

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter 1

RIN 3038-AD85

Final Exemptive Order Regarding Compliance with Certain Swap Regulations

AGENCY: Commodity Futures Trading Commission

ACTION: Final Order

SUMMARY: On July 12, 2012, the Commodity Futures Trading Commission (“Commission” or “CFTC”) published for public comment, pursuant to section 4(c) of the Commodity Exchange Act (“CEA”), a proposed order (“Proposed Order”) that would grant market participants temporary conditional relief from certain provisions of the CEA, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Dodd-Frank”), and the Commission also published its proposed interpretive guidance and policy statement (“Proposed Guidance”) regarding the cross-border application of the swap provisions of the CEA as added by Title VII of the Dodd-Frank Act. The Commission has determined to finalize the Proposed Order, with certain modifications and clarifications to address public comments. Under this final order (“Final Order”), a non-U.S. person that registers as a swap dealer (“SD”) or major swap participant (“MSP”) may delay compliance with certain entity-level requirements of the CEA (and Commission regulations promulgated thereunder), and non-U.S. SDs and MSPs and foreign branches of U.S. SDs and MSPs may delay compliance with certain transaction-level requirements of the CEA (and Commission regulations promulgated thereunder), subject to specified conditions. In

addition, the Commission is separately proposing further guidance on certain specific aspects of the Proposed Guidance (“Further Proposed Guidance”).

DATES: The Final Order is effective on December 21, 2012 and will expire on July 12, 2013.

FOR FURTHER INFORMATION CONTACT: Carlene S. Kim, Deputy General Counsel, (202) 418-5613, ckim@cftc.gov, Terry Arbit, Deputy General Counsel, (202) 418-5357, tarbit@cftc.gov, Mark Fajfar, Assistant General Counsel, (202) 418-6636, mfajfar@cftc.gov, Office of General Counsel; Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, (202) 418-5977, gbarnett@cftc.gov; Jacqueline H. Mesa, Director, Office of International Affairs, (202) 418-5386, jmesa@cftc.gov; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act,¹ which amended the CEA² to establish a new regulatory framework for swaps. The legislation was enacted to reduce systemic risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of SDs and MSPs; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

² 7 U.S.C.1 et seq. (amended 2010).

and data reporting regimes with respect to swaps, including real-time public reporting; and (4) enhancing the Commission’s rulemaking and enforcement authorities over all registered entities, intermediaries, and swap counterparties subject to the Commission’s oversight. Section 722(d) of the Dodd-Frank Act also amended the CEA to add section 2(i), which provides that the swap provisions of the CEA apply to cross-border activities when certain conditions are met, namely, when such activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” or when they contravene Commission rulemaking.³

In the two years since its enactment, the Commission has finalized 41 rules to implement Title VII of the Dodd-Frank Act. The finalized rules include those promulgated under CEA section 4s,⁴ which address registration of SDs and MSPs and other substantive requirements applicable to SDs and MSPs. Notably, many section 4s requirements applicable to SDs and MSPs are tied to the date on which a person is required to register, unless a later compliance date is specified.⁵ A number of other rules specifically applicable to SDs and MSPs have been proposed but not finalized.⁶

³ 7 U.S.C. 2(i)

⁴ 7 U.S.C 6s.

⁵ Examples of section 4s implementing rules that become effective for SDs and MSPs at the time of their registration include requirements relating to swap data reporting (Commission regulation 23.204) and conflicts of interest (Commission regulation 23.605 (c)-(d)). The chief compliance officer requirement (Commission regulations 3.1 and 3.3) is an example of those rules that have specific compliance dates. The compliance dates are summarized on the Compliance Dates page of the Commission’s web site. (<http://www.cftc.gov/LawRegulation/DoddFrankAct/ComplianceDates/index.htm>).

⁶ These include rules under CEA section 4s(e), 7 U.S.C. 6s(e) (governing capital and margin requirements for SDs and MSPs).

Further, the Commission published for public comment the Proposed Guidance,⁷ which set forth the manner in which it proposed to interpret section 2(i) of the CEA as it applies to the requirements under the Dodd-Frank Act and the Commission’s regulations promulgated thereunder regarding cross-border swap activities. Specifically, in the Proposed Guidance, the Commission described the general manner in which it proposed to consider: (1) whether a non-U.S. person’s swap dealing activities are sufficient to require registration as a “swap dealer”,⁸ as further defined in a joint release adopted by the Commission and the Securities and Exchange Commission (“SEC”) (collectively, the “Commissions”);⁹ (2) whether a non-U.S. person’s swap positions are sufficient to require registration as a “major swap participant,”¹⁰ as further defined in the Final Entities Rules; and (3) the treatment of foreign branches, agencies, affiliates, and subsidiaries of U.S. SDs and of U.S. branches of non-U.S. SDs. The Proposed Guidance also generally described the policy and procedural framework under which the Commission may permit compliance with a comparable regulatory requirement of a foreign jurisdiction to substitute for compliance with the requirements of the CEA. Last, the Proposed Guidance set forth the manner in which the Commission proposed to interpret section 2(i) of the CEA as it applies to the clearing, trading, and certain

⁷ “Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act,” 77 FR 41214, Jul. 12, 2012.

⁸ 7 U.S.C. 1a(49).

⁹ See “Further Definition of ‘Swap Dealer,’ ‘Security-Based Swap Dealer,’ ‘Major Swap Participant,’ ‘Major Security-Based Swap Participant’ and ‘Eligible Contract Participant,’” 77 FR 30596, May 23, 2012 (“Final Entities Rules”).

¹⁰ 7 U.S.C 1a(33).

reporting requirements under the Dodd-Frank Act with respect to swaps between counterparties that are not SDs or MSPs.

Contemporaneously with the Proposed Guidance, the Commission published the Proposed Order pursuant to section 4(c) of the CEA,¹¹ in order to foster an orderly transition to the new swaps regulatory regime and to provide market participants greater certainty regarding their obligations with respect to cross-border swap activities during the pendency of the Proposed Order. The Proposed Order would grant temporary relief from certain swap provisions of Title VII of the Dodd-Frank Act.

The public comment periods on the Proposed Order and the Proposed Guidance ended on August 13, 2012 and August 27, 2012, respectively. The Commission received approximately 26 letters on the Proposed Order and approximately 288 letters on the Proposed Guidance from a variety of market participants and other interested parties, including major U.S. and non-U.S. banks and financial institutions that conduct global swaps business, trade associations, clearing organizations, law firms (representing international banks and dealers), individual citizens, and foreign regulators.¹² The Commission staff also held numerous meetings and discussions with various market

¹¹ “Exemptive Order Regarding Compliance With Certain Swap Regulations,” 77 FR 41110 Jul. 12, 2012.

¹² Some of the commenters submitted a single comment letter addressing both the Proposed Order and the Proposed Guidance. The comment letters submitted in response to the Proposed Order and Proposed Guidance may be found on the Commission’s web site at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234>.

Approximately 200 individuals submitted substantially identical letters to the effect that oversight of the \$700 trillion global derivatives market is the key to meaningful reform. The letters stated that because the market is inherently global, risks can be transferred around the world with the touch of a button. Further, according to these letters, loopholes in the Proposed Guidance could allow foreign affiliates of Wall Street banks to escape regulation. Lastly, the letters requested that the Proposed Guidance be strengthened to ensure that the Dodd-Frank derivatives protections will directly apply to the full global activities of all important participants in the U.S. derivatives markets.

participants, domestic bank regulators, and other interested parties to discuss the Proposed Order and the Proposed Guidance.¹³

Further, the Commission staff closely consulted with the staff of the SEC in an effort to increase understanding of each other's regulatory approaches and to harmonize the cross-border approaches of the two agencies to the greatest extent possible, consistent with their respective statutory mandates.¹⁴ The Commission expects that this consultative process will continue as each agency works towards implementing its respective cross-border policy.

