August 13, 2018

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581
U.S.A.

Comments on De Minimis Exception to the Swap Dealer Definition,
issued by the Commodity Futures Trading Commission - RIN 3038–AE68

Dear Mr. Kirkpatrick:

We, the Japanese Bankers Association (JBA), would like to express our gratitude for this opportunity to comment on "De Minimis Exception to the Swap Dealer ("SD") Definition" ("Proposal") issued by the Commodity Futures Trading Commission (CFTC) on June 12, 2018. We respectfully expect that the following comments will contribute to your further discussion.

[General comments]

1. Maintaining the $8 billion de minimis threshold and de minimis calculation

We had provided a comment that the current de minimis threshold should at least be maintained at $8 billion or be increased and should not be considered for decrease[1]. Therefore, we welcome the CFTC's proposal, based on comprehensive analysis, to set the aggregate gross notional amount (AGNA) threshold at $8 billion in swap dealing activity. We also support the CFTC's proposal to exclude certain transactions from the de minimis threshold calculation performed to determine whether a person is an SD. However, there is also a concern that this proposal may force entities to take careful approaches more than necessary, because the scope and definition of excluded transactions is not clear. We will comment on this matter in detail in the "Specific comments" section.

[1] https://www.zenginkyo.or.jp/fileadmin/res/en/news/news160119.pdf

2. Flexible approach through substituted compliance with domestic regulations

From the perspective of international comity and avoidance of excessive regulatory burdens, the CFTC should take a flexible approach for non-U.S. entities subject to OTC derivatives regulations by permitting substituted compliance with regulations established at their home jurisdictions (e.g. Japanese financial institutions), and thereby regard them as complying with the regulatory requirements that are based on SD registration.

(Rationale)

Japanese financial institutions are subject to, and strictly supervised pursuant to, robust national OTC derivatives regulations under the Financial Instruments and Exchange Act. Imposing the regulatory requirements that are based on SD registration on such financial institutions which are similarly subject to strict regulations at their home jurisdictions would mean to inefficiently force them to comply with two regulations, giving rise to excessive burdens for them.

Furthermore, burdens to address the U.S. swap regulatory regime are indirectly imposed on some of non-SD entities as they have established a monitoring framework in practice in order to avoid or limit transactions with U.S. persons because they are reluctant to incur regulatory costs for SD registration.

In order to prevent such undue regulatory burden, a more efficient and effective/flexible equivalence assessment should be performed. Specifically, the CFTC should perform a comprehensive equivalence assessment on each jurisdiction's law as a whole, instead of determining equivalence individually for each regulatory requirement. If it is deemed that entities in such jurisdictions are regulated by strict national OTC derivatives regulations, they should be exempted from compliance with the U.S. regulations that are based on SD registration.

3. Cross-border application

We request the CFTC to clarify the role of the Proposal in relation to the proposed rule titled "Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants" ("Proposed rule") issued on October 11, 2016.

(Rationale)

In our comment in December 2016 to the proposed rule[2], we expressed our significant concern that it required a non-U.S. entity to count a significantly expanded scope of swap

[2] https://www.zenginkyo.or.jp/fileadmin/res/abstract/opinion/opinion281239.pdf

transactions that have minimal U.S. nexus towards its SD de minimis threshold. The Proposal does not specifically refer to this proposed rule. We are concerned that even if the de minims threshold would be maintained at $8 billion and entities' activities would be conducted accordingly, AGNA may automatically exceed the $8 billion threshold if the scope of swap transactions were to be included in de minimis calculation in accordance with the proposed rule.

[Specific comments]

A. $8 billion de minimis threshold for SD registration

(1) Based on the data and related policy considerations, is an $8 billion de minimis threshold appropriate? Why or why not?

(Comments)

We consider that the $8 billion de minimis threshold is appropriate.

(Rationale)

According to the CFTC's analysis in the Proposal, at the current $8 billion threshold, approximately 98 percent of all swap transactions in the U.S. market and greater than 99 percent of AGNA can be captured. It would not be reasonable, from the perspective of cost effectiveness, to lower the threshold and thereby increase entities' burden to capture the remaining 1-2%. Furthermore, given that a few years have passed since the $8 billion threshold was applied, maintaining this threshold would not necessitate entities to change their practice so much. In this view, we believe that the $8 billion de minimis threshold should be maintained.

