

CFTC Finalizes Cross-Border Swaps Guidance and Grants Limited Transitional Exemptive Relief

On July 12, 2013, the US Commodity Futures Trading Commission ("**CFTC**") approved final interpretive guidance on the cross-border application of its swap regulations, available [here](#) (the "**Guidance**"). Simultaneously, the CFTC approved a new exemptive order, available [here](#) (the "**Exemptive Order**"), to provide temporary relief from compliance with certain of the CFTC's regulatory requirements for swaps. The Exemptive Order includes relief that allows swap dealers ("**SDs**") and major swap participants ("**MSPs**") who are not US persons, as well as non-US branches of SDs and MSPs who are US persons ("**Foreign Branches**"), to delay compliance with certain entity-level requirements and transaction level requirements.

The Guidance generally expands the definition of US Person. It also provides that certain transaction-level and entity-level requirements will not apply to swaps activity outside the United States, although in some cases that exemption will apply only if the CFTC determines that "substituted compliance" with regulation comparable to US regulation is applicable. The CFTC has received, and will be considering, substituted compliance

Key highlights

Guidance:

- Expanded definition of US person
- Guidance on application of Entity Level Requirements and Transaction Level requirements to swaps by or with Foreign Branches and non-US persons
- Availability of Substituted Compliance for certain Transaction Level Requirements for Foreign Branches and non-US persons

Exemptive Order:

- Temporary relief from some of the requirements set out in the Guidance for Foreign Branches and non-US person

applications from six jurisdictions: Australia, Canada, the European Union, Hong Kong, Japan and Switzerland (the "**Six Jurisdictions**"). The Exemptive Order offers some phase-in periods for the application of the requirements of the Guidance. The Guidance also includes significant unanticipated changes to the CFTC's treatment of bank branches. In a footnote (fn. 513) the CFTC takes the view that a US branch of a non-US SD or MSP would be subject to transaction-level requirements. The Guidance also sets out a new set of conditions to determine when a trade is made by a Foreign Branch of a US bank.

Background

The CFTC published an initial draft of the Guidance for public comment on July 12, 2012 (the "**Proposed Guidance**"). At the time they published the Proposed Guidance, the CFTC also announced a proposed exemptive order (the "**Proposed Order**") providing temporary relief for certain cross-border swap activities from the regulations inserted into the US Commodity Exchange Act by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the related CFTC regulations.¹ The CFTC approved a final exemptive order on December 21, 2012 (the "**January Order**"), which adopted, with modifications, the relief described in the Proposed Order and expired on July 12, 2013.²

Who is a US Person?

Exemptive Order Relief

Temporary Extension of "US Person" Definition Provided in January Order

Pursuant to the Exemptive Order, the following definition of US Person provided in the January Order will remain in effect from July 13, 2013 **until 75 days after the Guidance was published in the Federal Register** - i.e. **October 9, 2013**. A "US person" is a person that falls into one of the following five categories:

1. A natural person who is a resident of the United States;
2. 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 (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or (B) effective as of April 1, 2013 for all such entities other than funds or collective investment vehicles, having its principal place of business in the United States;
3. A pension plan for the employees, officers or principals of a legal entity described in category 2 above, unless the pension plan is primarily for non-US employees of such entity;
4. An estate of a decedent who was a resident of the United States at the time of death, or a 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; or
5. An 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 categories 1 through 4 above.

¹ See Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 FR 41110 (July 12, 2012).

² See Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013).

The Guidance specifies an expanded definition so that a "US person" includes, but is not limited to:

1. any natural person who is a resident of the United States;
2. any estate of a decedent who was a resident of the United States at the time of death;
3. 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 category 4 or 5, 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;
4. any pension plan for the employees, officers or principals of a legal entity described in category 3, unless the pension plan is primarily for non-US employees of such entity;
5. 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;
6. any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in category 3 and that is majority-owned by one or more persons described in category 1, 2, 3, 4 or 5, except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-US persons and not offered to US persons;
7. 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 category 1, 2, 3, 4 or 5, and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and
8. 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 category 1, 2, 3, 4, 5, 6 or 7.

