



Commodity Futures Trading Commission

Office of Public Affairs

**Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
www.cftc.gov**

Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations

The Commodity Futures Trading Commission (CFTC or Commission) is adopting interpretive guidance and a policy statement (Guidance) regarding cross-border application of the swaps provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Dodd-Frank Act

The Dodd-Frank Act amended the Commodity Exchange Act (CEA) to establish comprehensive regulation of swaps by the Commission. Section 722(d) of the Dodd-Frank Act amended the CEA by adding section 2(i), which provides that the swaps provisions of the CEA (including any CEA rules or regulations) apply to cross-border activities when certain conditions are met, namely, when such activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” or when they contravene Commission rules or regulations as are necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act. The Guidance sets forth the general policy of the Commission in interpreting how section 2(i) of the CEA provides for the application of the swaps provisions of the CEA and Commission regulations to cross-border activities.

“U.S. Person” Interpretation

The definition of U.S. person is largely territorial-based. The definition would include collective investment vehicles - including hedge funds - that are directly or indirectly majority-owned by U.S. persons, or that have their principal place of business in the U.S. (focusing principally on location of the investment managers, fund sponsors and promoters, and the sales and trading desk used by the fund).

A non-U.S. person that is guaranteed by and an affiliate of a U.S. person is not included in the definition of U.S. person.

Swap Dealer De Minimis Threshold and Major Swap Participant (MSP) Calculation

A U.S. person should generally count in its swap dealer de minimis calculations all of its dealing swaps, whether with U.S. or non-U.S. counterparties. A non-U.S. person that is a guaranteed or conduit affiliate should also generally include in its swap dealer calculation all of its dealing swaps, whether with U.S. or non-U.S. counterparties. A non-U.S. person that is not a guaranteed or conduit affiliate should generally count swaps with U.S. persons and non-U.S. persons with may exclude certain dealing swaps, however, including dealing swaps with foreign branches of U.S. swap dealers, dealing swaps with non-U.S. persons that are not guaranteed affiliates (as well as certain swaps with guaranteed affiliates), and certain swaps entered into anonymously on a registered DCM, SEF, or FBOT.

Commission regulation 1.3(ggg)(4) requires that a person include, in determining whether its swap dealing activities exceed the de minimis threshold, the aggregate notional value of swap dealing transactions entered by its affiliates under common control. Based on the comments received on the Proposed Guidance and the Further Proposed

Guidance, and its further review of issues related to the aggregation requirement, the Commission's policy is to interpret the aggregation requirement in Commission regulation 1.3(ggg)(4) in a manner that applies the same aggregation principles to all affiliates in a corporate group, whether they are U.S. or non-U.S. persons. Further, the Commission will generally apply the aggregation principle (as articulated in the Final Entities Rules) such that, in considering whether a person is engaged in more than a de minimis level of swap dealing, a person (whether U.S. or non-U.S.) should generally include all relevant dealing swaps of all its U.S. and non-U.S. affiliates under common control, except that swaps of an affiliate (either U.S. or non-U.S.) that is a registered swap dealer are excluded, as discussed below. However, this aspect of the Commission's policy would generally apply only when the aggregate notional value of applicable swap dealing transactions of all such unregistered U.S. and non-U.S. affiliates of such registered swap dealer does not exceed the de minimis level.

Stated in general terms, the Commission's interpretation allows both U.S. persons and non-U.S. persons in an affiliated group to engage in swap dealing activity up to the de minimis threshold. When the affiliated group meets the de minimis threshold in the aggregate, one or more affiliate(s) (inside or outside the United States) would generally have to register as swap dealer(s) so that the relevant swap dealing activity of the unregistered affiliates remains below the threshold.

For purposes of determining whether a non-U.S. person holds swap positions above the MSP thresholds, a non-U.S. person should generally include (1) any swap position between it and a U.S. person, (2) any swap between it and a guaranteed affiliate (but its swap positions where its own obligations thereunder are guaranteed by a U.S. person should be attributed to that U.S. person and not included in the non-U.S. person's determination), and (3) any swap position between another (U.S. or non-U.S.) person and a U.S. person or guaranteed affiliate, where it guarantees the obligations of the other person thereunder. The Guidance provides certain non-U.S. persons with other exceptions.

Transaction-Level and Entity-Level Requirements

The various Dodd-Frank Act swaps provisions applicable to swap dealers and MSPs can be conceptually separated into Entity-Level Requirements, which apply to a swap dealer or MSP firm as a whole, and Transaction-Level Requirements, which apply on a transaction-by-transaction basis.

The Entity-Level Requirements under Title VII of the Dodd-Frank Act and the Commission's regulations promulgated thereunder relate to: (i) capital adequacy; (ii) chief compliance officer; (iii) risk management; (iv) swap data recordkeeping; (v) swap data repository reporting ("SDR Reporting"); and (vi) physical commodity large swaps trader reporting ("Large Trader Reporting"). The Guidance divides these requirements into two categories. The first category of Entity-Level Requirements includes capital adequacy, chief compliance officer, risk management, and swap data recordkeeping under Commission regulations 23.201 and 23.203 (except certain aspects of swap data recordkeeping relating to complaints and sales materials) ("First Category"). The second category of Entity-Level Requirements includes SDR Reporting, certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials under Commission regulations 23.201(b)(3) and 23.201(b)(4) and Large Trader Reporting ("Second Category").