The Commission also recognizes the critical role of international cooperation and coordination in the regulation of derivatives in the highly interconnected global market, where risks are transmitted across national borders and market participants operate in multiple jurisdictions. Close cooperative relationships and coordination with other jurisdictions take on even greater importance given that, prior to the recent reforms, the swaps market has largely operated without regulatory oversight and many jurisdictions are in differing stages of implementing their regulatory reform. To this end, the Commission staff has actively engaged in discussions with their foreign counterparts in an effort to better understand and develop a more harmonized cross-border regulatory framework. The Commission expects that these discussions will continue as it finalizes

¹³ The records of these meetings and communications can be found on the Commission's web site at: <http://cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm>.

¹⁴ In addition to differences in the applicable statutory provisions, there are also differences in the markets and products overseen by each agency, which may lead to divergent approaches to cross-border activities.

the cross-border interpretive guidance and as other jurisdictions develop their own regulatory requirements for derivatives.¹⁵

The Commission has determined not to take further action on the Proposed Guidance at this time. The Commission believes it will be beneficial to have further consultations with other domestic and international regulators in an effort to harmonize cross-border regulatory approaches prior to taking action with respect to the Proposed Guidance. The Commission also believes that further consideration of public comments, including the comments that may be received on the Further Proposed Guidance regarding the Commission's interpretation of the term "U.S. person," and its guidance regarding aggregation for purposes of SD registration, will be helpful to the Commission in issuing final interpretive guidance.

Nonetheless, the Commission has determined to issue the Final Order as a time-limited exemptive order that is substantially similar to the Proposed Order, except for the addition of provisions regarding registration and certain modifications and clarifications addressing public comments. Recently, the Commission staff granted time-limited, no-action relief to promote continuity in the application of Dodd-Frank requirements and facilitate the transition to those requirements by enabling swap market participants to apply a uniform and readily ascertainable standard regarding which swaps must be

¹⁵ This is one aspect of the Commission's on-going bilateral and multilateral efforts to promote international coordination of regulatory reform. The Commission staff is engaged in consultations with Europe, Japan, Hong Kong, Singapore, Switzerland, Canada, Australia, Brazil, and Mexico on derivatives reform. In addition, the Commission staff is participating in several standard-setting initiatives, co-chairs the IOSCO Task Force on OTC Derivatives, and has created an informal working group of derivatives regulators to discuss implementation of derivatives reform. See also Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-border OTC Derivatives Market, included in CFTC Press Release 6439-12, Dec. 4, 2012.

included in the calculations under the SD and MSP definitions.¹⁶ The Final Order continues that process and furthers the same purposes.¹⁷

In preparing the Final Order, the Commission has attempted to be responsive to commenters' concerns and recommendations, so that market practices will not be unnecessarily disrupted during the transition to the new swap regulatory regime. At the same time, the Commission also recognizes the importance of the new SD and MSP regulatory scheme to the Dodd-Frank swap reforms and, therefore, is mindful that its implementation should not be subject to undue delay. The Commission believes that the Final Order strikes the proper balance between promoting an orderly transition to the new regulatory regime, while appropriately tailoring relief to ensure that the Commission can responsibly discharge its statutory duties.

This release is organized in seven sections. Section II provides a brief overview of the Commission's exemptive authority under section 4(c) of the CEA and the Proposed Order; Section III provides a summary of the comments received on the Proposed Order and the Commission determinations regarding the Final Order; Section IV provides the Commission's findings pursuant to CEA section 4(c); Section V addresses the Paperwork Reduction Act; Section VI discusses cost benefit considerations; and Section VII contains the Final Order.

II. Commission's Exemptive Authority and Proposed Order

¹⁶ See CFTC Division of Swap Dealer and Intermediary Oversight, Re: Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant, No-Action Letter No.12-22, Oct. 12, 2012 ("CFTC Letter No. 12-22").

¹⁷ The Commission intends that the Final Order is in addition to any no-action relief issued or to be issued by the Commission staff. Unless specifically provided in any letter providing no-action relief, the Final Order does not limit the availability of any no-action relief.

A. Section 4(c) of the CEA

Section 4(c)(1) of the CEA authorizes the Commission to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of transaction from any of the provisions of the CEA (subject to certain exceptions) where the Commission determines that the exemption would be consistent with the public interest and the purposes of the CEA.¹⁸ Under section 4(c)(2) of the CEA, the Commission may not grant exemptive relief unless it determines that: (1) the exemption is appropriate for the transaction and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transaction will be entered into solely between “appropriate persons”; and (4) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.¹⁹ In enacting section 4(c), Congress noted that the purpose of the provision is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.²⁰

B. Proposed Order

Under the Proposed Order, the Commission would allow non-U.S. SDs and MSPs to delay compliance with certain Entity-Level Requirements of the Dodd-Frank Act (and the Commission’s regulations thereunder), subject to specified conditions described

¹⁸ CEA section 4(c)(1), 7 U.S.C. 6(c)(1).

¹⁹ CEA section 4(c)(2), 7 U.S.C. 6(c)(2).

²⁰ House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213.

therein.²¹ An exception to the foregoing relief from the Entity-Level Requirements related to the swap data repository (“SDR”) reporting requirement²² and part 20 of the Commission’s regulations relating to large-trader reporting (“LTR”). Specifically, non-U.S. SDs and MSPs would be required to comply with the SDR reporting and LTR requirements for all swaps with U.S. counterparties upon their compliance date. Further, for swaps with non-U.S. counterparties, the Commission proposed that only those non-U.S. SDs and MSPs that are not affiliates or subsidiaries of a U.S.-based SD would be permitted to delay compliance with the SDR reporting and LTR requirements.

With respect to U.S. SDs and MSPs, the Commission proposed to permit such registrants²³ to delay compliance with certain Entity-Level Requirements through January 1, 2013. This relief with respect to Entity-Level Requirements, however, would not extend to swap data recordkeeping, SDR reporting or LTR requirements. That is, U.S. SDs and MSPs would be required to comply with the swap data recordkeeping, SDR reporting and LTR requirements for all swaps.

The Commission also proposed to grant, with respect to certain Transaction-Level Requirements of the Dodd-Frank Act (and the Commission’s regulations thereunder), temporary relief to non-U.S. SDs and MSPs, as well as foreign branches of U.S. SDs and MSPs, for swaps with a non-U.S. counterparty so that they may comply only with the

²¹ The “Entity-Level Requirements” and “Transaction-Level Requirements” for purposes of the Proposed Order were the same as those defined for purposes of the Final Order. See section II.D.1., below.

²² See 7 U.S.C. 2(a)(13)(G). The Commission believes that the data reported to, and collected by, SDRs will be important to its ability to effectively monitor and address the risk exposures of individual market participants (including SDs and MSPs) and the concentration of risk within the swaps market more generally.

²³ For purposes of the Final Order, the term “registrant” means a registered SD or MSP.

regulations as may be required in the home jurisdiction of the non-U.S. registrant (or in the case of a foreign branch of a U.S. registrant, the foreign location of the branch).²⁴

With respect to swaps with any U.S. counterparty, however, these registrants (as well as foreign branches of U.S. SDs and MSPs) would be required to comply with all applicable Transaction-Level Requirements that are in effect. Finally, the Commission did not propose exemptive relief for swaps between market participants that are neither SDs nor MSPs.

