

## SEC Adopts Final Rules Regarding the Application of the “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities

On June 25, 2014, the U.S. Securities and Exchange Commission (the “**SEC**”) adopted final rules and guidance (the “**Final SEC Cross-Border Rules**”) regarding the application of the “security-based swap dealer” (“**SBSD**”) and “major security-based swap participant” (“**MSBSP**”) definitions to cross-border security-based swap activities under the Securities Exchange Act of 1934 (the “**Exchange Act**”), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Title VII**”).<sup>1</sup> The Final SEC Cross-Border Rules address only a portion of the comprehensive proposal for the regulation of cross-border security-based swap activities that the SEC issued in May 2013 (the “**SEC Cross-Border Proposal**”).<sup>2</sup> Among other matters, the Final SEC Cross-Border Rules address:

- Key definitions for purposes of delineating the scope of the SBSBD and MSBSP registration requirements, including definitions of “U.S. person,” “foreign branch,” “transaction conducted through a foreign branch,” and “conduit affiliate”;
  - Not only do these definitions determine the scope of the SBSBD and MSBSP registration requirements addressed in the Final SEC Cross-Border Rules, but the SEC also indicated that it may make use of these definitions in its subsequent Title VII rulemakings;
  - However, the Final SEC Cross-Border Rules do not define a “transaction conducted within the United States” or otherwise clarify how transactions between two non-U.S. persons that are arranged, negotiated or executed by personnel or agents located in the United States should be treated for purposes of the SBSBD definition or any

<sup>1</sup> Application of the “Security-based Swap Dealer” and “Major Security-based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities, Release No. 34-72472 (June 25, 2014), available at: <http://www.sec.gov/rules/final/2014/34-72472.pdf> (publication in the Federal Register forthcoming).

<sup>2</sup> Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Release No. 34-69490 (May 1, 2013), 78 Fed. Reg. 30968 (May 23, 2013), available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf>.

other rules. Instead, as discussed below, the SEC indicated that it will solicit comment on and address this issue at a later date;

- Which security-based swap dealing transactions a person must count toward the requirement to register as an SBSB, including the rules for counting transactions by non-U.S. persons with other non-U.S. persons when such transactions are guaranteed by an affiliated U.S. person, as well as rules for aggregating security-based swaps entered into by affiliated entities for purposes of determining SBSB status;
- Which security-based swap positions a person must count toward the requirement to register as an MSBSP, including the rules for counting positions that are guaranteed by a U.S. person;
- Procedures for foreign regulators and market participants to apply for “substituted compliance”;<sup>3</sup> and
- An anti-fraud rule that addresses the scope of the SEC’s cross-border anti-fraud enforcement authority.

In several important ways, including with respect to the definition of “U.S. person” and the treatment of foreign guaranteed and conduit affiliates of U.S. persons, the Final SEC Cross-Border Rules reflect greater consistency with the approach taken by the U.S. Commodity Futures Trading Commission (the “**CFTC**”) in its guidance regarding the cross-border application of Title VII (the “**CFTC Cross-Border Guidance**”)<sup>4</sup> than the SEC had originally proposed in the SEC Cross-Border Proposal. Nonetheless, the SEC’s and CFTC’s approaches to addressing the application of Title VII to cross-border activity continue to differ in certain important respects, as discussed below.<sup>5</sup>

Consistent with the SEC Cross-Border Proposal, the SEC states that the Final SEC Cross-Border Rules take a “territorial approach” to the application of Title VII in the cross-border context for purposes of determining when any of the activities described in the relevant statutory language (e.g., the SBSB definition) should be deemed to occur within the United States. Thus, the SEC appears to have rejected the argument that

<sup>3</sup> As described in the SEC Cross-Border Proposal, “substituted compliance” would permit a party to comply with SEC requirements in one or more areas covered by the Title VII rules by complying instead with some or all of the requirements of a foreign regulatory regime, provided that those requirements have been determined by the SEC to achieve comparable regulatory outcomes.

<sup>4</sup> See Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013), available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf>.

<sup>5</sup> Appendix A of this alert contains a comparison of the Final SEC Cross-Border Rules and the relevant portions of the CFTC Cross-Border Guidance.

application of Title VII should depend solely on the status of the counterparties to a security-based swap transaction, not the location of their activity or the activity of their agents. Yet, as noted above, the Final SEC Cross-Border Rules leave for future consideration by the SEC how transactions between two non-U.S. persons that are arranged, negotiated or executed by personnel or agents located in the United States should be treated for purposes of the SBSB definition. As a result, although the Final SEC Cross-Border Rules are intended to provide market participants with greater clarity regarding the treatment of their cross-border transactions, the deferral of any resolution on this issue leaves many important questions unresolved.

Although the Final SEC Cross-Border Rules will become effective 60 days after their publication in the Federal Register, as a practical matter the rules that address the application of the SBSB and MSBSP definitions and the procedures for submitting substituted compliance requests will not impose any requirements on U.S. or non-U.S. SBSBs or MSBSPs until after the SEC has completed relevant substantive rulemakings applicable to these entities.<sup>6</sup> However, because the SBSB definition takes into account transactions entered into over the 12-month period preceding the effectiveness of the SBSB registration requirement, and the MSBSP definition takes into account all positions open as of the effectiveness of the MSBSP registration requirement, firms may question when they should start counting transactions or positions for purposes of the relevant thresholds in the SBSB and MSBSP definitions. Although the SEC may address this question when adopting the registration rules for these entities, in the meantime firms will need to look to the SEC's more general statements about its approach to the "orderly implementation" of Title VII<sup>7</sup> to draw any inferences as to the SEC's intended approach to the implementation of registration requirements.

