



U.S. COMMODITY FUTURES TRADING COMMISSION

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Re: Time-Limited No-Action Position for Non-Bank Swap Dealers Domiciled in Japan, Mexico, United Kingdom and the European Union

Dear Ms. Brandon, Mr. Kennedy, and Ms. Webster,

This is in response to your joint letter dated September 22, 2021 to the Market Participants Division (“Division”) of the U.S. Commodity Futures Trading Commission (“Commission” or “CFTC”). By your joint letter, you request, on behalf of your members that are registered swap dealers (“SDs”), confirmation from the Division that it will not recommend an enforcement action to the Commission if certain foreign-domiciled SDs comply with their respective home-country capital and financial reporting requirements in lieu of the Commission’s capital and financial reporting requirements set forth in Regulations 23.100 –

23.106,¹ pending the Commission’s determination of whether the capital and financial reporting requirements of certain foreign jurisdictions are comparable to the Commission’s corresponding requirements as discussed below.

I. Background

On July 22, 2020, the Commission adopted comprehensive capital and financial reporting requirements for SDs that are not subject to the rules of a prudential regulator² (“nonbank SDs”) pursuant to Sections 4s(e) and (f) of the CEA.³ In adopting the final rules, the Commission recognized the legal and operational challenges for nonbank SDs to develop policies, procedures, and systems to implement new capital and financial reporting requirements, including the development of capital models. Accordingly, the Commission established an extended compliance date of October 6, 2021.⁴

The Commission also recognized that approximately one-half of the provisionally-registered nonbank SDs are organized and domiciled in foreign jurisdictions (“covered nonbank SDs”) and possibly subject to comprehensive capital and financial reporting requirements by home country regulators. To address potential duplicative capital and duplicative or inconsistent financial reporting requirements, the Commission adopted a substituted compliance framework to permit covered nonbank SDs to rely on compliance with their home country regulator’s capital and financial reporting requirements in lieu of meeting all or parts of the Commission’s capital adequacy and financial reporting requirements, provided the Commission finds such requirements comparable to the CFTC’s. The accompanying process allows covered nonbank SDs, or persons acting on their behalf, to submit an application to the Commission requesting a determination that all or part of the relevant foreign jurisdiction’s capital and/or financial reporting requirements are comparable to the Commission’s corresponding requirements and provides a basis for substituted compliance (herein referred to as “Capital Comparability Determination”).⁵

¹ Commission regulations are found at 17 CFR Ch. I, and are available at the Commission’s website, www.CFTC.gov.

² See Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020). The term “prudential regulator” is defined by section 1a(39) (7 U.S.C. 1a(39)) of the Commodity Exchange Act (“CEA”) (7 U.S.C. 1a et. seq.) to mean the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency.

³ See 7 U.S.C. 6s(e) and 6s(f).

⁴ *Id.* at 57525.

⁵ 17 CFR 23.106. Specifically, pursuant to Regulation 23.106, a covered nonbank SD, or a person acting on behalf of covered nonbank SDs, may file an application containing (i) a description of the objectives of the relevant foreign jurisdiction’s capital adequacy and financial reporting requirements over covered nonbank SDs that are subject to the Commission’s capital adequacy and financial reporting requirements; (ii) a description (including specific legal and regulatory provisions) of how the relevant foreign jurisdiction’s capital adequacy and financial reporting requirements address the elements of the Commission’s capital adequacy and financial reporting requirements for nonbank SDs, including, at a minimum, the methodologies for establishing and calculating capital adequacy requirements; and (iii) a description of the ability of the relevant foreign regulatory

Currently, the Commission has received applications for a Capital Comparability Determination with respect to the capital and financial reporting requirements of the European Union (“EU”), Japan, Mexico, and the United Kingdom (“UK”). The four jurisdictions are domiciles of 23 of the 26 provisionally-registered covered nonbank SDs.⁶

The Division has been actively analyzing and processing the applications, and has been in communication with both applicants and foreign regulators in the four jurisdictions to discuss the subject matter and relevant regulatory framework and to request additional information. The Division’s analysis has included reviewing English language translations (where applicable) of foreign laws and regulations, and comparing such laws and regulations to the Commission’s capital adequacy and financial reporting requirements. However, neither the Division and therefore nor the Commission, have completed their respective reviews and assessments of the comparability of the capital adequacy and financial reporting requirements of the four jurisdictions with the Commission corresponding requirements.

II. Request for Relief

By your joint letter, you request time-limited relief to permit covered nonbank SDs that are the subject of pending applications for Capital Comparability Determinations filed with the Commission to comply with the existing capital and financial reporting requirements as described in the materials submitted and/or otherwise relied upon in support of the relevant Capital Comparability Determination for their applicable home country regulators in lieu of the capital and financial reporting requirements set forth in Regulations 23.100 through 23.106 while the Division and Commission continue to review and finalize the pending Capital Comparability Determinations. Specifically, you note that absent relief covered nonbank SDs with pending applications will be required to implement the full scope of the Commission’s capital and financial reporting requirements while also complying with the full-scope of their respective home country capital and financial reporting requirements during the pendency of the application for comparability determination. You represent that such a result would impose substantial operational and financial burdens on covered nonbank SDs which the Commission sought to address by incorporating a substituted compliance framework into Regulation 23.106. In this regard, you state, as an example, that while many of the covered nonbank SDs are subject to home country financial reporting requirements that are comparable to the Commission’s financial reporting requirements set forth in Regulation 23.105, differences do exist in the accounting principles adopted in the different jurisdictions and in the form and frequency of

authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction’s capital adequacy and financial reporting requirements. *See* 17 CFR 23.106(a)(2)(i) – (iii).

