

January 7, 2014

CFTC Cross-Border Jurisdiction and Comparability Determinations

CFTC Issues Substituted Compliance Comparability Determinations and Takes Other Actions Regarding the Cross-Border Applicability of Dodd-Frank Title VII

SUMMARY

The Commodity Futures Trading Commission (“CFTC”) has recently taken a number of actions related to the cross-border applicability of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). On December 20, 2013, the Commodity Futures Trading Commission (the “CFTC”) issued a series of comparability determinations to provide for substituted compliance, with respect to certain CFTC swaps rules, with the regulatory schemes of six jurisdictions. The comparability determinations coincided with the expiration of the CFTC’s previously issued cross-border exemptive order, which had delayed compliance with various CFTC swaps rules through December 21, 2013 for non-U.S. swap dealers, major swap participants and certain non-U.S. branches of U.S. swap dealers. The comparability determinations will permit substituted compliance with respect to several entity-level requirements by swap dealers in Australia, Canada, the European Union (“EU”), Hong Kong, Japan and Switzerland, and for selected transaction-level requirements in the EU and Japan. Notably, the comparability determinations do not address CFTC requirements related to reporting swap transactions to a swap data repository (“SDR”) (which the CFTC addressed separately through no-action relief), the CFTC’s requirement that certain trades must be executed on a designated contract market (“DCM”) or swap execution facility (“SEF”), or the CFTC’s requirement that certain swaps must be cleared. CFTC staff also issued limited no-action relief for non-U.S. swap dealers and major swap participants with respect to certain CFTC swaps rules that are outside the scope of the comparability determinations. In addition, the staff recently issued an advisory providing guidance on the applicability of its cross-border jurisdiction to transactions with non-U.S. counterparties by U.S.-based employees of non-U.S. swap

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dealers. That guidance, in conjunction with prior CFTC action related to the cross-border applicability of its swaps rules, produced strong adverse reactions from many non-U.S. swap dealers, regulators, and trade associations and has resulted in litigation challenging the entirety of the CFTC's guidance on the cross-border applicability of its swaps rules. On January 3, 2014, the CFTC issued a request for comment on the staff advisory, and CFTC staff issued a related no-action letter applicable to non-U.S. swap dealers that will delay compliance with the majority of the provisions of the advisory until September 15, 2014.

BACKGROUND

This memorandum provides an overview of the CFTC's recent actions related to the cross-border applicability of the agency's swaps rules adopted pursuant to the Dodd-Frank Act. Those actions include:

- Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (the "Cross-Border Guidance"), adopted by the CFTC on July 12, 2013 and published in the Federal Register on July 26, 2013.¹
- Exemptive Order Regarding Compliance With Certain Swap Regulations (the "Exemptive Order"), adopted by the CFTC on July 12, 2013, and published in the Federal Register on July 22, 2013.²
- CFTC Staff Advisory No. 13-69, issued by the CFTC's Division of Swap Dealer and Intermediary Oversight ("DSIO") on November 14, 2013, addressing the applicability of transaction-level requirements to activity in the United States (the "DSIO Advisory").
 - CFTC Letter No. 13-71, issued by the CFTC's DSIO, Division of Clearing and Risk ("DCR"), and Division of Market Oversight ("DMO"), providing no-action relief with respect to certain aspects of the DSIO Advisory until January 14, 2014; issued on November 26, 2013.
 - Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States ("Request for Comment" on the DSIO Advisory), issued by the CFTC on January 3, 2014, and not yet published in the Federal Register.
 - CFTC Letter No. 14-01, issued by the CFTC's DSIO, DCR, and DMO, extending the no-action relief previously provided in CFTC Letter No. 13-71 through September 15, 2014; issued on January 3, 2014.
- Comparability determinations for six jurisdictions for substituted compliance purposes (the "Comparability Determinations"), issued by the CFTC on December 20, 2013 and published in the Federal Register on December 27, 2013. The Comparability Determinations were accompanied by related CFTC staff no-action relief, discussed in further detail, below.

