

CFTC Proposes Guidance on Cross-Border Application of Title VII of the Dodd-Frank Act

On June 29, 2012, the Commodity Futures Trading Commission (the “**Commission**”) issued proposed interpretive guidance regarding the cross-border application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank**”) (the “**Proposed Guidance**”). The Proposed Guidance interprets section 722(d) of Dodd-Frank, which provides that Title VII does not apply to activities outside the United States unless they have a direct and significant connection with, or effect on, U.S. commerce or contravene Commission anti-evasion rules. Additionally, also on June 29, 2012, the Commission issued a proposed exemptive order to delay the effectiveness of certain provisions of Title VII (the “**Proposed Order**”). Both the Proposed Guidance and the Proposed Order were adopted via a seriatim vote of the Commission. All five Commissioners voted in favor, but Commissioners O’Malia and Sommers offered sharp criticism of the Proposed Guidance in their concurring statements.¹ Comments on the Proposed Guidance are due 45 days after publication of the Proposed Guidance in the Federal Register and comments on the Proposed Order are due 30 days after publication of the Proposed Order in the Federal Register.

The Proposed Guidance would address the following:

- The definition of the term “U.S. person” for purposes of whether a person, or a person’s counterparties, would be subject to Title VII of Dodd-Frank and Commission regulations thereunder;
- The circumstances under which a non-U.S. person would be required to register as a swap dealer or major swap participant (“**MSP**”);
- The classification of Commission requirements as either “entity-level” or “transaction-level” for purposes of how they apply to non-U.S. registrants and activity, including the circumstances under which a registrant would be

¹ For example, Commissioner O’Malia expressed the view that the Proposed Guidance potentially exceeds the scope of the Commission’s authority, inconsistently applies Section 722(d) and impinges on considerations of international comity. Commissioner Sommers expressed a concern that the Commission’s approach is not sufficiently coordinated with foreign and other domestic regulators. Both Commissioner O’Malia and Commissioner Sommers suggested that the Proposed Guidance should have been released as a rulemaking, rather than interpretive guidance, especially since guidance does not require (and the Commission did not undertake) a cost-benefit analysis of the applicable requirements.

eligible for substituted compliance by compliance with comparable foreign regulations; and

- The process for non-U.S. persons to seek recognition of substituted compliance when eligible.

The Proposed Order would delay compliance with transaction-level requirements by up to a year for swaps by non-U.S. swap dealers and MSPs, and the foreign branches of U.S. swap dealers and MSPs, with non-U.S. persons. It also would delay compliance with entity-level requirements for up to a year for non-U.S. swap dealers and MSPs, and until January 1, 2013 for U.S. swap dealers and MSPs, in each case subject to certain exceptions.

The below Memorandum contains a more detailed summary and analysis of the Proposed Guidance and the Proposed Order. It is followed by an Appendix containing a matrix summarizing the treatment and requirements applicable to various categories of U.S. and non-U.S. swap dealers.

I. “U.S. Person” Definition

- A. The Proposed Guidance would establish a broad definition of “U.S. person,” a previously undefined term that is used in a number of contexts in the Commission’s regulations to describe the scope of applicable rules.
- B. The proposed definition of “U.S. person” would include, but not be limited to, persons or entities satisfying any of the following seven prongs:
 1. Any natural person who is a resident of the United States;
 2. Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is either:
 - a. Organized or incorporated under the laws of the United States or having its principal place of business in the United States (“legal entity”); or
 - i *The Commission confirms that a foreign branch or agency of such a U.S. person would be covered as a part, or an extension, of the U.S. person. Conversely, it also appears that the U.S. branch or agency of a non-U.S. person is considered a part of the non-U.S. person.*

- ii *Under this prong of the definition, any U.S.-domiciled fund would be captured as a U.S. person, regardless of the domicile or location of its manager or investors.*
 - iii *This prong of the definition would also appear to capture supranational institutions of which the United States is a member (e.g., the World Bank).*
- b. In which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person;
- i *The Commission separately clarifies that a foreign affiliate or subsidiary of a U.S. person would not itself be considered a U.S. person, even where such an affiliate or subsidiary has certain or all of its swap-related obligations guaranteed by the U.S. person (although it requests comment on whether this should be the case). As a result, it would appear that this prong of the definition is not intended to cover guaranteed foreign subsidiaries, but rather a foreign entity having unlimited liability or otherwise providing for recourse to one or more U.S. owners.*
 - ii *The Commission proposes no de minimis standard for the extent of the recourse/liability of the U.S. owners.*
 - iii *The Commission requests comment on whether a non-U.S. person who is controlled or under common control with a U.S. person should also be considered a U.S. person.*
 - iv *Although foreign affiliates of (including persons guaranteed by) a U.S. affiliate are not U.S. persons under the proposed definition, they are, under a variety of circumstances, either treated as a U.S. person or subject to Dodd-Frank (or comparable foreign requirements), both as registrants and as counterparties to transactions with U.S. and non-U.S. persons and registrants.*
3. Any individual account (discretionary or not) where the beneficial owner is a U.S. person;

As a result of this prong, accounts of U.S. persons managed on a discretionary basis by non-U.S. managers would be considered U.S. persons.