(2) Should the de minimis threshold be reduced to $3 billion? Why or why not?

(Comments)

The de minimis threshold should not be reduced to $3 billion.

(Rationale)

According to the CFTC's analysis in the Proposal, "at a lower threshold of $3 billion, there would only be a small amount of additional AGNA and swap transactions subject to SD regulation", indicating that reducing the threshold is not a measure that could realise policy objectives, such as increasing market transparency and reducing systemic risk. In addition, those entities managing their transactions based on the current $8 billion de minims threshold would need to further restrict their activities if that threshold is reduced. This would also require additional costs for changing their management practice and ultimately may reduce liquidity in the U.S. market.

(3) Should the de minimis threshold be increased? If so, to what threshold? Why or why not?

(Comments)

Preferably, the de minimis threshold should be increased to $100 billion.

(Rationale)

According to the CFTC's analysis in the Proposal, even if the de minimis threshold were raised to $100 billion, estimated AGNA coverage, etc., would be almost the same. Threfore, the basis for the determination not to raise the threshold is unclear.

If the de minimis threshold is to be increased, that threshold should be maintained permanently because the potential future reduction of the threshold would impose additional costs on entities for changing their management practices and would force unstable or conservative operations.

(5) As an alternative or in addition to maintaining an $8 billion threshold, should the Commission consider a tiered SD registration structure that would establish various exemptions from SD compliance requirements for SDs whose AGNA of swap dealing activity is between the $3 billion and $8 billion?

(Comments)

The CFTC should not consider the tiered SD registration structure.

(Rationale)

Under the tiered SD registration structure, requirements to be complied with and compliance programs to be established by entities could vary according to their AGNA, which would subject entities to extremely unstable operations relative to the case where a permanent threshold is established.

Furthermore, some entities may establish a conservative compliance program and abide by the strictest requirement. In this view, the tiered SD registration structure could become an inefficient framework.

(6) What is the impact of the de minimis threshold level on market liquidity? Are there entities that would increase their swap dealing activities if the Commission raised the de minimis exception, or decrease their swap dealing activities if the Commission lowered the threshold? How might these changes affect the swap market?

(Comments)

If the de minimis threshold is raised, the number of entities which will take more flexible actions to U.S. persons' needs for swap transactions will increase, which may improve market

liquidity.

(Rationale)

Since the de minimis threshold was originally intended to be lowered to $3 billion, some entities engage in activities conservatively, prohibiting SD activities with U.S. persons, in principle. If, however, that threshold is maintained at $8 billion on a permanent basis or is raised, it is quite possible that such entities may change its policy to allow flexibly conduct SD transactions within the $8 billion threshold.

(7) Are there additional policy or statutory considerations underlying SD regulation or the de minimis exception that the Commission should consider?

(Comments)

CFTC should specify that the termination, and modification of terms and conditions, of existing transactions will not be counted towards the de minimis threshold.

(Rationale)

Since it is not specified under the current SD regulation that the termination, and modification of terms and conditions, of existing transactions will not be counted towards the de minimis threshold, some entities basically prohibit not only new transactions but also the termination, and modification of terms and conditions, of existing transactions with U.S. persons.

Termination of transactions will mitigate counterparty credit risk and reduce gross notional amount. Also, modification of transactions' terms and conditions, for example, changes made within the existing transaction conditions (e.g. shortening the contractual term) or changes of counterparties, will not cause any new risks. Therefore, these transactions are should not be counted towards the de minimis threshold.

(8) Have there been any structural changes to the swap market such that the policy considerations have evolved since the adoption of the SD Definition?

(Comments)

Since non-SD entities outside the U.S. tend to avoid transactions with U.S. persons, the market is currently divided into the group of SDs (including SDs outside the U.S.) which can transact with U.S. persons and the group of non-SDs which are avoiding transactions with U.S. persons.

(Rationale)

U.S. entities established a mechanism whereby the head office registers as an SD and then their branches/subsidiaries outside the U.S. transact with non-SDs outside the U.S. On the other hand, U.S. non-financial entities cannot establish such a mechanism, and as a result are

forced to cease transactions with non-SDs outside the U.S. in some cases. We believe that such market segmentation is undermining diversity of the U.S. markets, and hence leading to sluggish market activities.

