to CFTC regulations, all swaps entered into by a person after October 12, 2012 in connection with such person's swap dealing activities are relevant to determining whether the person is a swap dealer and must therefore register as such with the CFTC.

Recently, several major swaps platforms that provide cleared OTC products announced their intention to transition the cleared swap activities offered on those markets to cleared futures contracts. In response to this market trend and requests from numerous market participants, the Division states in Letter No. 12-16 that it will not recommend enforcement action against any person for failure to include, in calculating whether its swap trading activities exceed the *de minimis* threshold applicable to its swap dealer status determination,

(A) a swap that:

i. references an exempt commodity[2] or agricultural commodity[3]

ii. is executed prior to December 31, 2012

iii. is either cleared on a registered derivatives clearing organization or entered into contingent upon it subsequently being exchanged for and cleared as a futures position as part of an exchange for a related position transaction conducted in accordance with a DCM's rules, or

(B) an option on a swap that is entered into contingent upon its being subsequently exchanged for and cleared as an option position as part of a DCM's exchange-of-option-for-option transaction.

Staff Interpretations and No-Action Relief Regarding ECP Status: Swap Guarantee Arrangements; Jointly and Severally Liable Counterparties; Amounts Invested on a Discretionary Basis; and "Anticipatory ECPs" (Letter No. 12-17)

On October 12, 2012, the CFTC's OGC issued a staff interpretation and no-action letter (available here) on matters concerning Eligible Contract Participants ("ECPs").

Letter No. 12-17 provided clarification on the following issues:

- Swap guarantors generally must be ECPs.
- A non-ECP generally may not be jointly and severally liable for swap obligations.
- Cash proceeds from a loan may be included in the calculation of "total assets" for purposes of qualifying as an ECP.

Letter No. 12-17 also provided no-action relief, subject to certain conditions, with respect to the application of the CEA Sections 2(e) and 13(a) to:

- Certain ECP guarantee arrangements.
- "Anticipatory ECPs"
- Certain determinations regarding "amounts invested on a discretionary basis"

Swap Guarantors Generally Must Be ECPs

Under Section 2(e) of the CEA, only ECPs may enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market…" The CFTC interpreted the term "swap" to include a guarantee of a swap under the final rules further defining the term "swap". The OGC clarifies in Letter No. 12-17 that Section 2(e) of the CEA requires the guarantor of a swap be an ECP, except under the following limited circumstances: (1) if the guaranteed swap is entered into on, or subject to the rules of, a DCM; (2) if a CFTC Order has been issued pursuant to Section 4(c) of the CEA providing such guarantor relief from compliance with Section 2(e) of the CEA, or (3) if the guaranteed swap is a trade option and the terms of CFTC regulation 32.3 are satisfied.

The OGC notes that guarantors who do not currently meet the ECP requirements can request to be treated or defined as ECPs.

Non-ECPs Generally Cannot Be Jointly and Severally Liable for Swap Obligations

Where ECPs and non-ECPs are jointly and severally liable for their loan obligations, such parties may want to hedge their exposure to the loan by entering into an interest rate swap on the same basis. However, as the OGC clarifies in Letter No. 12-17, Section 2(e) of the CEA makes it unlawful for a non-ECP to be a jointly and severally liable swap counterparty because such conduct constitutes entering into a swap, which a non-ECP cannot do other than on or subject to the rules of a DCM.

Cash Proceeds From a Loan Count Toward Total Assets

Under Section 1a(18)(A)(v)(I) of the CEA, a corporation, partnership, proprietorship, organization, trust or other entity can qualify as an ECP if it has total assets exceeding US$10 million. Responding to comments received, the OGC confirms that loan proceeds do count toward the US$10 million total asset calculation, even though there is an equivalent loan repayment obligation that is a liability. The calculation under Section 1a(18)(A)(v)(I) does not take into account liabilities. Consequently, an entity may qualify as an ECP as long as it has more than US$10 million in total assets even if it has a negative net worth.