The Transaction-Level Requirements include: (i) required clearing and swap processing; (ii) margining (and segregation) for uncleared swaps; (iii) mandatory trade execution; (iv) swap trading relationship documentation; (v) portfolio reconciliation and compression; (vi) real-time public reporting; (vii) trade confirmation; (viii) daily trading records; and (ix) external business conduct standards. The Guidance classifies all Transaction-Level Requirements except external business conduct standards as "Category A" Transaction-Level Requirements, and classifies external business conduct standards as "Category B" Transaction-Level Requirements.

Substituted Compliance

Consistent with CEA section 2(i) and comity principles, the Commission's policy generally is that a non-U.S. swap dealer or MSP may comply with a foreign jurisdiction's law and regulations in lieu of compliance with the attendant Entity-Level Requirements and/or Transaction-Level Requirements under the CEA and Commission regulations.

In issuing comparability determinations (which will be based on whether a foreign regime's requirements are comparable to and as comprehensive as the corollary area(s) of regulatory obligations encompassed by the Entity- and Transaction-Level Requirements), the Commission will rely upon an outcomes-based approach to determine whether foreign requirements achieve the same regulatory objectives as the Dodd-Frank Act. The Commission's comparability determinations may be made on a requirement-by-requirement basis, rather than on the basis of the foreign regime as a whole. The foreign regulations must be comparable and comprehensive but not necessarily identical.

Each of the 13 categories of requirements – five Entity-level, eight Transaction-level – would be subject to separate determinations of substituted compliance.

Application of Entity-Level Requirements and Transaction-Level Requirements

Generally, U.S. swap dealers and U.S. MSPs should comply in full with all of the Entity-Level Requirements, without substituted compliance available. Non-U.S. swap dealers and non-U.S. MSPs should also comply in full with all of the Entity-Level Requirements, except that substituted compliance would generally be available for certain Entity-Level Requirements.

U.S. swap dealers and U.S. MSPs should generally comply in full with Category A Transaction-Level Requirements, but a foreign branch of a U.S. bank that is a swap dealer or an MSP would generally be eligible for substituted compliance with respect to Category A Transaction-Level Requirements for swaps with certain counterparties. In addition, under certain circumstances, where a swap between the foreign branch of a U.S. swap dealer or U.S. MSP and a non-U.S. person (that is not a guaranteed or conduit affiliate) takes place in a foreign jurisdiction other than Australia, Canada, the European Union, Hong Kong, Japan, or Switzerland, the Commission's policy is to interpret CEA section 2(i) so that counterparties may comply with the Transaction-Level Requirements applicable to entities domiciled or doing business in the foreign jurisdiction where the foreign branch is located, rather than the Transaction-Level Requirements that would otherwise be applicable.

Non-U.S. swap dealers and non-U.S. MSPs should generally comply with Category A Transaction-Level Requirements for swaps with U.S. persons and with guaranteed or conduit affiliates, but would generally be eligible for substituted compliance for swaps with certain counterparties. Where a swap is executed anonymously between any non-U.S. person, whether a swap dealer or an MSP, and a U.S. person (or a non-U.S. person that is guaranteed by a U.S. person or conduit affiliate) on a registered DCM or SEF and cleared, the non-U.S. person will be considered to have satisfied each of the eight Category A Transaction-Level Requirements that apply to such a swap transaction as a consequence of being so executed on a DCM or SEF.

Generally, where a swap is with a U.S. swap dealer or U.S. MSP (including an affiliate of a non-U.S. person), the Commission's policy is that the parties to the swap should be subject to the Category B Transaction-Level Requirements in full, regardless of whether the counterparty is a U.S. person or a non-U.S. person, without substituted compliance available. On the other hand, where a swap is with a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person), the Commission's policy is that the Category B Transaction-Level Requirements should apply only if the counterparty to the swap is a U.S. person.

Application of the CEA's Swap Provisions and Commission Regulations to Market Participants That are Not Registered As a Swap Dealer or MSP

Five of the CEA's swaps provisions and Commission regulations promulgated thereunder – namely, those relating to required clearing, trade execution, real-time public reporting, Large Trader Reporting, SDR Reporting, and swap data recordkeeping (collectively, the Non Registrant Requirements) – also apply to persons or counterparties other than a swap dealer or MSP.

With regard to swaps between two non-registrants where one (or both) of the counterparties to the swap is a U.S. person (including an affiliate of a non-U.S. person), the parties to the swap generally would be expected to comply with the Non-Registrant Requirements. Where both parties are non-U.S. persons, the Non-Registrant Requirements generally will not apply. Additionally, where both parties to a swap are non-registrants and non-U.S. persons but both are also guaranteed or conduit affiliates, the Non-Registrant Requirements will apply to the swap (although substituted compliance will generally be possible for such requirements).