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<sup>6</sup> Market participants continue to be temporarily exempt from having to comply with certain other requirements added by or arising from Title VII. See Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, Release No. 34-64678 (Jun. 15, 2011), 76 Fed. Reg. 36287 (Jun. 22, 2011) (clarifying the compliance date for certain requirements added by Title VII, and in some cases providing temporary exemptive relief in connection with those requirements); Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Release No. 34-71485 (Feb. 5, 2014), 79 Fed. Reg. 7731 (Feb. 10, 2014) (extending exemptive relief from certain Exchange Act provisions in connection with Title VII's revision of the Exchange Act definition of "security" to encompass security-based swaps).

<sup>7</sup> See Statement of General Policy on the Sequencing of the Compliance Dates for Rules Applicable to Security-Based Swaps, Release No. 34-37177 (June 11, 2012), 77 Fed. Reg. 35625 (June 14, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-06-14/pdf/2012-14576.pdf>.

## I. Key Definitions

As discussed in greater detail below, whether a transaction or position counts toward a person's SBSB or MSBSP registration thresholds depends greatly on whether the person or its counterparty is a "U.S. person," "foreign branch" or "conduit affiliate," as well as on whether the transaction is "conducted through a foreign branch" of, or "guaranteed" by, a U.S. person. In addition, the SEC is likely to make use of these terms and concepts in delineating the cross-border scope of the remaining portions of its Title VII regime.

### A. "U.S. Person" Definition

The Final SEC Cross-Border Rules define the term "U.S. person" to mean:

- A natural person resident in the United States;
- A partnership, corporation, trust, investment vehicle or other legal person organized, incorporated or established under the laws of the United States or having its principal place of business in the United States;
- An account (whether discretionary or nondiscretionary) of a U.S. person;<sup>8</sup> or
- An estate of a decedent who was a resident of the United States at the time of death.

The "U.S. person" definition expressly excludes the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans, regardless of where they are organized or where their primary place of business is located.

Like the CFTC Cross-Border Guidance, the "U.S. person" definition in the Final SEC Cross-Border Rules includes a foreign branch, agency or office of a U.S. person, although non-U.S. counterparties may exclude from their SBSB and MSBSP registration calculations transactions conducted through foreign branches of U.S. banks that are registered as SBSBs.

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<sup>8</sup> The SEC explains that, where an account is owned by both U.S. and non-U.S. persons, the U.S. person status of the account, as a general matter, should turn on whether any U.S. person owner(s) of the account incur obligations under the security-based swap.

In addition, the Final SEC Cross-Border Rules define the term “principal place of business” in the “U.S. person” definition to mean the location from which the officers, partners or managers of a legal person primarily direct, control and coordinate the activities of the legal person. With respect to an externally managed investment vehicle (e.g., a hedge fund), the Final SEC Cross-Border Rules define the vehicle’s principal place of business as the office from which the manager of the investment vehicle primarily directs, controls and coordinates the investment activities of the investment vehicle.<sup>9</sup> The SEC stated that it expects that outcomes of its final definition of “principal place of business” for such entities will generally be similar to those produced under the CFTC Cross-Border Guidance.

Yet, unlike in the CFTC Cross-Border Guidance, the definition of “U.S. person” in the Final SEC Cross-Border Rules does not include collective investment vehicles (such as commodity pools, pooled accounts, and investment funds) that are majority-owned by U.S. persons. The SEC stated that it recognizes such vehicles give rise to risk to the U.S. financial system, but that the limited risks to U.S. investors created by virtue of their ownership of such vehicles does not justify treating such vehicles as U.S. persons, unless a vehicle’s principal place of business is in the United States. Nor does the SEC’s definition include a legal entity organized, incorporated or established outside the United States that is majority-owned by U.S. persons bearing unlimited responsibility for the obligations and liabilities of the legal entity, although such a legal entity would be considered to have a “guarantee” from its U.S. person owners, absent countervailing factors.

The Final SEC Cross-Border Rules permit a party to rely on a representation from its counterparty that it is not a U.S. person, unless the party knows or has reason to know that the representation is not accurate. The SEC decided against expressly permitting persons to rely solely on representations from counterparties that have been developed for purposes of the CFTC’s “U.S. person” definition, but stated that, depending on how market participants have applied the CFTC’s “U.S. person” tests, they may be able to rely on such representations. In this regard, despite the partial overlap between the CFTC’s “U.S. person” definition and the SEC’s definition, the presence of additional prongs in the CFTC’s definition, as well as the possibility that the fact-intensive “principal place of business” analysis may turn out differently under the different definitions, make it likely that existing representations regarding market participants’ statuses under the CFTC’s definition will not be sufficient in many cases.

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<sup>9</sup> The SEC notes that the mere retention of an asset manager that is a U.S. person, without more, would not necessarily bring an offshore investment vehicle within the “U.S. person” definition. However, the SEC does not provide much additional detail regarding what “more” the asset manager must do to be considered “primarily responsible for directing, controlling and coordinating” the investment activities of the investment vehicle.

*B. Definitions of “Foreign Branch” and “Transaction Conducted Through a Foreign Branch”*

The Final SEC Cross-Border Rules define a “foreign branch” as any branch of a U.S. bank if:

- The branch is located outside the United States;
- The branch operates for valid business reasons; and
- The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.

This definition is largely similar to the definition of “foreign branch” in the CFTC Cross-Border Guidance, but it does not include certain prongs in the CFTC’s definition (e.g., prongs relating to the status of the branch under U.S. banking regulation or the accounting of profits and losses accrued as a result of the branch’s activities).

The Final SEC Cross-Border Rules go on to define a “transaction conducted through a foreign branch” to mean a security-based swap transaction that is arranged, negotiated and executed by a U.S. person through a foreign branch of such U.S. person if:

- The foreign branch is the counterparty to such security-based swap transaction; and
- The security-based swap transaction is arranged, negotiated and executed on behalf of the foreign branch solely by persons located outside the United States.

