

CFTC Issues Final Guidance and Accompanying Exemptive Order on Cross-Border Application of Certain Swap Regulations

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At a public meeting on July 12, 2013, the Commodity Futures Trading Commission (CFTC or Commission) adopted final guidance on how Dodd-Frank Act requirements will apply to cross-border swap activities (Guidance).¹ In conjunction with the Guidance, the CFTC issued an order on an interim final basis phasing in the implementation of its Guidance (Exemptive Order).² During the July 12 meeting, Commissioner Bart Chilton stated that the Guidance is the CFTC's most complicated undertaking in the past three years. This client alert provides a broad overview of that Guidance and the Exemptive Order.

Guidance

The Guidance addresses several important topics relating to the CFTC's regulation of the global swap marketplace:

- **Definition of U.S. Person.** The Commission adopted as a foundation for the rest of its Guidance a definition of "U.S. person" that departs materially from the definitions originally proposed³ in several ways:⁴
 - *Principal Place of Business.* The Guidance explains when the CFTC will consider a company or fund, including a collective investment vehicle, that is not a pension plan or trust to have its principal place of business within the U.S. and thus be considered a U.S. person.⁵
 - *Majority-Owned Legal Entities.* Legal entities will be considered U.S. persons based on direct or indirect majority ownership by other U.S. persons if any majority owner(s) bear unlimited responsibility for the obligations and liabilities of the legal entity, and such responsibility is not born as the result of a guarantee.⁶
 - *Collective Investment Vehicles.* Regardless of place of incorporation or principal place of business, a collective investment vehicle will be considered a U.S. person if it is majority owned by other U.S. persons. The Guidance explains how beneficial ownership should be determined when collective investment vehicles under common control are involved and, notably, clarifies that any collective investment vehicles that are publicly offered to only non-U.S. persons, and not offered to (as opposed to publicly traded by) U.S. persons, will not be considered U.S. persons.⁷
 - *Pension Plans.* A pension plan existing primarily for foreign employees of a business entity incorporated in the U.S., or having its principal place of business in the U.S., will not be considered a U.S. person.⁸
 - *Estates and Trusts.* An estate of a decedent who was a U.S. resident at the time of death and a trust over which a U.S. court may exercise primary jurisdiction with respect to such trust's administration will be considered a U.S. person.⁹

- *Foreign Branches of U.S. Persons.* A foreign branch of a U.S. person will itself be considered a U.S. person. The Guidance also elaborates on the scope of the term “foreign branch” as well as when a swap will be considered to have been executed with a foreign branch.¹⁰

The Guidance clarifies that parties to a swap may reasonably rely on a written representation as to its counterparty’s U.S. person status by conducting due diligence that is reasonable in light of the facts and circumstances of the situation.¹¹

