

CFTC Finalizes Cross-Border Swaps Guidance and Establishes Compliance Schedule

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On July 12, 2013, the CFTC adopted long-anticipated final cross-border guidance (the “**Final Guidance**”) that provides guidelines for the application of the CFTC’s swap regulatory regime to cross-border swap activities. At the same time, the CFTC adopted a phase-in compliance schedule (the “**Exemptive Order**”) ¹ that extends, with material changes, the cross-border exemptive order issued by the CFTC in January 2013 (the “**January Order**”). ²

The Final Guidance and the Exemptive Order address several important topics, including:

- the final definition of U.S. person for purposes of the CFTC’s swap regulatory regime;
- guidance on which swaps a non-U.S. person must include in, and can exclude from, its swap dealer *de minimis* and major swap participant (“**MSP**”) threshold calculations;
- guidance on the types of offices the CFTC would consider to be a “foreign branch” of a U.S. swap dealer or MSP and the circumstances in which a swap transaction would be considered to be “with” such a foreign branch;
- guidance on how swap-related requirements will be applied to cross-border swap transactions and when substituted compliance would be available if the CFTC determines that a foreign jurisdiction’s rules are comparable to its own; and
- phased-in compliance periods for many of the swap regulatory regime’s requirements.

These documents contain many inconsistencies and ambiguities that create significant uncertainty for market participants and will likely require clarification from the CFTC. Some key examples are discussed below.

Comments on the Exemptive Order are due on **August 21, 2013**.

¹ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013), available [here](#); Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 43,785 (July 22, 2013), available [here](#).

² Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013), available [here](#).

A “U.S. person” generally includes, but is not 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 legal entity other than an entity described in prongs (iv) or (v) below 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 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) (where “majority-owned” means beneficial ownership of more than 50% of the equity or voting interest in the vehicle), except any vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;
- (vii) any legal entity 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).

Final Cross-Border Guidance

The CFTC states that the Final Guidance is not a definitive statement of the application of the CFTC’s swap regulatory regime to all cross-border swap activities, but is instead a statement of general policy intended to allow for flexibility in application to various situations and for consideration of all relevant facts and circumstances. Market participants involved in cross-border swap activities will need to exercise judgment in determining how the CFTC’s requirements will apply to those activities, and may need to seek guidance where additional clarity is needed.

U.S. Person Definition

The application of the CFTC’s swap regulatory regime to a cross-border transaction depends, in large part, on whether one of the counterparties to the transaction is a “**U.S. person.**” The Final Guidance contains the final definition of U.S. person, set forth in the accompanying sidebar, which has been adopted only for purposes of the CFTC’s swap regulatory regime. The various sub-paragraphs in the definition are referred to in the Final Guidance as “prongs.”

The Final Guidance states explicitly that the prongs of the U.S. person definition are not exhaustive and that there may be circumstances not fully addressed by those prongs and situations where the Final Guidance does not “appropriately resolve whether a person should be included in the interpretation of the term ‘U.S. person.’” Thus, it appears that there may be persons not described by the prongs that nonetheless may be U.S. persons. To determine its U.S. person status, a market participant should look to relevant facts and circumstances and a balance of the various regulatory interests that may apply, which include, among others:

- the strength of the connections between the person’s swap-related activities and U.S. commerce;
- the extent to which such activities are conducted in the United States; and
- 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 U.S. person definition could impose significant new burdens on market participants in determining the U.S. person status of their counterparties. In part to allay this burden, the Final Guidance provides that a party to a swap “should generally be permitted to reasonably rely on counterparty representations.” It is not entirely clear under the Final Guidance what the CFTC would view as “reasonable” reliance.

Principal Place of Business

Prong (iii) of the U.S. person definition provides that any corporation, partnership, limited liability company, fund or similar form of enterprise (other than a pension plan or a trust) is a U.S. person if it is organized or incorporated under the laws of the United States or if it has its principal place of business in the United States. For legal entities other than funds,

Guaranteed Affiliates and Conduit Affiliates

The term “**guaranteed affiliate**” refers to a non-U.S. person that is affiliated with, and whose swap obligations are guaranteed by, a U.S. person. It is unclear whether an entity that has only some of its swaps guaranteed by a U.S. person would be treated as a guaranteed affiliate for all purposes under the Final Guidance.

The Final Guidance does not provide a definition of “**conduit affiliate**” but instead includes factors the CFTC considers relevant in determining whether a non-U.S. person is a conduit affiliate. These factors include whether:

- (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 a 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 a third-party(ies) to its U.S. affiliates.

Swap dealers and their affiliates generally will not be regarded as conduit affiliates.

the CFTC would normally consider an entity’s principal place of business to be the place where the entity maintains its headquarters, provided that the headquarters is the actual center of direction, control and coordination.