This definition is also largely similar to the definition for when a swap is “with” a foreign branch for purposes of the CFTC Cross-Border Guidance, but it does not include certain prongs in the CFTC’s definition (e.g., the prong relating to the treatment of the swap for tax purposes).

The Final SEC Cross-Border Rules permit a counterparty trading with a foreign branch to rely on a representation that the security-based swap transaction is arranged, negotiated and executed on behalf of the foreign branch solely by persons located outside the United States, unless the counterparty knows or has reason to know that the representation is not accurate.

Thus, although the SEC has decided not to adopt a general test for transactions conducted within the United States at this time, the foreign branch definition effectively employs such a test that focuses on whether personnel in the United States arranged,

negotiated or executed the transaction. However, unlike in the SEC Cross-Border Proposal, which would have addressed transactions that are “solicited, negotiated, or executed” by persons outside the United States, the Final SEC Cross-Border Rules refer to transactions that are “arranged” in lieu of those that are “solicited” to reflect the fact that a person may engage in dealing activity not only through transactions that the person actively solicits, but also through transactions that result from counterparties reaching out to the person. Apart from this change, however, the SEC did not provide any interpretive guidance regarding what it means to arrange, negotiate or execute a trade outside the United States. Presumably, such guidance will be forthcoming in the SEC’s rulemaking with respect to transactions conducted within the United States, and it may take into account any further actions the CFTC takes to clarify its approach to swaps that are arranged, negotiated or executed by personnel or agents located in the United States.<sup>10</sup>

### C. “Conduit Affiliate” Definition

The Final SEC Cross-Border Rules define “conduit affiliate” to mean a non-U.S. person that:

- Is directly or indirectly majority-owned by one or more U.S. persons;<sup>11</sup> and
- In the regular course of business enters into security-based swaps with one or more other non-U.S. persons, or with foreign branches of U.S. banks that are registered as SBSDs, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. persons (other than U.S. persons that are registered as SBSDs or MSBSPs)<sup>12</sup> who

<sup>10</sup> On November 14, 2013, the CFTC’s Division of Swap Dealer and Intermediary Oversight issued an advisory stating that the CFTC’s “transaction-level” rules apply to swaps between a non-U.S. swap dealer and a non-U.S. person if the swaps are regularly arranged, negotiated or executed by personnel or agents of the non-U.S. swap dealer located in the United States. See CFTC Staff Advisory 13-69 (Nov. 14, 2013). Through a series of no-action letters, the CFTC staff has largely delayed the effectiveness of this advisory until December 31, 2014. See, e.g., CFTC No-Action Letter 14-74 (June 4, 2014). The CFTC has also solicited public comment on the advisory. See Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014), available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2014-00080.pdf>.

<sup>11</sup> For purposes of this definition, “majority-ownership” is satisfied if U.S. persons directly or indirectly own a majority interest in the non-U.S. person, where “majority interest” is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

<sup>12</sup> In the context of other aspects of the Final SEC Cross-Border Rules that turn on whether an entity is a registered SBSD or MSBSP, the SEC adopted exceptions to address the phase-in provisions of the SBSD and MSBSP definitions. However, it did not do so in the “conduit affiliate” definition. As a

are controlling, controlled by or under common control with the person, and enters into offsetting security-based swaps or other arrangements with such U.S. persons to transfer risks and benefits of those security-based swaps.<sup>13</sup>

The definition of “conduit affiliate” in the Final SEC Cross-Border Rules differs in certain ways from the CFTC’s interpretation of what constitutes a “conduit affiliate.” In particular, the CFTC stated that it did not intend that the term “conduit affiliate” would include affiliates of swap dealers, seemingly regardless of whether the particular U.S. affiliate on behalf of which a non-U.S. affiliate enters into swaps is registered as a swap dealer. As a result, the SEC’s definition could potentially cover a wider range of persons than the CFTC’s, even though the SEC stated its belief that no entities currently act as conduit affiliates in the security-based swap market.

#### D. Treatment of Guarantees by U.S. Persons

The Final SEC Cross Border Rules address the issue of guarantees by U.S. persons in the context of both the SBSD and MSBSP definitions. The Final SEC Cross-Border Rules include a security-based swap dealing transaction between a non-U.S. person and a non-U.S. counterparty in the non-U.S. person’s SBSD registration calculation if the non-U.S. counterparty has “rights of recourse” to the non-U.S. person’s U.S. parent or other U.S. affiliate in connection with the transaction. The Final SEC Cross-Border Rules also include a position arising from a security-based swap transaction between a non-U.S. person and a non-U.S. counterparty in the non-U.S. person’s MSBSP registration calculation if the non-U.S. counterparty has “rights of recourse” to a U.S. person with respect to the non-U.S. person’s obligations to the non-U.S. counterparty in connection with the position.

The “rights of recourse” (which might assume different forms, but for simplicity are referred to herein as a “guarantee”) need not necessarily be included within the security-based swap documentation or even otherwise reduced to writing, but the arrangement must provide the counterparty with a conditional or unconditional, legally enforceable right under the laws of the relevant jurisdiction. Thus, under the Final SEC Cross-Border Rules, a guarantee is present if, in connection with the security-based

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result, it is not clear how the SEC would envision applying that definition in circumstances in which the U.S. affiliate on whose behalf a non-U.S. affiliate transacts has triggered SBSD or MSBSP registration but is operating temporarily under the relevant phase-in provision.