Definition not exhaustive

As was the case in the Proposed Guidance, the CFTC refused to set out an exhaustive definition of US persons in the Guidance indicating that "there may be situations where a person not fully described in the [above definition] is appropriately treated as a 'US person' for purposes of this Guidance in view of the relevant facts and circumstances and a balancing of the various regulatory interests that may apply." Accordingly, persons who do not fall within one of the listed categories of this US person definition in the Guidance should periodically evaluate the following factors provided by the CFTC (particularly the first two):

- the strength of the connections between the person's swap-related activities and US commerce;
- the extent to which the person's swap-related activities are conducted in the United States;
- the importance to the United States (as compared to other jurisdictions where the person may be active) of regulating the person's swap-related activities;
- the likelihood that including the person within the interpretation of 'US person' could lead to regulatory conflicts; and
- considerations of international comity.

Territorial approach adopted for individuals and legal entities

The Guidance adopts a territorial approach with respect to individuals and legal entities. They are considered US persons, respectively, if they are residents in, or incorporated under, the laws of the United States. Legal entities included in category 3 of

the definition include not-for-profit entities as well as federal, state and local governments and their agencies and instrumentalities.

Legal entities are also US persons if their principal place of business is in the United States. For these purposes, the principal place of business of a legal entity (that is not a collective investment vehicle)³ is the location of its center of direction, control and coordination of its business activities, and so in most instances will be the place where the entity maintains its headquarters.⁴

In the case of a collective investment vehicle, the CFTC considers the principal place of business to be the location of the persons responsible for either (1) the formation and promotion of the collective investment vehicle or (2) the implementation of the vehicle's investment strategy. The CFTC views the location of the administrator, prime broker, custodian and placement agents as irrelevant to the determination of whether the investment vehicle is a US person. Such vehicles must look where the persons responsible for setting the investment objectives of the fund are located as well as the location of the persons that maintain overall control of the vehicle's investment strategies are located.

US majority-owned legal entities

While the definition of US person in category 7 includes an entity that is directly or indirectly majority-owned by one or more persons described in categories 1, 2, 3, 4 or 5 and in which "such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity," the Guidance makes clear that it is not necessary that all of the US persons with ownership interests in the entity have unlimited liability⁵ or that the US persons have unlimited liability for all of the obligations of the legal entity. In addition, the Guidance clarifies that this category of the definition of US person is not intended to include situations where the liability of US persons arises under a guarantee of the non-US legal entity's obligations rather than ownership of the entity.⁶

Certain collective investment vehicles

A collective investment vehicle would be a US person if it is organized or has its principal place of business in the United State but it may also be a US person if it is majority-owned by US persons described in categories 1, 2, 3, 4 or 5 of the definition (unless it is publicly offered only to non-US persons and is not offered to US persons). For these purposes, majority ownership means ownership of more than 50% of the equity or voting interest in the vehicle, and only direct ownership by US persons needs to be taken into account. However, the Guidance requires a look-through to investors in any vehicle that is controlled by or under common control with the collective investment vehicle.

In the Guidance, the CFTC has abandoned its proposal to include in the definition of US person a commodity pool the operator of which is required to register under the CEA.

Pension plans

The guidance includes as US persons any pension plan for the employees, officers or principals of a legal entity organized under the laws of or with its principal place of business in the United States, except when such plans are primarily for the benefit of non-US employees of such entities.

³ In the Guidance, the term "collective investment vehicle" is used to refer to "an entity or group of related entities created for the purpose of pooling assets of one or more investors and channeling these assets to trade or invest to achieve the investment objectives of the investor(s), rather than being a separate, active operating business." See Guidance, text accompanying footnote 195.

⁴ "[P]rovided that the headquarters... is not simply an office where the corporation holds its board meetings." See, Guidance, text accompanying footnote 194.

⁵ Guidance, text following footnote 212.

