



**Futures Industry Association**

2001 Pennsylvania Ave. NW  
Suite 600  
Washington, DC 20006-1823

202.466.5460  
202.296.3184 fax  
www.futuresindustry.org

**By Electronic Mail**

November 20, 2012

Honorable Jill Sommers  
Commissioner  
Commodity Futures Trading Commission  
1155 21st Street NW  
Washington DC 20581

**Re: Definition of a “US Person”  
Global Markets Advisory Committee Meeting, November 7, 2012**

Dear Commissioner Sommers:

The Futures Industry Association (“FIA”)<sup>1</sup> is pleased to submit this letter in response to the request for our views on the temporary definition of a “US person” set forth in Commodity Futures Trading Commission (“Commission”) Letter No. 12-22, which the Division of Swap Dealer and Intermediary Oversight (“Division”) issued on October 12, 2012 (“Letter”).<sup>2</sup> The Division adopted this temporary definition pending promulgation of the Commission’s Guidance on the Cross-Border Application of the Commodity Exchange Act (“Cross-Border Guidance”), in order to enable swap market participants “to apply a uniform and readily ascertainable standard regarding which swaps . . . must be included in their calculation of the aggregate gross notional amount of swaps connected with swap dealing activity for purposes of determining when, and if, they are no longer entitled to rely on the *de minimis* exception from swap dealer registration and must register with the Commission as a swap dealer.”

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<sup>1</sup> FIA is the leading trade organization for the futures, options and over the counter (“OTC”) cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world’s largest derivatives clearing firms as well as leading derivatives exchanges and clearing organizations from more than 20 countries. As the principal members of the derivatives clearing organizations, our member firms play a critical role in the reduction of systemic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions.

<sup>2</sup> Commissioner Wetjen made the request as part of the discussion at the meeting of the Global Markets Advisory Committee on November 7, 2012. We understand that the record of that meeting is remaining open for a period of two weeks, in part, to receive the public’s views on the “US person” definition and, in that regard, we ask that this letter be made a part of the record. If appropriate, we ask that it also be made a part of the record on the Commission’s Proposed Interpretive Guidance on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed.Reg. 41214 (July 12, 2012).

As set forth on pages 4-5 of the Letter, the Division defined a “US person” to include:

- (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 U.S. income tax regardless of source; or
- (v) An individual account (discretionary or not) where the beneficial owner is a person described in (i) through (iv) above.

The Division also confirmed that a person may reasonably rely on the representations of its counterparty as to whether such counterparty is a person described in (i) through (v) above.

FIA member firms have reviewed the temporary definition and, subject to two minor revisions described below, support its adoption on a more permanent basis. We concur with the Division that the temporary definition establishes a “uniform and readily ascertainable standard” for identifying “US persons.” As such, the definition contrasts sharply with the definition set out in the proposed Cross-Border Guidance, the breadth of which “creates significant legal uncertainty and exposes counterparties to unnecessary regulatory risk.”<sup>3</sup>

We suggest minor revisions to item (iii) and (iv), above. First, we propose that item (iii) be revised to read as follows:

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

We understand that pension plans formed primarily for the foreign employees of entities organized or incorporated under the laws of the US may nonetheless include a limited number of US employees. We do not believe that a limited number of US employees should require that the entire plan be deemed to be a US person.

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<sup>3</sup> Letter from Walt L. Lukken President and CEO, Futures Industry Association, to David A. Stawick, Secretary to the Commission, dated August 27, 2012, p. 5.

Second, we propose that item (iv) be revised to read as follows:

(iv) An estate or trust [organized under the laws of the United States](#), the income of which is subject to U.S. income tax regardless of source.

We understand that an estate or trust organized under the laws of a non-US jurisdiction may be subject to US income tax. As with the legal entities described in item (ii) above, therefore, we submit that an estate or trust should be deemed to be a US person only if it is organized under the laws of the United States. With these revisions, FIA would support adoption of the temporary definition of a “US person” on a permanent basis in connection with the Cross-Border Guidance.

We wish to take this opportunity to address two other issues relating to the definition of a “US person,” which were also addressed in our comment letter on the proposed Cross-Border Guidance. First, we note that the temporary definition of a US person (as well as the definition in the proposed Cross-Border Guidance) is limited to determining whether a person located outside of the United States would be required to be registered with the Commission as a swap dealer or major swap participant. We submit this purpose is too narrow. As SIFMA explained in its comment letter on the proposed Cross-Border Guidance, “consistency of interpretation and of application is essential in the implementation of a new and sweeping regulatory framework and [ ] this consistency will be best served by specifying a single, practicable definition at the outset of the compliance process.”<sup>4</sup> We, therefore, encourage the Commission to adopt this definition of a “US person” for the regulation of swap dealers and major swap participants more generally under Title VII of the Dodd-Frank Act. Separately, we ask the Commission to make clear that non-US branches of US persons are excluded from the definition of a “US person” to the extent that they face non-US counterparties, for purposes of both swap dealer and major swap participant regulatory purposes.

FIA appreciates your strong interest in finding a workable definition of a “US person,” and we look forward to working with you and other members of the Commission on this critical issue.

Sincerely,



Walt L. Lukken  
President and CEO

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<sup>4</sup> Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, to David A. Stawick, Secretary of the Commission, dated August 27, 2012, p. A-14.

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cc: Honorable Gary Gensler, Chairman  
Honorable Bart Chilton, Commissioner  
Honorable Scott O'Malia, Commissioner  
Honorable Mark Wetjen, Commissioner

Ronald H. Filler, Chairman, Global Markets Advisory Committee