4. Any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s);
 - a. *This prong of the definition would cover pools the operator of which is exempt or otherwise not required to register with the Commission.*
 - b. *It is unclear how the Commission intends for this definition to apply in cases where the ownership composition of the pool changes.*
 - c. *The Commission did not indicate how ownership “directly or indirectly” by U.S. persons would be quantified. The “look through” aspect of the interpretive guidance with respect to non-U.S. funds is a higher threshold than that of the definition of “Non-U.S. Person” in 17 C.F.R. 4.7(a)(iv), but it is not clear how far the look-back to indirect ownership goes.*
 - d. *There is no exception for foreign-offered funds that exclude initial sales to U.S. persons, including those listed on foreign exchanges.*

5. Any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the Commodity Exchange Act (the “CEA”);

Based on Commission interpretation of the jurisdictional scope of commodity pool operator (“CPO”) registration, this prong would appear to cover any pool that either

- a. *is organized in the U.S.,*
- b. *has any U.S. investors,*
- c. *is operated by a U.S. entity, or*

- d. *is operated or administered from within the United States., except for those pools the operator of which is exempt or excluded from CPO registration.*

In each case, without regard to the level of U.S. investment in the pool.

6. A pension plan for the employees, officers or principals of a legal entity with its principal place of business inside the United States; and
 7. An estate or trust, the income of which is subject to U.S. income tax regardless of source.
- C. *The Commission separately proposes the concept of a “conduit” affiliate of a U.S. person which, although not a U.S. person, is, under a variety of circumstances, either treated as a U.S. person or subject to Dodd-Frank (or comparable foreign requirements), both as a registrant and as a counterparty to transactions with U.S. and non-U.S. persons and registrants.*
- D. *Other than in the case of funds, as noted above, no generalized “look-through” approach applies to the U.S. person definition (subject to the “conduit” test noted above and described below and the Commission’s general anti-evasion authority).*

II. Swap Dealer Registration

A. Overview.

1. The Commission, together with the Securities and Exchange Commission (the “SEC”), has published final rulemaking specifying which entities qualify as swap dealers under Title VII (the “**Entity Definitions**”).² Under the Entity Definitions, U.S. persons (interpreted per the Proposed Guidance, as defined above) generally qualify as swap dealers if their swap dealing activity with all counterparties exceeds a specified *de minimis* threshold. Entities that qualify as swap dealers would be required to register as of the effective date of forthcoming final Commission rules further defining

² See generally Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 Fed. Reg. 30596 (May 23, 2012).

the term “swap” and would be subject to a number of additional requirements applicable to registered swap dealers.³

2. Under the Proposed Guidance, the Commission would interpret the swap dealer registration requirement to cover non-U.S. persons by reference to the level of swap dealing activity by them and their non-U.S. affiliates with U.S. persons or that is guaranteed by a U.S. person.

B. Registration Thresholds. A non-U.S. person would be required to register as a swap dealer if:

1. It engages in swap dealing transactions with (i) U.S. persons or (ii) non-U.S. persons where its obligations thereunder are guaranteed by a U.S. person; and
2. The aggregate notional value of all such transactions by such person and such person’s non-U.S. affiliates exceeds the swap dealer *de minimis* threshold (as specified in the Entity Definitions).⁴
 - a. *The basis for excluding swap dealing by U.S. affiliates is unclear, although as a practical matter such affiliates are likely to be subject to swap dealer registration themselves. The Commission requests comment whether the notional value of swap dealing by registered non-U.S. affiliates should also be excluded.*
 - b. *The Commission does not acknowledge (even as a request for comment) the risk-mitigating effects of capital requirements applicable to non-U.S. affiliates whose swap obligations are guaranteed by U.S. parents.*

C. Specific Considerations Regarding Swap Dealer Registration.

1. The location of swap dealing activity with U.S. persons would be irrelevant.

The Commission does not address the application of registration requirements to trading on a swap execution facility or other trading platform – including those on which trading is anonymous – nor to

³ See generally Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613 (Jan. 19, 2012) (the “Registration Rule”).

⁴ See Entity Definitions, 77 Fed. Reg. at 30744.

swaps that are cleared through a U.S. derivatives clearing organization (“DCO”).