⁶ Guidance, text accompanying footnote 215.

Estates and trusts

In the Guidance, the CFTC revised its approach to trust and estates. Instead of looking at whether the income of the estate or trust is subject to taxation in the US to determine whether such trust is a US person, the CFTC now focuses, with respect to estates, on whether the decedent was a US person at the time of death, and, with respect to trusts, on the governing law of such trust and whether a court located in the United States is able to exercise primary supervision over the administration of the trust.

Non-US branches of US persons ("Foreign Branches")

Consistent with the approach announced in the Proposed Guidance, the CFTC has reiterated its view that Foreign Branches are US persons. Nevertheless, taking into consideration international comity principles and the comments received, the CFTC departed from its initial approach to the application of certain requirements to Foreign Branches.

For purposes of the relief granted to Foreign Branches and discussed elsewhere in this memorandum, the CFTC restricted its definition of a "non-US branch" of a US SD or MSP to the Foreign Branch of a US bank that:

- Is subject to Regulation K or the FDIC International Banking Regulation, or otherwise designated as a 'non-US branch' by the US bank's primary regulator;
- Maintains accounts independently of the home office and of the accounts of other non-US branches with the profit or loss accrued at each branch determined as a separate item for each non-US branch; and
- Is subject to substantive regulation in banking or financing in the jurisdiction where it is located

(collectively, the **"Foreign Branch Characteristics"**). The Foreign Branch Characteristics are not exclusive and the CFTC indicated that it will consider other relevant facts and circumstances in considering whether a non-US office of a US bank may be treated as 'non-US branch' for purposes of the Guidance.

In addition, for purposes of determining whether a particular transaction was entered into by the Foreign Branch, the Guidance adopted the following factors which modify the criteria included in the January Order:

- 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 US bank.
 - this factor modifies the first of the January Order Criteria to allow negotiation by employees located in a Foreign Branch other than the one that will enter into the swap. The scope of this requirement is potentially very broad, since only clerical and administrative functions are excluded and many banks rely on centralized functions, such as credit, risk or legal staff, in their head office to support branch activity.
- the Foreign Branch or another Foreign Branch is the office through which the US 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 US bank is such Foreign Branch.
 - this factor avoids the language in the January Order Criteria that treated the Foreign Branch as the "counterparty", giving effect to the general principle that the Foreign Branch is not a separate legal person and, therefore, cannot by itself be a party to a contract.
- the swap is entered into by such Foreign Branch in its normal course of business.
- the swap is treated as a swap of the Foreign Branch for tax purposes.
- the swap is reflected in the local accounts of the Foreign Branch.

Categorization of Entity- and Transaction-Level Requirements

As part of the Guidance, the CFTC has categorized its regulatory requirements regarding swaps into **Entity-Level Requirements** and **Transaction-Level Requirements**. Entity-Level Requirements are those which apply to an SD or MSP firm as a whole. Transaction-Level Requirements are those which apply to individual swap transactions. The CFTC further sub-categorized Entity-Level Requirements into categories 1 and 2, and Transaction-Level Requirements into categories A and B. These sub-categorizations are used to determine whether various regulatory requirements apply to cross-border swaps pursuant to the Guidance. The tables in Annex A indicate which requirements are grouped in which of these sub-categories, with brief descriptions of each requirement.

Application of the Entity-Level and Transaction-Level Requirements to SDs and MSPs

Exemptive Order Relief

Transitional Relief for Category 1 Entity-Level Requirements

- Non-US SDs/MSPs established in one of the Six Jurisdictions may delay compliance with the Category 1 entity-level requirements until the earlier of
 - (1) December 21, 2013; or
 - (2) 30 days following the issuance of an applicable Substituted Compliance Determination for the relevant Entity-Level Requirement for the non-US SD's or non-US MSP's jurisdiction.

Except that such relief is qualified for SDR Reporting as described below and does not apply to Large Trades Reporting.