Unlike the January Order, the Final Guidance includes as a U.S. person any fund or other collective investment vehicle with its principal place of business in the United States. The CFTC will generally consider the principal place of business of a collective investment vehicle to be in the United States if the senior personnel responsible for either (1) the formation and promotion of the vehicle or (2) the implementation of the vehicle’s investment strategy are located in the United States, depending on the facts and circumstances that are relevant to determining the center of direction, control and coordination of the vehicle.

Funds Majority-Owned by U.S. Persons

Prong (vi) of the U.S. person definition includes as a U.S. person a fund or other collective investment vehicle that is majority-owned by one or more U.S. persons. The Final Guidance states that, generally, funds would not need to look through to their *indirect* owners, except that a fund would need to look through to the beneficial owners of any other legal entity invested in the fund that is controlled by or under common control with the fund. For example, a master fund would need to look to the U.S. person status of the investors in its feeder funds, where the master and feeder funds are under common control.

The Final Guidance contains an exemption from the U.S. person definition for funds and other collective investment vehicles that are publicly offered only to non-U.S. persons and not offered to U.S. persons.

Swap Dealer and MSP Registration Threshold Calculations and Aggregation Requirements

CFTC rules implementing the statutory definitions of swap dealer and MSP specify the level of swap dealing activity that would cause a person to be a swap dealer (the “**swap dealer de minimis threshold**”) and the level of swap positions that would cause a person to be an MSP (the “**MSP registration threshold**”).

Swap Dealer

The Final Guidance provides that, in calculating whether it has exceeded the swap dealer *de minimis* threshold:

- a **U.S. person** must count all swaps entered into in a dealing capacity, regardless of the U.S. person status of its counterparty;
- a **guaranteed affiliate** or **conduit affiliate** (each as described in the accompanying sidebar) must count all swaps entered into in a dealing capacity, regardless of the U.S. person status of its counterparty; and

- a **non-U.S. person that is not a guaranteed affiliate or conduit affiliate** is required to count transactions with:
 - U.S. persons, other than foreign branches of U.S. swap dealers;³ and
 - guaranteed affiliates, except where the guaranteed affiliate:
 - is registered as a swap dealer;
 - is not a swap dealer but engages in *de minimis* swap dealing activity and is affiliated with a swap dealer; or
 - is guaranteed by a non-financial entity.

A non-U.S. person that is not a guaranteed affiliate or conduit affiliate is not required to count towards its swap dealer *de minimis* threshold swaps entered into anonymously on a registered designated contract market (“**DCM**”), swap execution facility (“**SEF**”) or foreign board of trade (“**FBOT**”) and cleared. In addition, the Final Guidance clarifies that only the initial execution of a subsequently cleared swap, and not the novation to the clearinghouse, is required to be counted towards the swap dealer *de minimis* threshold of a non-U.S. person that is neither a guaranteed affiliate nor a conduit affiliate.

An entity (whether a U.S. person or a non-U.S. person) is required to aggregate swap dealing positions that it counts toward the swap dealer *de minimis* threshold with those of all of its U.S. and non-U.S. affiliates that it controls, is controlled by, or is under common control with, except that swaps of an affiliate that is a registered swap dealer may be excluded from this calculation. In practice, this means that a group of affiliated entities that are not registered as swap dealers may enter into up to \$8 billion of swap dealing activity over a 12-month period (or \$25 million with special entities) before at least one entity in the group must register as a swap dealer.

MSP

In determining whether it is required to register as an MSP:

- a **U.S. person** must count all swaps, regardless of the U.S. person status of its counterparty;
- a **guaranteed affiliate** or **conduit affiliate** must count all swaps, regardless of the U.S. person status of its counterparty;
- a **non-U.S. person that is not a guaranteed affiliate and is a financial entity** is required to count transactions with:
 - U.S. persons (other than foreign branches of a U.S. swap dealer); and

³ The definition of “foreign branch” and the criteria for determining when a transaction is considered “with a foreign branch” are quite detailed and restrictive, as described under “Foreign Branch Transactions” below.

- foreign branches of U.S. swap dealers or guaranteed affiliates that are swap dealers, unless the swap is cleared or the documentation of the swap requires the foreign branch or guaranteed affiliate to collect daily variation margin, with no threshold, on its swaps with the non-U.S. person (and the position is addressed in the swap dealer’s risk management program); and
- a **non-U.S. person that is not a guaranteed affiliate and is not a financial entity** is only required to count transactions with U.S. persons (other than foreign branches of a U.S. swap dealer).