<sup>13</sup> The SEC explained that in order to be a “conduit affiliate” it would not be necessary that the non-U.S. person transfer the risks and benefits of all of its security-based swaps, nor that the non-U.S. person transfer all of the risks and benefits of any particular security-based swap. For example, a non-U.S. person could transfer market risk, but not credit risk, arising from its security-based swaps with other non-U.S. persons or foreign branches, or it could use swaps to transfer some of the market risks of such security-based swaps (e.g., by using index credit default swaps to transfer approximately the risks arising from a portfolio of single-name credit default swaps).

swap, the counterparty itself has a legally enforceable right, in whole or in part, to payment or collection from the U.S. person, regardless of the form of the arrangement that provides such a legally enforceable right. As a result, a general keepwell agreement or similar arrangement from a parent to its foreign subsidiary would not necessarily constitute a guarantee for purposes of the Final SEC Cross-Border Rules, unlike in the CFTC Cross-Border Guidance.

*E. Definition of “Transaction Conducted Within the United States”*

As noted above, the Final SEC Cross-Border Rules do not include an element of the SEC Cross-Border Proposal that would have required a non-U.S. person to include a security-based swap transaction entered into in a dealing capacity with another non-U.S. person against its SBSB *de minimis* threshold if the security-based swap was a “transaction conducted within the United States.” Under the SEC Cross-Border Proposal, such conduct also would have triggered the application of certain Title VII transaction-level requirements (e.g., clearing, trade execution and reporting). Given the complex and important issues raised by that proposed requirement, the SEC stated that it expects to solicit additional comment regarding when a transaction between two non-U.S. persons should be included in the relevant SBSB *de minimis* calculations because one or both counterparties are engaged in security-based swap activity within the United States. By delaying any resolution on this issue, the SEC may be in a better position to determine the extent to which it should coordinate its approach to conduct within the United States with the CFTC’s approach, which is currently subject to legal challenge<sup>14</sup> and temporary no-action relief from the CFTC staff.<sup>15</sup>

**II. SBSBs: Calculation of *De Minimis* Threshold**

Under rules jointly adopted by the CFTC and SEC, an entity must register as an SBSB if its security-based swap dealing activities over the preceding 12 months exceed \$3 billion in notional of credit default security-based swaps (subject to a phase-in level of \$8 billion in notional), \$150 million in notional of other types of security-based swaps (subject to a phase-in level of \$300 million in notional) or \$25 million in notional in any type of security-based swap with counterparties that are “special entities.”<sup>16</sup> An entity must generally aggregate all security-based swap dealing activities of its affiliates with its own for purposes of the notional threshold calculations, subject to certain exceptions.

<sup>14</sup> See Complaint, Securities Indus. & Fin. Mkts. Ass’n. v. CFTC, No. 1:13-cv-1916 (D.D.C. filed Dec. 4, 2013).

<sup>15</sup> See note 10, *supra*.

<sup>16</sup> See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” Release No. 34-66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-10562.pdf>.

The Final SEC Cross-Border Rules clarify which security-based swap dealing transactions of U.S. and non-U.S. persons, and their affiliates, count toward the SBSB *de minimis* threshold.

A. Application of SBSB De Minimis Threshold to U.S. Persons

Under the Final SEC Cross-Border Rules, a U.S. person must count all of its security-based swap dealing transactions with U.S. and non-U.S. counterparties (other than majority-owned affiliates)<sup>17</sup> toward its *de minimis* threshold, including transactions conducted through a foreign branch of the U.S. person. In addition, a U.S. person must aggregate with its own security-based swap dealing transactions all those security-based swap dealing transactions engaged in by any of its affiliates, both U.S. and non-U.S., if the affiliate must count the transaction toward its own *de minimis* threshold.<sup>18</sup> Nonetheless, the Final SEC Cross-Border Rules do not require a U.S. person to aggregate the security-based swap dealing activities of an affiliate that is a registered SBSB or an affiliate that has not yet registered because of the phase-in provision in the SBSB definition. Unlike in the SEC Cross-Border Proposal, the Final SEC Cross-Border Rules do not require as a condition of this exception that the security-based swap dealing activities of the person and the registered SBSB be “operationally independent.” Thus, affiliates could share the same back office and risk management operations and still rely on the exception from aggregation.<sup>19</sup>

B. Application of SBSB De Minimis Threshold to Non-U.S. Persons

Under the Final SEC Cross-Border Rules, a non-U.S. person (a “**foreign dealer**”) must count toward its *de minimis* threshold the following:

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<sup>17</sup> Security-based swap transactions between majority-owned affiliates do not constitute security-based swap dealing activity and, therefore, do not count toward the *de minimis* threshold (but see the discussion of “conduit affiliate” below).

<sup>18</sup> Unlike the exception from the SBSB definition for inter-affiliate transactions, which is based on a majority ownership standard, this aggregation requirement covers all affiliates under common “control,” even if such control arises from a combination of other factors (such as board membership, contractual rights and minority ownership) that does not include common majority ownership.

<sup>19</sup> It is not clear whether the SEC will, in connection with subsequent rulemakings, adopt any other rules to address the principal concern underlying its operational independence proposal, which was that registered SBSBs might book transactions to unregistered affiliates in order to evade the rules applicable to a registered SBSB.

- Security-based swap dealing transactions with a U.S. person counterparty (other than transactions with majority-owned affiliates and transactions conducted through the foreign branch of a registered SBSB);<sup>20</sup>
- Security-based swap dealing transactions with a non-U.S. person counterparty (other than a majority-owned affiliate) if such counterparty has legally enforceable rights of recourse against a U.S. affiliate of the foreign dealer in connection with the foreign dealer's obligations under the security-based swap;<sup>21</sup> and
- All security-based swap dealing activity (other than transactions with a majority-owned affiliate) if the foreign dealer acts as a "conduit affiliate."