- **For SDR Reporting** (see definition in Annex A): Non-US SDs/MSPs established in any of the Six Jurisdictions may delay compliance with the **SDR reporting requirements**:
 - (1) if the non-US SD/MSP is not part of a corporate with an ultimate parent that is a US financial institution; and
 - (2) if no swap reporting requirements are implemented in the home country of the non-US SD/MSP, the non-US SD/MSP complies with CFTC recordkeeping requirements, including the requirement to obtain legal entity identifiers; and
 - (3) if swap reporting requirements have been implemented in the relevant home country, the non-US SD/MSP is in compliance with the applicable reporting and recordkeeping requirements.

Such relief will be in effect until the earlier of

- (1) December 21, 2013; or
- (2) 30 days following the issuance of an applicable Substituted Compliance Determination for the relevant Entity-Level Requirement for the non-US SD's or non-US MSP's jurisdiction.

Exemptive Order Relief

Transitional Relief for Transaction-Level Requirements

I. A non-US SD/MSP and the following counterparties:

- **Non-US Person:** Under the Guidance, the transaction-level requirements do not apply to a swap between a non-US SD/MSP and a non-US person (that is not a US Guaranteed or Conduit Affiliate).
- **Non-US Counterparty that is a US Guaranteed or Conduit Affiliate or Foreign Branch:** Under the Guidance, Substituted Compliance applies and the Exemptive Order provides relief until December 21, 2013 or 30 days after a substituted compliance determination is made (for non-US SDs/MSPs in the Six Jurisdictions) or for 75 days after publication of the Guidance, October 9, 2013 (for non-US SDs/MSPs outside the Six Jurisdictions); except that clearing requirements only get relief for 75 days after publication of the Guidance (October 9, 2013); real-time reporting involving a Guaranteed Affiliate gets relief for non-US SDs/MSPs in the Six Jurisdictions until September 30, 2013, external business conducts rules do not apply at all; and trade execution rules get no relief under the Exemptive Order.
- **US Person:** The Transaction level rules apply to a swap between a non-US SD/MSP and a US Person.

II. A Foreign Branch and the following counterparties:

- **Non US Person (including a Guaranteed or Conduit Affiliate of a US Person) or Foreign Branch:** Under the Guidance, substituted compliance applies but the Exemptive Order grants relief until the earlier of December 21, 2013 or 30 days after a substituted compliance determination is made (for Foreign Branches in the Six Jurisdictions) or 75 days after the publication of the Guidance, October 9, 2013 (for Foreign Branches outside the Six Jurisdictions); except that clearing only gets relief for 75 days after publication of the Guidance (October, 9, 2013); trade execution (which is not yet in effect in the US) gets no relief; real time reporting involving a Foreign Branch in the Six Jurisdictions and a Guaranteed Affiliate gets relief until September 30, 2013; and external business conduct rules do not apply at all.
- **US Person:** The Transaction-level rules apply.

III. Swaps Involving No SD/MSP:

- **One Party is a US Person:** Transaction-level rules apply.
- **Both Parties are Guaranteed/Conduit Affiliates of US Persons:** Substituted Compliance applies under the Guidance but the Exemptive Order grants relief for 75 days from publication of the Guidance, which is October 9, 2013.
- **Both Parties are Non-US Persons (but neither or only one is a Guaranteed/Conduit Affiliate of a US Person):** The Transaction-level rules do not apply under the Guidance.

US SDs and MSPs

US SDs and US MSPs must comply with all Entity-Level Requirements and Transaction-Level Requirements irrespective of whether the swap counterparty is a US person or non-US person, without substituted compliance available. The same applies to US SDs and US MSPs that are affiliates of non-US persons.

Foreign Branches of US SDs or MSPs ("Foreign Branches")

- **Entity-Level Requirements.** All Entity-Level Requirements would apply to an MSP that is a US bank acting through a Foreign Branch. The CFTC stated that a foreign branch of a US bank has no separate legal existence but is an integral part of the US principal entity. As a result, the US bank, as the principal entity, would be the party ultimately responsible for compliance with the Entity-Level Requirements for the entire legal entity.