- ***Guaranteed and Conduit Affiliates.*** As used throughout the Guidance, “guaranteed affiliates” refers to non-U.S. person affiliates of U.S. persons that are guaranteed by U.S. persons.¹² The Guidance also explains “conduit affiliates,” such as treasury centers located overseas, as non-U.S. persons that act as vehicles for their U.S. person affiliates to conduct swap transactions with non-U.S. third parties.¹³ The Commission interprets these types of entities as potentially having a significant effect on U.S. commerce and, accordingly, will interpret Section 2(i) of the Commodity Exchange Act (CEA) as applying CEA swaps provisions to swap transactions that are entered into by guaranteed or conduit affiliates similarly to how those provisions apply to swap transactions entered into by U.S. persons.¹⁴
- ***Swap Dealer and Major Swap Participant Registration.*** Whether a swap transaction is relevant to determining a person’s status as a swap dealer (SD) or major swap participant (MSP) will be based on whether the potential registrant’s counterparty is a U.S. person, non-U.S. person, foreign branch of a U.S. SD, or a guaranteed or conduit affiliate of a U.S. person.
 - Exhibit 1 identifies by type of counterparty which swap dealing activity should be included in counting toward the *de minimis* SD registration threshold.¹⁵
 - Exhibit 2 identifies by type of counterparty which swap transactions should be included in counting toward the MSP registration threshold.¹⁶
- ***Aggregation of Affiliates.*** When counting toward the *de minimis* level of swap dealing activity, both a U.S. and non-U.S. person should include the swap dealing activities of all of its U.S. and non-U.S. affiliates under common control.¹⁷ Both U.S. and non-U.S. persons may exclude swap dealing activities of a U.S. or non-U.S. affiliate that is a registered SD.¹⁸
- ***Entity-Level and Transaction-Level Requirements and Application Thereof to Cross-Border Market Participants.*** The CFTC has divided into two categories the CEA and CFTC swap regulatory requirements that potentially would apply to cross-border market participants — Entity-Level Requirements and Transaction-Level Requirements. As the titles suggest, Entity-Level Requirements apply on a firm-wide basis, while Transaction-Level requirements apply on a transaction-by-transaction basis. The Guidance further subdivides these Entity-Level and Transaction-Level Requirements: Entity-Level Requirements are divided into a First Category and a Second Category, and Transaction-Level Requirements are divided into Category A and Category B.
 - Exhibit 3 identifies the Entity-Level Requirements (both the First Category and the Second Category) and when the requirements would apply to SDs and MSPs.
 - Exhibit 4 identifies the Category A Transaction-Level Requirements and when they would apply to swaps of SDs/MSPs.
 - Exhibit 5 identifies the Category B Transaction-Level Requirements and when they would apply to swaps of SDs/MSPs.

- Exhibit 6 identifies when certain Entity-Level and Transaction-Level Requirements would apply to entities that are engaged in swap activity but not registered as SDs or MSPs (referred to as Non-Registrant Requirements).
- **Substituted Compliance.** The Guidance allows for a substituted compliance program. Under this program, the CFTC may allow an entity to comply with the laws of its home jurisdiction instead of complying with the relevant CEA/CFTC Entity-Level and/or Transaction-Level Requirements when the CFTC finds that the requirements of the entity’s home jurisdiction are comparable to and as comprehensive as the corresponding Entity-Level and/or Transaction-Level Requirement (such comparability determination is called a “Substituted Compliance Determination”).¹⁹ Exhibits 3, 4, 5 and 6 indicate when entities are eligible for substituted compliance with respect to Entity-Level and/or Transaction-Level Requirements. Anyone who is eligible for substituted compliance may apply for a Substituted Compliance Determination, either individually or collectively, as may foreign regulators.²⁰ Once a Substituted Compliance Determination is made, it will apply for all entities or transactions in the relevant jurisdiction to the extent provided in the determination.

Exemptive Order

The Exemptive Order is designed to help market participants transition from operating under the CFTC’s January 7, 2013, exemptive order (January Order), which provided time-limited relief to certain cross-border market participants until July 12, 2013.²¹ Accordingly, the Exemptive Order will phase in the Guidance as follows:

- The Guidance’s definition of “U.S. person,” exclusions from the SD and MSP registration threshold calculations, and aggregation principles for purposes of the SD calculation will become effective on October 9, 2013. Until then, the January Order’s treatment of these issues will continue to apply.²²
- A non-U.S. person that is required to register as a SD once the Guidance’s “U.S. person” definition, exclusions from the SD and MSP calculations, and aggregation principles take effect, but who was previously exempt from registration as an SD under the January Order, may delay registration until two months after the end of the month in which the person exceeds the *de minimis* threshold for SD registration under the Guidance’s new standards.²³
- For Entity-Level Requirements:
 - A non-U.S. SD or non-U.S. MSP established in Australia, Canada, the European Union, Hong Kong, Japan or Switzerland may defer compliance with any Entity-Level Requirement for which substituted compliance is possible under the Guidance until the earlier of December 21, 2013, or 30 days after a Substituted Compliance Determination for the relevant jurisdiction has issued.²⁴
 - > With respect to the CFTC’s Part 45 and 46 swap data repository reporting (SDR Reporting) requirements, however, this time-limited relief is only available for the non-U.S. SD ‘s or non-U.S. MSP’s swaps with non-U.S. counterparties and is conditioned on the non-U.S. SD or non-U.S. MSP: i) not being part of an affiliated group in which the ultimate parent is a U.S. SD or MSP, U.S. bank, U.S. financial holding company, or U.S. bank holding company, and ii) complying with the swap data recordkeeping and reporting requirements of its home jurisdiction.²⁵