The proposed temporary exemptive relief for non-U.S. registrants (and foreign branches of U.S. registrants with respect to Transaction-Level Requirements) would become effective on the compliance date for registration and expire 12 months following the publication of the Proposed Order in the Federal Register (i.e., July 12, 2013). In the Proposed Order, the Commission also stated that, in the interest of promoting an orderly transition to the new swap regulatory regime, it intends to consider extending the effectiveness of the exemptive relief at its expiration based on, among other things, whether and when substituted compliance with foreign regulatory requirements for non-U.S. persons is available.

A non-U.S. registrant seeking relief under the Proposed Order would have to satisfy certain conditions. First, a non-U.S. person that is required to register as an SD or MSP would have to apply to become registered as such when registration is required. Second, within 60 days of applying for registration, a non-U.S. registrant would have to submit to the National Futures Association (“NFA”) a compliance plan addressing how it

²⁴ Under the Proposed Guidance, a foreign branch of a U.S. person would be deemed a U.S. person. Accordingly, swaps entered into between a foreign branch of a U.S. person and another foreign branch of a U.S. person would be subject to the Transaction-Level Requirements.

plans to comply, in good faith, with all applicable requirements under the CEA and related rules and regulations upon the effective date of final cross-border interpretive guidance.

The Commission further noted that the proposed relief would neither: (1) limit the applicability of any CEA provision or Commission regulation to any person, entity or transaction except as provided in the Proposed Order; nor (2) affect any effective date or compliance date set out in any specific Dodd-Frank Act rulemaking by the Commission.

III. Comments on the Proposed Order and Commission Determinations

A. Comments Generally

Many commenters expressed general support for the Proposed Order but urged the Commission to broaden the scope of the relief to give market participants adequate time to implement necessary operational and compliance changes and to reflect the fact that certain key aspects of the Proposed Guidance (particularly those relating to registration determinations) were not yet final as of the date of the comments.²⁵ Many of the commenters supporting temporary exemptive relief also suggested specific

²⁵ See e.g., Letters from Security Industry and Financial Markets Association (“SIFMA”) (Aug. 13, 2012); Institute of International Bankers (“IIB”) (Aug. 9, 2012); Cleary Gottlieb Steen & Hamilton LLP (“Cleary”) (Aug. 16, 2012); and Futures Options Association (“FOA”) (Aug. 13, 2012). Some of the commenters expressly stated that the Commission should finalize the exemptive relief as promptly as possible. See e.g., IIB Letter at 1 and Cleary Letter at 3. For example, IIB stated that the proposed relief should be modified to address “unrealistic and unwarranted” compliance burdens related to the Proposed Guidance and certain aspects of the Commission regulations adopted to date. IIB Letter (Aug. 9, 2012) at 2. Accordingly, IIB requested limited interim relief from certain aspects of the Commission’s registration and definitional rules (in particular, the aggregation requirement for purposes of the de minimis calculation). *Id.* at 3-7. Similarly, The Clearing House Association LLC (“The Clearing House”) expressed concerns that the proposed relief will be “ultimately ineffective” in accomplishing its objectives if concepts from the Proposed Guidance are required to be applied before they are finalized, and requested exemption from those rules or concepts that are not yet finalized. The Clearing House (Aug. 13, 2012) at 2.

modifications or clarifications of the Proposed Order concerning the scope and/or timing of the exemptive relief.²⁶

On the other hand, other commenters – namely, public interest groups such as Americans for Financial Reform (“AFR”) and Public Citizen’s Congress Watch – expressed concerns about delaying the implementation of the Dodd-Frank Act to overseas activities.²⁷ AFR stated that the Proposed Order would significantly extend the period where markets lack critical protections against derivatives risks and expressed concern about taxpayer exposure to foreign banks, particularly “foreign affiliates of U.S. banks whose liabilities are guaranteed (implicitly or explicitly) by the parent company.”²⁸ Similarly, Public Citizen’s Congress Watch expressed the concern that the Proposed Order would unnecessarily delay compliance with most entity requirements and transaction requirements for foreign subsidiaries and affiliates of U.S. financial institutions and for U.S. subsidiaries and affiliates of foreign banks, further prolonging exposure of U.S. taxpayers to unnecessary systemic risks.²⁹

B. Definition of “U.S. Person”

²⁶ See, e.g., SIFMA (Aug. 13, 2012), at 3, 5-6, 10-13, A-50; Lloyds Banking Group (“Lloyds”) (Aug. 13, 2012) at 1-2; IIB (Aug. 9, 2012), at 5; Canadian Bankers Association (Aug. 13, 2012), at 2; Credit Suisse (Aug. 27, 2012), at 7; Cleary (Aug. 16, 2012), at 4; Deutsche Bank AG (“Deutsche Bank”) (Aug. 13, 2012), at 3, 7; Societe Generale (Aug. 8, 2012), at 2.

²⁷ See AFR (Aug. 13, 2012), at 1-4. AFR stated that, while it recognized the complexities and challenges the industry faces, “the large swap entities designated under the Dodd-Frank Act have been aware of the general contours of these requirements for several years, and there have already been significant delays in implementation.” AFR Letter at 2. Public Citizen’s Congress Watch expressed concerns that delayed compliance would unnecessarily prolong American taxpayers’ exposure to the systemic risks of U.S. institutions and interests. See Public Citizen’s Congress Watch (submitted by Professor I. Michael Greenberger) (“Public Citizen’s Congress Watch”) (Aug. 14, 2012) at 1-13.

²⁸ AFR (Aug. 13, 2012) at 2.

²⁹ See Public Citizen’s Congress Watch (Aug. 14, 2012) at 1-2.

Although at this time the Commission is not making any determinations as to the scope of the final interpretive guidance, the Commission believes that the comments received on the definition of U.S. person set forth in the Proposed Guidance are nonetheless relevant and helpful in determining the appropriate scope of exemptive relief in the Final Order. Taken together, these comments generally support, as an interim measure, the approach taken by the Commission staff in CFTC Letter No. 12-22 regarding the initial scope of the application of the CEA to swaps activities.

Accordingly, in light of the Commission's experience to date with CFTC Letter No. 12-22 and these comments, it is taking a similar approach to the definition of U.S. person to that set forth in the staff no-action letter and supported by many commenters.

To be clear, the Commission wishes to emphasize that the discussion here is not, and should not be construed as, an indication of, or a limitation on, the definition of the term "U.S. person" that the Commission may adopt in final cross-border interpretive guidance. As discussed further below, the Commission is seeking further comment on this issue. However, the Commission is aware that the terms "U.S. person" and "non-U.S. person" are commonly used in the discussion of these issues. For ease of reference, therefore, this release and the Final Order use the term "U.S. person" to refer to a person that is described by the criteria discussed below, and the term "non-U.S. person" to refer to any other person.³⁰

1. Proposed Definition in the Proposed Guidance

³⁰ A number of commenters voiced concerns regarding potential expansion of the term "U.S. person" that they thought could result from the prefatory phrase "includes, but is not limited to" that appeared in the Proposed Guidance. These commenters requested that the Commission affirmatively state that non-U.S. persons are any persons that do not meet the definition of "U.S. person." See SIFMA (Aug. 27, 2012) at A-15; IIB (Aug. 27, 2012) at 11-12; European Commission ("EC") (Aug. 24, 2012) at 1-2; and Australian Bankers Association Inc. ("Australian Bankers") (Aug. 27, 2012) at 4.

Under the Proposed Guidance, the term “U.S. person” would be defined by reference to the extent to which swap activities or transactions involving one or more such persons have the relevant connection with activities in, or effect on, U.S. commerce.³¹ As proposed, the term “U.S. person” would encompass both: (1) persons (or classes of persons) located within the United States; as well as (2) persons that may be domiciled or operating outside the United States, but whose swap activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” within the meaning of CEA section 2(i).³² That is, the term “U.S. person” identifies those persons whose swap activities - either individually or in the aggregate - satisfy the jurisdictional nexus under section 2(i) of the CEA.