The Final Guidance also includes complex attribution rules, which generally require a swap to be attributed to the guarantor for purposes of its MSP calculations subject to a number of exceptions, including where the guaranteed entity fits within certain regulatory categories.

Foreign Branch Transactions

The Final Guidance explains the types of offices the CFTC would consider to be a “foreign branch” of a U.S. swap dealer or MSP, as described in the accompanying sidebar. The Final Guidance also specifies the circumstances in which a swap transaction would be deemed to be “with a foreign branch,” including the following:

Foreign Branch Characteristics

A “foreign branch” is a non-U.S. branch of a U.S. swap dealer or MSP that:

- is a “foreign branch,” as defined in the applicable banking regulation, of a U.S. bank that is subject to Regulation K or the FDIC International Banking Regulation;
- 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
- is subject to substantive regulation in banking or financing in the jurisdiction where it is located.

The CFTC will also consider other relevant facts and circumstances.

- 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;
- 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;
- 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; and
- the swap is reflected in the local accounts of the foreign branch.

According to the Final Guidance, the booking location of the swap would not be the determinative factor in the analysis of whether a transaction is with a foreign branch.

The Final Guidance also states that a swap that meets all of the requirements described in the sidebar, and above, will nevertheless *not* be considered to be “with a foreign branch” if material terms of the swap are negotiated or agreed to by employees of the U.S. bank located in the United States.

Application of Swap-Related Requirements

The Final Guidance adopts, with modifications, the categorization of Entity-Level and Transaction-Level requirements in the January Order and applies them to cross-border swap activities as described below. Charts summarizing the swap-related requirements and the applicable phase-in periods are provided in the appendices to this memorandum.

The Final Guidance also sets out a “substituted compliance” framework, under which market participants may comply with local law for certain requirements and certain transactions, to the extent that the CFTC finds local law comparable. We note in this section where the Final Guidance makes substituted compliance available, and we discuss the substituted compliance determination process in more detail below.

Entity-Level Requirements

The Final Guidance divides Entity-Level requirements into First Category and Second Category requirements, as described in the accompanying sidebar.

U.S. Swap Dealers and MSPs, including their foreign branches, generally must comply with all Entity-Level requirements, and no substituted compliance is available.

Non-U.S. Swap Dealers and MSPs, including those affiliated with U.S. persons, also must generally comply with Entity-Level requirements. Substituted compliance is potentially available for First Category Entity-Level requirements, regardless of the U.S. person status of the counterparty to a swap. With respect to Second Category Entity-Level requirements:

- for SDR reporting, substituted compliance is potentially available only where the counterparty is a non-U.S. person (though whether substituted compliance is available for swaps with guaranteed or conduit affiliates is unclear) and the CFTC has direct electronic access to the swap data stored at the foreign trade repository;
- for swap data recordkeeping requirements relating to customer complaints and sales and marketing materials, substituted compliance is potentially available only where the counterparty is a non-U.S. person; and
- for large trader reporting, substituted compliance is not available.

Entity-Level Requirements

First Category

- capital adequacy
- chief compliance officer
- risk management
- swap data recordkeeping, except rules relating to customer complaints and sales and marketing materials

Second Category

- swap data reporting to swap data repositories (“**SDRs**”), including historical swap reporting
- swap data recordkeeping requirements relating to customer complaints and sales and marketing materials
- large trader reporting

Transaction-Level Requirements

Category A

- clearing and swap processing
- margin and segregation for uncleared swaps
- trade execution
- swap trading relationship documentation
- portfolio reconciliation and compression
- real-time public reporting
- trade confirmation
- daily trading records

Category B

- external business conduct standards

5% Exemption

For swaps between a foreign branch of a U.S. swap dealer and a non-U.S. person that is not a guaranteed affiliate or a conduit affiliate, if the transaction takes place in a foreign jurisdiction other than Australia, Canada, the European Union, Hong Kong, Japan and Switzerland (the “Six Jurisdictions”), parties may comply with the local law of the foreign branch if:

- the aggregate notional value of the swaps of all the U.S. swap dealer’s foreign branches in foreign jurisdictions other than the Six Jurisdictions does not exceed 5% of the aggregate notional value, measured quarterly, of all of the swaps of the U.S. swap dealer; and
- the U.S. person maintains records with supporting information to verify that the first element is present, as well as to define and address risks that may arise from the non-application of the Transaction-Level requirements.