- > With respect to physical commodity large swaps trader reporting (Large Trader Reporting) requirements, substituted compliance is not possible and the Exemptive Order does not afford time-limited relief from such requirements. Accordingly, cross-border market participants must be in compliance with Large Trader Reporting requirements (including recordkeeping), effective immediately.
 - No relief is specified with respect to non-U.S. SDs and non-U.S. MSPs established in jurisdictions other than Australia, Canada, the European Union, Hong Kong, Japan or Switzerland.
- For Transaction-Level Requirements:
 - A non-U.S. SD or non-U.S. MSP established in, or a foreign branch of a U.S. SD or MSP located in,²⁶ Australia, Canada, the European Union, Hong Kong, Japan or Switzerland may comply with the laws of the relevant foreign jurisdiction in lieu of complying with any Category A Transaction-Level Requirement for which substituted compliance is possible under the Guidance until the earlier of December 21, 2013, or 30 days after a Substituted Compliance Determination has issued for the relevant foreign jurisdiction.²⁷
 - > With respect to the CFTC's Part 43 real-time reporting requirements, however, the time-limited relief only extends to September 30, 2013, and only applies to swap transactions with guaranteed affiliates of a U.S. person.
 - A non-U.S. SD or non-U.S. MSP established in, or a foreign branch of a U.S. SD or MSP located in, any jurisdiction other than Australia, Canada, the European Union, Hong Kong, Japan or Switzerland may comply with the laws of the relevant foreign jurisdiction in lieu of complying with any Transaction-Level Requirement for which substituted compliance is possible under the Guidance until October 9, 2013.²⁸
 - A non-U.S. SD or non-U.S. MSP, or a foreign branch of a U.S. SD or MSP, that enters into a swap that is subject to the clearing requirement,²⁹ but that was not required to be cleared under the January Order, may delay complying with the clearing requirement until October 9, 2013.³⁰
 - A guaranteed affiliate of a U.S. person (established in any jurisdiction outside the U.S.) that is not registered as an SD or MSP and that enters into a swap with another such non-registrant guaranteed affiliate may comply with the laws of the jurisdiction in which it is established for the relevant Transaction-Level Requirement in lieu of complying with any Transaction-Level Requirement for which substituted compliance is possible until October 9, 2013.

EXHIBIT 1 – Swap Dealer Registration

This chart identifies by status of counterparty which swap dealing activity should be included in counting toward the de minimis SD registration threshold.

		COUNTERPARTY					
		U.S. Person (Other Than Foreign Branch of U.S. SD)	Foreign Branch of U.S. SD	Non-U.S. Person That Is a Guaranteed Affiliate of a U.S. Person	Non-U.S. Person That Is a Conduit Affiliate of a U.S. Person	Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person	
POTENTIAL REGISTRANT	U.S. Person	Included	Included	Included	Included	Included	
	Non-U.S. Person That Is a Guaranteed or Conduit Affiliate of a U.S. Person	Included	Included	Included	Included	Included	
	Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person	Included	Excluded	Included (unless an SD, affiliated with an SD, or guaranteed by a non-financial entity ³¹)	Excluded	Excluded	

(Exhibit 2 appears on the next page)

EXHIBIT 2 – Major Swap Participant Registration

This chart identifies by status of counterparty which swap transactions should be included in counting toward the MSP registration threshold.