2. Comments

³¹ See Proposed Guidance, 77 FR at 41218.

³² Specifically, as set forth in the Proposed Guidance, the definition of 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 U.S. income tax regardless of source.

Under the proposal, a “U.S. person” would include a foreign branch of a U.S. person; on the other hand, a non-U.S. affiliate or subsidiary guaranteed by a U.S. person would not be deemed a “U.S. person.”

In general, commenters stated that the proposed “U.S. person” definition presented significant interpretive issues and implementation challenges.³³ The commenters contended that it would be difficult to determine U.S. person status because the proposed definition was, they said, overly broad, contained ambiguities, and would require collection of information not readily accessible at this time. The commenters, therefore, urged the Commission to provide market participants with sufficient time to implement a final definition of the term “U.S. person” and to reconsider the proposed definition in favor of “a simpler, more easily applied” definition of “U.S. person.”³⁴

A number of commenters requested that the Commission adopt an interim definition of “U.S. person” that would allow firms to rely on their existing systems and classifications and avoid the need to develop systems to achieve temporary compliance with standards that may change when a definition of the term “U.S. person” is finalized.³⁵ IIB explained that applying any definition of “U.S. person” that departs from status based on residence or jurisdiction of organization, and in some cases principal place of business, will require time to implement relevant documentation conventions and diligence procedures.³⁶ IIB, therefore, requested that the Commission implement a phased-in interim approach to the “U.S. person” definition that would encompass, in

³³ See SIFMA (Aug. 27, 2012) at 5; Societe Generale (Aug. 8, 2012) at 4; IIB (Aug. 27, 2012), at 4-14; Deutsche Bank (Aug. 27, 2012), at 1-4; Goldman Sachs Group, Inc. (“Goldman”) (Aug. 27, 2012), at 3; The Hong Kong Association of Banks (“Hong Kong Banks”) (Aug. 27, 2012), at 4; Australian Bankers (Aug. 27, 2012) at 4.

³⁴ See SIFMA (August 27, 2012) at A-10.

³⁵ See e.g., Cleary (Aug. 16, 2012) at 6; SIFMA (Aug. 27, 2012) at A-8-A9; IIB (Aug. 9, 2012) at 4; Deutsche Bank (Aug. 13, 2012) at 2; State Street Corporation (“State Street”) (Aug. 27, 2012) at 2; and Goldman (Aug. 27, 2012) at 3.

³⁶ See IIB (Aug. 9, 2012) at 4.

general, (1) a natural person who is a U.S. resident; and (2) a corporate entity that is organized or incorporated under the laws of the United States or has its place of business in the United States.³⁷

SIFMA also urged the Commission to phase in the “U.S. person” definition, citing the implementation difficulties identified by IIB. Specifically, SIFMA recommended that the Commission allow market participants to apply an interim definition of “U.S. person” until 90 days after the final definition of “U.S. person” is published.³⁸ SIFMA stated that its interim definition - which was identical to IIB’s interim definition - should identify “core” U.S. persons and allow its members to phase in compliance with the Dodd-Frank requirements without building new systems that might have to be changed when a final definition is adopted.

3. Commission Determination on Definition of “U.S. Person”

The Commission finds merit in the comments suggesting that it should adopt a phased approach to cross-border activities. The Commission understands, from the comments, that market participants may need additional time to assess their businesses in light of the Final Order and to institute necessary changes to their systems and operations. Therefore, for purposes of the Final Order, the Commission will apply a definition of the term “U.S. person” based upon the counterparty criteria set forth in CFTC Letter No. 12-22³⁹ with certain modifications as described below. With respect to the other issues

³⁷ Id. For purposes of IIB’s suggested definition, a foreign branch of a U.S. SD would be considered a non-U.S. person. IIB added that it believed that the Commission should adopt a final definition of “U.S. person” that is consistent with IIB’s proposed interim definition.

³⁸ See SIFMA (Aug. 25, 2012) at A-8.

³⁹ The counterparty criteria set forth in CFTC Letter No. 12-22 are:

(i) A natural person who is a resident of the United States;

raised by commenters regarding the definition of “U.S. person,” the Commission believes that further public comment and consideration during the effectiveness of the Final Order will be helpful.

For purposes of the Final Order, the Commission will treat as a “U.S. person” any person identified by the following five criteria:⁴⁰

- (i) A natural person who is a resident of the United States;
- (ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or (B) effective as of April 1, 2013 for all such entities other than funds or collective investment vehicles, having its principal place of business in the United States;

-
- (ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is organized or incorporated under the laws of the United States;
 - (iii) A pension plan for the employees, officers, or principals of a legal entity described in (ii) above, unless the pension plan is exclusively for foreign employees of such entity;
 - (iv) An estate or trust, the income of which is subject to U.S. income tax, regardless of source; or
 - (v) An individual account (discretionary or not) where the beneficial owner is a person described in (i) through (iv) above.

⁴⁰ The Commission understands that persons may currently be relying upon the counterparty criteria set forth in CFTC Letter No. 12-22. Thus, until December 31, 2012, persons may continue to apply those criteria for purposes of the Final Order. In effect, until December 31, 2012, a person may apply either the counterparty criteria in CFTC Letter No. 12-22, or the definition set forth herein for purposes of the Final Order. Beginning on January 1, 2013 (i.e., following the expiration of CFTC Letter No. 12-22), a person must apply the definition set forth in the Final Order for purposes of swaps entered into on or after that date.

- (iii) A pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is primarily for foreign employees of such entity;
- (iv) An estate of a decedent who was a resident of the United States at the time of death, or a trust governed by the laws of a state or other jurisdiction in the United States if a court within the United States is able to exercise primary supervision over the administration of the trust; or
- (v) An individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in (i) through (iv) above.

The modifications made by the Commission to the counterparty criteria set forth in CFTC Letter No. 12-22 relate to (1) the location of an entity's principal place of business, (2) the treatment of pension plans for foreign employees, (3) the treatment of estates and trusts, and (4) the treatment of joint accounts.⁴¹

First, regarding the location of an entity's principal place of business, the Commission considered that the second counterparty criterion in CFTC Letter No. 12-22 is generally intended to cover legal entities that are physically located or incorporated within U.S. territory. For purposes of the Final Order, the Commission believes it is appropriate to treat as a "U.S. person" a legal entity that is not incorporated in the United

⁴¹ Also, the Commission is clarifying that language in the second counterparty criterion in CFTC Letter No. 12-22 referring to an entity "incorporated under the laws of the United States" includes an entity incorporated under the laws of a state or other jurisdiction in the United States.

States but that nonetheless has its “principal place of business” in the United States.⁴²

The Commission believes that it is appropriate to consider an entity that is organized outside the United States but nonetheless has its “principal place of business” within the United States in the same manner as an entity organized or incorporated under the laws of the United States, because the center of direction, control and coordination of its business activities is located in the United States.⁴³ However, the Commission understands from commenters that market participants will need a short period of time to implement the treatment of entities with a principal place of business in the United States as “U.S. persons.”⁴⁴ Therefore, the Commission will not treat entities incorporated or organized outside the United States and with a principal place of business in the United States as U.S. persons until April 1, 2013 (i.e., approximately 90 days after effectiveness of the

⁴² For purposes of the Final Order, the Commission will construe the term “principal place of business” as referring to the single place where a corporation’s officers direct, control, and coordinate the corporation’s activities. Typically, the principal place of business will be where the corporation maintains its headquarters. See Hertz v Friend, 559 U.S. ___, 130 S.Ct. 1181, 1192, 175 L.Ed. 2d 1029 (2010) (“[I]n practice [a company’s principal place of business] should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control and coordination, *i.e.*, the ‘nerve center’”).

