



# Commodity Futures Trading Commission

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## Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations

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

### Dodd-Frank Act

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

### “U.S. Person” Interpretation

The definition of U.S. person is largely territorial-based. The definition would include collective investment vehicles - including hedge funds - that are directly or indirectly majority-owned by U.S. persons, or that have their principal place of business in the United States based on the relevant facts and circumstances (focusing principally on whether the senior personnel responsible for either the formation and promotion of the fund or the implementation of the fund’s investment strategy are located in the United States).

A non-U.S. person that is guaranteed by and is an affiliate of a U.S. person is not included in the definition of U.S. person (a “guaranteed affiliate”), but both “guaranteed affiliates” and “conduit affiliates” are treated the same as a U.S. person in certain respects under the Guidance.

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.

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

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

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

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

For purposes of determining whether a non-U.S. person holds swap positions above the MSP thresholds, a non-U.S. person should generally include (1) any swap position between it and a U.S. person, (2) any swap between it and a guaranteed affiliate (but its swap positions where its own obligations thereunder are guaranteed by a U.S. person should be attributed to that U.S. person and not included in the non-U.S. person's determination), and (3) any swap position between another (U.S. or non-U.S.) person and a U.S. person or guaranteed affiliate, where it guarantees the obligations of the other person thereunder. A non-U.S. person may exclude certain transactions from the MSP calculation threshold as further described in the Guidance.

## Transaction-Level and Entity-Level Requirements

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

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

marketing and sales materials under Commission regulations 23.201(b)(3) and 23.201(b)(4) and Large Trader Reporting (“Second Category”).

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

## **Substituted Compliance**

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

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

Each of the 13 categories of requirements – five Entity-level, eight Transaction-level – would be subject to separate determinations of substituted compliance. Substituted compliance does not apply to Large Trader Reporting, i.e., non-U.S. persons that are subject to part 20 would comply with it in the same way that U.S. persons comply. In addition, substituted compliance is generally not expected to be applicable with regard to the Category B Transaction-Level Requirements (i.e., the external business conduct standards).

## **Application of Entity-Level Requirements and Transaction-Level Requirements**

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

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

Under a limited exception, even where there is not a comparable foreign regulatory regime, where a swap is between the foreign branch of a U.S. bank that is swap dealer or MSP and a non-U.S. person (that is not a guaranteed or conduit affiliate), the foreign branch may comply with the transaction-level requirements of the foreign jurisdiction in which it is domiciled or doing business if the aggregate notional value of the swaps of all foreign branches in such countries does not exceed 5% of the aggregate notional value of all the swaps of the U.S. swap dealer, and the U.S.

person maintains records with supporting information, as well as to identify, define, and address any significant risk that may arise from the non-application of the Transaction-Level Requirements. 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.”

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

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

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

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

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

Appendices C through F to the Guidance, which outline the application of the Entity-Level Requirements and Transaction-Level Requirements in various circumstances, are attached. Such Appendices should be read in conjunction with the rest of the Guidance.

## Appendix C – Application of the Entity-Level Requirements to Swap Dealers and MSPs\*

<p><b>U.S. Swap Dealer or MSP (including an affiliate of a non-U.S. person). Also applies when acting through a foreign branch.<sup>1</sup></b></p>	<p>Apply</p>
<p><b>Non-U.S. Swap Dealer or MSP (including an affiliate of a U.S. person).</b></p>	<p>First Category:<sup>2</sup> Substituted Compliance</p> <p>Second Category:<sup>3</sup> Apply for U.S. counterparties; Substituted Compliance for SDR reporting with non-U.S. counterparties that are not guaranteed or conduit affiliates; Substituted compliance (except for Large Trader Reporting) with non-U.S. counterparties<sup>4</sup></p>

**\*The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.**

- <sup>1</sup> Both Entity-Level and Transaction-Level Requirements are the ultimate responsibilities of the U.S.-based swap dealer or MSP.
- <sup>2</sup> First Category is capital adequacy, Chief Compliance Officer, risk management, and swap data recordkeeping (except Commission regulations 23.201(b)(3) and (4)).
- <sup>3</sup> Second Category is SDR Reporting, certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials (Commission regulations 23.201(b)(3) and (4)), and Large Trader Reporting.
- <sup>4</sup> Substituted compliance does not apply to Large Trader Reporting, *i.e.*, non-U.S. persons that are subject to part 20 would comply with it in the same way that U.S. persons comply. With respect to the SDR Reporting requirement, the Commission may make substituted compliance available only if direct access to swap data stored at a foreign trade repository is provided to the Commission.

## Appendix D – Application of the Category A Transaction-Level Requirements to Swap Dealers and MSPs\*

(Category A includes (1) Clearing and swap processing; (2) Margining and segregation for uncleared swaps; (3) Trade Execution; (4) Swap trading relationship documentation; (5) Portfolio reconciliation and compression; (6) Real-time public reporting; (7) Trade confirmation; and (8) Daily trading records).