2. In determining whether the *de minimis* threshold is met, the notional value of dealing transactions with foreign branches of registered U.S. swap dealers, with guaranteed foreign affiliates of U.S. persons and “conduit” foreign affiliates of U.S. persons would be excluded.
3. A non-U.S. person should first determine whether its swap activities with respect to U.S. persons as counterparties (or swap dealing activities benefitting from a U.S. origin guarantee of the related dealing obligations) qualify as swap dealing, even if the person were engaged in swap dealing with respect to non-U.S. persons as counterparties.
 - a. *The Commission’s proposal would thus enable a non-U.S. swap dealer whose activities in the United States are limited to non-dealing activities to exclude both its non-U.S. dealing activity and its U.S. non-dealing transactions in applying the de minimis test.*
 - b. *The Commission requests comment on whether it would generally be feasible for a non-U.S. person to distinguish swap dealing activities with U.S. persons from swap dealing activities with non-U.S. persons.*
4. Swaps between common majority-owned affiliates would be excluded, consistent with the Entity Definitions. However, if exposure arising from swap dealing activity by a non-U.S. person as principal to non-U.S. counterparties is “indirectly transferred to [a] U.S. person (by way of a back-to-back swap or other arrangement),” then the U.S. person would become subject to swap dealer registration. Similarly, if a foreign affiliate or subsidiary of a U.S. person engages in solicitation or negotiation as agent in connection with swaps entered into by the U.S. person, the U.S. person would be subject to swap dealer registration.
 - a. *The Commission does not reconcile this view of “back-to-back” booking with its exclusion under the Entity Definitions of swaps between majority-owned affiliates.*
 - b. *The Proposed Guidance does not include any thresholds for the scope of the back-to-back activity or any other limiters.*

- c. *It is unclear whether the Commission intends a similar analysis to apply for MSP registration purposes, although presumably it should not given the focus of the MSP definition on credit exposures.*
- d. *It is possible that this approach to registration would require the registration of the U.S. subsidiary of a foreign bank, where the foreign bank enters into transactions outside the United States with non-U.S. counterparties and backs-to-back the market risk arising from swaps in U.S. underliers to the U.S. subsidiary.*
- e. *In addition, the Proposed Guidance could be read to require that, in each of these cases involving agent transactions or back-to-back swaps, both the U.S. and non-U.S. affiliate comply with all applicable Dodd-Frank swap dealer requirements, though it is unclear exactly what Dodd-Frank requirements would be regarded as applicable to the foreign affiliate in this situation.*

- 5. Swap dealer registration would apply to a U.S. person, including its foreign branches and agencies, on an entity-wide basis (subject to the Commission's application of principles of comity).
- 6. Even if a U.S. branch, agency, affiliate or a subsidiary of a non-U.S. person engages in solicitation or negotiation in connection with swaps with U.S. persons entered into by the non-U.S. person, the non-U.S. person would be subject to swap dealer registration.

The Commission does not request comment on issues, such as the registration of a foreign bank's board members as principals, that arise from the registration process itself.

- 7. Similarly, if a foreign affiliate or subsidiary of a U.S. person engages in solicitation or negotiation as agent in connection with swaps entered into by the U.S. person, the U.S. person would be subject to swap dealer registration.

- D. Limited Designation. The Commission confirms that, unless a swap dealer applies for and is granted a limited designation, all of its swap activities would be subject to Title VII, not only the swap activities that trigger the registration requirement. However, the Commission requests comment on how the limited designation provision could be applied with respect to cross-border swap activities.

III. Major Swap Participant Registration

A. Overview.

1. Under the Entity Definitions, U.S. persons qualify as MSPs if their swap positions with all counterparties exceed certain specified thresholds. Entities that qualify as MSPs would be required to register and would be subject to a number of additional requirements applicable to registered MSPs.
2. Under the Proposed Guidance, the Commission would interpret the definition of MSP to include non-U.S. persons by reference to the level of their swap positions, and the positions of other non-U.S. persons whom they guarantee, facing U.S. persons

B. Registration Thresholds. A non-U.S. person would be required to register as an MSP if the aggregate value of the following positions exceeded the MSP thresholds (as specified in the Entity Definitions):⁵

1. Any swap positions between it and a U.S. person, excluding swap positions where the non-U.S. person's obligations are guaranteed by a U.S. person (because those guaranteed positions would be attributed to the U.S. guarantor); and

The Commission did not make the clarification that swaps with foreign branches of U.S. persons are not relevant in the context of MSP registration for non-U.S. counterparties, but instead requested comment on whether doing so would be appropriate in light of the MSP definition's focus on risk as opposed to activities.

2. Any swap positions between another non-U.S. person and a U.S. person, where it guarantees the obligations of the non-U.S. person thereunder.

- a. *This interpretation would appear to subject to MSP registration the non-U.S. parent guarantor of a non-U.S. person's swaps with U.S. persons. The Commission does not address the status of a non-U.S. parent guarantor of a U.S. person. However, in each case, presumably the exclusion from attribution to a parent guarantor for positions held by a registered swap dealer (or other person subject to*

⁵ See 77 Fed. Reg. at 30748.