⁴³ Commenters supported inclusion of the principal place of business element in the interim definition. See Cleary (Aug. 16, 2012) at 6 (“the Firms respectfully request that the Commission adopt an interim ‘U.S. person’ definition based on factors such as residence, place of organization or incorporation and principal place of business”); see also IIB (Aug. 27, 2012) at 13 (suggested definition of “U.S. person” that includes “Any corporation, partnership, limited liability company, business or other trust, association, joint stock company or any form of enterprise similar to the foregoing (other than a collective investment vehicle, employee benefit plan, estate or trust) that is organized or incorporated under the laws of the United States or having its principal place of business in the United States.”); SIFMA (Aug. 13, 2012) at 4 (“The Commission should include as part of the Final Exemptive Order a workable, uniform definition of U.S. person for this transitional time period. . . . For most [of our members] this would consist of Any natural person who is a resident of the U.S.; and Any corporation, partnership, LLC, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing that is organized or incorporated under the laws of the United States or has its principal place of business in the United States. . . . [S]uch a definition would allow most of our members to identify those counterparties that are U.S. persons during the Interim Period without the necessity of building new, interim systems that might have to be changed when a Final Definition is adopted.”).

⁴⁴ See, e.g., SIFMA (Aug. 25, 2012) at A-8 (suggesting 90-day period to transition to definition including principal place of business element).

Final Order). The Commission also understands from commenters that the application of the principal place of business element may be complex for funds and collective investment vehicles and require further guidance in this regard; therefore, at this time for purposes of the Final Order, the Commission has determined that this element will not apply to funds or collective investment vehicles.⁴⁵

Second, regarding the treatment of pension plans, the Commission is refining the third counterparty criterion in CFTC Letter No. 12-22 to indicate that a pension plan that is “primarily” (rather than exclusively) for the foreign employees of an entity is also a “U.S. person” for purposes of the Final Order.⁴⁶

Third, regarding the treatment of estates and trusts, the Commission is refining the fourth counterparty criterion in CFTC Letter No. 12-22 so that the treatment of an estate or trust for purposes of this relief does not depend on whether the income of the estate or trust is subject to U.S. income tax.⁴⁷ The Commission understands that whether income is subject to U.S. tax can depend on a variety of factors, including the source of the income, which may not be relevant for purposes of the Dodd-Frank Act. Accordingly, for purposes of the Final Order, the Commission is of the view that an estate should be treated as a “U.S. person” if the decedent was a resident of the United States at the time

⁴⁵ See, e.g., Cleary (Aug. 16, 2012) at 7; IIB (Aug. 27, 2012 at 6-7. The Commission is separately proposing further guidance regarding the treatment of funds and other collective investment vehicles for purposes of the definition of the term “U.S. person.”

⁴⁶ In a letter to the Commissioners dated November 30, 2012 requesting transition relief under Title VII of the Dodd-Frank Act, the Futures Industry Association (“FIA”), IIB and SIFMA suggested that this criterion be modified to replace the word “exclusively” with “primarily.” See joint letter from FIA, IIB and SIFMA (Nov. 30, 2012) at 14, fn. 14.

⁴⁷ See, e.g., IIB Letter (Aug. 27, 2012) at 12 (market participants do not typically identify an estate’s or trust’s regulatory status on the basis of its tax status); see also joint letter from FIA, IIB and SIFMA at 14, fn. 14 (suggesting that the fourth criterion from CFTC Letter No. 12-22 be limited to estates and trusts organized under the laws of the United States).

of death, and a trust should be treated as a “U.S. person” if it is governed by the law of a state or other jurisdiction in the United States and a court within the United States is able to exercise primary supervision over the administration of the trust.

The Commission believes that this approach is appropriate in view of how estates and trusts use swaps, and is consistent with how they are treated for other purposes under law. For estates, if the decedent was a party to any swaps at the time of death, then those swaps would continue to be treated in the same way after the decedent’s death, when the swaps would most likely pass to the decedent’s estate. Also, this test will be predictable and easy to apply for natural persons planning for how their swaps will be treated after death, for executors and administrators of estates, and for the swap counterparties to natural persons and estates.

With respect to trusts, the Commission considered that each trust is governed by the laws of a particular jurisdiction, which may depend on steps taken when the trust was created or other circumstances surrounding the trust. The Commission believes that if a trust is governed by U.S. law (i.e., the law of a state or other jurisdiction in the United States), then it is reasonable to treat the trust as a U.S. person for purposes of the Final Order. The definition also requires that a court within the United States be able to exercise primary supervision over the administration of the trust.⁴⁸ Including this element of the definition will ensure that the treatment of the trust for purposes of the Final Order will be in line with how the trust is treated for other legal purposes.

⁴⁸ The Commission is aware that one element of the test applied by the Internal Revenue Service to determine if a trust is a U.S. person for tax purposes depends on whether a court within the United States is able to exercise primary supervision over the administration of the trust. See 26 CFR 301.7701-7(a)(1)(ii). However, the Commission does not intend to formally adopt the Internal Revenue Service test for this purpose.

Finally, regarding the treatment of joint accounts, the Commission is refining the fifth counterparty criterion in CFTC Letter No. 12-22 to include not only individual accounts where the beneficial owner is a person described in the preceding counterparty criteria, but also joint accounts where any of the beneficial owners is such a person.

Due Diligence. As described above, many commenters said that the information necessary to accurately assess the status of their counterparties as U.S. persons may not be available, or may be available only through overly burdensome due diligence. For this reason, these commenters requested that the Commission allow for reasonable reliance on counterparty representations as to their “U.S. person” status.⁴⁹

The Commission agrees with the commenters that a party to a swap, in order to rely upon the exemptive relief provided in the Final Order, should be able to reasonably rely on its counterparty’s representation in determining whether the counterparty is a “U.S. person.” In this context, the Commission interprets the “reasonable” standard to mean that a party to a swap should conduct reasonable due diligence on its counterparties, with what is reasonable in a particular situation to depend on the relevant facts and circumstances. The Commission notes that under its external business conduct rules, an SD or MSP generally meets its due diligence obligations if it reasonably relies on counterparty representations, absent indications to the contrary.⁵⁰ Similarly here, the

⁴⁹ For example, SIFMA stated that a swap counterparty should be responsible for determining its own U.S.-person status but in the alternative, recommended that the Commission allow for reasonable reliance on counterparty representations. See SIFMA (Aug. 27, 2012) at A-16-18. SIFMA and Cleary further pointed out that the Commission has accepted reasonable reliance on counterparty representations in the context of the external business conduct rules. See SIFMA/AMG (Aug. 27, 2012) at 4-5; and Cleary (Aug. 16, 2012) at 6.

⁵⁰ See 77 FR 9734, Feb. 17, 2012. Consistent with the “reasonable reliance” standard in the external business conduct rules, an SD or MSP may rely on the written representations of a counterparty in performing its due diligence. However, an SD or MSP cannot rely on a written representation and continue

Commission believes that allowing for reasonable reliance on counterparty representations provides for an objective standard and avoids subjective evaluations. This, in turn, facilitates a more consistent and foreseeable determination of whether a person is a “U.S. person” for purposes of relying on temporary exemptive relief.

Finally, the Commission confirms that this definition of “U.S. person” applies only for purposes of the Final Order. Further, the Commission confirms that the definition of “U.S. person” applies only to Commission regulations promulgated under Title VII’s swap provisions. Thus, for example, it would not apply to the CEA provisions (and Commission regulations promulgated thereunder) relating to the futures markets.