Transaction-Level Requirements

The Final Guidance divides the Transaction-Level requirements into Category A and Category B, as described in the accompanying sidebar. The Final Guidance applies these requirements to swap transactions based on the status of the counterparties, as summarized in the charts below.⁴

Application of Category A Transaction-Level Requirements				
Counter-party is:	U.S. person (other than a foreign branch)	Foreign branch	Guaranteed or conduit affiliate	Non-U.S. person that is not a guaranteed or conduit affiliate
Swap dealer or MSP is:				
U.S. swap dealer or MSP (other than through a foreign branch)	Apply	Apply	Apply	Apply
Foreign branch	Apply	Apply, substituted compliance potentially available	Apply, substituted compliance potentially available	Apply, substituted compliance potentially available. 5% Exemption also potentially available, as described in the accompanying sidebar.
Non-U.S. swap dealer or MSP (other than through a U.S. branch)	Apply with no substituted compliance available	Apply, substituted compliance potentially available	Apply, substituted compliance potentially available	Do not apply
U.S. branch of a non-U.S. swap dealer or MSP	Apply	Apply	Apply	Apply

In addition, the Final Guidance provides that Category A Transaction-Level requirements are generally deemed satisfied for a swap between a non-U.S. person and a U.S. person that is executed anonymously on a DCM, SEF or FBOT and cleared, though the exact scope of this exception is unclear.

In an important and controversial change from the proposed guidance, the Final Guidance provides that Transaction-Level requirements would apply

⁴ Appendix D to the Final Guidance includes two notes regarding the applicability of swap trading relationship documentation and portfolio compression requirements to transactions involving swap dealers and MSPs. It is unclear to what extent these footnotes override the application of these requirements reflected elsewhere in the Guidance, including as set out in the chart in Appendix D.

to all swaps of a **U.S. branch of a non-U.S. swap dealer or MSP**, with no substituted compliance available. The Final Guidance does not discuss when a swap would be considered to be “with a U.S. branch” of a non-U.S. swap dealer or MSP.

The Category B Transaction-Level requirements – the external business conduct standards applicable to swap dealers and MSPs – would apply to the cross-border swap activities of swap dealers and MSPs as follows:

Application of Category B Transaction-Level Requirements (External Business Conduct Standards)				
Counter-party is: Swap dealer or MSP is:	U.S. person (other than a foreign branch)	Foreign branch	Guaranteed or conduit affiliate	Non-U.S. person that is not a guaranteed or conduit affiliate
U.S. swap dealer or MSP (other than through a foreign branch)	Apply	Apply	Apply	Apply
Foreign branch	Apply	Do not apply	Do not apply	Do not apply
Non-U.S. swap dealer or MSP (other than through a U.S. branch)	Apply	Do not apply	Do not apply	Do not apply
U.S. branch of a non-U.S. swap dealer or MSP	Apply	Apply	Apply	Apply

In Appendix E of the Final Guidance, the CFTC indicates that a U.S. swap dealer or MSP that solicits or negotiates swaps through a foreign subsidiary or affiliate will be treated differently from a U.S. swap dealer or MSP that does not (i.e., external business conduct standards would not apply when dealing with foreign branches, guaranteed affiliates, conduit affiliates and non-U.S. persons when soliciting or negotiating swaps through a foreign subsidiary or affiliate), but this distinction is not discussed anywhere in the text of the Final Guidance.

“Essentially Identical” Determinations

The Final Guidance provides that, even where substituted compliance is not available, a market participant could be deemed to be in compliance with CFTC rules where it complies with requirements in its home jurisdiction that are “essentially identical” to U.S. requirements. The Final Guidance provides little detail on how “essentially identical” determinations will be made. However, almost contemporaneously with issuing the Final Guidance, the CFTC staff issued a no-action letter finding that risk mitigation rules implemented by the European Union under the European Market Infrastructure Regulation (“**EMIR**”) are essentially identical to the CFTC’s rules relating to confirmation, portfolio reconciliation and

compression, and valuation and dispute resolution, with certain exceptions. Under this no-action letter, for a swap that is subject to concurrent jurisdiction under U.S. and E.U. risk mitigation rules, compliance under EMIR constitutes compliance under U.S. rules, subject to conditions. The CFTC staff also issued a no-action letter allowing market participants that are clearing members to meet CFTC clearing requirements by through two European clearinghouses, neither of which are registered with the CFTC or exempt from registration.⁵

Requirements for Transactions between Non-Registrants

Swap clearing, trade execution, real-time reporting, large trader reporting, SDR reporting and swap data recordkeeping requirements apply to swap transactions between market participants that are not registered as swap dealers or MSPs (“**Non-Registrants**”). The following table summarizes the application of these requirements (the “**Non-Registrant Requirements**”).