¹ For additional information, please see our memo to clients at Sullivan & Cromwell LLP, CFTC Approves Final Guidance and Exemptive Order on Cross-Border Application of the Swaps Provisions of Dodd-Frank (Jul. 22, 2013), available at http://www.sullcrom.com/files/Publication/a4b77b6c-4872-47bc-9b8f-20eafc626023/Presentation/PublicationAttachment/8e9583b8-a430-4a05-a72c-298919e548d0/SC_Publication_CFTC_Cross_Border_Application_of_Dodd_Frank_Title_VII.pdf.

² See *id.*

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- Memorandum of Understanding between the CFTC and the Monetary Authority of Singapore (the “Singapore MOU”) regarding cooperation and the exchange of information in the supervision and oversight of regulated entities that operate on a cross-border basis in the United States and Singapore; signed on December 27, 2013.

A. CFTC CROSS-BORDER GUIDANCE

On July 12, 2013, the CFTC issued the “Cross-Border Guidance” addressing the application of the swaps provisions of the Commodity Exchange Act (the “CEA”), as amended by Title VII of the Dodd-Frank Act, and related CFTC regulations thereunder (the “CFTC Regulations”) with respect to various market participants, including non-U.S. swap dealers (“SDs”) and major swap participants (“MSPs”), non-U.S. SDs and MSPs guaranteed by a U.S. person, non-U.S. branches of U.S. SDs and MSPs, and certain non-registrants.³ The Cross-Border Guidance categorized the majority of the CFTC’s swaps regulations into either entity-level requirements or transaction-level requirements, and applied the requirements to cross-border transactions in various ways, based on the nature and location of the SD or MSP and the counterparties. The regulatory requirements were categorized by the CFTC as follows:

- Entity-level requirements:
 - First category: capital adequacy;⁴ chief compliance officer;⁵ risk management;⁶ and swap data recordkeeping⁷ (except for recordkeeping requirements related to complaints, marketing and sales materials).
 - Second category: SDR reporting;⁸ certain aspects of swap data recordkeeping relating to complaints, marketing and sales materials;⁹ and large trader reporting.¹⁰
- Transaction-Level Requirements:

³ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (Jul. 26, 2013). See also Sullivan & Cromwell LLP, *supra* note 1.

⁴ 7 U.S.C. 6s(e). The CFTC has proposed, but not yet finalized, a rule to implement capital adequacy requirements. Capital Requirements of Swap Dealers and Major Swap Participants, 76 Fed. Reg. 27802 (May 12, 2011).

⁵ 17 CFR § 3.3.

⁶ 17 CFR §§ 23.600, 23.601, 23.602, 23.603, 23.605, 23.606.

⁷ 17 CFR §§ 23.201, 23.203.

⁸ 17 CFR pt. 45.

⁹ 17 CFR §§ 23.201(b)(3), 23.201(b)(4).

¹⁰ 17 CFR pt. 20.

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- Category A: clearing and swap processing;¹¹ margining and segregation for uncleared swaps;¹² trade execution;¹³ swap trading relationship documentation;¹⁴ portfolio reconciliation and compression;¹⁵ real-time public reporting;¹⁶ trade confirmation;¹⁷ and daily trading records.¹⁸
- Category B: external business conduct standards.¹⁹

With respect to swaps activity undertaken by a non-U.S. SD or MSP, or a non-U.S. branch of a U.S. SD or MSP, the Cross-Border Guidance provided that certain entity- and transaction-level requirements would either (i) not apply or (ii) be permitted to be satisfied by “substituted compliance” with the applicable laws in another jurisdiction—provided that the CFTC first made a “comparability determination” with respect to the regulatory scheme in that jurisdiction. That is, substituted compliance would only be permitted in certain instances, and when permitted, would only be available in jurisdictions for which the CFTC issues a comparability determination finding that the relevant non-U.S. regulatory scheme is comparable to and as comprehensive as the applicable requirements of the swaps-related CFTC Regulations. When rendering such a determination, the CFTC explained that it would examine the comprehensiveness and scope of the relevant non-U.S. requirements as well as the comprehensiveness of the non-U.S. regulator’s supervisory compliance program and the home jurisdiction’s authority to enforce its oversight.²⁰

Under the Cross-Border Guidance, the applicability of the entity- and transaction-level requirements to non-U.S. SDs and MSPs, as well as the potential ability to rely on substituted compliance, is determined as follows (see following page):

¹¹ 17 CFR §§ 50.2, 50.4; see also 17 CFR §§ 23.506, 23.610, 39.12.