Commission/SEC capital requirements or a U.S. bank) would still apply.

- b. *A non-U.S. parent guarantor of a swap between two U.S. persons would presumably also include such a swap in determining its MSP status, on the basis of the guidance in the Entity Definitions that a non-dealer/MSP entity's swap positions in general would be attributed to a parent or guarantor to the extent of recourse in connection with the position, except where the guaranteed person is subject to Commission/SEC capital requirements or is a U.S. bank.*
- C. Swap positions between a non-U.S. person and a U.S. person where a U.S. person guarantees the obligations of the non-U.S. person would be attributed to the U.S. person guarantor for MSP purposes, rather than the non-U.S. person.

Again, presumably the exclusion from attribution to a parent guarantor for positions held by a registered swap dealer (or other person subject to Commission/SEC capital requirements or a U.S. bank) would still apply.

IV. Application of Entity- and Transaction-Level Requirements

- A. Overview. Generally, entities registering as swap dealers or MSPs are subject to a host of regulatory requirements under Title VII and the regulations thereunder regardless of whether the entity is a U.S. person or a non-U.S. Person. However, under the Proposed Guidance, non-U.S. registrants would only be subject to transaction-level requirements for swaps with U.S. persons and certain types of non-U.S. persons. In some circumstances, non-U.S. registrants (and the foreign branches of U.S. registrants) also would be eligible for substituted compliance with foreign regulatory regimes for entity-level requirements, transaction-level requirements or both.
- B. Classification of Requirements.
 - 1. Entity-Level Requirements. These would include requirements relating to capital (*e.g.*, proposed Commission Rule 23.101), chief compliance officer (Commission Rule 3.3), risk management, internal conflicts and other duties (Commission Rules 23.600, 23.601, 23.602, 23.03, 23.605, 23.606, 23.607, 23.608 and 23.609), swap data recordkeeping (Commission Rules 23.201 and 203 and Part 46 of the Commission's rules), swap data repository ("**SDR**") reporting (Parts

45 and 46 of the Commission's rules) and large trader reporting (Part 20 of the Commission's rules).

2. Transaction-Level Requirements. These would be divided into two categories:

- a. Risk Mitigation and Transparency. These would include requirements relating to clearing and swap processing (CEA Section 2(h)(1) and Commission Rules 23.506 and 23.610), margin and segregation for uncleared swaps (CEA Sections 4s(e) and (l)), trade execution (CEA Section 2(h)(8)), swap trading relationship documentation (proposed Commission Rule 23.504 (except (b)(2))), portfolio reconciliation and compression (proposed Commission Rules 23.502 and 23.503), real-time public reporting (Part 43 of the Commission's rules), trade confirmation (proposed Commission Rules 23.501 and 504(b)(2)) and daily trading records (Commission Rule 23.202).
- b. Sales Practice. These would include Commission external business conduct standards under CEA Section 4s(h)

3. *The Commission requests comment on whether portfolio reconciliation and compression, clearing, margin and segregation requirements should be categorized as entity-level requirements. It also requests comment on whether real-time public reporting and trade execution requirements should be treated like external business conduct standards.*

4. *Other Commission requirements – such as anti-fraud/anti-manipulation and position limits – would not be covered by the Proposed Guidance.*

C. Treatment as U.S. Persons for Transaction-Level Requirements.

1. Guaranteed Foreign Affiliates. For purposes of whether transactions by a non-U.S. swap dealer or MSP with it would be subject to transaction-level requirements, a non-U.S. person whose obligations are guaranteed or otherwise supported by a U.S. person would effectively be treated as a U.S. person (but the guaranteed transaction may be subject to substituted compliance as described below).

The Commission does not acknowledge the risk-mitigating effects of local capital requirements in this context, either.

2. Conduits. Similar treatment would apply to a non-U.S. person that operates as a “conduit” for a U.S. affiliate. A non-U.S. person would be considered to operate as a “conduit” for swaps in which (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person regularly enters into swaps with one or more U.S. affiliates or subsidiaries of the U.S. person; and (iii) the financials of the non-U.S. person are included in the consolidated financial statements of the U.S. person.
 - a. *The conduit definition does not account for whether the putative conduit is already subject to comparable local regulation, its inter-affiliate swaps are systematic or not, both market and credit risk are transferred, or its inter-affiliate swaps are conducted in compliance with transaction-level requirements as applicable to non-affiliate transactions.*
 - b. *A non-U.S. dealer facing a non-U.S. person will apparently need to ascertain whether its counterparty “regularly enters into swaps with one or more U.S. affiliates or subsidiaries of the U.S. person” in order to be sure it is not facing a conduit.*