Unlike the CFTC, the SEC does not require a guaranteed affiliate's non-U.S. counterparty to count guaranteed transactions toward the non-U.S. counterparty's SBSB *de minimis* threshold.<sup>22</sup>

Like U.S. persons, a non-U.S. person must aggregate all security-based swap dealing transactions engaged in by any of its affiliates, regardless of whether that affiliate is a U.S. or non-U.S. person, if the affiliate must count the transaction toward its own *de minimis* threshold. As with U.S. persons, the Final SEC Cross-Border Rules do not require a non-U.S. person to aggregate the security-based swap dealing activities of an affiliate that is a registered SBSB or an affiliate that has not yet registered because of the phase-in provision in the SBSB definition.

In addition, the Final SEC Cross-Border Rules permit a non-U.S. person to exclude a transaction from counting against the SBSB *de minimis* threshold if the non-U.S. person enters into the transaction anonymously on an execution facility or national securities exchange and clears the transaction through a clearing agency. It is unclear

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<sup>20</sup> The Final SEC Cross-Border Rules include an exception from the requirement that the foreign branch be a part of a registered SBSB during the period prior to 60 days after the earliest date on which SBSB registration is required.

<sup>21</sup> The SEC indicated that its approach to dealer registration for guaranteed affiliates may be more targeted than the CFTC's, noting that the CFTC Cross-Border Guidance "appears to broadly opine that non-U.S. persons who receive any express guarantee from a U.S. affiliate should, as a general matter, count all of their dealing activity against the *de minimis* thresholds, regardless of whether a counterparty has recourse against the U.S. person in connection with the swap." Final SEC Cross-Border Rules at p. 134. However, the SEC's reading of the CFTC Cross-Border Guidance does not appear to take into account other statements in the CFTC Cross-Border Guidance, or the CFTC's proposed cross-border guidance from July 2012, that suggest a transactional, rather than an entity-based, approach to transaction counting.

<sup>22</sup> For this reason, the SEC does not need to provide non-U.S. counterparties an exception, as the CFTC does, from counting transactions with guaranteed affiliates that are registered SBSBs.

whether this exception will apply to transactions entered into anonymously and cleared within the United States after the SEC provides guidance regarding conduct in the United States.

### **III. MSBSPs: Calculation of Position and Exposure Thresholds**

The SEC adopted rules jointly with the CFTC that provide that a market participant will be deemed to be a “major security-based swap participant” if its security-based swap positions exceed certain “substantial position” and “substantial counterparty exposure” thresholds.<sup>23</sup>

Under the Final SEC Cross-Border Rules, U.S. persons must count all of their security-based swap positions when determining whether they are MSBSPs. Non-U.S. persons must count the following positions against the MSBSP thresholds:

- Positions arising from security-based swap transactions with U.S. person counterparties (other than positions arising from transactions with majority-owned affiliates and transactions conducted through the foreign branch of a registered SBSB);<sup>24</sup>
- Positions arising from security-based swap transactions with a counterparty (other than a majority-owned affiliate) that has rights of recourse against a U.S. person in connection with the non-U.S. person’s obligation under the security-based swap, regardless of whether the U.S. person is affiliated with the non-U.S. person; and
- All positions arising from security-based swap transactions (other than transactions with majority-owned affiliates), if a non-U.S. person acts as a “conduit affiliate.”

In addition, subject to the exception noted below, the Final Cross-Border Rules require a person to attribute the security-based swap positions it guarantees to itself for MSBSP calculation purposes in the following manner:

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<sup>23</sup> See note 16, *supra*.

<sup>24</sup> The Final SEC Cross-Border Rules include an exception from the requirement that the foreign branch be a part of a registered SBSB during the period prior to 60 days after the earliest date on which SBSB registration is required. However, it is not clear how market participants are to determine whether legacy positions entered into with a foreign branch were “conducted through” the foreign branch in circumstances where the parties did not track whether personnel located in the United States arranged, negotiated or executed the security-based swap on behalf of the foreign branch.

- A U.S. person that provides a guarantee of the security-based swap obligations of a non-U.S. person must attribute all of that non-U.S. person's security-based swap positions that the U.S. person guarantees;<sup>25</sup>
- A non-U.S. person that provides a guarantee of the security-based swap obligations of a U.S. person must attribute all of the U.S. person's security-based swap positions that it guarantees; and
- A non-U.S. person that provides a guarantee of the security-based swap obligations of another non-U.S. person must attribute only the guaranteed security-based swap positions arising from transactions with U.S.-person counterparties.

The Final SEC Cross-Border Rules include an exception from these attribution requirements for any guaranteed positions entered into by a person if the person is subject to Basel capital standards, to capital regulation by the SEC or the CFTC (for example, as a registered SBSD or swap dealer),<sup>26</sup> or is regulated as a bank in the United States.

Unlike the CFTC, the SEC does not require a non-U.S. person that has rights of recourse against a U.S. person to include that position in its major participant threshold calculations, arguing that the inability of that non-U.S. person counterparty to pay what it owes to its guaranteed non-U.S. counterparty pursuant to a security-based swap will generally not pose risk to the U.S. financial system because it will not trigger the obligation of the U.S. guarantor.

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<sup>25</sup> Notably, the SEC's approach requires both the U.S. person guarantor and the non-U.S. person whose obligations it guarantees to count the same set of guaranteed security-based swap positions against their respective MSBSP thresholds, although registration of the guaranteed non-U.S. person as an SBSD or MSBSP would generally eliminate the attribution requirement.

Also, the SEC reiterated its interpretation that a U.S. person that provides a guarantee of the security-based swap obligations of another U.S. person must attribute the other U.S. person's security-based swap positions that it guarantees to itself for MSBSP calculation purposes unless the guaranteed U.S. person is subject to capital regulation by the SEC or CFTC or is regulated as a bank in the United States.