Foreign Branch of U.S. Person. The Commission views as a “U.S. person” the foreign branch of a U.S. person. As the Commission explained in the Proposed Guidance, a branch does not have a legal identity separate from that of its principal entity. In this respect, the Commission notes that branches are neither separately incorporated nor separately capitalized and, more generally, the rights and obligations of a branch are the rights and obligations of its principal entity (and vice versa). Under these circumstances, the Commission views the activities of a foreign branch as the activities of the principal entity.⁵¹

to claim the exemptive relief if it has information that would cause a reasonable person to question the accuracy of the representation. In other words, an SD or MSP cannot ignore red flags when relying on written representations in performing its due diligence. Further, if agreed to by the counterparty, the written representations may be included in counterparty relationship documentation. However, an SD or MSP may only rely on such representations in the counterparty relationship documentation if the counterparty agrees to timely update any material changes to the representations. In addition, the Commission expects SDs and MSPs to review the written representations on a periodic basis to ensure that they remain appropriate for their intended purpose.

⁵¹ In the Proposed Guidance, the Commission asked whether a foreign branch of a U.S. SD should be defined as a “U.S. person.” Some commenters recommended that a foreign branch of a U.S. SD be excluded from the definition of “U.S. person.” Sullivan & Cromwell on behalf of Bank of America, Citigroup, and J.P. Morgan (“S&C”) argued that a foreign branch should not be considered a U.S. person

Accordingly, the Commission declines to recognize foreign branches of U.S. persons separately from their U.S. principals for purposes of the Dodd-Frank swap provisions, including registration and Entity-Level and Transaction-Level Requirements. Therefore, if a foreign branch were to be an SD or MSP, as discussed further below, its U.S. principal would be required to register, and that registration would encompass the foreign branch. Based on the same rationale, the Dodd-Frank Act fully applies to a swap between a foreign branch of a U.S. person and a foreign branch of another U.S. person. Nevertheless, for purposes of the Final Order, as discussed further below, foreign branches of U.S. persons may comply only with transaction-level requirements as may be required in the location of the foreign branch with respect to swaps with foreign counterparties. Further, non-U.S. persons may exclude swaps with foreign branches of registered SDs for purposes of determining whether they have exceeded the de minimis level of swap dealing activity under the SD definition. Finally, for purposes of the Final Order, as further discussed below, the Transaction-Level Requirements will not apply to a swap transaction between foreign branches of U.S. SDs or foreign branches of U.S. MSPs. The Commission believes that it is appropriate to extend the foregoing relief on a temporary basis while the Commission continues to consider, and works with foreign regulators regarding, the treatment of foreign branches of U.S. registrants.

C. Registration

solely on the basis that it is a part of a U.S. bank. See S&C (Aug. 13, 2012) at 6-7. Citigroup Inc. (“Citi”) recommended that the Commission define a foreign branch of a U.S. SD as a non-U.S. person, so long as the branch remains subject to Entity-Level Requirements and obtains substituted compliance for Transaction-Level Requirements for transactions with non-U.S. persons. See Citi (Aug. 27, 2012) at 2-4. In Citi’s view, this would address comments by the foreign branch’s non-U.S. clients that they would have to register as SDs or MSPs, while assuring that such non-U.S. clients’ swaps with the foreign branch are covered by the Transaction-Level Requirements or substituted compliance. See also State Street (Aug. 27, 2012) at 3; and IIB (Aug. 27, 2012) at 8.

1. Timing of Registration for All Prospective SDs and MSPs

i. Comments

The Proposed Order did not include any delay in the timing of the registration requirement for either U.S. or non-U.S. prospective registrants. A number of commenters urged the Commission to delay registration of SDs and MSPs.⁵² Some of these commenters noted that final regulatory determinations essential to the implementation of Commission regulations are either still in proposed form or have only recently been finalized.⁵³ As a result, commenters said, firms will need additional time to assess whether they will be required to register as an SD or MSP and the consequences of doing so.⁵⁴

SIFMA recommended a delay of at least 90 days following the publication of final interpretive guidance;⁵⁵ Societe Generale recommended delaying registration at least until the Proposed Guidance has been finalized.⁵⁶ Cleary recommended a delay of at least 90 days after a final exemptive order is issued, explaining that firms will need

⁵² See e.g., SIFMA (Aug. 13, 2012) at 3, 5; IIB (Aug. 9, 2012) at 5; Societe Generale (Aug. 9, 2012) at 2, Citi (Aug. 13, 2012) at 2; Goldman (Aug. 27, 2012) at 8-9; and Lloyds (Aug. 13, 2012) at 1-2.

⁵³ See e.g., Goldman (Aug. 27, 2012) at 9 (citing the Commission's proposed rule on the treatment of inter-affiliate transactions for purposes of mandatory clearing and the anticipated Commission action on the status of guarantees of swaps); Societe Generale (Aug. 9, 2012) at 2; and IIB (Aug. 9, 2012) at 2.

⁵⁴ Without such relief, commenters are concerned that they will be required to register based on requirements that are subject to change at a later date. See Cleary (Aug. 16, 2012) at 6; SIFMA (Aug. 27, 2012) at A1-8; IIB (Aug. 9, 2012) at 4-5).

⁵⁵ See also Goldman (Aug. 27, 2012) at 9.

⁵⁶ See Societe Generale (Aug. 9, 2012) at 2.

additional time to assess and comply with the determinations therein.⁵⁷ Lloyds suggested that registration be delayed for non-U.S. SDs for at least 12 months after the publication of final guidance, with computation of the de minimis threshold starting from that date.⁵⁸

ii. Commission determination on timing of registration

Throughout the Dodd-Frank rulemaking process, the Commission consistently has strived to strike the proper balance between the need to implement the new regulatory framework for swaps without undue delay, and the need to minimize disruption and hardships for market participants. Consistent with that goal, the Commission has taken steps to provide greater certainty to market participants regarding registration determinations and their compliance obligations. The Commission is also mindful that more than two years have passed since the Dodd-Frank Act – a comprehensive reform of the swaps market – was enacted as a direct response to the financial crisis of 2008. A central element of this reform is the registration and regulation of SDs and MSPs. For example, registered SDs and MSPs are required to clear swaps with certain counterparties, are subject to detailed reporting and recordkeeping requirements and must comply (when final) with new capital and margin requirements -- all of which are designed to enhance market transparency and protections against systemic risk.

In the Commission's view, any further delay in the registration of SDs and MSPs would effectively postpone Dodd-Frank's comprehensive new regulatory regime for swaps, frustrating the congressional mandate embodied in the Dodd-Frank Act. Further,

⁵⁷ See Cleary (Aug. 16, 2012) at 4. IIB suggested a delay until a "reasonable" period after the final exemptive order is issued. See IIB (Aug. 9, 2012) at 9. IIB also noted that this is particularly important for non-U.S. firms that are required to coordinate their registration plans with their home country regulators.

⁵⁸ See Lloyds (Aug. 13, 2012) at 1-2.

given the global nature of the swaps market, an SD or MSP - whether operating in or outside the United States - plays an important role in the U.S. swaps market. Under these circumstances, the Commission believes that a further delay in the compliance date for registration as an SD or MSP would adversely affect the Commission's ability to discharge its responsibilities under the CEA and would be contrary to the public interest. Therefore, the Commission declines to delay the registration requirement for non-U.S. SDs and MSPs.

However, the Commission believes it is appropriate to provide targeted, time-limited exemptive relief with respect to the swap dealing transactions to be included in the de minimis threshold calculation that applies for purposes of the SD definition. The Commission expects that this step, and the other relief provided in the Final Order, will substantially address commenters' concerns regarding the complexity of implementing the swap requirements for the interim period during which the Final Order is in effect.