D. Application to Particular Types of Market Participants.

1. U.S.-Based Swap Dealer/MSP. A U.S.-based swap dealer/MSP would be subject to all entity-level and transaction-level requirements across all its swap activities, including when acting through a non-U.S. subsidiary or affiliate.
2. Foreign Branch/Agency of U.S.-Based Swap Dealer/MSP.
 - a. The foreign branch/agency of a U.S.-based swap dealer/MSP would be subject to entity-level requirements.
 - b. The foreign branch/agency of a U.S.-based swap dealer/MSP would be subject to all transaction-level requirements for all swaps (other than external business conduct standards with non-U.S. persons), except:
 - i. It would be eligible for substituted compliance by compliance with local requirements for swaps with non-U.S. persons (including U.S.-guaranteed subsidiaries and conduits (but excluding other foreign branches or agencies of U.S. persons));

To be eligible for substituted compliance with respect to clearing, the Commission expects to find comparability of Dodd-Frank with the foreign regulatory regime when (i) the swap is subject to a mandate issued by appropriate government authorities in the home country of the counterparties to the swap, provided that the foreign mandate is “comparable and comprehensive” to the Commission’s mandate and (ii) the swap is cleared through a DCO that is exempt from Commission registration.

- ii It would be eligible for an “emerging market” exception for swaps in countries where foreign regulations are not comparable, provided that (i) the aggregate notional value (expressed in U.S. dollars and measured on a quarterly basis) of the swaps of all foreign branches and agencies in such countries does not exceed 5 percent of the aggregate notional value of all the swaps of the U.S.-based swap dealer and (ii) the U.S.-based swap dealer maintains records with supporting information to verify its eligibility for the exception and to identify, define and address any significant risk that may arise from non-application of the transaction-level requirements.
- *The Commission would include in the numerator all transactions in the relevant jurisdictions and not merely those that fail to comply with Dodd-Frank clearing or margin requirements and would not exclude, for example, transactions with foreign corporate end-users who are hedging.*
 - *The Commission does not identify the penalty for exceeding the 5 percent threshold, although the implication would be that the non-conforming transactions no longer benefit from the exemption and are in violation of Dodd-Frank. It requests comment on the exception, including whether to change the percentage threshold or replace it with an aggregation notional threshold.*

- *While foreign branches of U.S. persons are eligible for substitute compliance and the limited “emerging market” exemption, the Commission indicates that neither treatment will apply in relation to transactions with other foreign branches of U.S. persons, because all such branches are defined as “U.S. persons.”*

3. The Foreign Swap Dealer/MSP Affiliate of a U.S. Person.

- a. The same requirements would apply to the foreign swap dealer/MSP affiliate of a U.S. person whether the foreign affiliate was guaranteed by a U.S. person or not.
- b. Such a foreign affiliate would be subject to entity-level requirements, but would be eligible for substituted compliance.
 - i *To be eligible for substituted compliance with respect to SDR reporting, the Commission would need direct access to the foreign repository.*
 - ii *The Commission is apparently requiring a foreign swap dealer/MSP to comply with SDR reporting and large trader reporting for swaps with all counterparties (U.S. or non-U.S.), subject to substituted compliance in the case of transactions with non-U.S. persons (and it is unclear what substituted compliance would mean in the case of specific reportable positions on U.S. contracts).*
- c. The foreign affiliate would be subject to all transaction-level requirements for swaps with U.S. persons (except foreign branches of U.S. persons).
- d. The foreign affiliate would be subject to transaction-level requirements (except external business conduct) for swaps with non-U.S. persons whose obligations are guaranteed by, or that operate as conduits for, U.S. persons, but would be eligible for substituted compliance with respect to such.

The Commission did not address whether the “emerging market” exception for foreign branches might also be applicable to transaction-level requirements as between

foreign affiliates and such guaranteed or conduit counterparties.

- e. The foreign affiliate would not be subject to transaction-level requirements for swaps with other non-U.S. persons, except (i) swap trading relationship documentation requirements would apply to all transactions with registered swap dealers and MSPs and (ii) participation in multilateral compression exercises would be mandatory for trades with other registered swap dealers.

Under the Proposed Guidance, foreign swap dealer/MSP affiliates of a U.S. person would benefit from greater leeway in complying with foreign rather than U.S. law than foreign branches of a U.S.-based swap dealer/MSP.

- f. As noted above, if a foreign swap dealer affiliate transferred risks arising from its swap dealing to a U.S. affiliate, the U.S. affiliate would be subject to swap dealer registration. In such a case where both affiliates are registered swap dealers, the affiliates would share responsibility for compliance with applicable obligations owed to third-party counterparties.