		COUNTERPARTY					
		U.S. Person (Other Than Foreign Branch of U.S. SD/MSP)	Foreign Branch of U.S. SD	Non-U.S. Person That Is a Guaranteed Affiliate of a U.S. Person	Non-U.S. Person That Is a Conduit Affiliate of a U.S. Person	Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person	
POTENTIAL REGISTRANT	U.S. Person	Included	Included	Included	Included	Included	
	Non-U.S. Person That Is a Guaranteed or Conduit Affiliate of a U.S. Person	Included	Included	Included	Included	Included	
	Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person	Included	Excluded ³²	Excluded (if an SD) ³³	Excluded	Excluded	

(Exhibit 3 appears on the next page)

EXHIBIT 3 – Application of Entity-Level Requirements to Swap Dealers and Major Swap Participants

This chart identifies when the two categories of Entity-Level Requirements will apply to SDs and MSPs.

Entity-Level Requirements are:		U.S. Person	Non-U.S. Person
First Category	U.S. SD/MSP	Apply	Apply
<ul style="list-style-type: none"> - capital adequacy - chief compliance officer - risk management - swap data recordkeeping (except certain aspects relating to complaints and sales materials) 	Non-U.S. SD/MSP	First Category: Substituted Compliance Second Category: Apply	First Category: Substituted Compliance Second Category (except Large Trader Reporting): Substituted Compliance (Substituted Compliance only available for SDR Reporting if the counterparty is not guaranteed by, or an affiliate conduit of, a U.S. person ³⁴)
Second Category			
<ul style="list-style-type: none"> - SDR reporting - swap data recordkeeping relating to complaints and marketing and sales materials - Large Trader Reporting 			

(Exhibit 4 appears on the next page)

EXHIBIT 4 – Application of Category A Transaction-Level Requirements to Swap Dealers and Major Swap Participants

This chart identifies when Category A Transaction-Level Requirements will apply to SDs and MSPs for swaps with different kinds of counterparties.

Category A Transaction-Level Requirements are:	U.S. Person (Other Than Foreign Branch of U.S. SD/MSP)	Foreign Branch of U.S. Bank That Is an SD/MSP	Non-U.S. Person That Is a Guaranteed or Conduit Affiliate of a U.S. Person	Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person
<ul style="list-style-type: none"> - clearing and swap processing - margin (and segregation) for uncleared swaps - trade execution mandate - swap trading relationship documentation - portfolio reconciliation and compression - real-time public reporting - trade confirmation - daily trading records 	U.S. SD/MSP	Apply	Apply	Apply
	Foreign Branch of U.S. Bank that is an SD/MSP	Apply	Substituted Compliance	Substituted Compliance
	Non-U.S. SD/MSP	Apply ³⁵	Substituted Compliance	Substituted Compliance
	U.S. Branch of non-U.S. SD/MSP³⁶	Apply	Apply	Apply

(Exhibit 5 appears on the next page)

EXHIBIT 5 – Application of Category B Transaction-Level Requirements to Swap Dealers and Major Swap Participants

This chart identifies when Category B Transaction-Level Requirements will apply to SDs and MSPs for swaps with different kinds of counterparties.

Category B Transaction- Level Requirements are: - external business conduct standards		U.S. Person (Other Than Foreign Branch of U.S. SD/MSP)	Foreign Branch of U.S. Bank That Is an SD/MSP	Non-U.S. Person That Is Guaranteed or Conduit Affiliate of a U.S. Person	Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person
	U.S. SD/MSP	Apply	Apply	Apply	Apply
	Foreign Branch of U.S. Bank That Is an SD/MSP	Apply	Do Not Apply	Do Not Apply	Do Not Apply
	Non-U.S. SD/MSP	Apply ³⁷	Do Not Apply	Do Not Apply	Do Not Apply

(Exhibit 6 appears on the next page)

EXHIBIT 6 – Application of Certain Entity-Level and Transaction-Level Requirements to Non-Registrants

This chart identifies when Non-Registrant Requirements will apply to non-registrants and their swap transactions with different kinds of counterparties.