- *Category A Transaction-Level Requirements.* Where a swap is between a Foreign Branch and a US person, substituted compliance would not be available for Category A Transaction-Level Requirements. However, substituted compliance would be available where a swap is between (i) two Foreign Branches or (ii) a Foreign Branch and a non-US person, including any Guaranteed Affiliates or Conduit Affiliates.
- *Category B Transaction-Level Requirements.* Category B Transaction-Level Requirements apply only if a swap is between a Foreign Branch and a US person (that is not also a Foreign Branch). Category B Transaction-Level Requirements do not apply to swaps between a Foreign Branch and (i) another Foreign Branch or (ii) a non-US person, regardless of whether the non-US person is a Guaranteed Affiliate or Conduit Affiliate.

The CFTC has set up a limited safe-harbor for swaps in certain jurisdictions where no substituted compliance determination has been made. Under that provision, where a swap between the Foreign Branch and a non-US person (that is not a Guaranteed Affiliate or a Conduit Affiliate) takes place in a foreign jurisdiction outside the Six Jurisdictions, the counterparties may generally comply only with any transaction-level requirements imposed by regulators in the jurisdiction where the Foreign Branch is located *provided that* (a) the aggregate notional value of all the swaps of the US SD's Foreign Branches in such countries does not exceed 5% of the aggregate notional value of all of the swaps of the US SD, and (b) the US Person maintains records with supporting information for the 5% limit and to identify, define, and address any significant risk that may arise because the Transaction-Level Requirements do not apply.

Non-US SDs and MSPs

- *Entity-Level Requirements.*
 - Non-US SDs and non-US MSPs would be required to comply with the following Entity-Level Requirements with no substituted compliance available: (i) capital adequacy, (ii) chief compliance officer, (iii) risk management, and (iv) swap data recordkeeping, except certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials (together, the "**First Category Entity-Level Requirements.**") In addition, no substituted compliance would be available with respect to the Large Trader Reporting requirement, whether or not a swap is entered into with a US person.
 - Substituted compliance would be available to non-US SDs and non-US MSPs with respect to the SDR Reporting requirement (see definition in Annex A) where a swap is entered into with a non-US counterparty (other than a Guaranteed Affiliate or a Conduit Affiliate), provided that the CFTC has a direct access to the relevant swap data stored at the foreign trade repository. Substituted compliance would also be available to non-US SDs and non-US MSPs with respect to certain aspects of swap data recordkeeping that relate to complaints and marketing and sales materials where a swap is entered into with a non-US counterparty.
 - The CFTC noted that it would consider relief, subject to certain conditions and restrictions, that would permit Guaranteed Affiliates in a corporate group under common control that do not enter into swaps with US persons or US Guaranteed Affiliates or Conduit Affiliates of US persons to comply with certain First Category Entity-Level Requirements on a consolidated or group basis.
- *Category A Transaction-Level Requirements.*
 - Non-US SDs and non-US MSPs would be required to comply with all Category A Transaction-Level Requirements with respect to all swaps with US persons (other than Foreign Branches), with no substituted compliance available.
 - Substituted compliance would be available with respect to swaps executed between a non-US SD or non-US MSP and a: (i) Foreign Branch, (ii) Guaranteed Affiliate or (iii) Conduit Affiliate.
 - Category A Transaction-Level Requirements do not apply with respect to swaps between non-US SDs or non-US MSPs and non-US persons that are not Guaranteed Affiliates or Conduit Affiliates.

- Where a swap is executed anonymously between any non-US person and a US person (other than a Foreign Branch) on a registered DCM, SEF or FBOT⁷ registered with the CFTC and cleared, the non-US person will be considered to have satisfied each applicable Category A Transaction-Level Requirement.
- *Category B Transaction-Level Requirements.* Category B Transaction-Level Requirements apply only if a swap is between a non-US SD or MSP and a US person (other than a Foreign Branch). Category B Transaction-Level Requirements do not apply to swaps between a non-US SD or MSP and (i) a Foreign Branch or (ii) a non-US person, regardless of whether the non-US person is a Guaranteed Affiliate or Conduit Affiliate.