2 An "exempt commodity" is defined under Section 1a(20) of the CEA.

3 An "agricultural commodity" is defined under Section 1.3(zz) of the CFTC Regulations.

Swap Guarantee Arrangements

Under Section 1a(18)(A)(v)(II) of the CEA, a corporation, partnership, proprietorship, organization, trust or other entity can qualify as an ECP if it has obligations that are guaranteed by the following types of ECPs: (1) an entity that has total assets exceeding US$10 million; (2) financial institutions; (3) state-regulated insurance companies; (3) investment companies subject to regulation under the Investment Company Act of 1940 (the Investment Company Act); (4) certain regulated commodity pools; (5) certain governmental entities; and (6) any other person the CFTC determines to be eligible to be an ECP in light of such person's financial or other qualifications pursuant to Section 1a(18)(C). Many commenters wanted to expand this universe to ECPs that can confer ECP status under section 1a(18)(A)(v)(II). The OGC found merit in allowing certain additional types of ECPs to guarantee the swap obligations of a non-ECP. Accordingly, the OGC will recommend no-action relief under the following circumstances:

(A) The guarantor (the "Guarantor") is:

- A corporation, partnership, proprietorship, organization, trust or other entity that has a net worth exceeding US$1 million
- An indirect proprietorship that consists of an individual or, if permitted by applicable state law where the proprietorship operates, individuals, with:
  - a net worth (in the aggregate across all indirect co-proprietors, where applicable state law permits proprietorships comprising more than one individual) exceeding US$1 million
  - amounts invested on a discretionary basis, the aggregate of which is in excess of US$5 million (in the aggregate across all indirect co-proprietors, where applicable state law permits proprietorships comprising more than one individual)

(B) All of the following conditions are satisfied:

- The non-ECP whose swap obligations are being guaranteed (the "Guaranteed Swap Counterparty") enters into the swaps solely to manage the floating interest rate risk associated with a loan received, or reasonably likely to be received, by such Guaranteed Swap Counterparty in the conduct of its business.
- In the case of all Guarantors other than a proprietorship Guarantor, the Guarantor is an owner of the Guaranteed Swap Counterparty and plays an active role in operating the business of such Guaranteed Swap Counterparty (other than performing solely clerical, secretarial or administrative functions).
- In the case of a proprietorship Guarantor, if applicable state law contemplates proprietorships with more than one proprietor, the Guarantor and the Guaranteed Swap Counterparty are co-proprietors.
- The Guarantor computes its net worth or amounts invested on a discretionary basis in accordance with generally accepted accounting principles, consistently applied (provided that the value of real property can be determined using fair market value).
- The Guaranteed Swap Counterparty enters into the guaranteed swaps only as a principal.
- The beneficiary of the swap guarantee (the "Beneficiary") verifies that the Guarantor and Guaranteed Swap Counterparty satisfy the conditions of this no-action position.

The no-action relief set forth in Letter No. 12-17 is available from October 12, 2012 to March 12, 2013, to swap guarantors in violation of the requirement that such guarantor must be an ECP.

Anticipatory ECPs

Under the current regime, some common types of loans cannot be hedged if the borrower cannot qualify as an ECP because it has not reached the US$10 million total assets threshold under CEA section 1a(18)(A)(v)(I). For example, construction loans are usually disbursed incrementally, so even though the completed project is an asset in excess of US$10 million, the borrower may be unable to qualify as an ECP until the project is completed. To account for this, the OGC has determined to provide no-action relief for hedging by borrowers that will achieve ECP status by the time their loans are fully disbursed. As long as a lender has provided a borrower a bona fide commitment to fund a loan amount that brings the borrower's total assets to more than US$10 million, then such an "anticipatory" ECP should be permitted to enter into a swap prior to the loan closing so that the borrower can lock in a favorable fixed interest rate on the fixed leg of the interest rate swap it wishes to use to manage the floating interest rate risk of the loan. The OGC considers a loan commitment to be bona fide if: (1) the commitment is in writing; (2) the loan closing is subject only to the satisfaction of commercially reasonable conditions to closing (e.g., the Guarantor/Guaranteed Swap Counterparty is required to provide documentation of its income for the prior two tax years); and (3) the loan commitment is entered into solely for business purposes unrelated to qualifying as an ECP. In response to these concerns, the OGC will recommend that the CFTC not commence an enforcement action in connection with a swap entered into prior to the borrower receiving the proceeds of a related loan in an amount sufficient for the Guaranteed Swap Counterparty or other non-ECP swap counterparty to achieve ECP status under CEA section 1a(18)(A)(v)(I), if:

- The swap for which ECP status is necessary is intended to manage the Guaranteed Swap Counterparty's or other non-ECP swap counterparty's floating interest rate risk on the loan.

- In the case of a swap entered into by a Guaranteed Swap Counterparty or other non-ECP swap counterparty to manage its floating interest rate risk on a loan that would, if disbursed, cause the Guaranteed Swap Counterparty or other non-ECP swap counterparty to qualify as an ECP under CEA section 1a(18)(A)(v)(I) but that has not yet closed, the Guaranteed Swap Counterparty or other non-ECP swap counterparty has received a bona fide loan commitment for such loan.
- In the case of a construction loan or other loan disbursed in stages, the lender intends at the time of making the loan, or the related loan commitment to fund the entirety of the loan, subject only to the satisfaction of commercially reasonable closing conditions and/or the failure to occur, after loan disbursements have commenced, of any events set forth in the loan or swap documentation that would excuse the lender's obligation to continue funding the loan (such as, for example, the borrower's failure to make a payment), provided that such events are not designed to permit the lender to fail to fund the loan while leaving the swap in place.
- The loan is funded in an amount causing the Guaranteed Swap Counterparty or other non-ECP swap counterparty to qualify as an ECP under CEA section 1a(18)(A)(v)(I), unless it is not funded in such amount as a result of a failure to satisfy a commercially reasonable condition to closing the loan set forth in the bona fide loan commitment or an event set forth in the loan or swap documentation that would excuse the lender's obligation to continue funding the loan (such as, for example, the borrower's failure to make a payment).

Amounts Invested on a Discretionary Basis

Under Section 1a(18)(xi) of the CEA, as amended by the Dodd-Frank Act, an individual's eligibility as an ECP is based upon such individual's "amounts invested on a discretionary basis". Commenters sought further guidance as to how to calculate such amounts. The OGC indicates that users can rely upon the definition of "investments" in Rule 2a51-1 of the Investment Company Act, which is currently used to determine qualified purchaser status to calculate such amounts. Given the similar goals and in an effort to be consistent, the OGC will not recommend that the CFTC commence an enforcement action if a person relied upon the standards set forth in Rule 2a-51-1 to determine ECP status for purposes of CEA section 1a(18)(A)(xi).

Additional Relief

For the period from October 12, 2012 to December 31, 2012, no-action relief will be provided for swap counterparties in violation of the ECP requirement if the non-ECP counterparty (1) previously qualified as an ECP prior to enactment of the Dodd-Frank Act or (2) prior to October 12, 2012, was eligible to enter into an agreement in reliance upon the Second Effective Date Extension Order[4] and, in either case, the swap counterparty to a non-ECP is in good faith preparing to come into compliance with the swap counterparty verification requirements under CFTC regulation §23.430 (if applicable) or otherwise is seeking to determine whether its counterparty is an ECP.

Staff No-Action Relief: Temporary Relief From the De Minimis Threshold for Certain Swaps With Special Entities (Letter No. 12-18)

Entities that enter swap positions that, in the aggregate, exceed certain CFTC prescribed thresholds, must register as an SD. With respect to transactions with a Special Entity[5], such threshold is US$25 million. On July 12, 2012 the CFTC received a petition (the "Petition") requesting that swaps that relate to the petitioners' utility operations be excluded from the *de minimis* calculation applicable to Special Entities. While the CFTC considers the Petition and so that the ability of utility Special Entities (i.e., Special Entities that provide public utility services) to enter into hedges is not disrupted, in Letter No. 12-18 (available here), the Division grants no-action relief with respect to the Special Entity *de minimis* threshold with respect to swaps where such Special Entity:

- Owns or operates electric or natural gas facilities or electric or natural gas operations (or anticipated facilities or operations).
- Supplies natural gas and/or electric energy to other utility special entities
- Has public service obligations (or anticipated public service obligations) under Federal, State or local law or regulation to deliver electric energy and/or natural gas service to utility customers
- Is a Federal power marketing agency as defined in Section 3 of the Federal Power Act (a "Utility Special Entity")

4 Commission's Second Amendment to July 14, 2011 Order for Swap Regulation, 77 FR 41260 (July 13, 2012) ("Second Effective Date Extension Order").

5 The term "special entity" encompasses: Federal agencies; States, State agencies and political subdivisions (including cities, counties and municipalities); "employee benefit plans" as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"); "governmental plans" as defined under ERISA; and endowments.

The Division will not recommend enforcement action against a person for failure to apply to be registered as a swap dealer if the following conditions are satisfied:

- The utility commodity swaps connected with the person's swap dealing activities into which the person—or any other entity controlling, controlled by or under common control with the person—enters over the course of the immediately preceding 12 months (or following October 12, 2012, if that period is less than 12 months) have an aggregate gross notional amount of no more than US$800 million.
- The person—or any other entity controlling, controlled by or under common control with the person—has not entered into swaps as a result of its swap dealing activities in excess of the general *de minimis* threshold or (not counting utility commodity swaps) the special entity *de minimis* threshold).
- The person is not a "financial entity," as defined in the CEA.
- The person relying on the no-action relief provides notice to the [Division] stating that it is applying for such relief. The notice must indicate the identity of the Utility Special Entity with which the person has entered into utility commodity swaps connected with the person's swap dealing activities and, with respect to each Utility Special Entity, the total gross notional value of such utility commodity swaps. The notice must be provided to the Division by December 31, 2012 and thereafter on a quarterly basis using the email address dsionoaction@cftc.gov.

The no-action relief will remain effective until the effective date of CFTC action with respect to the Petition. For purposes of the no-action relief, the term "utility commodity swap" is defined in Letter No. 12-18 to mean any swap that meets all the following conditions:

- A party to the swap is a Utility Special Entity.
- A party to the swap that is a Utility Special Entity is using the swap for the purposes described in CFTC Regulation 1.3(ggg)(6)(iii).
- The swap is related to an exempt commodity in which both parties to the swap transact as part of the normal course of their physical energy businesses.

Interpretation of Bona Fide Hedging in Commission Regulation 4.5: Restatement of Terms Incorporated by Reference (Letter No. 12-19)

Part 4.5 of the CFTC Regulations contains an exemption from registration as a CPO for certain operators of qualifying entities that trade commodity interests below certain thresholds. In calculating such thresholds, the operator can exclude commodity futures or commodity options contracts, or swaps solely entered into for bona fide hedging purposes within the meaning and intent of certain CFTC Rules, including Rule 1.3(z)(1) and 151.15.

In Letter No. 12-19 (available here), the Division states that it will not recommend enforcement action against any person based on the application of the trading threshold test set forth in Part 4.5 where such person has excluded transactions falling within the substance of Regulations 1.3(z)(1) and 151.5, as amended. Recently, Regulations 1.3(z)(1) and 151.5 were vacated and questions were raised as to the correct interpretation of the "bona fide hedging" exclusion under Part 4.5. The Division restates Regulations 1.3(z)(1) and 151.5 in Letter No. 12-19 and therefore is restating the interpretation of what constitutes bona fide hedging.

Time-Limited No-Action Relief: Swaps in Agricultural and Exempt Commodities Not to be Considered in Calculating Aggregate Gross Notional Amount for Purposes of Swap Dealer *De Minimis* Exception and Calculation of Whether a Person Is a Major Swap Participant (Letter No. 12-20)

On October 12, 2012, the Division issued Letter No. 12-20 (available here) providing no-action relief, subject to certain conditions, for the exclusion of swaps referencing agricultural commodities[6] and exempt commodities[7] from the calculation of:

1. the aggregate gross notional amount of swaps connected with swap dealing activity for the purpose of determining whether a person has exceeded the *de minimis* threshold and must register as an SD.