¹² 7 U.S.C. 6s(e); 6s(l). The CFTC has proposed, but not yet finalized, a rule to implement margin requirements. Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23732, 23733-40 (Apr. 28, 2011). The segregation rules have been finalized at 17 CFR § 23.700 *et seq.*

¹³ 7 U.S.C. 2(h)(7); see also 17 CFR §§ 37.10, 38.12.

¹⁴ 17 CFR §§ 23.504(a), 23.504(b), 23.505.

¹⁵ 17 CFR §§ 23.502, 23.503.

¹⁶ 17 CFR pt. 43, § 23.205.

¹⁷ 17 CFR § 23.501.

¹⁸ 17 CFR § 23.202.

¹⁹ 17 CFR §§ 23.400-402, 23.410, 23.430-434, 23.440, 23.450-451.

²⁰ The CFTC indicated that comparability determinations would be made on a requirement-by-requirement basis by comparing specific foreign requirements against specific CEA provisions and the CFTC Regulations. Thus, a market participant could potentially be permitted to rely upon substituted compliance under one requirement while still remaining subject to other CFTC swap requirements for which there is no comparable and comprehensive regulation in its home jurisdiction.

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Applicability of Entity- and Transaction- Level Requirements to Non-U.S. SDs and MSPs:²¹

Entity-Level Requirements (for a Non-U.S. SD or MSP) ²²				
First category	Apply to all SDs and MSPs, regardless of counterparty			
Second category	<i>Transactions with U.S. counterparties:</i> Apply.	<i>SDR Reporting:</i> Substituted compliance available for transactions with non-U.S. counterparties that are not guaranteed or conduit affiliates ¹ <i>Swap data recordkeeping relating to complaints, marketing and sales materials:</i> Substituted compliance available for transactions with all non-U.S. counterparties <i>Large trader reporting:</i> Apply.		
Transaction-Level Requirements (by counterparty)				
Category A				
	<i>Swaps w/ U.S. person</i>	<i>Swaps w/ Non-U.S. Branch of U.S. Bank that is SD or MSP</i>	<i>Swaps w/ Non-U.S. Person Guaranteed by, or Affiliate Conduit¹ of, a U.S. Person</i>	<i>Swaps w/ Non-U.S. Person Not Guaranteed by, and Not an Affiliate Conduit¹ of, a U.S. Person</i>
Non-U.S. Branch of U.S. Bank that is SD or MSP	Apply	Substituted Compliance	Substituted Compliance ²	Substituted Compliance ²
Non-U.S. SD or MSP (including affiliate of U.S. person)	Apply	Substituted Compliance	Substituted Compliance	Do Not Apply
Category B				
For the following SDs and MSPs, the Category B Transaction Level Requirements will only apply for swaps with a U.S. person (excluding from the U.S. person definition for this purpose any non-U.S. branch of a U.S. bank that is a SD or MSP): <ul style="list-style-type: none"> • U.S. SD or MSP (when soliciting and negotiating through a non-U.S. subsidiary or affiliate), • Non-U.S. Branch of U.S. Bank that is an SD or MSP, and • Non-U.S. SD or MSP (including affiliates of U.S. persons). 				
Notes: ¹ Factors that are relevant to the consideration of whether a non-U.S. person is an "affiliate conduit" include whether: (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person controls, is controlled by, or is under common control with the U.S. person; (iii) 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 such U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third party(ies) to its U.S. affiliates; and (iv) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person. Other facts and circumstances also may be relevant. ² Under a limited exception, 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 counterparties generally may comply only with the transaction-level requirements in the foreign jurisdiction where the foreign branch is located if the aggregate notional value of all the swaps of the U.S. swap dealer's foreign branches in such countries does not exceed 5% of the aggregate notional value of all of the swaps of the U.S. swap dealer, and the U.S. person maintains records with supporting information for the 5% limit and to identify, define and address any significant risk that may arise from the non-application of the Transaction-Level Requirements.				