It is unclear whether the Commission intends for this circumstance to arise solely in the case where a foreign affiliate required to register as a swap dealer for its other activities (e.g., as a result of swaps entered into by it as principal with U.S. persons) acts as agent for its U.S. swap dealer affiliate – in which case, for example, both affiliates would be subject to Dodd-Frank compliance – or also in the case where the foreign affiliate enters into swaps as principal that are back-to-backed to the affiliated U.S. swap dealer (even though in such a case it is hard to see how the U.S. affiliated swap dealer would owe an obligation to the foreign affiliate’s counterparty). As noted above, it is also unclear exactly which Dodd-Frank obligations the Commission regards as applicable to the foreign affiliate in such a circumstance.

- 4. Non-U.S.- Based Swap Dealer/MSP. A non-U.S.- based swap dealer/MSP would receive the same treatment as a foreign swap dealer/MSP affiliate of a U.S. person.

The Commission requests comment on how to address SDR reporting for a non-U.S. swap dealer or MSP that is prohibited from reporting swap transaction data to an SDR as a result of home country privacy laws.

E. Treatment of End Users.

1. U.S.-Based End User. A U.S.-based end user would be subject to clearing, trade execution, real-time public reporting, large trader reporting, SDR reporting and swap data recordkeeping for all of its swaps.
2. Non-U.S.- Based End User. A non-U.S.-based end user, whether or not guaranteed by a U.S. person, would be subject to clearing, trade execution, real-time public reporting, large trader reporting, SDR reporting and swap data recordkeeping only for swaps with U.S. persons.

With respect to large trader reporting, the Commission notes that it would “require non-U.S. persons with reportable positions” to comply, but also indicated that, as to non-dealer/MSPs, transactions with non-U.S. persons were not subject to large trader reporting.

V. Process for Comparability Determinations.

- A. As described above, the Commission may allow substituted compliance by compliance with foreign regulatory regimes for non-U.S. entities in some circumstances. The Proposed Guidance sets forth the general standards and scope the Commission will use in evaluating applications for substituted compliance, although procedural details will need to be further developed by the Commission together with the National Futures Association (the “NFA”).
- B. Standard.
 1. To qualify for substituted compliance, a foreign requirement would need to be determined to be “comparable and comprehensive” by the Commission.
 - a. According to the Commission this would be an “outcome” (presumably as opposed to a “means”) oriented evaluation.
 - b. The Commission stresses that “comparable does not necessarily mean identical.”

c. In making its evaluation, the Commission also would take into account the (i) scope and objectives of the relevant foreign requirement, (ii) the comprehensiveness of those requirements, (iii) comprehensiveness of the foreign regulator's supervisory compliance program, and (iv) authority to support and enforce its oversight of the non-U.S. swap dealer or MSP.

2. The Commission expects that it would enter into a Memorandum of Understanding or similar arrangement with the foreign regulator specific to the context of supervising swap dealers and MSPs, including with respect to procedures for confirming continuing oversight activities, access to information, on-site visits and notifications and procedures in certain situations.

The Commission expressly reserves the right to access records held by non-U.S. swap dealers and MSPs that comply with Dodd-Frank recordkeeping by substituted compliance.

C. Scope. The Commission's determination would be made on an individual requirement basis, rather than the foreign regime as a whole, based on a review in the following areas: (i) capital, (ii) chief compliance officer, (iii) clearing and swap processing, (iv) daily trading records, (v) margin and segregation for uncleared swaps, (vi) large trader reporting, (vii) portfolio reconciliation and compression, (viii) real-time public reporting, (ix) SDR reporting, (x) risk management, and other internal conduct standards (xi) swap data recordkeeping, (xii) swap trading relationship documentation, (xiii) trading confirmations and (xiv) trade execution.

D. Applications.

1. Applications would be made directly to the Commission on behalf of a non-U.S. person in connection with its application to register as a swap dealer or MSP, but could be made by a single non-U.S. person, a group of non-U.S. persons from the same jurisdiction or a foreign regulator.

2. The application would include with specificity all applicable legislation, rules and policies, and the Commission may conduct an on-site exam, consult with the foreign regulator or request an opinion of counsel.

VI. Proposed Exemptive Order

A. On the same day as it released the Proposed Guidance, the Commission published the Proposed Order, which would extend temporary relief to both U.S.- and non-U.S.-based swap dealers with respect to compliance with certain Title VII requirements.

B. General Considerations.

1. Registration as a swap dealer would not be delayed.

The Commission does not address whether non-U.S. persons are to follow the Proposed Guidance in determining whether they must register (even though provisional registration would effectively codify that aspect of the Proposed Guidance before it is finalized).

2. For purposes of the Proposed Order, the definition of “U.S. person” would be the same as defined in the Proposed Guidance, except that for purposes of the Proposed Order a foreign branch of a U.S. bank would be deemed to be a non-U.S. person for purposes of such foreign branch’s obligations as a swap dealer. However, the Commission stated that, as in the Proposed Guidance, a foreign branch must treat a counterparty which is also a foreign branch of a U.S. person as a U.S. person, but sought comment on this aspect of the Proposed Order.