2. whether a person is an MSP.

6 As defined in footnote 2.

7 As defined in footnote 3.

As noted above, all of a person's swap dealing activities after October 12, 2012 are relevant in determining whether such person is an SD whether or not such swap dealing includes entry into a swap that might be exchanged for a futures contract on a DCM. Likewise, all of a person's outstanding swap positions are relevant in determining whether the person is an MSP.

In response to the recent announcement of several major platforms that provide over-the-counter markets for cleared swaps in exempt commodities of their intention to transition the cleared swap activities to cleared futures contracts and other information received by the Division, the Division published Letter No. 12-20. The Division believes that limited transitional no-action relief is warranted in order to provide participants in the market for swaps referencing agricultural commodities and exempt commodities sufficient time to determine whether and in what manner to transition their current business practices to comply with the new CFTC Regulations.

Swap Dealers

Letter No. 12-20 provides that the Division will not recommend enforcement action against any person for failure to include, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of determining its swap dealer status, a swap, or an option on a swap, that:

- references an agricultural commodity or an exempt commodity
- is executed **prior** to October 20, 2012

Note that this date differs from the cut-off date in Letter No. 12-16 (summarized above) which allows market participants to exclude swaps referencing an agricultural commodity or an exempt commodity entered into prior to December 31, 2012 as long as such swap is cleared on a registered derivatives clearing organization or entered into contingent upon it subsequently being exchanged for and cleared as a futures position as part of an exchange for a related position transaction conducted in accordance with a DCM's rules.

In Letter No. 12-20, the Division notes that prior to the enactment of the Dodd-Frank Act, CEA Sections 2(h)(3)-(5) provided an exemption from most requirements of the CEA for certain "agreements, contracts and transactions" in exempt commodities that were executed or traded on an electronic trading facility (commonly referred to as "exempt commercial markets," or "ECMs"). The Dodd-Frank Act repealed former CEA Section 2(h), and "agreements, contracts and transactions" on ECMs are currently permitted only pursuant to the Second Effective Date Extension Order[8] which extends the temporary exemptive relief the CFTC granted on July 14, 2011 from certain provisions of the CEA that otherwise would have taken effect July 16, 2011. The no-action relief set forth in Letter No. 12-20 applies to any "agreement, contract or transaction" on an ECM that is a swap and that otherwise satisfies the conditions set forth in the Letter.

Major Swap Participants

Letter 12-20 also provides that the Division will not recommend enforcement action against any person for failure to include, in its calculation of daily average aggregate uncollateralized outward exposure and daily average aggregate potential outward exposure for purposes of Section 1.3(jjj)(4) of the CFTC Regulations (such Section governing, in part, the calculation of the "substantial position" requirement for determining whether a person is a major swap participant as set forth in Section 1.3(hhh) of the CFTC Regulations), such exposures arising from any swap that references an exempt commodity or an agricultural commodity from October 12, 2012 through October 20, 2012, inclusive. This means that exposures resulting from any swap that references an exempt commodity or agricultural commodity may be excluded from the daily average calculation until October 21, 2012.

8 Commission's Second Amendment to July 14, 2011 Order for Swap Regulation, 77 FR 41260 (July 13, 2012).

Time-Limited No-Action Relief: Foreign Exchange Swaps and Foreign Exchange Forwards Not to Be Considered in Calculating Aggregate Gross Notional Amount for Purposes of Swap Dealer *De Minimis* Exception or in Calculating Substantial Position in Swaps or Substantial Counterparty Exposure for Purposes of the Major Swap Participant Definition; Time-Limited No-action Relief for Persons That Meet the Definitions of Commodity Pool Operators and Commodity Trading Advisors Solely as a Result of Their Foreign Exchange Swap and Foreign Exchange Forward Activities (Letter No. 12-21)

On October 12, 2012, the Division issued Letter No. 12-21 (available here) on matters concerning foreign exchange forwards and foreign exchange swaps.