<sup>26</sup> It is unclear how the SEC intends for this exception to the attribution requirements to apply in circumstances in which the guaranteed entity will become subject to capital requirements as an SBSD or MSBSP, but is not yet subject to those requirements (either because the SEC's capital requirements are not yet effective or because the guaranteed entity is operating under the phase-in provisions of the SBSD or MSBSP definition).

#### **IV. Substituted Compliance Process**

The Final SEC Cross-Border Rules adopt procedures for parties to apply for substituted compliance, which would permit market participants to comply with U.S. requirements by complying with foreign requirements. Like the CFTC, the SEC now permits both foreign regulators and market participants to apply for substituted compliance determinations. The Final SEC Cross Border Rules also require the SEC to publish a complete substituted compliance application for public comment before taking final action on the request. However, the SEC did not address the availability of “substituted compliance” with respect to any Title VII requirements relating to security-based swaps or provide guidance regarding the standard the SEC will use in making substituted compliance determinations.

#### **V. The Anti-Fraud Rule**

The Final SEC Cross-Border Rules also include an anti-fraud rule that addresses the scope of the SEC’s cross-border anti-fraud civil enforcement authority under Section 929P of the Dodd-Frank Act (the “*Morrison* fix”), clarifying that the SEC believes the anti-fraud authority applies where sufficient conduct in furtherance of the fraud occurs, or sufficient effects of the fraud are felt, within the United States.

#### **VI. Next Steps**

The Final SEC Cross-Border Rules do not address the cross-border application of the substantive obligations applicable to SBSDs and MSBSPs (e.g., business conduct standards, recordkeeping and reporting, clearing and trade execution, or margin and capital requirements), the classification of these requirements as “entity-level” or “transaction-level,” the circumstances in which market participants will be eligible for substituted compliance with respect to these requirements, or the circumstances in which non-U.S. security-based swap exchanges, execution facilities, clearing agencies or data repositories must register with the SEC. Instead, the SEC indicated that it will address these cross-border issues in subsequent rulemakings relating to the underlying substantive requirements.

In this regard, Chair White indicated that she has asked the staff to advance their recommendations on the remaining rules in parallel, guided by the Commission’s 2012 “roadmap” for implementing Title VII.<sup>27</sup> Consistent with that roadmap, Chair White said that the SEC will next look to consider a recommendation on security-based swap transaction reporting and the registration and regulation of security-based swap data

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<sup>27</sup> See note 7, *supra*.

repositories.<sup>28</sup> Elsewhere Chair White has indicated that she also expects the SEC to consider the application of Title VII's mandatory clearing requirement to single-name credit default swaps, starting with those that were first cleared prior to the enactment of Title VII.<sup>29</sup>

\* \* \*

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<sup>28</sup> See Chair Mary Jo White, Opening Statement on the Adoption of Cross-Border Securities-Based Swap Rules under Title VII of the Dodd-Frank Act, Washington, D.C. (June 25, 2014), *available at*: <http://www.sec.gov/News/Speech/Detail/Speech/1370542159253#.U68Y4c9OWew>.

<sup>29</sup> See Chair Mary Jo White, Testimony on "Oversight of Financial Stability and Data Security" Before the United States Senate Committee on Banking, Housing, and Urban Affairs (Feb. 6, 2014), *available at*: <http://www.sec.gov/News/Testimony/Detail/Testimony/1370540757488#.U68ans9OWew>.

## Appendix A: Comparison of SEC and CFTC Cross-Border Approaches

The table below is intended to provide a high-level comparison of the Final SEC Cross-Border Rules and the CFTC Cross-Border Guidance. It is summary in nature, details have been omitted that may prove important in particular cases, and the description should not be viewed as a source of definitive legal guidance.

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
<b><u>“U.S. Person” Definition</u></b>			
<b>“U.S. Person” Definition</b>	<p>“U.S. person” is defined to mean any of the following:</p> <ol style="list-style-type: none"> <li>Any natural person resident in the U.S.;</li> <li>Any partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the U.S. or having its principal place of business in the U.S.;</li> <li>Any account (whether discretionary or non-discretionary) of a U.S. person; or</li> <li>Any estate of a decedent who was a resident of the United States at the time of death.</li> </ol>	<p>“U.S. person” is defined to include, but not be limited to, the following:</p> <ol style="list-style-type: none"> <li>Any natural person who is a resident of the United States;</li> <li>Any estate of a decedent who was a resident of the United States at the time of death;</li> <li>Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (4) or (5) below) (a “legal entity”), in each case that is organized or incorporated under the laws of the United States or having its principal place of business in the United States;</li> </ol>	<p>To determine U.S. person status of funds, in addition to a principal place of business test, the CFTC imposes an ownership test that treats funds majority-owned by U.S. persons as U.S. persons. The SEC does not.</p> <p>The SEC’s definition, unlike the CFTC’s definition, does not include separate prongs for pension plans, trusts, or foreign legal entities majority-owned by U.S. persons with unlimited responsibility for the legal entities’ obligations and liabilities.</p> <p>The CFTC has indicated that supranational organizations are excluded from U.S. person status for certain purposes. The SEC expressly excludes certain supranational organizations from the “U.S. person” definition.</p>

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
<p><b>“U.S. Person” Definition (cont.’d)</b></p>	<p>For purposes of this definition, “principal place of business” means the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle.</p> <p>U.S. person does not include the following international organizations: the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.</p>	<ol style="list-style-type: none"> <li>4. Any pension plan for the employees, officers or principals of a legal entity described in prong (3), unless the pension plan is primarily for foreign employees of such entity;</li> <li>5. Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;</li> <li>6. Any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (3) and that is majority-owned by one or more persons described in prong (1), (2), (3), (4) or (5), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;</li> </ol>	<p>Both agencies characterize a foreign branch or agency of a U.S. person as a U.S. person.</p> <p>Both the CFTC and SEC generally allow reasonable reliance on counterparty representations with respect to the counterparty’s status as a U.S. person.</p>