C. U.S.-Based Swap Dealer/MSP. A U.S.-based swap dealer/MSP would be permitted to delay compliance with entity-level requirements until January 1, 2013, except with respect to swap data recordkeeping, SDR reporting and large trader reporting. Transaction-level requirements would apply to all of its swaps.

D. Foreign Branch of U.S.-Based Swap Dealer/MSP. For 12 months following the publication of the Proposed Order in the Federal Register, the foreign branch of a U.S. based swap dealer/MSP would not be subject to transaction-level requirements for swaps with a non-U.S. person counterparty, provided that the swap dealer/MSP submits a compliance plan to the NFA 60 days following its registration addressing how it plans to comply, in good faith, with all applicable transaction-level requirements upon expiration of the exemptive order (including whether it would seek a comparability determination and rely on compliance with local requirements and, if so, a description of such requirements).

- E. Foreign Swap Dealer/MSP (including Guaranteed Foreign Affiliates of U.S. Persons). For 12 months following the publication of the Proposed Order in the Federal Register, a foreign swap dealer/MSP would:
1. Be permitted to delay compliance with respect to Entity-Level Requirements (except SDR reporting and large trader reporting), provided that it that the swap dealer submits a compliance plan to the NFA 60 days following its registration addressing how it plans to comply, in good faith, with all applicable Entity-Level and Transaction-Level Requirements under the CEA (including whether it would seek a comparability determination and rely on compliance with local requirements and, if so, a description of such requirements).
 - a. *In contrast to the Proposed Guidance, the Proposed Order would require a foreign swap dealer/MSP affiliate or subsidiary of a U.S. swap dealer to comply with SDR reporting and large trader reporting for swaps with all counterparties (U.S. and non-U.S.) during the relief period. Other foreign swap dealers would only be subject to such requirements for swaps with U.S. counterparties during the relief period.*
 - b. *Because the Proposed Orders term would begin only upon a swap dealer's registration, it would not cover compliance with large trader reporting during the period between the effectiveness of the Entity Definitions and the registration date.*
 2. Not be subject to transaction-level requirements for swaps with non-U.S. persons.
 3. Be required to comply with transaction-level requirements under the CEA for swaps with U.S. persons.
- F. The Proposed Order would not apply to, among other requirements, anti-fraud and anti-manipulation rules or position limits.

* * *

Please call any of your regular contacts at the firm or any of the partners and counsel listed under Derivatives in the Practices section of our website (www.cgsh.com) if you have any questions.

Appendix: Summary Matrix of Commission Cross-Border Proposals

<i>Type of Entity</i>	<i>When Would Swap Dealer Registration Be Required?</i>	<i>Would Entity-Level Rules⁶ Apply?</i>	<i>Would Transaction-Level Rules⁷ Apply to Swaps with U.S. Persons?⁸</i>	<i>Would Transaction-Level Rules Apply to Swaps with Non-U.S. Persons?</i>	<i>Would Non-U.S. Counterparty Need to Treat the Entity as a U.S. Person for its Own Compliance Purposes?</i>	<i>What Relief Would the Entity Receive under the Proposed Exemption?</i>
<i>U.S. Person</i>	When the entity's swap dealing, together with that of its U.S. <u>and</u> non-U.S. affiliates, exceeds the <i>de minimis</i> threshold	Yes	Yes	Yes	Yes	Delayed compliance with entity-level rules until January 1, 2013, except for recordkeeping and SDR and large trader reporting

⁶ These would include requirements relating to capital (*e.g.*, proposed Commission Rule 23.101), chief compliance officer (Commission Rule 3.3), risk management, internal conflicts and other duties (Commission Rules 23.600, 23.601, 23.602, 23.03, 23.605, 23.606, 23.607, 23.608 and 23.609), swap data recordkeeping (Commission Rules 23.201 and 23.203, Part 46 of the Commission's rules), SDR reporting (Parts 45 and 46 of the Commission's rules) and large trader reporting (Part 20 of the Commission's rules).

⁷ These would include requirements relating to clearing and swap processing (CEA Section 2(h)(1) and Commission Rules 23.506 and 23.610), margin and segregation for uncleared swaps (CEA Sections 4s(e) and (l)), trade execution (CEA Section 2(h)(8)), swap trading relationship documentation (proposed Commission Rule 23.504 (except (b)(2)), portfolio reconciliation and compression (proposed Commission Rules 23.502 and 23.503), real-time public reporting (Part 43 of the Commission's rules), trade confirmation (proposed Commission Rules 23.501 and 23.504(b)(2)), daily trading records (Commission Rule 23.202) and external business conduct (CEA Section 4s(h)).