Application of Non-Registrant Requirements			
Counter-party A is: Counter-party B is:	U.S. person	Guaranteed or conduit affiliate	Non-U.S. person that is not a guaranteed or conduit affiliate
U.S. person	Apply	Apply	Apply
Guaranteed or conduit affiliate	Apply	Apply, substituted compliance potentially available (except that substituted compliance is not available for large trader reporting)	Do not apply, except for large trader reporting
Non-U.S. person that is not a guaranteed or conduit affiliate	Apply	Do not apply, except for large trader reporting	Do not apply, except for large trader reporting

⁵ See No-Action Relief for Registered Swap Dealers and Major Swap Participants from Certain Requirements under Subpart I of Part 23 of Commission Regulations in Connection with Uncleared Swaps Subject to Risk Mitigation Techniques under EMIR, CFTC Letter No. 13-45 (July 11, 2013), [available here](#); No-Action Relief with Regard to Sections 5b(a) and 2(h)(1)(A) of the Commodity Exchange Act and Implementing Regulations Thereunder, CFTC Letter No. 13-43 (July 11, 2013), [available here](#); No-Action Relief with Regard to Sections 5b(a) and 2(h)(1)(A) of the Commodity Exchange Act and Implementing Regulations Thereunder, CFTC Letter No. 13-44 (July 11, 2013), [available here](#).

January Order “U.S. Person” Definition

“U.S. person” means any person that is:

- (i) a natural person who is a resident of the United States;
- (ii) a corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is (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;
- (iii) a pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is primarily for foreign employees of such entity;
- (iv) 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
- (v) 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 (i) through (iv) above.

In addition, the Final Guidance provides that where at least one of the counterparties to a swap is a conduit affiliate, and one of the counterparties elects the inter-affiliate clearing exemption for the swap, the CFTC generally would expect the parties to the swap to comply with the conditions of the inter-affiliate clearing exemption.⁶

Substituted Compliance Determinations

As described above, the Final Guidance allows market participants to comply with local law for certain requirements where the CFTC has made a “substituted compliance” determination. The Final Guidance outlines the procedures through which a substituted compliance determination may be made. Foreign regulators, an individual non-U.S. entity or group of non-U.S. entities, a U.S. bank that is a swap dealer or MSP with respect to its foreign branches or a trade association or other group on behalf of similarly situated entities may request that the CFTC consider whether a foreign jurisdiction’s swap regulatory requirements are comparable to those of the CFTC. Generally, the CFTC would expect that an application would, at a minimum:

- state the basis for requesting that the CFTC find that a particular set of foreign laws and regulations is comparable to, and as comprehensive as, particular Dodd-Frank Act requirements;
- include all applicable legislation, rules and policies;
- provide an assessment of whether the objectives of the two regulatory regimes are comparable and comprehensive; and
- if the applicant is a registered swap dealer or MSP, provide an explanation of the capacity in which it is licensed in its home country and whether the applicant is in good standing.

In reviewing a request for a substituted compliance determination, the CFTC generally will consider the objectives of a foreign jurisdiction’s swap regulations and will base its analysis on a comparison of specific foreign requirements against Commodity Exchange Act provisions and CFTC regulations in 13 categories of regulatory obligations. The CFTC may determine that a foreign jurisdiction’s swap regulatory requirements are comparable in some, all or none of these categories.

The CFTC expects that, in connection with a determination that substituted compliance is appropriate, it would enter into supervisory memoranda of understanding or other arrangements that provide for information-sharing and cooperation in the context of supervising swap dealers and MSPs, such as procedures for confirming continuing oversight activities, access to information, on-site visits and notification procedures in certain situations.

⁶ See Davis Polk Memorandum “CFTC Provides Inter-affiliate Swap Clearing and Reporting Relief” (Apr. 15, 2012), [available here](#).

Phase-In Compliance Schedule

The Exemptive Order requires market participants to continue to use, until October 9, 2013, the January Order’s U.S. person definition, provided in the accompanying sidebar. In addition, the Exemptive Order generally permits market participants, until the same date, to continue to use the same swap dealer *de minimis* and MSP threshold calculation rules (including aggregation requirements) as in the January Order, with limited exceptions.⁷ A non-U.S. person that was not required to register as a swap dealer using the definitions and standards in the January Order, but must register as a result of the Final Guidance, will have until two months after the end of the month in which the person exceeds the *de minimis* threshold to register as a swap dealer.