(9) Are entities curtailing their swap dealing activity to avoid SD registration at $8 billion or $3 billion thresholds, and if so, what impact is that having on the swap market? Are certain asset classes or product types more affected by such curtailed dealing activity than others?

(Comments)

Some entities are prohibiting swap transactions with U.S. persons, in principle, in order to avoid SD registration.

(Rationale)

Those entities, even internationally-active leading Japanese banks, which are already subject to regulations established at their home jurisdictions and consider SD registration as not realistic because it would pose additional enhanced regulatory requirements, are not entering into swap activities with U.S. persons that are required to be counted towards the de minimis threshold. A requirement to establish a compliance framework within two months, which is a short period of time, after the AGNA reached threshold is another factor that is causing entities to engage in extremely conservative management.

B. Swaps Entered Into by Insured Depository Institutions in Connection With Loans to Customers

(1) Based on the data and related policy considerations, is the proposed IDI De Minimis Provision appropriate? Why or why not?

(Comments)

The proposed De Minimis Provision for insured depository institutions (IDI) should be applied to the non-U.S. IDIs because they also need to address customers' needs.

With respect to swaps that qualify for the exclusion from the IDI de minimis calculation, the CFTC should also add: (i) swaps in connection with not only loans arranged by the financial institution itself but also loans issued by other banks to the customer; and (ii) swaps that are entered into by a third party on behalf of a financial institution and are allocated to the financial institution.

(Rationale)

Not only IDIs within the U.S. but also those financial institutions subject to the deposit insurance system outside the U.S. (non-U.S. IDIs) are curtailing those swaps entered into in connection with originating a loan for U.S. customers. Given that such swaps could be entered into on a cross-border basis, non-U.S. IDIs should also be permitted to exclude those swaps from their de minimis calculation. While IDIs within the U.S. are managing risks sufficiently

under the FDIC's supervision, Japanese banks are also conducting risk management at the equal level under the supervision of the Deposit Insurance Corporation of Japan. In this view, it would be reasonable to permit the exclusion stated above at least for Japanese banks.

With respect to those swaps entered into in connection with loans issued by other banks to U.S. customers and those syndicated loans in which the syndicate leader conducts allocation to the mandated lead arranger, it would be appropriate to exclude them from swap activities because they are arranged for the customer's hedging purposes (i.e. a hedge item exists and there are hedging needs for the customer). We also request the CFTC to confirm that these types of swaps include not only interest rate swaps but also currency swaps.

(3) If the underlying loan is called, put, accelerated, or if it goes into default before the scheduled termination date, should the related swap be required to be terminated to remain eligible for the IDI De Minimis Provision?

(Comments)

The related swap should not be required to be terminated.

(Rationale)

It would be difficult to obtain customers' understanding over stipulating in the contract that the related swap will be terminated to remain eligible for the IDI De Minimis Provision. Particularly when the underlying loan goes into default, financial institutions are generally required to respond to such event flexibly. Therefore, it would not be realistic to treat the underlying loan and the related swap identically.

C: Swaps Entered Into To Hedge Financial or Physical Positions

(1) Based on the policy considerations, is the proposed Hedging De Minimis Provision appropriate? Why or why not?

(Comments)

The proposed Hedging De Minimis Provision is appropriate.

(Rationale)

Hedging financial or cash positions is not an activity conducted as a dealer but is an activity conducted for the entity's own benefit. In this view, such a hedging activity should not be regulated by the SD regulatory regime.

Furthermore, for entities with large sized balance sheet, the amount of positions needed to be hedged fluctuates significantly. Given this, the threshold management that restricts transactions within a certain limit is not suitable for such entities.

(2) Is the proposed Hedging De Minimis Provision too narrowly or broadly tailored?

(Comments)

The scope of application of the proposed Hedging De Minimis Provision should be clarified.

(Rationale)

Although the Proposal refers to those swaps that qualify for the Hedging De Minimis Provision, the scope of application of such Hedging De Minimis Provision is uncertain (e.g. the definition of "price maker of the hedging swap" is unclear), which would disrupt its smooth implementation. We also request to confirm that this type of swaps includes not only interest rate swaps but also currency swaps.