2. Scope of Transactions to be Included in Registration Calculations

The Commission has adopted final rules and interpretive guidance implementing the statutory definitions of the terms "swap dealer" and "major swap participant" in CEA sections 1a(49) and 1a(33).⁵⁹ The Final Entities Rules delineate the activities that cause a person to be an SD and the level of swap positions that cause a person to be an MSP. In addition, the Commission has adopted rules concerning the statutory exceptions from the definition of an SD, including the de minimis exception.⁶⁰ Commission regulation

⁵⁹ 7 U.S.C. 1a(49) and 1a(33). See Final Entities Rules.

⁶⁰ Section 1a(49)(D) of the CEA (7 U.S.C. 1a(49)(D)) provides that "[t]he Commission shall exempt from designation as a swap dealer an entity that engages in a de minimis quantity of swap dealing in connection with transactions with or on behalf of its customers. The Commission shall promulgate regulations to

1.3(ggg)(4) sets forth a de minimis threshold of swap dealing, which takes into account the notional amount of a person's swap dealing activity over the prior 12 months.⁶¹

When a person engages in swap dealing transactions above that threshold, the person meets the SD definition in section 1a(49) of the CEA.⁶² Commission regulations 1.3(jjj)(1) and 1.3(III)(1) set forth swap position thresholds for the MSP definition in Commission regulation 1.3(hhh). When a person holds swap positions above those thresholds, such person meets the MSP definition in section 1a(39) of the CEA.

i. Proposed guidance

In the Proposed Guidance, the Commission addressed the general manner in which a person's overseas swap dealing activities or positions may require registration as an SD or MSP, respectively. Specifically, under the Proposed Guidance, a non-U.S. person whose swap dealing transactions with U.S. persons exceed the de minimis threshold would be required to register as an SD.⁶³ Likewise, under the Proposed Guidance, a non-U.S. person who holds swap positions with U.S. counterparties that are

establish factors with respect to the making of this determination to exempt." This provision is implemented in Commission regulation 1.3(ggg)(4).

⁶¹ As used in this release, the meaning of the term "swap dealing" is consistent with that used in the Final Entities Rules.

⁶² Under Commission regulation 3.10(a)(1)(v)(C) and Commission regulation 23.21, a person is required to register as an SD when, on or after October 12, 2012, the person falls within the definition of an SD. However, the rule defining "swap dealer" includes a de minimis threshold so that an entity is not an SD if it, together with the entities controlling, controlled by, and under common control with it, engages in swap dealing activity during the prior 12 months in an aggregate gross notional amount of less than the specified thresholds. The rule further specifies that swap dealing activity engaged in before the effective date of both the "swap dealer" and "swap" definition rules (*i.e.*, before October 12, 2012) does not count toward the de minimis threshold. The rule also provides that an entity that exceeds the de minimis threshold must register as an SD two months after the end of the month in which it exceeds the threshold. See Commission regulation 1.3(ggg)(4).

⁶³ See Proposed Guidance, 77 FR at 41218-41219.

above the specified MSP thresholds would be required to register as an MSP.⁶⁴ In determining whether a non-U.S. person is engaged in more than a de minimis level of swap dealing, the Proposed Guidance would include the notional value of any swap transactions between such non-U.S. person (or any of its non-U.S. affiliates under common control) and a U.S. person, other than foreign branches of registered SDs.⁶⁵ Following a similar rationale, the Proposed Guidance stated that in calculating whether a non-U.S. person meets an MSP threshold, the non-U.S. person would include the notional value of any swaps entered into between such non-U.S. person and a U.S. person.⁶⁶

In general, commenters did not raise concerns or objections to the Commission's interpretation that non-U.S. persons who engage in more than a de minimis level of swap dealing with U.S. persons would be required to register as SDs.⁶⁷ A number of commenters argued, however, that a non-U.S. person should not be required to register as

⁶⁴ *Id.* CFTC Letter 12-22 applied a similar approach for both SD and MSP purposes.

⁶⁵ Proposed Guidance, 77 FR at 41218-41220. Further, where the potential non-U.S. SD's swap obligations are guaranteed by a U.S. person, the non-U.S. person would be required to register with the Commission as an SD when the aggregate notional value of its swap dealing activities (along with the swap dealing activities of its non-U.S. affiliates that are under common control and also guaranteed by a U.S. person) with U.S. persons and non-U.S. persons exceeds the de minimis threshold. Additionally, the Proposed Guidance clarified that a non-U.S. person without a guarantee from a U.S. person would not be required to register as an SD if it does not engage in swap dealing with U.S. persons as part of "a regular business" with U.S. persons, even if the non-U.S. person engages in dealing with non-U.S. persons.

⁶⁶ *Id.* at 41221. The Proposed Guidance also provided that if the non-U.S. person's swaps are guaranteed by a U.S. person, then such swaps will be attributed to the U.S. guarantor and not the potential non-U.S. MSP. Further, the non-U.S. person would be required to include in its MSP calculation any swaps between another non-U.S. person and a U.S. person if the potential non-U.S. MSP guarantees the obligations of the other non-U.S. person thereunder.

⁶⁷ One commenter, Japanese Bankers Association, stated that the cross-border application of Dodd-Frank is overbroad because it would capture even hedging transactions of a non-U.S. SD with a U.S. SD that is making a market. The definition of "dealing activity" is ambiguous, this commenter asserted, and might require the non-U.S. SD to register. *See* Japanese Bankers Association ("Japanese Banks") (Aug. 27, 2012) at 1.

an SD solely by reason of its swap obligations being guaranteed by a U.S. person.⁶⁸

SIFMA stated that the “connection between a non-U.S. swap dealing entity and its U.S. guarantor creates too tenuous a nexus to justify registration on the basis of this relationship alone.”⁶⁹ Other commenters raised various other issues with respect to the treatment of guarantees.⁷⁰

ii. Commission determination on exemptive relief regarding registration

Registration Thresholds for Non-U.S. Persons. As noted above, the Commission is not, at this time, taking action on the Proposed Guidance. Under CEA sections 1a(49)

⁶⁸ See e.g., Goldman (Aug. 27, 2012) at 5; ISDA (Aug. 10, 2012) at 12 (in the typical case, an intra-group guarantee allocates risks and activities within the corporate group and is not a dealing activity of the non-U.S. person); Commercial Energy Working Group (“CEWG”) (submitted by Sutherland Asbill) (Aug. 27, 2012), at 6-7 (Proposed Guidance should not include swap guarantees for aggregation purposes because it is contrary to the Final Entities Rules; jurisdiction should not be extended to transactions between two non-U.S. persons if the swap obligations of one party are guaranteed by a U.S. person because U.S. jurisdiction in these circumstances is not supported by law or existing international conventions).

⁶⁹ See SIFMA (Aug. 27, 2012) at A-29. As an alternative, SIFMA posited that only guarantees by a U.S. person for which there is a material likelihood of payment by the U.S. guarantor should be counted towards the de minimis calculation. To implement this recommendation, SIFMA suggested that the Commission establish a standard for determining that the likelihood of payment is remote, such as a comparison of the aggregate contingent liability of the U.S. person guarantor to the net equity of that guarantor. *Id.* at A-29 - A-30.