	<b>U.S. Person (other than Foreign Branch of U.S. Bank that is a Swap Dealer or MSP)</b>	<b>Foreign Branch of U.S. Bank that is a Swap Dealer or MSP</b>	<b>Non-U.S. Person Guaranteed by, or Affiliate Conduit<sup>1</sup> of, a U.S. Person</b>	<b>Non-U.S. Person <u>Not</u> Guaranteed by, and Not an Affiliate Conduit<sup>1</sup> of, a U.S. Person</b>
<b>U.S. Swap Dealer or MSP (including an affiliate of a non-U.S. person)</b>	Apply	Apply	Apply	Apply
<b>Foreign Branch of U.S. Bank that is a Swap Dealer or MSP</b>	Apply	Substituted Compliance	Substituted Compliance <sup>2,3</sup>	Substituted Compliance <sup>2</sup>
<b>Non-U.S. Swap Dealer or MSP (including an affiliate of a U.S. person)</b>	Apply	Substituted Compliance	Substituted Compliance <sup>3</sup>	Do Not Apply

**\*The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.**

<sup>1</sup> 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.

- <sup>2</sup> Under a limited exception, even where there is not a comparable foreign regulatory regime, where a swap is between the foreign branch of a U.S. bank that is swap dealer or MSP and a non-U.S. person (that is not a guaranteed or conduit affiliate), the foreign branch may comply with the transaction-level requirements of the foreign jurisdiction in which it is domiciled or doing business if the aggregate notional value of the swaps of all foreign branches in such countries does not exceed 5% of the aggregate notional value of all the swaps of the U.S. swap dealer, and the U.S. person maintains records with supporting information, as well as to identify, define, and address any significant risk that may arise from the non-application of the Transaction-Level Requirements. 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.”

**Notes:**

- <sup>1</sup> The swap trading relationship documentation requirement applies to all transactions with registered swap dealers and MSPs.
- <sup>2</sup> Participation in multilateral portfolio compression exercises is mandatory for dealer to dealer trades.

**Appendix E – Application of the Category B Transaction-Level Requirements to Swap Dealers and MSPs\***

(Category B is External Business Conduct Standards).

	<b>U.S. Person (other than Foreign Branch of U.S. Bank that is a Swap Dealer or MSP)</b>	<b>Foreign Branch of U.S. Bank that is a Swap Dealer or MSP</b>	<b>Non-U.S. Person Guaranteed by, or Affiliate Conduit<sup>1</sup> of, a U.S. Person</b>	<b>Non-U.S. Person <u>Not</u> Guaranteed by, and Not an Affiliate Conduit<sup>1</sup> of, a U.S. Person</b>
<b>U.S. Swap Dealer or MSP (including an affiliate of a non-U.S. person)</b>	Apply	Apply	Apply	Apply
<b>U.S. Swap Dealer or MSP (when it solicits and negotiates through a foreign subsidiary or affiliate)</b>	Apply	Do Not Apply	Do Not Apply	Do Not Apply
<b>Foreign Branch of U.S. Bank that is a Swap Dealer or MSP</b>	Apply	Do Not Apply	Do Not Apply	Do Not Apply
<b>Non-U.S. Swap Dealer or MSP (including an affiliate of a U.S. person)</b>	Apply	Do Not Apply	Do Not Apply	Do Not Apply

**\*The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.**

<sup>1</sup> 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.

**Appendix F – Application of Certain Entity-Level and Transaction-Level Requirements to Non-Swap Dealer/Non-MSP Market Participants\***

(The relevant Dodd-Frank requirements are those relating to: clearing, trade execution, real-time public reporting, Large Trader Reporting, SDR Reporting and swap data recordkeeping).

	<b>U.S. Person (including an affiliate of non-U.S. person)</b>	<b>Non-U.S. Person Guaranteed by, or Affiliate Conduit<sup>1</sup> of, a U.S. Person</b>	<b>Non-U.S. Person <u>Not</u> Guaranteed by, or Affiliate Conduit<sup>1</sup> of, by U.S. Person</b>
<b>U.S. Person (including an affiliate of non-U.S. person)</b>	Apply	Apply	Apply
<b>Non-U.S. Person Guaranteed by, or Affiliate Conduit<sup>1</sup> of, a U.S. person</b>	Apply	Substituted Compliance <sup>2,3,4</sup>	Do Not Apply <sup>4</sup>
<b>Non-U.S. Person <u>Not</u> Guaranteed by, or Affiliate Conduit<sup>1</sup> of, U.S. Person</b>	Apply	Do Not Apply <sup>4</sup>	Do Not Apply <sup>4</sup>

**\*The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.**

<sup>1</sup> 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.

<sup>2</sup> Substituted compliance does not apply to Large Trader Reporting, *i.e.*, non-U.S. persons that are subject to part 20 would comply with it in the same way that U.S. persons comply. With respect to the SDR Reporting requirement, the Commission may permit substituted compliance only if direct access to swap data stored at a foreign trade repository is provided to the Commission.

- <sup>3</sup> Large Trader Reporting rules apply if one or both of the counterparties is a non-U.S. clearing member or is otherwise a non-U.S. person that is subject to Large Trader Reporting.