(3) How will the proposed Hedging De Minimis Provision impact entities that enter into swaps to hedge financial or physical positions?

(Comments)

The proposed Hedging De Minimis Provision is expected to enhance market liquidity.

(Rationale)

Since non-SDs will be able to resume transactions with U.S. entities to hedge financial or cash positions in the banking account, it is expected that the market liquidity will improve as a result.

D. Swaps Resulting From Multilateral Portfolio Compression Exercises

(1) Is the proposed MPCE De Minimis Provision appropriate? Why or why not?

(Comments)

The proposed MPCE De Minimis Provision is appropriate. In addition to swaps resulting from multilateral portfolio compression exercises, swaps resulting from bilateral portfolio compression exercises should also be excluded from the de minimis calculation.

(Rationale)

We welcome the CFTC's proposal to apply the de minimis exception on a permanent basis which has been permitted in the form of No-Action Letter because it should help entities to stably implement its operational framework.

In the case of MPCE, a more efficient balance sheet compression can be realised if U.S. persons would participate. Furthermore, if swaps resulting from compression exercises are counted towards the de minimis threshold even though such compression exercises contribute to the mitigation of counterparty credit risk and reduction of the notional amount of

outstanding swap transactions, entities will not be able to perform an efficient compression, and in some cases, may have to avoid the compression exercise itself. From this viewpoint, the CFTC should also exclude swaps resulting from bilateral portfolio compression exercises from the de minimis calculation. The same rationale applies to our comment to the following question (2).

(2) Is the proposed MPCE De Minimis Provision too narrowly or broadly tailored? Are there additional restrictions or conditions that should apply in order for swaps resulting from multilateral portfolio compression exercises to not count towards a person's de minimis threshold?

(Comments)

We consider that the proposed MPCE De Minimis Provision is appropriately tailored and additional restrictions or conditions are unnecessary for swaps resulting from multilateral portfolio compression exercises. Similarly, swaps resulting from bilateral portfolio compression exercises should be excluded from the de minimis calculation without any restrictions or conditions.

(Rationale)

Above mentioned approach would facilitate the mitigation of various risks through compression exercises.

E. Methodology for Calculating Notional Amounts

(1) Is the proposed process to determine the methodology to be used to calculate the notional amount for any group, category, type, or class of swaps appropriate? Why or why not?

(Comments)

The CFTC should not authorize the Division of Swap Dealer and Intermediary Oversight (DSIO) to determine the methodology to be used to calculate the notional amount in connection with the determination of SD registration, but instead the CFTC itself should determine and publish such a methodology.

(Rationale)

Authorization of DSIO will allow discretion (i.e. give rise to an uncertainty) in determining the calculation methodology, which may lead to a non-transparent process. In this view, the CFTC should determine and publish the methodology the CFTC considers as appropriate for calculating notional amounts for the SD registration purposes.

Comments related to "III. Other Considerations"

A. Dealing Counterparty Count and Dealing Transaction Count Thresholds

(1) Taking into account the Commission's policy objectives, should minimum dealing

counterparty counts and minimum dealing transaction counts be considered in determining an entity's eligibility for the de minimis exception?

(Comments)

Minimum dealing counterparty counts and minimum dealing transaction counts should be considered unless these factors make threshold management practice more complex.

(Rationale)

Dealing counterparty counts and dealing transaction counts could be one of the factors for considering systemic risk. However, in considering not only notional amounts but also dealing counterparty counts and dealing transaction counts taken into account in determining the necessity of SD registration, we are concerned that entities may need to engage in activities more conservatively and may incur increased management costs as a result of management practices becoming more complicated.

(2) Would a dealing counterparty count threshold of 10 dealing counterparties be appropriate? Why or why not? Is another dealing counterparty count threshold more appropriate?

(Comments)

Preferably, the dealing counterparty count threshold should be at least 100 or more dealing counterparties.

(Rationale)

According to the CFTC's analysis in the Proposal, the median counterparty count for 108 Likely SDs was 132 counterparties and the median counterparty count for 78 registered SDs was 186 counterparties. Given this, the minimum dealing counterparty count threshold of 10 dealing counterparties is deemed to be extremely conservative and not effective.

(3) Would a dealing transaction count threshold of 500 dealing transactions be appropriate? Why or why not? Is another dealing transaction count threshold more appropriate?