The Cross-Border Guidance also addressed the applicability of certain entity- and transaction-level requirements (clearing, trade execution, real-time public reporting, large trader reporting, SDR reporting and swap data recordkeeping) to non-registrants:

²¹ For a complete reproduction of the related charts that accompanied the Cross-Border Guidance, please see our July 22, 2013 memo to clients, cited *supra* note 3.

²² U.S. SDs and MSPs, and their foreign branches, must comply with all entity-level requirements.

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Applicability of Certain Entity- and Transaction-Level Requirements to Non-Registrants:

Entity- and Transaction-Level Requirements¹ for Non-SDs/MSPs (by counterparty)			
	<i>Swaps w/ U.S. person</i>	<i>Swaps w/ Non-U.S. Person Guaranteed by, or Affiliate Conduit² of, a U.S. Person</i>	<i>Swaps w/ Non-U.S. Person Not Guaranteed by, and Not an Affiliate Conduit² of, a U.S. Person</i>
Non-U.S. Person Guaranteed by, or Affiliate Conduit ² of, a U.S. Person	Apply	Substituted Compliance (except for large trader reporting)	Do Not Apply
Non-U.S. Person Not Guaranteed by, and Not an Affiliate Conduit ² of, a U.S. Person	Apply	Do Not Apply	Do Not Apply
<p><i>Notes:</i></p> <p>¹ Clearing, trade execution, real-time public reporting, large trader reporting, SDR Reporting and swap data recordkeeping.</p> <p>² Same as above.</p>			

B. CROSS-BORDER EXEMPTIVE ORDER

In connection with the Cross-Border Guidance, the CFTC issued the “Exemptive Order” that was set to generally expire on December 21, 2013, and which provided relief, subject to certain conditions, from various entity-level and transaction-level requirements for certain market participants.²³ The Exemptive Order provided relief from the entity-level requirements for which substituted compliance is permitted under the Cross-Border Guidance for non-U.S. SDs and MSPs located in Australia, Canada, the EU, Hong Kong, Japan and Switzerland, until the earlier of December 21, 2013, or 30 days following the issuance of a substituted compliance determination for the relevant entity-level requirement of the applicable jurisdiction.²⁴ However, for SDR reporting under parts 45 and 46 of CFTC regulations, the Exemptive Order relief only extended to non-U.S. SDs and MSPs that are not part of an affiliated group in which the ultimate parent entity is a U.S. SD, U.S. MSP, U.S. Bank, U.S. financial holding company or U.S. bank holding company. In addition, the Exemptive Order permitted a non-U.S. SD or MSP in these jurisdictions to comply with any law or regulation of its home jurisdiction in lieu of complying with comparable transaction-level requirements (with the exception of mandatory clearing;²⁵ the trade execution requirement; and, for transactions with guaranteed affiliates of U.S. persons, the real-time reporting requirements under Part 43 of the CFTC Regulations²⁶) for which substituted compliance is

²³ Note that a complete summary of the Cross-Border Guidance and Exemptive Order can be found in our memo to clients, *supra* note 3.

²⁴ Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 43785 (Jul. 22, 2013).

²⁵ With respect to the clearing requirement, the Exemptive Order provided relief to “any non-U.S. SD or non-U.S. MSP that was not required to clear” under a prior CFTC exemptive order, which relief expired 75 days after the Cross-Border Guidance was published in the Federal Register.

²⁶ The Exemptive Order provided relief from real-time reporting for swaps transactions entered into by non-U.S. SDs and non-U.S. MSPs for swaps transactions with guaranteed affiliates of U.S. persons until September 30, 2013.

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possible under the Cross-Border Guidance, until the earlier of December 21, 2013, or 30 days following the issuance of a substituted compliance determination for the relevant transaction-level requirement.