Non-U.S. Swap Dealers and MSPs in the Six Jurisdictions⁸

The Exemptive Order provides non-U.S. swap dealers and MSPs located in the Six Jurisdictions the following phase-in compliance schedule with respect to swaps with non-U.S. person counterparties and foreign branches:

- as of July 13, 2013, such non-U.S. swap dealers and MSPs must comply with large trader reporting requirements and all other requirements for which relief is not granted;
- by September 30, 2013, such non-U.S. swap dealers and MSPs must comply with real-time reporting requirements for swaps with guaranteed and conduit affiliates;
- by October 9, 2013, such non-U.S. swap dealers and MSPs must clear designated swaps with guaranteed and conduit affiliate counterparties, as well as foreign branches;
- by the earlier of (i) December 21, 2013 and (ii) 30 days after the date on which a substituted compliance determination is made for the particular requirement in the particular jurisdiction, such non-U.S. swap dealers and MSPs must comply with:
 - the reporting requirements under Part 45 and Part 46 of the CFTC’s regulations, for all swaps with non-U.S. person counterparties, although this relief is available only where:
 - the non-U.S. swap dealer or MSP is not part of an affiliated group in which the ultimate parent entity is a U.S. swap dealer, U.S. MSP, U.S. bank, U.S.

⁷ See Davis Polk Memorandum “CFTC Issues Final Cross-Border Swap Exemptive Order” (Dec. 27, 2012), [available here](#).

⁸ To the extent a person established in a jurisdiction other than the Six Jurisdictions becomes registered as a swap dealer or MSP, no timing relief would be available under the Exemptive Order, absent further CFTC action.

financial holding company or U.S. bank holding company; and

- the non-U.S. swap dealer or MSP complies with swap data recordkeeping and reporting requirements of its home jurisdiction, or if the home jurisdiction has not implemented any swap data reporting requirements, it complies with specified recordkeeping requirements under the CFTC's regulations; and
- all other Entity-Level and Transaction-Level requirements, to the extent they apply to the particular swap under the Final Guidance.

There appears to be no relief available for swap trade execution requirements, though no swaps are currently subject to these requirements.

The Exemptive Order does not separately address compliance timing for U.S. branches of non-U.S. swap dealers and MSPs.

Foreign Branches of U.S. Swap Dealers and MSPs

The Exemptive Order provides foreign branches of U.S. swap dealers and MSPs the following phase-in compliance schedule with respect to Transaction-Level requirements for swaps with non-U.S. person counterparties and other foreign branches:

- by September 30, 2013, foreign branches in the Six Jurisdictions must comply with real-time reporting requirements for swaps with guaranteed and conduit affiliates;
- by October 9, 2013:
 - all foreign branches must clear designated swaps with non-U.S. person counterparties, as well as other foreign branches;
 - foreign branches outside of the Six Jurisdictions must comply with all other Transaction-Level requirements to the extent required under the Final Guidance;
- by the earlier of (i) December 21, 2013 and (ii) 30 days after the date on which a substituted compliance determination is made for the particular requirement in the particular jurisdiction, foreign branches in the Six Jurisdictions must comply with all other Transaction-Level requirements to the extent required under the Final Guidance.

No relief is available for swap trade execution requirements, though no swaps are currently subject to these requirements. In addition, no relief is provided to foreign branches for Entity-Level requirements.

Importantly, all of the relief for swaps by and with foreign branches in the Exemptive Order is conditioned on the swap in question satisfying the requirements for a swap to be considered "with" a foreign branch of a U.S. person in the Final Guidance, as discussed above.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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Non-Registrants

Non-Registrants that are guaranteed or conduit affiliates have until October 9, 2013 to come into compliance with Transaction-Level requirements for swaps with non-U.S. persons, including other guaranteed affiliates or conduit affiliates, and with foreign branches of U.S. swap dealers and MSPs.

The Exemptive Order does not provide phase-in relief for Non-Registrants (1) for Entity-Level requirements, including SDR Reporting and swap data recordkeeping, and (2) for large trader reporting, which applies to Non-Registrants that are clearing members.

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APPENDIX A
SUMMARY OF APPLICATION OF ENTITY-LEVEL REQUIREMENTS TO SWAP DEALERS