US Branches of Non-US SDs/MSPs

Footnote 513 of the Guidance states that the CFTC takes the view that a US branch of a non-US SD or MSP would be subject to transaction-level requirements without substituted compliance being available because of a claimed "strong supervisory interest" in regulating swap dealing activities occurring in the United States. This view was not expressed in the Proposed Guidance and was not widely expected. The Exemptive Order does not address this view of US branches.

Substituted Compliance

A foreign regulator, an entity subject to CFTC regulation (or a group of such entities) or a trade association may apply to the CFTC for a determination that a non-US swap regulation regime is comparable to the CFTC's rules. Such an application must state with specificity the legal basis for such request, include all applicable laws and regulations and provide an assessment of how the two regulatory regimes are comparable and comprehensive.

The CFTC would have the discretion to issue its comparability determination subject to various conditions and expects most comparability analyses to involve consultations with foreign regulators. In addition, the CFTC would also seek to enter into a memorandum of understanding with the appropriate foreign regulator regarding information sharing and addressing the oversight and supervision of applicable SDs.

If the CFTC issues a comparability determination with respect to a particular jurisdiction, it will apply to all entities or transactions in such jurisdiction, to the extent provided in such determination. The CFTC will review each compliance determination within four years of its issuance.

Application of the Entity-Level and Transaction-Level Requirements to entities that are not SDs or MSPs

The CFTC has provided that clearing, trade execution, real-time public reporting, Large Trader Reporting, SDR Reporting and swap data recordkeeping (collectively, the "Non-Registrant Requirements") apply to all swap counterparties, not only SDs and MSPs.

If a US Person that is a non-SD or MSP enters into a swap with a non-US Person, the Non-Registrant Requirements will apply, and no substituted compliance will be permissible. For a swap executed on a DCM, SEF or FBOT and cleared by a DCO, each counterparty will only need to comply with Large Trader Reporting, SDR Reporting and swap data recordkeeping, as the DCM, SEF or the FBOT would fulfill the other Non-Registrant Requirements. The CFTC will, subject to certain conditions, provide transitional relief to certain European Union multilateral trading facilities for fulfilling Non-Registrant Requirements if the CFTC's trade execution requirement is triggered before March 15, 2014.

⁷ "Designated contract market," "swap execution facility" and "foreign board of trade."

For swaps between two non-US counterparties that are not SDs or MSPs, Large Trader Reporting will apply for swaps that are directly or indirectly linked to specified US-listed physical commodity futures contracts. This will require parties to comply with Large Trader Reporting even if all of their swaps are with non-US persons. The other Non-Registrant Requirements will not apply.

For two parties that are both Guaranteed Affiliates or Conduit Affiliates, the Non-Registrant Requirements will apply, although the parties will be permitted to use substituted compliance (other than for Large Trader Reporting). If one of the parties is a Guaranteed Affiliate or Conduit Affiliate and the other is a non-US Person, the Non-Registrant Requirements will not apply, except for Large Trader Reporting.

SD and MSP Registration

Under the CFTC rules, a person is required to register as an SD or an MSP if its swap dealing activities or swap positions over the preceding 12 months exceed the *de minimis* threshold.

Exemptive Order Relief

Delayed implementation for Non-US Persons

Pursuant to the Exemptive Order, for 75 days after the Final Guidance is published in the Federal Register, which is October 9, 2013, parties may continue to rely on the January Order for the definition of US Person.

In addition, the Exemptive Order allows all non-US persons to continue to apply the aggregation principle set forth in the January Order until 75 days after the Final Guidance is published in the Federal Register (October 9, 2013).