⁶ In addition to the four jurisdictions covered by the filed applications for Capital Comparability Determinations, two covered nonbank SDs are also organized and domiciled in Singapore and one covered nonbank SD is organized and domiciled in Australia. The covered nonbank SDs domiciled in Singapore and Australia have indicated to Division staff that they will not be seeking a capital comparability determination pursuant to Regulation 23.106 and, therefore, are not subject to the relief set forth in this letter.

some of the financial reporting requirements of the relevant jurisdictions. You also state that absent relief, covered nonbank SDs would be required to maintain books and records, and to prepare and present financial reports, in accordance with multiple accounting principles.

In support of this request, you also note that, as stated in each of the pending Capital Comparability Determination applications, the covered nonbank SDs are subject to home country capital regimes that are based on the Basel Committee on Banking Supervision's international framework for banking institutions, which is consistent with the Commission's SD capital requirements. Therefore, you request relief to permit covered nonbank SDs that are subject to Capital Comparability Determination applications filed with the Commission prior to the October 6th compliance date to comply with their applicable home country capital and financial reporting requirements in lieu of the Commission's capital and financial reporting requirements pending the Commission's final assessment of the Capital Comparability Determination applications.

III. Division No-Action Position

The Division has considered your request and the related facts and circumstances and believes that time-limited no action relief is warranted, subject to the conditions set forth below. The conditions recognize that the covered nonbank SDs that are subject to pending Capital Comparability Determination applications must comply with applicable home country capital and financial reporting requirements. The Division further understands based on the applications that the covered nonbank SDs are subject to home country capital requirements that are based on the BCBS framework.⁷

The Division believes that providing the relief requested on a time-limited basis, subject to the financial reporting and notification conditions specified below, will not materially impact its ability to monitor the financial condition and overall safety and soundness of the covered nonbank SDs. These conditions will permit the Division to continue to review and monitor the capital adequacy of these SDs under their home-country requirements during the interim time-period between the compliance date and the date the Commission issues a final determination. SDs eligible for such relief herein should not in any way view the information which may be provided to the Commission pursuant to this relief as dispositive of the type information the Commission may ultimately determine necessary as part of any final Capital Comparability Determination.

Based on the facts and representations set forth in your letter, and those summarized above, the Division will not recommend an enforcement action to the Commission against covered nonbank SD that is subject to a Capital Comparability Determination application filed with the Commission and that complies with the capital and financial reporting requirements of its home country regulator in lieu of the capital and financial reporting requirements set forth in Regulations 23.100 – 23.106. The Division's relief is subject to the conditions listed below.

⁷ See 85 FR at 57491.

1. SDs organized and domiciled in Mexico are licensed with the Mexican Banking and Securities Commission (Comision Nacional Bancaria y de Valores) as broker-dealers (casa de bolsa).
2. SDs organized and domiciled in Japan are registered with the Financial Services Agency of Japan as Type I Financial Instruments Business Operators.
3. SDs organized and domiciled in the UK are licensed with the UK Prudential Regulatory Authority or the UK Financial Conduct Authority as investment firms.
4. SDs domiciled in the EU are licensed as credit institutions or as investment firms in an EU member state.
5. Covered nonbank SDs submit to the Division financial information required by the home country regulator within 15 days of being required to submit such information to their home country regulator. Such information should also include a Statement of Financial Condition, Statement of Income/Loss, and Statement of Regulatory Capital to the extent these are not part of the information required by their home country regulator. The information should be provided in English and may be prepared in the format required under the home country requirements.⁸
6. Covered nonbank SDs provide notice to the Division within 24 hours of when they know or should have known that their regulatory capital is less than 120 percent of their minimum capital requirement as determined under their home country requirements.⁹
7. Covered nonbank SDs must provide notice to the Division of their intent to rely on this relief.¹⁰

The relief granted by this letter will expire the earlier of October 6, 2022 or the issuance of final Capital Comparability Determinations applicable to the covered nonbank SDs located in the EU, Japan, Mexico, and the UK.

This letter, and the position taken herein, represent the views of Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. This letter and the no-action position taken herein are not binding on the

⁸ Covered nonbank SDs that are dually-registered with the Securities and Exchange Commission (“SEC”) as broker-dealers or security-based swap dealers may file financial reports required by the SEC with the Division in lieu of the financial reports required by their home country regulators. The covered nonbank SDs should file copies of the SEC financial reports with the Division at the same time the financial reports are filed, or required to be filed, with the SEC.

⁹ Information required to be submitted to the Division pursuant to this relief should be submitted using the Winjammer™ system maintained by National Futures Association.

¹⁰ Notice of such intent should be directed to the following email inbox: MPDFinancialRequirements@cftc.gov.

Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in Commission regulations. Further, this letter, and the positions taken herein, are based upon the facts and circumstances presented to Division staff. Any different, changed or omitted material facts or circumstances might render the relief provided by this letter void. Finally, as with all staff letters, the Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please feel free to contact Thomas Smith, Deputy Director, at 202-418-5495, Josh Beale, Associate Director at 202-418-5446, or Jennifer Bauer, Special Counsel at 202-418-5472.

Sincerely,

Amanda L. Olear
Acting Director