Non-Registrant Requirements are: <ul style="list-style-type: none"> - clearing - trade execution - real-time public reporting - Large Trader Reporting - SDR Reporting - swap data recordkeeping 		U.S. Person	Non-U.S. Person That Is a Guaranteed or Conduit Affiliate of a U.S. Person	Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person	
		U.S. Person	Apply	Apply	Apply
		Non-U.S. Person That Is a Guaranteed or Conduit Affiliate of a U.S. Person	Apply	Substituted Compliance ³⁹	Do Not Apply (Except for Large Trader Reporting)
		Non-U.S. Person That Is Not a Guaranteed or Conduit Affiliate of a U.S. Person	Apply	Do Not Apply (Except for Large Trader Reporting)	Do Not Apply (Except for Large Trader Reporting)

(End Notes appear on the following pages)

END NOTES

- 1 “Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations,” 78 Fed. Reg. 45292 (July 26, 2013). The Guidance took effect on July 26, 2013.
- 2 “Exemptive Order Regarding Compliance With Certain Swap Regulations,” 78 Fed. Reg. 43785 (July 22, 2013). The Exemptive Order took effect on July 13, 2013, and the Commission is soliciting comments for 30 days from the date of publication in the Federal Register (*i.e.*, until August 21).
- 3 See “Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act,” 77 Fed. Reg. 41214 (July 12, 2012) (Proposed Guidance). The Commission proposed further guidance on certain aspects of the Proposed Guidance, including modifications to its definition of “U.S. person.” See “Further Proposed Guidance Regarding Compliance with Certain Swap Regulations,” 78 Fed. Reg. 909 (Jan. 7, 2013) (Further Proposed Guidance).
- 4 See Guidance at 45316-17. This definition applies only to swaps regulations promulgated by the CFTC pursuant to Title VII of the Dodd-Frank Act. See Guidance at 45316. The Commission will interpret the term “U.S. person” generally to include, but not be limited to:
 - (i) any natural person who is a resident of the United States;
 - (ii) any estate of a decedent who was a resident of the United States at the time of death;
 - (iii) 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 (other than an entity described in prongs (iv) or (v), below) (a legal entity), in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States;
 - (iv) any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension plan is primarily for foreign employees of such entity;
 - (v) any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;
 - (vi) any commodity pool, pooled account, investment fund or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv) or (v), except any commodity pool, pooled account, investment fund or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;
 - (vii) any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv) or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and
 - (viii) any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi) or (vii).
- 5 See Guidance at 45309-12. The Guidance provides several examples by way of illustration as to when the Commission would view a collective investment vehicle as having its principal place of business in the United States.
- 6 See Guidance at 45312-13. This definition mirrors the alternative version described in the Further Proposed Guidance.
- 7 See Guidance at 45313-14. The Proposed Guidance did not distinguish between the collective investment vehicle being publicly offered and public traded. Additionally, the Guidance does not adopt the Commission’s earlier proposal to consider as a U.S. person any collective investment vehicle, the operator of which would be required to register with the CFTC as a commodity pool operator.
- 8 See Guidance at 45314.
- 9 See Guidance at 45314-15. The CFTC withdrew the proposed reliance on the U.S. tax status of estates and trusts.
- 10 See Guidance at 45315. The Commission will consider a “foreign branch” of a U.S. SD/MSP to be any “foreign branch” (as defined in the applicable banking regulation) of a U.S. bank that:
 - (i) is subject to Regulation K, 12 CFR part 121, or the FDIC International Banking Regulation, 12 CFR part 347, or otherwise designated as a “foreign branch” by the U.S. bank’s primary regulator;

- (ii) maintains accounts independently of the home office and of the accounts of other foreign branches with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and
- (iii) is subject to substantive regulation in banking or financing in the jurisdiction where it is located.