Registration Thresholds

Which Swaps are Counted. Pursuant to the Final Guidance, the following entities must count all of their dealing swaps with both US and non-US counterparties for purposes of determining whether the SD registration requirement applies:

- a US person,
- an "affiliate conduit" of a US person (a "Conduit Affiliate"); and
- a non-US affiliate of a US person that is guaranteed by a US person (a "Guaranteed Affiliate")⁸.

The same entities must also include all of their swap positions with both US and non-US counterparties for purposes of determining whether the MSP registration requirement applies.

In contrast, a non-US person that is not a Conduit Affiliate or a Guaranteed Affiliate must only count toward its *de minimis* SD registration threshold its swap dealing activities with US persons and Guaranteed Affiliates, but is not required to count its swap dealing activities with any (i) Foreign Branch, (ii) Guaranteed Affiliate which is either itself registered as an SD or is an affiliate of a registered SD, and (iii) Guaranteed Affiliate which is guaranteed by a non-financial entity.

With respect to the calculation of MSP thresholds, a non-US person that is a financial entity but is not a Conduit Affiliate or a Guaranteed Affiliate is not required to count toward its MSP threshold its exposure under swaps with a Foreign Branch or a Guaranteed Affiliate that is itself an SD, provided that either the swap is cleared or the documentation of the swap requires the Foreign Branch or Guaranteed Affiliate to collect daily margin, with no threshold. However, where a non-US person is not a financial entity or a Guaranteed Affiliate, it would not be required to count toward its MSP thresholds its swaps with a Foreign Branch or a Guaranteed Affiliate that is itself an SD without having to satisfy any additional conditions.

⁸ Conduit Affiliates and Guaranteed Affiliates are described in the next section below.

The CFTC noted that since a Guaranteed Affiliate's obligations are guaranteed by a US person, the swap should be attributed to that US person guarantor and would be included in the US person guarantor's MSP threshold determination. Further, where a non-US person guarantees another person's obligations under a swap with a US person counterparty, such swap position would also be counted toward the non-US guarantor's MSP threshold.

Aggregation. CFTC Rule 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. Pursuant to the Final Guidance, the aggregation principle will apply to all affiliates in a corporate group, whether they are US or non-US persons, except that for swaps of non-US persons (that are not Guaranteed or Conduit Affiliates), the only swaps included in the aggregation totals are: (i) dealing swaps with US persons (other than Foreign Branches) and (ii) certain dealing swaps with Guaranteed Affiliates. As a result, in considering whether a person is engaged in more than a *de minimis* level of swap dealing, it must include all relevant dealing swaps of all its US and non-US affiliate under common control (including parent companies and subsidiaries), other than swaps of an affiliate that is registered as an SD and other than certain swaps of non-US affiliates, as described above.

Exclusion of Certain Swaps Executed Anonymously on a SEF, DCM or FBOT and Cleared. Under the Final Guidance, a non-US person that is not guaranteed by a US person is not required to include swaps entered into anonymously on a registered designated contract market, swap execution facility or foreign board of trade provided that the swap is cleared.

Guaranteed Affiliates and Conduit Affiliates

A "**Guaranteed Affiliate**", is an affiliate of a US person that enters into a swap that is guaranteed by a US person.

Factors relevant to identifying a "**Conduit Affiliate**" are whether it:

- is majority-owned by a US person;
- controls, is controlled by or is under common control with the US person;
- includes its financial results in the consolidated financial statements of the US affiliate; and
- in its regular business, enters into swaps with non-US counterparties and offsetting trades with its US affiliate, which thereby carries the economic risks and benefits of the swap with the non-US third parties.

Affiliates of swap dealers are not "conduit affiliates."