With respect to non-U.S. branches of U.S. banks that are SDs and MSPs located in Australia, Canada, the EU, Hong Kong, Japan and Switzerland, the Exemptive Order provided limited temporary relief from compliance with the Category A transaction-level requirements for which substituted compliance is possible under the Cross-Border Guidance,²⁷ permitting these non-U.S. branches to comply with the laws and regulations of the jurisdiction in which the branch is located until the earlier of December 21, 2013 or 30 days following the issuance of a substituted compliance determination with respect to the jurisdiction in which the non-U.S. branch is located. As with the relief granted to non-U.S. SDs and non-U.S. MSPs, this transaction-level requirement relief did not extend to mandatory clearing (limited relief for clearing was granted until 75 days after the Cross-Border Guidance was published in the Federal Register), the trade execution requirement, or real-time reporting (limited relief with respect to real-time reporting was granted until September 30, 2013). The Exemptive Order also provided transitional relief to any non-U.S. branch of a U.S. SD or MSP in any jurisdiction other than those identified above, generally permitting such branches to comply with the laws and regulations of the jurisdiction in which the branch is located in lieu of complying with any transaction-level requirement for which substituted compliance is possible under the Cross-Border Guidance until 75 days after the Cross-Border Guidance was published in the Federal Register.

For swap transactions between two non-registrant non-U.S. guaranteed affiliates of U.S. persons, the Exemptive Order similarly provided transitional relief, generally permitting such persons to comply with the laws and regulations of the jurisdiction in which they were located in lieu of complying with any transaction-level requirement for which substituted compliance is possible under the Cross-Border Guidance until 75 days after the Cross-Border Guidance was published in the Federal Register.

C. CFTC ADVISORY AND RELATED LITIGATION

Following the issuance of the Cross-Border Guidance, market participants had expressed concern regarding certain aspects of the Cross-Border Guidance with respect to which there was still substantial ambiguity. Specifically, there was uncertainty with respect to the applicability of the transaction-level requirements to transactions entered into with non-U.S. counterparties by employees or agents of a non-U.S. swap dealer located in the U.S. The uncertainty related to the fact that the relevant CFTC statement appeared only in a brief footnote in the Cross-Border Guidance, and the footnote did not identify all of the circumstances under which the involvement of U.S. personnel in transactions with non-U.S. counterparties would trigger CFTC jurisdiction, or the rules that would apply if such jurisdiction was

²⁷ Under the Cross-Border Guidance, non-U.S. branches of U.S. banks that are SDs and MSPs would not be required to comply with Category B transaction-level requirements (i.e., external business conduct standards) unless the counterparty is a U.S. person (excluding from the U.S. person definition for this purpose any non-U.S. branch of a U.S. bank that is an SD or MSP).

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triggered.²⁸ In the DSIO Advisory, the CFTC staff expressly asserted that the use of “personnel or agents located in the U.S.” to “regularly arrang[e], negotiat[e], or execut[e] swaps for or on behalf of an SD” involved conduct that amounts to “performing core, front-office activities of that SD’s dealing business” within the U.S. and would thus subject such transactions arranged, negotiated or executed by such persons to transaction-level requirements.

This more expansive interpretation of the CFTC’s jurisdictional reach provoked criticism by non-U.S. regulators and non-U.S. market participants. A spokeswoman for EU financial services commissioner Michel Barnier stated, “We were very surprised by the latest CFTC rules which seem to us to go against both the letter and spirit of the path forward agreement. . . . [The rules] are another step away from the kind of inter-operable global system that we want to build.”²⁹

In addition, on December 4, 2013, citing the DSIO Advisory, among other things, the Securities Industry and Financial Markets Association (“SIFMA”), International Swaps and Derivatives Association, Inc. (“ISDA”) and the Institute of International Bankers (“IIB”) sued the CFTC in the U.S. District Court for the District of Columbia, claiming that the issuance of the Cross-Border Guidance, and multiple CFTC swaps rules, to the extent they may apply in cross-border situations, constituted improper rulemakings under the Administrative Procedures Act and the CEA.³⁰ The complaint argued that the CFTC failed to perform cost-benefit analysis or comply with other procedural requirements for formal rulemaking and promulgated substantive cross-border rules that exceeded the CFTC’s statutory jurisdiction. The case is currently pending under the name *Securities Industry & Financial Markets Ass’n et al. v. CFTC*, No. 13-CV-1916 (D.D.C. Dec. 4, 2013).