See Guidance at 45329. The Commission will consider a swap to have been executed with a “foreign branch” of a U.S. SD/MSP if:

- (i) the employees negotiating and agreeing to the terms of the swap (or, if the swap is executed electronically, managing the execution of the swap), other than employees with functions that are solely clerical or ministerial, are located in such foreign branch or in another foreign branch of the U.S. bank;
- (ii) the foreign branch or another foreign branch is the office through which the U.S. bank makes and receives payments and deliveries under the swap on behalf of the foreign branch pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the U.S. bank is such foreign branch;
- (iii) the swap is entered into by such foreign branch in its normal course of business;
- (iv) the swap is treated as a swap of the foreign branch for tax purposes; and
- (v) the swap is reflected in the local accounts of the foreign branch.

See Guidance at 45329-30.

- 11 See Guidance at 45315 and n.227. This standard is meant to be similar to the “reasonable reliance” standard for SDs and MSPs in the External Business Conduct Rules. See 77 Fed. Reg. 9734 (Feb. 17, 2012).
- 12 See Guidance at 45318. The Commission will interpret the term “guarantee” to include traditional guarantees and other formal arrangements that support the non-U.S. person’s ability to perform its swap obligations. The Commission will consider substance rather than form when analyzing the facts and circumstances of an arrangement to determine whether it is a “guarantee.” See Guidance at 45320 and n.267.
- 13 See Guidance at 45358-59. The Commission interprets the following factors to be indicative of a conduit affiliate:
 - (i) the non-U.S. person is a majority-owned affiliate of a U.S. person;
 - (ii) the non-U.S. person is controlling, controlled by or under common control with the U.S. person;
 - (iii) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and
 - (iv) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third-party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates.
- 14 See Guidance at 45319.
- 15 Generally, the Guidance provides that a non-U.S. person does not need to count toward the *de minimis* threshold any swap dealing activity that is both (i) executed on a designated contract market (DCM), swap execution facility (SEF), or foreign board of trade (FBOT) and (ii) cleared. See Guidance at 45325. Additionally, a non-U.S. person does not need to count toward the *de minimis* threshold the swap that results from clearing a trade through a CFTC-registered derivatives clearing organization (*i.e.*, the novated trade).
- 16 Generally, a guaranteed swap should be attributed to the person to whom there is recourse. See Guidance at 45326. Thus, if a U.S. person enters into a swap guaranteed by a non-U.S. person, the swap should be attributed to the non-U.S. person’s MSP threshold, whereas a swap entered into by a non-U.S. person that is guaranteed by a U.S. person should be attributed to the U.S. person’s MSP threshold.
- 17 See Guidance at 45323.
- 18 See Guidance at 45323. Thus, when the affiliated group meets the *de minimis* threshold in the aggregate, one or more affiliates would have to register as an SD so that the swap dealing activity of the unregistered affiliates remains below the threshold.
- 19 See Guidance at 45342-43. In assessing comparability, the CFTC will rely upon an outcomes-based approach to determine whether another jurisdiction’s requirements achieve the same regulatory objectives as the Dodd-Frank Act.
- 20 To date, market participants or regulators in Australia, Canada, the European Union, Hong Kong, Japan and Switzerland have submitted to the Commission requests for Substituted Compliance Determinations. See Guidance at 45351 n.514.