Counterparty is:	U.S. Person ¹	Foreign Branch of a U.S. Swap Dealer or Non-U.S. Person that is a Guaranteed or Conduit Affiliate	Non-U.S. Person (not a Guaranteed or Conduit Affiliate)
Swap dealer is:			
U.S. Swap Dealer	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i> 	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i> 	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i>
Foreign Branch of a U.S. Swap Dealer, Branch is in one of the Six Jurisdictions²	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i> 	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i> 	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i>
Foreign Branch of a U.S. Swap Dealer, Branch is outside the Six Jurisdictions	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i> 	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i> 	All Entity-Level requirements; no substituted compliance <ul style="list-style-type: none"> ▪ <i>All requirements in effect</i>
Non-U.S. Swap Dealer in the Six Jurisdictions (other than through a U.S. branch)	All Entity-Level requirements; potential for substituted compliance only for First Category ³ <ul style="list-style-type: none"> ▪ <i>Large trader, SDR reporting and certain recordkeeping requirements in effect</i> ▪ <i>Remaining requirements effective the earlier of 12/21/13 and 30 days after a substituted compliance determination</i> 	All Entity-Level requirements; potential for substituted compliance for First and Second Category, ³ except large trader reporting (availability for SDR reporting is ambiguous) <ul style="list-style-type: none"> ▪ <i>SDR reporting (unless conditions are met)⁴ and large trader reporting requirements in effect</i> ▪ <i>Remaining requirements effective the earlier of 12/21/13 and 30 days after a substituted compliance determination</i> 	All Entity-Level requirements; potential for substituted compliance for First and Second Category, ³ except for large trader reporting ⁵ <ul style="list-style-type: none"> ▪ <i>SDR reporting (unless conditions are met)⁴ and large trader reporting requirements in effect</i> ▪ <i>Remaining requirements effective the earlier of 12/21/13 and 30 days after a substituted compliance determination</i>
U.S. Branch of a Non-U.S. Swap Dealer, Dealer is based in one of the Six Jurisdictions	All Entity-Level requirements; potential for substituted compliance only for First Category requirements ³ <ul style="list-style-type: none"> ▪ <i>Large trader, SDR reporting and certain recordkeeping requirements in effect</i> ▪ <i>Remaining requirements effective the earlier of 12/21/13 and 30 days after a substituted compliance determination</i> 	All Entity-Level requirements; potential for substituted compliance for First and Second Category, ³ except large trader reporting (availability for SDR reporting is ambiguous) <ul style="list-style-type: none"> ▪ <i>SDR reporting (unless conditions are met)⁴ and large trader reporting requirements in effect</i> ▪ <i>Remaining requirements effective the earlier of 12/21/13 and 30 days after a substituted compliance determination</i> 	All Entity-Level requirements; potential for substituted compliance for First and Second Category, ³ except for large trader reporting ⁵ <ul style="list-style-type: none"> ▪ <i>SDR reporting (unless conditions are met)⁴ and large trader reporting requirements in effect</i> ▪ <i>Remaining requirements effective the earlier of 12/21/13 and 30 days after a substituted compliance determination</i>

¹ The January Order's U.S. Person definition will be in effect until 10/9/13.

² The Six Jurisdictions are Australia, Canada, the European Union, Hong Kong, Japan and Switzerland. To the extent a person established in a jurisdiction other than the Six Jurisdictions becomes registered as a swap dealer or MSP, the applicability of these requirements would be the same; however, no timing relief would be available under the Exemptive Order, absent further CFTC action.

³ First Category requirements are capital adequacy, chief compliance officer, risk management and swap data recordkeeping (except certain aspects relating to complaints and marketing and sales materials). Second Category requirements are swap data reporting to swap data repositories ("SDRs"), including historical reporting, swap data recordkeeping requirements relating to customer complaints and sales materials and large trader reporting.

⁴ A non-U.S. swap dealer whose ultimate parent entity is not a U.S. swap dealer, U.S. MSP, U.S. bank, U.S. financial holding company or U.S. bank holding company may delay compliance with SDR reporting for transactions with non-U.S. person counterparties until December 21, 2013 and 30 days after a substituted compliance determination is made, if (1) its home jurisdiction has implemented swap data reporting and recordkeeping requirements and the dealer is in compliance with those requirements; or (2) for jurisdictions where no swap data reporting and recordkeeping requirements have been implemented, the swap dealer complies with the CFTC's recordkeeping requirements under regulations 45.2, 45.6, 46.2 and 46.4.

⁵ Substituted compliance is only available for SDR reporting if the CFTC has direct electronic access to the relevant swap data that is stored at the foreign trade repository.