As further explained below, Letter No. 12-21 provides time-limited no-action relief from the obligation to include any foreign exchange swap or foreign exchange forward for purposes of:

- Determining if a person is a major swap participant under CFTC Regulation 1.3(hhh)
- Calculating the aggregate gross notional amount of swaps connected with swap dealing activity for determining whether an entity is no longer entitled to rely on the *de minimis* exception for swap dealer registration under CFTC Regulation 1.3(ggg)(4)
- Determining whether a person would meet the definitions of "commodity pool operator ("CPO") or commodity trading adviser ("CTA") under the CEA to the extent that the Secretary of the Treasury ("Secretary") exempts such swaps or forwards from the definition of the term "swap" under the CEA

The CEA, as amended by the Dodd-Frank Act, provides that "foreign exchange forwards" and "foreign exchange swaps" shall be considered "swaps" under the swap definition unless the Secretary issues a written determination that either foreign exchange swaps, foreign exchange forwards or both: (i) should not be regulated as swaps; and (ii) are not structured to evade the Dodd-Frank Act in violation of any rule promulgated by the CFTC pursuant to section 721(c) of the Dodd-Frank Act. The Secretary published in the Federal Register on May 5, 2011 a proposed determination to exempt both foreign exchange swaps and foreign exchange forwards from the definition of the term "swap" in the CEA. At the time Letter No. 12-21 was published, a final determination to exempt had not been issued by the Secretary.[9]

Pursuant to their authority under the Dodd-Frank Act, the CFTC and the SEC adopted joint rules to explicitly define the term "swap" to include foreign exchange forwards and foreign exchange swaps (as those terms are defined in the CEA), in order to include in one rule the definitions of those terms and the related regulatory authority with respect to foreign exchange forwards and foreign exchange swaps. The final rules incorporate the provision of the Dodd-Frank Act that foreign exchange forwards and foreign exchange swaps will no longer be considered swaps if the Secretary issues the written determination described above to exempt such products from the swap definition. These joint final rules became effective on October 12, 2012.

After October 12, 2012, all swaps entered into by a person in connection with the person's swap dealing activities are relevant in determining whether the person is within the swap dealer definition and therefore must register as a swap dealer. Also, beginning on October 12, 2012, a person must begin to calculate whether it is within the definition of major swap participant in CFTC Regulation 1.3(hhh). At the time of publication of Letter No. 12-21, the Secretary had not yet finalized its proposed exemptive rules with respect to foreign exchange swaps and foreign exchange forwards and absent further action from the CFTC, the definition of swap would have included foreign exchange swaps and foreign exchange forwards entered into after October 12, 2012. In addition, among the changes made by the Dodd-Frank Act to the CEA were to include within the CPO definition the operator of a collective investment vehicle that trades swaps, and to include within the CTA definition a person who provides advice concerning swaps, which in both cases would include foreign exchange forwards and foreign exchange swaps absent a determination by the Secretary described above.

Determination of Swap Dealer

Letter No. 12-21 effectively allows a person to exclude from its calculation of the aggregate gross notional amount of swaps connected with its swap dealing, any foreign exchange swap or foreign exchange forward entered into between October 12, 2012 and December 31, 2012. However, the no-action relief is conditional: the Secretary must make the determination

9 The Secretary issued a final determination exempting foreign exchange swaps and foreign exchange forwards on November 16, 2012. Such final determination is yet to be published in the Federal Register.

by December 31, 2012. If the Secretary has not issued a final determination by such date, all foreign exchange swaps and foreign exchange forwards must be included in the dealing determination for purposes of the *de minimis* threshold.[10] Also, if prior to December 31, 2012 the person otherwise exceeds the applicable *de minimis* threshold,any such foreign exchange swaps and foreign exchange forwards that would otherwise be excluded from the calculation must be considered for purposes of determining the date by which the person must apply to be registered as a swap dealer.