On January 3, 2014, the CFTC issued the Request for Comment on the DSIO Advisory regarding the applicability of the transaction-level requirements to swaps between non-U.S. SDs registered with the Commission and non-U.S. person counterparties where the swap is “arranged, negotiated, or executed

²⁸ This uncertainty arose from the guidance provided in footnote 513 in the Cross-Border Guidance:

Consistent with the foregoing rationale, the Commission takes the view that a U.S. branch of a non-U.S. swap dealer or MSP would be subject to Transaction-Level requirements, without substituted compliance available. As discussed above, a branch does not have a separate legal identity apart from its principal entity. Therefore, the Commission considers a U.S. branch of a non-U.S. swap dealer or non-U.S. MSP to be a non-U.S. person (just as the Commission considers a foreign branch of a U.S. person to be a U.S. person). Nevertheless, the Commission also recognizes its strong supervisory interest in regulating the dealing activities that occur with [or within] the United States, irrespective of the counterparty (just as the Commission allows for substituted compliance for foreign branches in certain instances to take into account the strong supervisory interest of local regulators).

Cross-Border Guidance, *supra* note 3, at 45350 n.513.

²⁹ Jim Brudsen, *EU Says Gensler Swaps Rule Clashes With Trans-Atlantic Pact*, Bloomberg News, Nov. 21, 2013, <http://www.bloomberg.com/news/2013-11-21/eu-says-gensler-swaps-rule-clashes-with-trans-atlantic-pact.html>.

³⁰ Complaint at 2-4, *Sec. Indus. & Fin. Markets Ass’n et al. v. CFTC*, No. 13-CV-1916 (D.D.C. Dec. 4, 2013).

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by personnel or agents of the non-U.S. SD located in the United States.”³¹ In connection with the Request for Comment, DSIO, DCR and DMO extended previously issued no-action relief to non-U.S. SDs from certain transaction-level requirements when these SDs enter into swaps, using personnel or agents located in the United States, with non-U.S. counterparties that are not guaranteed affiliates or conduit affiliates of U.S. persons. The relief, which was originally scheduled to expire on January 14, 2013, now expires on September 15, 2014.³²

COMPARABILITY DETERMINATIONS

A. OVERVIEW

On December 20, 2013, the CFTC approved the Comparability Determinations that would permit substituted compliance, in lieu of compliance with certain CFTC regulations applicable to swaps, with non-U.S. regulatory regimes by SDs and MSPs in the relevant jurisdictions.³³ In particular, the CFTC issued comparability determinations for several entity-level requirements in six jurisdictions: Australia, Canada, the EU, Hong Kong, Japan and Switzerland. The CFTC also issued comparability determinations for certain transaction-level requirements in the EU, and for a more narrow set of transaction-level requirements in Japan. In a dissenting statement,³⁴ Commissioner O’Malia emphasized, among other things, that the comparability determinations were made on a rule-by-rule basis rather than the category-by-category outcomes-based approach agreed upon by the OTC Derivatives Regulators Group (“ODRG”).³⁵

³¹ *Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States* (Jan. 3, 2014), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister010314.pdf>.

³² Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers, CFTC No-Action Letter No. 14-01 (Jan. 3, 2014), available at <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/14-01.pdf>.

³³ Press Release, U.S. Commodities Futures Trading Commission, CFTC Approves Comparability Determinations for Six Jurisdictions for Substituted Compliance Purposes (Dec. 20, 2013), available at <http://www.cftc.gov/PressRoom/PressReleases/pr6802-13>.

³⁴ U.S. Commodities Futures Trading Commission, Statement of Dissent by Commissioner Scott D. O’Malia (Dec. 20, 2013), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement122013>.

³⁵ The ODRG is a group of “international financial regulators including central banks, banking supervisors, and market regulators, and other governmental authorities that have direct authority over OTC derivatives market infrastructure providers or major OTC derivatives market participants, or consider OTC derivative market matters more broadly” and was formed “to provide regulators with a means to cooperate, exchange views and share information related to OTC derivatives CCPs and trade repositories.” *Overview*, The OTC Derivatives Regulators’ Forum, <http://www.otcdf.org/> (last visited Dec. 30, 2013).

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B. COMPARABILITY DETERMINATIONS

In general, the CFTC's approach to making the Comparability Determinations was substantially identical across the six jurisdictions and involved reviewing the U.S. requirements and analyzing the purpose, content and effect of the corresponding non-U.S. requirements.