Exemptive Order Relief

Transitional Relief for US Guaranteed Affiliates and Conduit Affiliates

Pursuant to the Exemptive Order, the CFTC has exempted US Guaranteed affiliates and Conduit Affiliates from complying with the Transaction-Level Requirements relevant to swaps with non-US persons and Foreign Branches **until 75 days after the Guidance is published in the Federal Register, which is October 9, 2013.**

Annex A

Entity-Level Requirements	
Category 1	
Capital adequacy	Non-bank SDs and MSPs must hold a minimum level of adjusted net capital.
Chief compliance officer	SDs and MSPs must designate a chief compliance officer
Risk management	SDs and MSPs must establish internal risk management policies and maintain business and continuity and disaster recovery programs.
Swap data recordkeeping (excluding complaints and sales materials)	SDs and MSPs must keep books and records for all activities related to their business, including historical swaps.
Category 2	
SDR reporting	All swaps, cleared and uncleared, must be reported to an SDR by the applicable reporting counterparty.
Large trader reporting	SDs, clearing organizations and clearing members that hold significant positions in swaps that are linked, directly or indirectly to a prescribed list of US-listed physical commodity futures contracts must provide position reports periodically. In addition, SDs, clearing organizations, clearing members and traders with positions in the covered physical commodity swaps are subject to related recordkeeping requirements.
Swap data recordkeeping (for complaints and sales materials only)	SDs and MSPs must keep records of complaints received and all marketing and sales presentations, advertisements, literature and communications.
Transaction-Level Requirements	
Category A	
Clearing and swap processing	Swaps subject to mandatory clearing must be cleared through a DCO and compliance by SDs, MSPs and DCOs is required for certain processing standards.
Margin and segregation	Uncleared swaps will be subject to margin and segregation requirements. The rules have not yet been finalized.
Trade execution	Swaps subject to mandatory clearing and are "available to trade" must be executed on a DCM or SEF.
Swap trading relationship documentation	SDs and MSPs must establish, maintain and enforce written policies and procedures to ensure execution of written swap trading relationship documentation.
Portfolio reconciliation and compression	SDs and MSPs must establish policies and procedures for portfolio compression and conduct reconciliation periodically.
Real-time public reporting	All "publicly reportable swap transactions" must be reported and publicly disseminated.
Trade confirmation	SDs and MSPs are required to execute confirmations within prescribed time frames.
Daily trading records	SDs and MSPs must maintain daily records of data related to pre-execution, execution and post-execution for each swap.
Category B	
External business conduct standards	SDs and MSPs must comply with prescribed standards for conduct with counterparties, including diligence regarding counterparty eligibility, trade suitability, disclosure and provision of marks.

Annex B

Application of Category A and Category B Transaction-Level Requirements					
	US Person (other than a non-US Branch of a US Bank that is an SD or MSP)	US branch of a non-US Bank that is an SD or MSP	Foreign Branch of a US Bank that is an SD or MSP	Non-US Person that is guaranteed by a US person or is an affiliate conduit of a US person	Non-US Person that is NOT guaranteed by a US person & is NOT an affiliate conduit of a US person
SD or MSP that is a US person	Both Category A ("A") and Category B ("B") apply	Both A & B apply	Both A & B apply	Both A & B apply	Both A & B apply
US branch of a non-US Bank that is an SD or MSP	Both A & B apply	Both A & B apply	Both A & B apply	Both A & B apply	Both A & B apply
Foreign Branch of a US Bank that is an SD or MSP	Both A & B apply	Both A & B apply	Substituted compliance possible for A ¹ B does not apply	Substituted compliance possible for A ^{1,2} B does not apply	Substituted compliance possible for A ^{1,2} B does not apply
Non-US SD or MSP (other than a US branch of a non- US Bank that is an SD or MSP)	Both A & B apply	Both A & B apply	Substituted compliance possible for A ³ B does not apply	Substituted compliance possible for A ³ B does not apply	Neither A nor B applies

¹ Exemptive Order generally gives temporary relief.

² A limited exception from the applicability of Category A requirements may also be available if the aggregate notional value of swaps of the non-US branch of a US SD does not exceed 5% of the aggregate notional value of all the swaps of the relevant US SD.

³ Exemptive Order gives temporary relief for Non-US SD/MSPs in the Six Jurisdictions or Non-US SD/MSPs dealing with Guaranteed Affiliates

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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