Determination of Major Swap Participant Status

Letter No. 12-21 also provides that the Division will not recommend enforcement action against an entity for failure to include, in its calculation of its substantial position in swaps or substantial counterparty exposure for purposes of determining its MSP status, any foreign exchange swap or foreign exchange forward that is covered by an exemption by the Secretary under section 1a(47)(E)(i) of the CEA that is effective prior to December 31, 2012.

Determination of CPO/CTA Status

In addition, the Division will not recommend enforcement action against a person who operates a collective investment vehicle that trades foreign exchange swaps and forwards or a person who provides advice concerning foreign exchange swaps and forwards, and would have to apply to be registered as a CPO or CTA solely as a result of these respective activities, for failure to apply to be registered, if the Secretary issues a final determination to exempt foreign exchange swaps and forwards from the term "swap" that becomes effective before December 31, 2012.

Time-Limited No-Action Relief: Swaps Only With Certain Persons to Be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer *De Minimis* Exception and Calculation of Whether a Person Is a Major Swap Participant (Letter No. 12-22)

On October 12, 2012, the Division issued Letter No. 12-22 (available here) regarding the types of persons with which swaps are entered into that should be included in calculations related to the determinations of "swap dealer" and "major swap participant" status.

In the CFTC's Proposed Cross-Border Interpretive Guidance[11] issued on July 12, 2012, the CFTC proposed a definition of the term "US person"[12] that would encompass persons (or classes of persons) located within the United States as well as those that may be domiciled or operating outside the United States. This definition would be used to identify those persons whose swap activities would be included in the calculation of the aggregate gross notional amount of swaps connected with swap dealing activity for purposes of determining when and if a person is no longer entitled to rely on the *de minimis* exception from swap dealer registration (under Regulation 1.3(ggg)(4)) and in the calculation of whether a person is a major swap participant (under Regulation 1.3(hhh)).

As of October 12, 2012, persons must comply with the CFTC's swap dealer registration regulations with respect to their swap activities, and entities that engage in more than the *de minimis* level of swap dealing activity (measured by aggregate gross notional amount) after October 12, 2012, must register as swap dealers by no later than two months after the end of the month

10 As noted above, the Secretary made its final determination exempting such products on November 16, 2012

11 Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41213 July 12, 2012

12 Specifically, the CFTC proposed to define the term "US person" as follows:

"US person" would include, but not be limited to:

(i) Any natural person who is a resident of the United States.

(ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States ("legal entity"), or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a US person.

(iii) any individual account (discretionary or not) where the beneficial owner is a US person.

(iv) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a US person(s).

(v) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA.

(vi) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States.

(vii) an estate or trust, the income of which is subject to United States income tax regardless of source.

in which they exceed the *de minimis* level. Thus, an entity engaged in swap dealing activity must determine whether or not a swap entered into after October 12, 2012, should be included in the calculation of its aggregate gross notional amount of swap dealing activity.

The CFTC did not, however, finalize the interpretive guidance or the exemptive order prior to October 12, 2012 and as a result the Division issued Letter No. 12-22 to provide guidance.

The Division notes that there is concern that prior to the CFTC's issuance of final guidance or a final exemptive order setting forth a definition of "US person", foreign entities may adopt either potentially over-inclusive or potentially under-inclusive categorizations of their counterparties for purposes of determining whether their swap dealing activities exceed the *de minimis* threshold under the swap dealer definition and registration requirements, or whether certain thresholds have been exceeded for determining whether a person must register as a major swap participant. Either result would not be consistent with the CFTC's intent, which is to establish uniform and consistent standards for these two determinations.

Additionally, in the Proposed Cross-Border Interpretive Guidance, the CFTC proposed to exclude "the notional value of dealing transactions with foreign branches of registered US swap dealers" from the calculation of the aggregate gross notional amount of swaps connected with swap dealing activity under Regulation 1.3(ggg)(4)(i) (the "*de minimis* thresholds") for purposes of determining when, and if, a foreign entity is no longer entitled to rely on the *de minimis* exception from swap dealer registration.