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
“U.S. Person” Definition (cont.’d)		<p>7. Any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (1), (2), (3), (4) or (5) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and</p> <p>8. Any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (1), (2), (3), (4), (5), (6) or (7).</p>	
<b><u>Dealer Registration</u></b>			
<b>Transactions that Are Considered in Determining Dealer Registration Obligations</b>	<p>The following transactions count toward a person’s <i>de minimis</i> threshold in determining whether it must register as an SBSD:</p> <ul style="list-style-type: none"> <li>For a U.S. person, all security-based swap dealing transactions (including transactions conducted through a foreign branch);</li> </ul>	<p>The following transactions count toward a person’s <i>de minimis</i> threshold in determining whether it must register as a swap dealer (“SD”):</p> <ul style="list-style-type: none"> <li>For a U.S. person (including a foreign branch), guaranteed affiliate or conduit affiliate, all swap dealing transactions; and</li> </ul>	<p>The CFTC and SEC both count transactions by guaranteed and conduit affiliates toward the <i>de minimis</i> threshold, but they do so in slightly different ways. See the discussion of guarantees and conduit affiliates below.</p>

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
<p><b>Transactions that Are Considered in Determining Dealer Registration Obligations (cont.'d)</b></p>	<ul style="list-style-type: none"> <li>For a non-U.S. person (other than a "conduit affiliate"), security-based swap dealing transactions (a) with a U.S. person (other than a transaction conducted through a foreign branch of a registered SBSB or any foreign branch prior to 60 days after the effective date of when SBSB registration is first required) and (b) with a non-U.S. person counterparty if such counterparty has rights of recourse against a U.S. affiliate of the non-U.S. person in connection with the non-U.S. person's obligations; and</li> <li>For a "conduit affiliate," all security-based swap dealing transactions.</li> </ul> <p>The SEC provides an exclusion that permits a non-U.S. person to exclude a security-based swap transaction from determining whether it must register as an SBSB if the person enters into the transaction anonymously on an execution facility or national securities exchange and clears the transaction through a clearing agency. In addition, under existing SEC rules, security-based swaps with majority-owned affiliates are excluded.</p>	<ul style="list-style-type: none"> <li>For a non-U.S. person that is not a guaranteed or conduit affiliate, (a) swap dealing transactions with U.S. persons (other than foreign branches of a U.S. SD); and (b) swap dealing transactions with guaranteed affiliates, excluding guaranteed affiliates that are: (i) SDs, (ii) affiliated with an SD and acting pursuant to the SD <i>de minimis</i> exception or (iii) guaranteed by a non-financial entity. A non-U.S. person that is not a guaranteed or conduit affiliate may also exclude any cleared swap transactions it enters into anonymously on a registered designated contract market, swap execution facility or foreign board of trade.</li> <li>In addition, under existing CFTC rules, swaps with majority-owned affiliates are excluded.</li> </ul>	

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
<b>Aggregation</b>	The SEC requires aggregation for purposes of the SBSD <i>de minimis</i> calculation of all security-based swap transactions of commonly-controlled affiliates that would otherwise count for purposes of the <i>de minimis</i> calculations as per the above row, <u>except</u> transactions of an affiliate that is registered as an SBSD.	The CFTC requires aggregation for purposes of the SD <i>de minimis calculation</i> of all swap transactions of commonly-controlled affiliates that would otherwise count for purposes of the <i>de minimis</i> calculations as per the above row, <u>except</u> transactions of an affiliate that is registered as an SD.	The agencies' approaches on aggregation are consistent.
<b>Treatment of Guarantees</b>	The SEC requires a non-U.S. person to include security-based swap dealing transactions in which its counterparty has rights of recourse against a U.S. affiliate of the non-U.S. person as part of the non-U.S. person's SBSD <i>de minimis</i> calculation.	The CFTC requires a guaranteed affiliate (a non-U.S. person that is an affiliate of a U.S. person and that is guaranteed by a U.S. person) to include all of its swap dealing transactions as part of its SD <i>de minimis</i> calculation; however, it appears that an entity should only be considered a "guaranteed affiliate" with respect to the swap transactions for which its obligations are guaranteed by a U.S. person.	<p>Although their approaches to guaranteed affiliates are similar, the SEC has a narrower conception of what constitutes a guarantee than the CFTC has. Unlike the CFTC, the SEC does not treat general keepwell agreements or similar arrangements from a parent to its foreign subsidiary as guarantees unless they provide a counterparty legally enforceable rights of recourse to the parent.</p> <p>In addition, unlike the CFTC, the SEC does not require a non-U.S. counterparty to count a security-based swap dealing transaction with a guaranteed affiliate toward its <i>de minimis</i> threshold (although the guaranteed affiliate would have to count the transaction toward its <i>de minimis</i> threshold if the transaction was in connection with its dealing activity).</p>