(Comments)

Preferably, the dealing transaction count threshold should be at least 10,000 or more.

(Rationale)

According to the CFTC's analysis in the Proposal, the median transaction count for 108 Likely SDs was 5,233 trades and the median transaction count for 78 registered SDs was 12,004 trades. Given this, the minimum dealing transaction count threshold of 500 dealing transactions is deemed to be extremely conservative and not effective. Furthermore, the "SWAP DEALER DE MINIMIS EXCEPTION PRELIMINARY REPORT" issued on November 18, 2015 describes that "the 10,001 to 100,000 Transaction Count range was the lowest level at which the majority of Potential Swap Dealing Entities in each asset class was registered." With above points considered, it would be reasonable to set the dealing transaction

count threshold at 10,000 or more dealing transactions.

(8) Should registered SDs or MSPs be counted towards the dealing counterparty count threshold?

(Comments)

They should not be counted towards the dealing counterparty count threshold.

(Rationale)

Under a transaction between a U.S. SD/MSP and a non-U.S. person, the U.S. SD/MSPs are subject to real time public reporting and swap data reporting. The CFTC is thereby able to obtain trade data and achieve regulatory objectives. Furthermore, given that SDs and MSPs are subject to enhanced capital and other requirements under the supervision of U.S. authorities, associated risks are limited. In addition, SDs and MSPs, as a professional market participant, are not covered by the External Business Conduct regulations and are not required to provide customer protections.

(11) Should a facts and circumstances analysis apply to determine if an amendment or novation to an existing swap is swap dealing activity that counts towards a person's dealing transaction count? Why or why not?

(Comments)

Whether to treat an amendment or novation to an existing swap as swap dealing activity that counts towards a person's dealing transaction count should be determined based on actual conditions in consideration of the nature of the amendment or novation (the same applies to the case of a termination).

(Rationale)

For example, if an amendment is counted, it is assumed that those cases where the final due date is extended by one day because of the change in holidays, or those cases where the principal amount is decreased significantly through a partial termination of an existing swap and as a result the associated risk is mitigated significantly, will also be included in the dealing transaction count. However, if such cases are also counted, complicated rules will only increase management burdens and are unlikely to produce intended effects such as mitigating risks, increasing transparency and promoting market integrity (see pp. 27445-27446).

B. Exchange-Traded and/or Cleared Swaps

(4) Should all exchange-traded swaps be excepted from the de minimis calculation, or only certain transactions? If so, which transactions? Should only those trades that are anonymously executed be excepted? How would the Commission judiciously differentiate, monitor, and track such transactions apart from other exchange-traded swaps?

(Comments)

Any swap transactions executed on SEFs/DCMs should be excepted from the de minimis calculation.

(Rationale)

Price transparency is ensured for swap transactions executed on SEFs/DCMs and the CFTC is able to capture the status of swap transactions through trade reporting. This means that the CFTC has already been regulating and supervising transactions executed on SEFs/DCMs, and therefore, risk is limited. In this view, these swap transactions should be excepted from the de minimis calculation.

(5) Should all cleared swaps be excepted from the de minimis calculation, or only certain transactions? If so, which transactions? Should the Commission differentiate between trades that are intended to be cleared and trades that are actually cleared? How would the Commission judiciously differentiate, monitor, and track such transactions apart from other cleared swaps?

(Comments)

Any swap transactions cleared on DCOs should be excepted from the de minimis calculation. We request CFTC to confirm existing transactions back-loaded by DCOs are also excepted from the de minimis calculation.

(Rationale)

Those swaps cleared on DCOs should not be included in the de minimis calculation because counterparty risk has already been reduced and significant systemic risk has already been mitigated. Naturally, it would not be necessary to add requirements for transacting on SEFs/DCMs.

(10) If exchange-traded swaps are excepted from the de minimis calculation, should the Commission establish a notional backstop above which an entity must register? If so, what is the appropriate level for the backstop?

(11) If cleared swaps are excepted from the de minimis calculation, should the Commission establish a notional backstop above which an entity must register? If so, what is the appropriate level for the backstop?

(Comments)

The CFTC should not establish a notional backstop.

