JFMC | Japan Financial Markets Council

5 March, 2014
Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Submitted by website: http://comments.cftc.gov

Dear Ms. Jurgens

Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States

1. Introduction

The Japan Financial Markets Council (JFMC)[1] is grateful for the opportunity to comment on the Commodity Futures Trading Commission (CFTC) request for views on the application of CFTC regulations to swaps between non-U.S. swap dealers and non-U.S. counterparties involving personnel or agents of non-U.S. swap dealers located in the United States.

2. Overall position

The JFMC believes the approach set out in the CFTC's 'Staff Advisory' will lead to a significant administrative and inappropriate regulatory burden on non-U.S. firms, such as those based in Japan. We believe the CFTC's 'personnel-based test' (i.e. whether a non-U.S. firm regularly uses personnel or agents located in the U.S. to arrange, negotiate, or execute a swap with a non-U.S. person) for determining the cross-border application of Transaction-Level Requirements to Non-U.S.

[1] The JFMC is an association which includes representatives from five Japan-based institutions and five international firms active in Japanese capital markets. Its aim is to ensure that authorities deciding on regulatory initiatives that have a global impact are aware of and take into account the effect of new regulations on Japanese capital markets. The current JFMC members are: Bank of Tokyo-Mitsubishi UFJ, Daiwa Securities Group, Mizuho Securities, Nomura Holdings, SMBC Nikko Securities Inc, BNP Paribas, Citigroup Japan Holdings Corp, Deutsche Bank Group, JPMorgan Securities Japan Co., Ltd. and Morgan Stanley Japan Holdings. The co-chairs of the JFMC are the representatives from Morgan Stanley and Nomura.

Swap Dealers is problematic and would ask the CFTC to reconsider its position. Our overall rationale is as follows:

a. ***Time zone and unfair impact:*** The approach unfairly precludes options open to Asia-based Swap Dealers to cover U.S. market hours and service their non-U.S. based clients by using U.S. based personnel or agents.

b. ***Non-recognition of an equivalent regime:*** The approach is unreasonably 'extra-territorial'. It does not take account of the features of the Japanese regulatory regime which, like the U.S. regime, is compliant with G20 objectives.

c. ***Creates uncertainty and disrupts firms' business planning:*** The sudden change of approach set out in the Staff Advisory, which appears to undermine the generally accepted core principle of providing cross-border guidance, makes it difficult for firms (including Japan-based Swap Dealers and Non-U.S. Swap Dealer entities affiliated with Japanese Dealers) to plan for the future.

3. **Detailed explanation**

a. Time zone and unfair impact

The time difference between the U.S. and Asia makes it difficult for Asia-based Swap Dealers to avoid involving personnel or agents located in the U.S. even when the trades are not booked in the U.S.

For example, a swap transaction between an Asian-based Swap Dealer and a European counterparty which takes place after the close of European business hours is in some cases booked in the Swap Dealer's office in either Asia or Europe. But sometimes, because of the time difference, these transactions may have to be arranged, negotiated or executed by personnel or agents of the Asian-based Swap Dealer based in the U.S.

The ‘personnel based test’ approach is therefore unfairly burdensome for Asia-based Swap Dealers. It effectively forces them to consider:

- transferring their traders and salespeople in New York to outside of the U.S. (e.g. to establish a night desk in London or an early morning desk in Sydney, so that they can cover the client services during the New York market hours); and/or
- terminating the agency contract with the U.S.-based agents.

b. Unreasonable extra-territorial impact

The JFMC believes these regulations are not in line with the limitations imposed on the *Dodd-Frank Wall Street Reform and Consumer Protection Act:* to regulate activities outside the U.S. only if the activities have a direct and significant connection with activities in, or effect on, U.S. commerce or raise evasion concerns. Capturing administrative and immaterial activities, necessitated by time differences, and using that as the basis to regulate transactions booked outside the U.S. which have no impact on the U.S. economy, not only seems to exceed the legislative limitations set out in the Act but also appears inherently unfair to firms from other jurisdictions.

More importantly, the ‘personnel-based’ test results in unreasonable extra-territorial reach. If all jurisdictions employed a similar approach there would be a serious breakdown in cross-border business. The approach also does not take account of the regulatory conditions put in place by Japanese regulators, which are in line with G20 objectives. The JFMC urges the CFTC to accept international comity as the core regulatory principle that should govern cross-border transactions.

c. Creating Uncertainty

The production of the criteria in the Staff Advisory - which was not subject to consultation – has significant wider global regulatory implications. First, the market can be confused if a regulatory agency’s guidance does not appear to be in line with the underlying regulation - in this case the general principles of

Title VII of the Dodd-Frank Act, whose overall goal is to reduce risks of the U.S. financial system. Second, the production of criteria by a government agency of one single country that arbitrarily define its authority to regulate certain types of business activities between third countries (and not take account of the usual cross-border regulatory principles) causes a level of unpredictability which will result in confusion. It is likely to impede firms' ability to develop global long-term business strategies, as capricious changes in a regulatory regime are difficult to plan for.

In order to reduce the unstable factors in developing global business strategies, firms may decide to avoid countries that introduce unpredictable regulatory liabilities. In the case of the Dodd-Frank Act we do not believe this was the original intention of the legislation.

4. Conclusion

We are grateful that the CFTC has opened up the criteria set out in the Staff Advisory for public consultation. We strongly urge the Commission to review the criteria and adopt a more risk-based approach that is sensitive to international business requirements from Asian market players and in line with cross-border regulatory co-operation principles.

If you have any queries about any of the comments outlined in this letter please do not hesitate to contact us for more information.

Yours faithfully,

Jonathan B. Kindred Shigesuke Kashiwagi

Co-chairs of the Japan Financial Markets Council

Contact: International Bankers Association of Japan (IBA Japan): Paul Hunter

Telephone +81 (0)3-6205-7531 E-mail g-info@ibajapan.org