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
<b>Conduit Affiliates</b>	<p>The SEC requires a conduit affiliate to count all of its security-based swap dealing transactions toward its SBSD <i>de minimis</i> calculation.</p> <p>The SEC defines “conduit affiliate” to mean a person, other than a U.S. person, that:</p> <ul style="list-style-type: none"> <li>• Is directly or indirectly majority-owned by one or more U.S. persons; and</li> <li>• In the regular course of business enters into security-based swaps with one or more other non-U.S. persons, or with foreign branches of U.S. banks that are registered as SBSDs, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. persons (other than U.S. persons that are registered as SBSDs or MSBSP) who are controlling, controlled by or under common control with the person, and enters into offsetting security-based swaps or other arrangements with such U.S. persons to transfer risks and benefits of those security-based swaps.</li> </ul>	<p>The CFTC requires a conduit affiliate to count all of its swap dealing transactions toward its SD <i>de minimis</i> calculation.</p> <p>The CFTC defines “conduit affiliate” to mean:</p> <ul style="list-style-type: none"> <li>• The non-U.S. person is a majority-owned affiliate of a U.S. person;</li> <li>• The non-U.S. person is controlling, controlled by or under common control with the U.S. person;</li> <li>• The financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and</li> <li>• 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 its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates.</li> </ul>	<p>The SEC’s definition of “conduit affiliate” differs in certain ways from the CFTC’s interpretation of what constitutes a “conduit affiliate.”</p> <p>For example, unlike the SEC, the CFTC’s approach takes into account whether the conduit affiliate’s financial results are consolidated in the U.S. person’s financial statements.</p> <p>In addition, the CFTC states that it did not intend that the term “conduit affiliate” would include affiliates of swap dealers, whereas the SEC only excludes the specific transactions with registered SBSDs from consideration in determining whether an entity is a “conduit affiliate.”</p>

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
<b><u>Major Participant Registration</u></b>			
<b>Positions that Are Considered in Determining Major Participant Registration Obligations</b>	<p>A U.S. person must include in its MSBSP calculations security-based swap positions with all counterparties.</p> <p>A non-U.S. person must include in its MSBSP calculations the following security-based swap positions:</p> <ul style="list-style-type: none"> <li>• Positions arising from transactions with U.S. persons (other than positions arising from transactions conducted through a foreign branch of a registered SBSB or any foreign branch prior to 60 days after the effective date of when SBSB registration is first required);</li> <li>• Positions arising from transactions with a counterparty that has rights of recourse against a U.S. person in connection with the non-U.S. person's obligation under the security-based swap; and</li> <li>• All positions if the non-U.S. person acts as a "conduit affiliate."</li> </ul> <p>In addition, under existing SEC rules, security-based swaps with majority-owned affiliates are excluded.</p>	<p>A U.S. person must include in its major swap participant ("MSP") calculations swap positions with all counterparties.</p> <p>Guaranteed and conduit affiliates of a U.S. person must include swap positions with all counterparties, though possibly conduit affiliates can take advantage of the exceptions described in the next paragraph.</p> <p>A non-U.S. person must include its swap positions with U.S. persons and guaranteed affiliates, except that (a) a non-U.S. person that is not a guaranteed affiliate and <u>is</u> a financial entity excludes swap positions with foreign branches of U.S. SDs and guaranteed affiliates that are SDs, provided that such swaps are either cleared or subject to daily variation margin; and (b) a non-U.S. person that is not a guaranteed affiliate and <u>is not</u> a financial entity excludes swap positions with foreign branches of U.S. SDs and guaranteed affiliates that are SDs.</p> <p>In addition, under existing CFTC rules, swaps with majority-owned affiliates are excluded.</p>	<p>Both the CFTC and SEC exclude positions between non-U.S. entities and foreign branches of U.S. SDs/SBSBs, but the CFTC exception is subject to certain conditions.</p> <p>Unlike the CFTC, the SEC does not require a non-guaranteed, non-U.S. person to count positions with a guaranteed affiliate of a U.S. person toward the MSBSP thresholds.</p> <p>In addition, unlike the CFTC, the SEC requires a guaranteed affiliate to count the positions with respect to which it receives a guarantee toward its MSBSP thresholds (see <i>also</i> attribution of guarantees in the next row).</p> <p>In addition, while the SEC requires conduit affiliates to count all of their positions toward the MSBSP thresholds, the scope of positions a conduit affiliate must include in its MSP calculations under the CFTC Cross-Border Guidance is less clear.</p>

	Final SEC Cross-Border Rules	CFTC Cross-Border Guidance	Key Differences/Issues/Comments
<p><b>Attribution of Guaranteed Positions for Major Participant Calculation Purposes</b></p>	<p>In addition to its direct SBS positions, a person must attribute to itself for MSBSP calculation purposes:</p> <ul style="list-style-type: none"> <li>• <u>U.S. Person Guarantor</u>: All security-based swap positions it guarantees;</li> <li>• <u>Non-U.S. Person Guarantor</u>: (a) All security-based swap positions of a U.S. person that it guarantees and (b) security-based swap positions with U.S. persons by a non-U.S. person that it guarantees;</li> </ul> <p><u>except</u> that a guarantor does not need to attribute to itself guaranteed positions of a person that is subject to CFTC/SEC capital requirements, capital requirements established by a U.S. banking regulator or foreign capital requirements that are consistent with the Basel Accords.</p>	<p>In addition to its direct swap positions, a person must attribute to itself for MSP calculation purposes:</p> <ul style="list-style-type: none"> <li>• <u>U.S. Person Guarantor</u>: All swap positions it guarantees;</li> <li>• <u>Non-U.S. Person Guarantor</u>: (a) All swap positions of a U.S. person or guaranteed affiliate that it guarantees and (b) swap positions of a non-U.S. person with U.S. persons and guaranteed affiliates for which it guarantees the non-U.S. person;</li> </ul> <p><u>except</u> that a guarantor does not need to attribute to itself guaranteed positions of a person that is subject to CFTC/SEC capital requirements, capital requirements established by a U.S. banking regulator or foreign capital requirements that are consistent with the Basel Accords.</p>	<p>Both the CFTC and SEC exclude guaranteed positions of non-U.S. entities subject to Basel-compliant capital standards in addition to entities subject to CFTC/SEC or U.S. banking regulator oversight.</p> <p>The SEC, unlike the CFTC, requires both the U.S. person guarantor and the non-U.S. person whose obligations it guarantees to count the same set of guaranteed security-based swap positions against their respective MSBSP thresholds, although registration of the guaranteed non-U.S. person as an SBS or MSBSP would generally eliminate the attribution requirement.</p>

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