APPENDIX B
SUMMARY OF APPLICATION OF TRANSACTION-LEVEL REQUIREMENTS TO SWAP DEALERS*

Counterparty is:	U.S. Person	Foreign Branch of a U.S. Swap Dealer or Non-U.S. Person that is a Guaranteed or Conduit Affiliate	Non-U.S. Person (not a Guaranteed or Conduit Affiliate)
Swap dealer is:			
U.S. Swap Dealer	All Transaction-Level requirements; no substituted compliance ▪ <i>All requirements in effect</i>	All Transaction-Level requirements; no substituted compliance ▪ <i>All requirements in effect</i>	All Transaction-Level requirements; no substituted compliance ▪ <i>All requirements in effect</i>
Foreign Branch of a U.S. Swap Dealer, Branch is in one of the Six Jurisdictions²	All Transaction-Level requirements; no substituted compliance ▪ <i>All requirements in effect</i>	Transaction-Level requirements, except EBC; potential for substituted compliance ▪ <i>Real-time public reporting effective on 9/30/13, only if counterparty is a guaranteed or conduit affiliate</i> ▪ <i>Clearing requirement effective on 10/9/13</i> ▪ <i>Remaining requirements effective earlier of 12/21/13 and 30 days after a substituted compliance determination</i>	Transaction-Level requirements, except EBC; potential for substituted compliance ▪ <i>Clearing requirement effective on 10/9/13</i> ▪ <i>Remaining requirements effective earlier of 12/21/13 and 30 days after a substituted compliance determination</i>
Foreign Branch of a U.S. Swap Dealer, Branch is outside the Six Jurisdictions	All Transaction-Level requirements; no substituted compliance ▪ <i>All requirements in effect</i>	Transaction-Level requirements, except EBC; potential for substituted compliance ▪ <i>All requirements effective on 10/9/13</i>	Transaction-Level requirements, except EBC; potential for substituted compliance; 5% Exemption may be available ▪ <i>All requirements effective on 10/9/13</i>
Non-U.S. Swap Dealer in the Six Jurisdictions (other than through a U.S. branch)	All Transaction-Level requirements; no substituted compliance ▪ <i>All requirements in effect</i>	Transaction-Level requirements, except EBC; potential for substituted compliance ▪ <i>Real-time public reporting effective on 9/30/13, only if counterparty is a guaranteed or conduit affiliate</i> ▪ <i>Clearing requirement effective on 10/9/13</i> ▪ <i>Remaining requirements effective earlier of 12/21/13 and 30 days after a substituted compliance determination</i>	Transaction-Level requirements do not apply
U.S. Branch of a Non-U.S. Swap Dealer, Dealer is based in one of the Six Jurisdictions	All Transaction-Level requirements; no substituted compliance ▪ <i>All requirements in effect</i>	All Transaction-Level requirements; no substituted compliance ▪ <i>Timing unclear</i>	All Transaction-Level requirements; no substituted compliance ▪ <i>Timing unclear</i>

* If a swap between a non-U.S. person and a U.S. person is executed anonymously on a registered DCM, SEF or FBOT and is cleared, both counterparties will generally be considered to have satisfied Category A Transaction-Level requirements, though the exact scope of the exception is unclear.

¹ The January Order's U.S. Person definition will be in effect until 10/9/13.

² The Six Jurisdictions are Australia, Canada, the European Union, Hong Kong, Japan and Switzerland. To the extent a person established in a jurisdiction other than the Six Jurisdictions becomes registered as a swap dealer or MSP, no timing relief would be available under the Exemptive Order, absent further CFTC action.

APPENDIX C

SUMMARY OF APPLICATION OF SWAP REGULATORY REQUIREMENTS BETWEEN NON-REGISTRANTS*

Counterparty B is:	U.S. Person	Non-U.S. Person that is a Guaranteed or Conduit Affiliate	Non-U.S. Person (not a Guaranteed or Conduit Affiliate)
Counterparty A is:			
U.S. Person	All Non-Registrant requirements; no substituted compliance <ul style="list-style-type: none"> All requirements in effect 	All Non-Registrant requirements; no substituted compliance <ul style="list-style-type: none"> All requirements in effect 	All Non-Registrant requirements; no substituted compliance <ul style="list-style-type: none"> All requirements in effect
Non-U.S. Person that is a Guaranteed or Conduit Affiliate	All Non-Registrant requirements; no substituted compliance <ul style="list-style-type: none"> All requirements in effect 	All Non-Registrant requirements; substituted compliance available for all but large trader reporting <ul style="list-style-type: none"> Large trader reporting, SDR reporting and swap data recordkeeping requirements in effect Clearing, trade execution, and real-time public reporting effective on 10/9/13 <p>If at least one party is a conduit affiliate, different requirements may apply.</p>	Large trader reporting, and the conditions of the inter-affiliate clearing exemption if elected; no substituted compliance <ul style="list-style-type: none"> In effect
Non-U.S. Person (not a Guaranteed or Conduit Affiliate)	All Non-Registrant requirements; no substituted compliance <ul style="list-style-type: none"> All requirements in effect 	Large trader reporting, and the conditions of the inter-affiliate clearing exemption if elected; no substituted compliance <ul style="list-style-type: none"> In effect 	Large trader reporting <ul style="list-style-type: none"> In effect

* Non-Registrant requirements include clearing, trade execution, real-time public reporting, large trader reporting (for clearing members), SDR reporting (including historical reporting) and swap data. If a swap is executed anonymously on a registered DCM or SEF and cleared by a registered DCO, neither party to the swap is required to comply with the Non-Registrant requirements that would otherwise apply, with the exception of large trader reporting, SDR reporting and swap data recordkeeping.

¹ The January Order's U.S. person definition will be in effect until 10/9/13.