1. Entity-Level Requirements

The following comparison chart summarizes the comparability determinations for entity-level requirements for Australia, Canada, the EU, Hong Kong, Japan and Switzerland (section numbers refer to Chapter 17 of the Code of Federal Regulations):

Commission Rule	Australia	Canada	EU	Hong Kong	Japan	Switzerland
<i>Chief Compliance Officer</i> § 3.3	Comparable ^{1,2}	Comparable ²				
<i>Swap Data Recordkeeping</i> §§ 23.201, 23.203	Comparable ⁴	Comparable ⁴	Comparable ⁴	Comparable ⁴	Comparable	Comparable ⁴
<i>Risk Management Program</i> § 23.600	Comparable ³	Comparable ³	Comparable ³	Comparable ³	Comparable ³	Comparable ³
<i>Monitoring of Position Limits</i> § 23.601	Comparable	Comparable	Comparable	Comparable	Comparable	Comparable
<i>Diligent Supervision</i> § 23.602	Comparable	Comparable	Comparable	Comparable	Comparable	Comparable
<i>Business Continuity</i> § 23.603	Comparable	Comparable	Comparable	Comparable	Comparable	Comparable
<i>Research Conflicts</i> § 23.605(c)	Comparable	Comparable	Comparable	Comparable	Comparable	Comparable
<i>Clearing Conflicts</i> § 23.605(d)	Comparable	Comparable	Comparable	Comparable	Comparable	Comparable
<i>Undue Influence</i> § 23.605(e)	Comparable	Comparable	Comparable	Comparable	Comparable	Comparable
<i>Availability of Information for Disclosure</i> § 23.606	Comparable ⁴	Comparable ⁴	Comparable ⁴	Comparable ⁴	Comparable	Comparable ⁴
<i>Clearing Member Risk Management</i> § 23.609	Comparable	Comparable	Comparable	No Determination	Comparable	No Determination

Notes:

¹ Other than for § 3.3(e), which requires an SD or MSP to produce an annual compliance report and stipulates the content thereof.

² Other than for § 3.3(f), which requires (i) the CEO or CCO of an SD or MSP to certify that the annual compliance report is accurate and complete, and (ii) the annual compliance report to be furnished to the CFTC.

³ Other than for § 23.600(c)(2), which requires an SD or MSP to produce quarterly risk exposure reports and provide such reports to its senior management, governing body and the CFTC.

⁴ The CFTC reserves the right to require an SD or MSP to provide direct access to or produce records required to be maintained under the CEA and CFTC Regulations to CFTC staff, the staff of an applicable U.S. prudential regulator or the U.S. Department of Justice.

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2. Transaction-Level Requirements

As noted above, in addition to the comparability determinations for entity-level requirements, the CFTC also issued comparability determinations for certain transaction-level requirements in the EU, and for a more narrow set of transaction-level requirements in Japan, as follows:

- *EU transaction-level comparability determinations.* The CFTC determined that EU law and regulations are comparable to and as comprehensive as the following transaction-level requirements: portfolio reconciliation (§ 23.502), portfolio compression (§ 23.503), trade confirmation (§ 23.501), swap trading relationship documentation (§ 23.504) and daily trading records (§ 23.202).³⁶
- *Japan transaction-level comparability determinations.* The CFTC determined that Japanese law and regulations are comparable to and as comprehensive as the following transaction-level requirements: swap trading relationship documentation (§ 23.504) and daily trading records (§ 23.202).³⁷

It is notable that the CFTC has not made any comparability determinations with respect to the CFTC's mandatory clearing, real-time reporting and the trade-execution requirements. In addition, the CFTC has not made any comparability determination with respect to its requirements for margining uncleared swaps, which have been proposed but not finalized as of the date of this memorandum.³⁸