(Rationale)

A notional backstop is not necessary for both swaps executed on SEFs/DCMs and swaps cleared on DCOs. This is because, with respect to the former, price transparency is ensured and the CFTC supervises them through trade reporting, and with respect to the latter,

counterparty risk is already reduced and significant systemic risk is already mitigated.

Furthermore, establishing a notional backstop would complicate management practices and may increase regulatory costs and compliance risks. Ultimately, entities may determine that it is impossible to manage thresholds and withhold from engaging in those transactions using this provision, thereby undermining market liquidity.

(13) Should persons be able to haircut the notional amounts of their exchange-traded swaps for purposes of the de minimis calculation? If so, would a 50 percent haircut be appropriate? Why or why not?

(14) Should persons be able to haircut the notional amounts of their cleared swaps for purposes of the de minimis calculation? If so, would a 50 percent haircut be appropriate? Why or why not?

(Comments)

Persons should not be able to haircut the notional amounts.

(Rationale)

A haircut is not necessary for both swaps executed on SEFs/DCMs and swaps cleared on DCOs. This is because, with respect to the former, price transparency is ensured and the CFTC supervises them through trade reporting, and with respect to the latter, counterparty risk has already been reduced and significant systemic risk has already been mitigated.

Furthermore, establishing a haircut would complicate management practices and may increase regulatory costs and compliance risks. Ultimately, entities may determine that it is impossible to manage thresholds and withhold from those transactions using this provision, thereby undermining market liquidity.

(16) Would an exception for exchange-traded swaps increase the volume of swaps executed on SEFs or DCMs?

(Comments)

The exception for exchange-traded swaps would increase the volume of swaps executed on SEFs/DCMs.

(Rationale)

While it is assumed that market participants would use facilities appropriate to their own investment strategy after comparing facilities which are equivalent to SEFs/DCMs such as MTF, etc., in general, it is expected that the volume of swap transactions by non-SDs with U.S. entities will increase.

(17) Would an exception for cleared swaps increase the volume of swaps that are cleared?

(Comments)

The exception for cleared swaps would increase the volume of swaps that are cleared.

(Rationale)

If swaps cleared on DCOs are clearly excluded from the de minimis threshold calculation, the volume of swaps that are cleared is considered to increase because those entities managing swap transactions in a limited manner based on the current de minimis threshold of $8 billion will no longer need to manage swaps in the limited manner.

(25) How should transactions executed on exempt multilateral trading facilities, exempt organized trading facilities, and/or exempt DCOs be treated?

(Comments)

They should be excepted from the de minimis threshold calculation.

(Rationale)

If swap transactions executed on SEFs/DCMs will be excepted from the de minimis calculation, transactions executed on MTFs and OTFs which are recognized as equivalent to SEFs should also be excepted in order to avoid complication of the regulatory framework. With respect to exempt DCOs, there is no reason for treating them separately from registered DCOs because exempt DCOs are operated in line with international standards (e.g. the Principles for Financial Market Infrastructures) and are already subject to necessary supervisory measures (e.g. trade reporting requirements to the CFTC) when obtaining the CFTC's approval for exemption.

C. Non-Deliverable Forwards (NDFs)

(1) Should the Commission except NDFs from consideration when calculating the AGNA of swap dealing activity for purposes of the de minimis exception? Why or why not?

(Comments)

The CFTC should except NDFs from consideration when calculating the AGNA of swap dealing activity for purposes of the de minimis exception.

(Rationale)

Similarly to FX swaps and FX forwards, NDFs are traded in a market with a relatively high transparency and liquidity, and a mechanism to mitigate settlement risk is implemented. In addition, self-directed disciplinary and control activities have already been conducted in the FX markets across jurisdictions. In this view, NDFs should be excepted from the de minimis threshold calculation, similarly to FX swaps and FX forwards.

Given that NDFs are widely used as hedge instrument in relation to emerging country currencies, etc., it is preferable that they will be treated consistently with normal foreign exchange contracts.

(3) Do NDFs pose any particular systemic risk in a manner distinct from foreign exchange swaps and foreign exchange forwards?

(Comments)

It is considered that NDFs pose less systemic risks.

(Rationale)

Since NDFs do not involve the exchange of currencies due to nature of product, they would rather pose less systemic risk than FX swaps and FX forwards.