- 21 See "Final Exemptive Order Regarding Compliance with Certain Swap Regulations," 78 Fed. Reg. 858 (Jan. 7, 2013). For a description of the January Order, see the January 11, 2013, Skadden Client Alert entitled "CFTC Issues Final Exemptive Order on Cross-Border Application of Certain Swap Regulations."
- 22 Note that, with respect to the issue of exclusions from the SD and MSP registration threshold calculations, the exclusions will apply regardless of whether the swap obligations of the non-U.S. person performing the calculation are guaranteed by a U.S. person.
- 23 See Exemptive Order at 43788.
- 24 See Exemptive Order at 43788.
- 25 If the home jurisdiction of the non-U.S. SD or non-U.S. MSP has not implemented swap data reporting requirements, the non-U.S. SD or non-U.S. MSP must comply with CFTC regulations 45.2, 45.6, 46.2 and 46.4. See Exemptive Order at 43789.
- 26 For purposes of the Exemptive Order, market participants must use the term "foreign branch" and the interpretation of when a swap is with a foreign branch set forth in the Guidance.
- 27 See Exemptive Order at 43789. This relief does not include delaying compliance with the clearing requirement under CEA section 2(h)(1), part 50 of the Commission's regulations, and Commission regulation 23.506; the trade execution requirement under CEA section 2(h)(8) and Commission regulation 37.12 or 38.11; or the real-time reporting requirement under Part 43 of the Commission's regulations for swaps with guaranteed affiliates of a U.S. person. See Exemptive Order at 43789, 43790.
- The Exemptive Order does not explicitly provide a phase-in timeline for Category B Transaction-Level Requirements; rather, the Exemptive Order notes that a non-U.S. SD/MSP and a foreign branch of U.S. bank that is an SD/MSP generally must comply with Category B Transaction-Level Requirements for swaps with a U.S. person (other than a foreign branch of a U.S. bank that is an SD or MSP). See Exemptive Order at 43789.
- 28 See Exemptive Order at 43790-91. With respect to non-U.S. SDs/MSPs, this relief is limited to swap transactions with guaranteed affiliates of a U.S. person. For their part, guaranteed affiliates and affiliate conduits do not need to comply with Transaction-Level Requirements relating to swaps with non-U.S. persons or foreign branches of U.S. SDs/MSPs until 75 days after the Guidance is published in the Federal Register.
- 29 See CEA Section 2(h)(1), CFTC regulations under Part 50, and CFTC regulation 23.506.
- 30 See Exemptive Order at 43790.
- 31 A non-financial entity is an entity not described in CEA 2(h)(7)(C)(i).
- 32 If the potential registrant is a financial entity as defined in CEA 2(h)(7), then the swap either must be cleared or daily variation margin must be required.
- 33 If the potential registrant is a financial entity as defined in CEA 2(h)(7), then the swap either must be cleared or daily variation margin must be required.
- 34 In addition, for substituted compliance to be available with respect to SDR Reporting, the Commission must have direct and electronic access to the relevant swap data stored at the foreign trade repository.
- 35 Substituted compliance is not available, but a market participant will satisfy its Dodd-Frank requirements when it complies with "essentially identical" requirements in its home jurisdiction. Additionally, where a swap is executed anonymously between the non-U.S. person and a U.S. person (or a non-U.S. person that is guaranteed by a U.S. person or a conduit affiliate) on a registered DCM, SEF or FBOT and cleared, the non-U.S. person generally will be considered to have satisfied the Category A Transaction-Level Requirements.
- 36 In a departure from the CFTC's prior treatment of U.S. branches of non-U.S. SDs/MSPs, the Guidance specifies that a U.S. branch of a non-U.S. SD/MSP would be subject to Transaction-Level requirements, without substituted compliance available. See Guidance at 45350 n. 513.
- 37 Category B Transaction-Level Requirements are not applicable where the swap is executed anonymously on a registered DCM, SEF or FBOT and cleared.
- 38 In a departure from the CFTC's prior treatment of U.S. branches of non-U.S. SDs/MSPs, the Guidance specifies that a U.S. branch of a non-U.S. SD/MSP would be subject to Transaction-Level requirements, without substituted compliance available. See Guidance at 45350 n. 513.
- 39 Substituted compliance is not available with respect to Large Trader Reporting. Substituted Compliance is only available for SDR Reporting if the CFTC has direct and electronic access to swap data stored at a foreign trade repository.