C. RELATED NO-ACTION RELIEF; MOU WITH MONETARY AUTHORITY OF SINGAPORE

1. No-Action Relief

On December 20, 2013, CFTC staff also issued time-limited no-action relief from the swap data reporting requirements in Part 45 and Part 46 of the CFTC Regulations for non-U.S. SDs and MSPs established in Australia, Canada, the EU, Japan or Switzerland.³⁹ The CFTC issued this relief in lieu of comparability determinations for swap data reporting, which were not released on December 20, 2013. The no-action letter provides transitional relief for swaps between a non-U.S. SD and MSP and a non-U.S. counterparty that is a guaranteed affiliate or conduit affiliate of a U.S. person. The relief expires on March 3, 2014 for reporting under Part 45 and April 2, 2014 for reporting under Part 46. The no-action letter also provides relief for swaps between a non-U.S. SD and MSP and a non-U.S. counterparty that is *not* a guaranteed affiliate or conduit affiliate of a U.S. person, which expires upon the earlier of December 1, 2014 or 30

³⁶ Comparability Determination for European Union: Certain Transaction-Level Requirements, 78 Fed. Reg. 78878 (Dec. 27, 2013).

³⁷ Comparability Determination for Japan: Certain Transaction-Level Requirements, 78 Fed. Reg. 78890 (Dec. 27, 2013).

³⁸ Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 Fed. Reg. 23732, 23733-40 (Apr. 28, 2011); see also Sullivan & Cromwell LLP, Proposed Margin Requirements for Uncleared Swaps under Dodd-Frank (Apr. 18, 2011).

³⁹ Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland, CFTC No-Action Letter No. 13-75 (Dec. 20, 2013), available at <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/13-75.pdf>. Note that this relief did not extend to Hong Kong.

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days following the issuance of a comparability determination by the CFTC with respect to the SDR reporting rules for the jurisdiction in which the non-U.S. SD or MSP is established. This no-action relief does not extend to the large trader reporting requirements of Part 20 of the CFTC Regulations, for which substituted compliance is not available.

The CFTC also issued time-limited no-action relief from the internal business conduct standards found in regulation 23.600(c)(2) (periodic risk exposure reports as part of an SDs risk management program) and 23.608 (restrictions on counterparty clearing relationships) for Australia, Canada, the EU, Japan or Switzerland, and regulation 23.609 (clearing member risk management) for Switzerland.⁴⁰ This time-limited no-action relief, which expires March 3, 2014, provides non-U.S. SDs and MSPs in these jurisdictions with a transition period to comply with these internal business conduct standards.

2. MOU with Monetary Authority of Singapore

On December 27, 2013, the CFTC signed the non-legally binding Singapore MOU with the Monetary Authority of Singapore.⁴¹ The Singapore MOU provides for regular consultation with respect to events that could impact cross-border entities subject to the regulatory jurisdiction of both authorities and information-sharing to facilitate cross-border enforcement and supervisory activities. The Singapore MOU also specifies the procedures for periodic meetings and on-site visits and defines the permissible use and confidentiality obligations that apply to information shared between the authorities. On the same day, the CFTC granted Singapore Exchange Derivatives Clearing Ltd. registration as a derivatives-clearing organization.⁴²

⁴⁰ Time-Limited No-Action Relief from Certain Entity-Level Internal Business Conduct Requirements for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan, and Switzerland, CFTC No-Action Letter No. 13-78 (Dec. 20, 2013), *available at* <http://www.cftc.gov/ucm/groups/public/@lrlattergeneral/documents/letter/13-78.pdf>.

⁴¹ U.S. CFTC & Monetary Authority of Singapore, Memorandum of Understanding Concerning Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Covered Entities (Dec. 27, 2013), *available at* <http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/masmou2013.pdf>.

⁴² Press Release, U.S. Commodities Futures Trading Commission, CFTC Grants Singapore Exchange Derivatives Clearing Ltd. Registration as a Derivatives Clearing Organization (Dec. 27, 2013), *available at* <http://www.cftc.gov/PressRoom/PressReleases/pr6812-13>.

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3. Other Requirements Not Addressed

As indicated above, the Comparability Determinations do not address swap data reporting, the requirements for mandatory clearing, and the CFTC's trade execution requirements. Similarly, the CFTC's comparability determinations do not address capital adequacy requirements or margin requirements for uncleared swaps, which rules, as noted above, have not yet been finalized. Therefore, there remains the potential for conflicting rules in these areas as between the CFTC's requirements and the requirements of another jurisdiction, and comparability determinations in these other areas remain uncertain.

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