Because the proposed exclusion would be limited to *registered* US swap dealers and many of the persons who expect to register as US swap dealers may not do so until December 31, 2012, or later, industry participants have expressed concern that a foreign entity will be required after October 12, 2012, to begin counting toward the *de minimis* threshold any swap dealing transactions with a foreign branch of any person that may meet the definition of "US person" in the Proposed Cross-Border Interpretive Guidance and that is not yet *registered* as a US swap dealer. As a result, foreign entities may exceed the *de minimis* threshold and be required to register as a swap dealer solely as a result of the fact that its counterparty is the foreign branch of a US swap dealer that will not have registered by October 12, 2012. This outcome would occur notwithstanding that many persons in the United States with foreign branches intend to register as swap dealers later in 2012 or early 2013. The Division believes that this potential outcome would be inconsistent with the scope of relief intended by the Proposed Cross-Border Interpretive Guidance.

Similarly, if a foreign entity must include swaps with such foreign branches in its calculation of whether it is within the definition of major swap participant in Regulation 1.3(hhh), it could be required to register as such. Although the Proposed Cross-Border Interpretive Guidance did not provide for a similar exclusion with respect to the consideration of a foreign entity's swaps with foreign branches of US swap dealers with respect to determining whether such foreign entity must register as a major swap participant, the Division believes that it would be appropriate to provide limited transitional relief in this respect

Limited-Time No-Action Relief—Swap Dealers

The Division will not recommend that the CFTC take enforcement action against any person not described in (i) through (v) below for failure to include a swap executed prior to the earlier of December 31, 2012, or the effective date of a definition of "US person" in a final Exemptive Order Regarding Compliance with Certain Swap Regulations, in its calculation of its *de minimis* thresholds, so long as the counterparty to such swap is not:

i. A natural person who is a resident of the United States

ii. A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is organized or incorporated under the laws of the United States

iii. A pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is exclusively for foreign employees of such entity

iv. An estate or trust, the income of which is subject to US income tax regardless of source

v. An individual account (discretionary or not) where the beneficial owner is a person described in (i) through (iv) above

For purposes of this no-action relief, a person may reasonably rely on the representations of its counterparty as to whether such counterparty is not a person described in (i) through (v) above.

Consistent with the Proposed Cross-Border Interpretive Guidance definition of "US person," the position taken herein shall apply where the counterparty to such swap is not a person described in (i) through (v) above whether or not that counterparty's obligations under the swap are guaranteed by a person described in (i) through (v) above.

Limited-Time No-Action Relief—Major Swap Participant Determination

The Division will not recommend that the CFTC take enforcement action against any person not described in (i) through (v) above for failure to include a swap executed prior to the earlier of December 31, 2012, or the effective date of a definition of "US person" in a final Exemptive Order Regarding Compliance with Certain Swap Regulations, in its calculation of whether a person is a major swap participant, as long as the counterparty to such swap is not a person described in (i) through (v) above.

Limited-Time No-Action Relief—Foreign Branch of a US Swap Dealer

Further, the Division will not recommend that the CFTC take enforcement action against any person not described in (i) through (v) above for failure to include a swap executed prior to the earlier of December 31, 2012, or the effective date of a final Exemptive Order Regarding Compliance with Certain Swap Regulations, in its calculation of the *de minimis thresholds* or in its calculation of whether it is a major swap participant, as long as the counterparty to such swap is a foreign branch of a person described in (i) through (v) above that meets the definition of a swap dealer under Section 1a(49) of the CEA and Regulation 1.3, and such person represents that it intends to register with the CFTC as a swap dealer by March 31, 2013.

In a footnote, the Division notes that the representation of the intention to register with the CFTC as a swap dealer need not be obtained prior to execution of a swap in order to rely on this staff no-action letter when excluding such swap from the calculation of swap notional for the purposes of the *de minimis* thresholds or in its calculation of whether it is a major swap participant.

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