⁸ The term "U.S. person" would include, but not be limited to: (i) any natural person who is a resident of the United States; (ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States ("legal entity") or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person; (iii) any individual account (discretionary or not) where the beneficial owner is a U.S. person; (iv) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s); (v) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA; (vi) a pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States; and (vii) an estate or trust, the income of which is subject to United States income tax regardless of source.

<i>Type of Entity</i>	<i>When Would Swap Dealer Registration Be Required?</i>	<i>Would Entity-Level Rules⁶ Apply?</i>	<i>Would Transaction-Level Rules⁷ Apply to Swaps with U.S. Persons?⁸</i>	<i>Would Transaction-Level Rules Apply to Swaps with Non-U.S. Persons?</i>	<i>Would Non-U.S. Counterparty Need to Treat the Entity as a U.S. Person for its Own Compliance Purposes?</i>	<i>What Relief Would the Entity Receive under the Proposed Exemption?</i>
<i>Foreign Branch of a U.S. Person</i>	When the entity's swap dealing, together with its U.S. <u>and</u> non-U.S. affiliates, exceeds the <i>de minimis</i> threshold	Yes	Yes	Yes, except for external business conduct. The foreign branch would be eligible for substituted compliance and "emerging market" exception ⁹	Yes, except for purposes of whether the non-U.S. counterparty must register as a swap dealer	Delayed compliance with entity-level rules until January 1, 2013, except for recordkeeping and SDR and large trader reporting Delayed compliance with transaction-level rules for swaps with non-U.S. persons until 12 months after publication of the Proposed Order

⁹ Exception is for swaps in countries where foreign regulations are not comparable, provided that (i) the aggregate notional value (expressed in U.S. dollars and measured on a quarterly basis) of the swaps of all foreign branches and agencies in such countries does not exceed 5 percent of the aggregate notional value of all the swaps of the U.S.-based swap dealer and (ii) the U.S.-based swap dealer maintains records with supporting information to verify its eligibility for the exception and to identify, define and address any significant risk that may arise from non-application of the transaction-level requirements.

Type of Entity	When Would Swap Dealer Registration Be Required?	Would Entity-Level Rules ⁶ Apply?	Would Transaction-Level Rules ⁷ Apply to Swaps with U.S. Persons? ⁸	Would Transaction-Level Rules Apply to Swaps with Non-U.S. Persons?	Would Non-U.S. Counterparty Need to Treat the Entity as a U.S. Person for its Own Compliance Purposes?	What Relief Would the Entity Receive under the Proposed Exemption?
<p><i>Non-U.S. Person (including a non-U.S.-based entity or a subsidiary/affiliate of a U.S. person)</i></p>	<p>When the entity (a) engages in swap dealing transactions with (i) U.S. persons or (ii) non-U.S. persons where <u>the entity's</u> obligations thereunder are guaranteed by a U.S. person and (b) the aggregate notional value of all such transactions by such entity and such entity's <u>non-U.S.</u> affiliates exceeds the <i>de minimis</i> threshold¹⁰</p>	<p>Yes, but eligible for substituted compliance</p>	<p>Yes</p>	<p>No, except for swaps with non-U.S. persons whose swaps are guaranteed by a U.S. person or who operate as a "conduit" for a U.S. person.¹¹ For such swaps, transaction-level rules (except external business conduct) would apply, but substituted compliance would be available¹²</p>	<p>No (although if the entity is guaranteed by a U.S. person or operates as "conduit" for a U.S. person, the entity's non-U.S. swap dealer/MSP counterparties would be subject to transaction-level rules for swaps with the entity as per the previous column)</p>	<p>Delayed compliance with transaction-level rules for swaps with non-U.S. persons <u>and</u> entity-rules (<u>except</u> SDR and large trader reporting) until 12 months after publication of the Proposed Order</p>

¹⁰ If swap dealing activity by such a non-U.S. person as principal to non-U.S. counterparties is "indirectly transferred to [a] U.S. person (by way of a back-to-back swap or other arrangement)," then the U.S. person would become subject to swap dealer registration. In addition, the Proposed Guidance could be read to require that, in a case involving back-to-back swaps with a U.S. affiliate, both the U.S. and non-U.S. affiliate comply with all applicable Dodd-Frank swap dealer requirements.

¹¹ A non-U.S. person would be considered to operate as a "conduit" for swaps in which (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person regularly enters into swaps with one or more U.S. affiliates or subsidiaries of the U.S. person; and (iii) the financials of the non-U.S. person are included in the consolidated financial statements of the U.S. person.

¹² Note that (i) swap trading relationship documentation requirements would apply to all transactions with registered swap dealers and MSPs and (ii) participation in multilateral compression exercises would be mandatory for trades with other registered swap dealers.

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299