⁷⁰ See Goldman (Aug 27, 2012) at 5 (inconsistent to require SD registration solely on the basis of guarantees by a U.S. parent, absent any showing of a “direct and significant” jurisdictional nexus; concerns can be addressed through anti-evasion authority). See also CEWG (Aug. 27, 2012) at 7 (because there is no legal basis under CEA section 2(i) for asserting jurisdiction based on a guaranty, Commission should clarify that a non-U.S. person is not subject to Commission regulation, even where a U.S. person guarantees either counterparty); The Hong Kong Association of Banks (“HKAB”) (Aug. 27, 201) at 8 (swaps between non-U.S. persons should be excluded from the de minimis determination regardless of whether a counterparty is guaranteed); ISDA (Aug. 10, 2012) at 12 (focus should be on whether a U.S. guarantor of a non-U.S. person should register); Investment Industry Association of Canada (“IIAC”) (Aug. 27, 2012) at 6 (seeking confirmation that indirect holding company ownership alone does not constitute a guarantee); and JP Morgan (Aug. 27, 2012) at 10 (term “guarantee” should not include keepwells and liquidity puts that do not create the same third-party rights and may be unenforceable by third parties). *But see contra* AFR (June 14, 2012) at 2 (failure to include guaranteed affiliates as U.S. persons and to capture the “large grey area” between explicit and informal guarantees creates opportunities to escape Dodd-Frank regulations by shifting business overseas; Commission should clarify that it will “follow through on properly implementing these principles and will not enable a ‘race to the bottom’ in which incentives are created for derivatives affiliates of global banks that are able to relocate to areas of lax regulation to take advantage of an inadequate ‘substituted compliance’ regime.”).

and 1a(33) and Commission regulations 1.3(ggg)(4) and 1.3(hhh),⁷¹ a person is required to take account of the notional amount of all of its swap dealing activity over the prior 12 months for purposes of the SD determination, and all of its swap positions for purposes of the MSP determination. These CEA provisions and the Commission's regulations apply to activities within the United States and, as provided in section 2(i), to certain activities outside the United States.

However, while the Commission continues to consider the comments on its Proposed Guidance regarding section 2(i), the Commission believes it appropriate to provide, under the Final Order, relief for non-U.S. persons (regardless of whether the non-U.S. persons' swap obligations are guaranteed by U.S. persons) from the requirement that a person include all its swaps in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for SD purposes or in its calculations for MSP purposes. On the other hand, the Commission believes that it is not appropriate to provide a non-U.S. person with relief from the registration requirement when the aggregate level of its swap dealing with U.S. persons, as that term is defined above, exceeds the de minimis level of swap dealing, or when the level of its swap positions with U.S. persons, again as that term is defined above, exceeds one of the MSP thresholds. In the Commission's view, such relief from the registration requirement is inappropriate when a level of swap activities that is substantial enough to require registration as an SD or an MSP when conducted by a U.S. person, is conducted by a non-U.S. person with U.S. persons as counterparties.

⁷¹ 7 U.S.C. 1a(49) and 1a(33). See Final Entities Rules.

Therefore, the Final Order provides that a non-U.S. person (regardless of whether the non-U.S. persons' swap obligations are guaranteed by U.S. persons) does not need to include in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4) or in its calculation of whether it is an MSP for purposes of Commission regulation 1.3(hhh), any swaps where the counterparty is a non-U.S. person.

Exclusion for Swaps with Foreign Branches of U.S. Swap Dealers. The Proposed Guidance would exclude from a non-U.S. person's de minimis threshold calculation its swap transactions with foreign branches of U.S. SDs. This exclusion was intended to allow non-U.S. persons to continue their swap activities with foreign branches of U.S. SDs without exceeding the de minimis threshold, thereby triggering a requirement to register as an SD.

In CFTC Letter 12-22, the Commission staff noted that because the proposed exclusion would be limited to registered U.S. SDs and many of the persons who expect to register as U.S. SDs may not do so until December 31, 2012, or later, market participants had expressed concern that a non-U.S. person could be required after October 12, 2012, to begin counting toward the de minimis threshold any swap dealing transactions with a foreign branch of any person that may meet the definition of "U.S. person" and that is not yet registered (and consequently be required to register as an SD) even though many U.S. persons with foreign branches intend to register as SDs later in 2012 or in early 2013.⁷²

⁷² Similarly, if a non-U.S. person must include swaps with such foreign branches in its calculation of whether it is within the definition of MSP in Commission regulation 1.3(hhh), it could be required to register with the Commission in that capacity. Although the Proposed Guidance did not provide for a similar exclusion with respect to the consideration of a non-U.S. person's swaps with foreign branches of U.S. SDs with respect to determining whether the non-U.S. person must register as an MSP, some

The Commission staff noted that this potential outcome would not be consistent with the scope of relief intended to be provided in the Proposed Guidance.⁷³

The Commission believes it appropriate to provide, in this Final Order, the scope of relief afforded in CFTC Letter No. 12-22 while it considers action on the Proposed Guidance. Accordingly, for purposes of the Final Order, swap transactions by a non-U.S. person with a foreign branch of a registered U.S. SD, or with a foreign branch of a U.S. person that is not yet registered as a U.S. SD but that does intend to register as such when required, are not required to be included in the calculations for SD and MSP registration purposes.

Therefore, the Final Order provides that a non-U.S. person does not need to include in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4) or in its

commenters requested that the Commission provide a similar exclusion. See SIFMA (Aug. 27, 2012) at 9, A-28, A-29; Citi (Aug. 27, 2012) at 2-3.

⁷³ Commenters, such as Goldman, argued that the rationale for this exclusion is equally applicable to non-U.S. persons that are banks or broker-dealers when dealing with U.S. SDs that do not conduct overseas business through foreign branches. Absent a similar interpretation in these circumstances, they argued, U.S. SDs would be at a competitive disadvantage vis-à-vis foreign branches of U.S. SDs since non-U.S. persons will limit their dealing activities to foreign branches of U.S. SDs. See Goldman (Aug. 27, 2012) at 5-6. The Commission does not believe that it would be appropriate for a non-U.S. person to exclude from the de minimis calculation swap dealing transactions with U.S. SDs (other than their foreign branches). By way of comparison, however, for purposes of the Final Order, a swap that a non-U.S. person enters into with a non-U.S. affiliate of a U.S. SD (whether guaranteed by a U.S. person or not) is not a swap with a U.S. person and, thus, need not be counted towards the de minimis calculation. The Commission proposed to interpret section 2(i) so as to exclude swap dealing transactions with a foreign branch of a U.S. SD in order to avoid the otherwise potential result that foreign entities would cease doing swap dealing business with foreign branches of U.S. SDs in order to avoid SD status, while continuing to do business with foreign affiliates of U.S. SDs located in the same jurisdiction. The Commission does not believe relief should be provided in a manner that would lead to such disparate treatment of entities located outside the United States, *i.e.*, foreign branches and foreign affiliates of U.S. SDs that are located in the same jurisdiction but that happen to bear a different legal structure. Similar considerations of potentially discriminatory results do not apply, however, with respect to swaps directly with U.S. SDs. Such U.S. SDs are different in kind from a foreign affiliate of a U.S. SD, and the rationale for the foreign branch exclusion is inapposite in these circumstances.

calculation of whether it is an MSP for purposes of Commission regulation 1.3(hhh), any swap where the counterparty is a foreign branch of a U.S. person that is registered as an SD or that represents that it intends to register with the Commission as an SD by March 31, 2013.⁷⁴

Aggregation for the De Minimis Calculation. Commission regulation 1.3(ggg)(4) requires that a person include, in determining whether its swap dealing activities exceed the de minimis threshold, the aggregate notional value of swap dealing transactions entered by its affiliates under common control. Additionally, under the Proposed Guidance, a non-U.S. person, in determining whether its swap dealing transactions exceed the de minimis threshold, would include the aggregate notional value of swap dealing transactions entered into by its non-U.S. affiliates under common control but would not include the aggregate notional value of swap dealing transactions entered into by its U.S. affiliates.

Numerous comments on the Proposed Guidance discussed considerations relating to when the swap dealing activities of affiliates should be aggregated for purposes of determining if a non-U.S. person is required to register as an SD. The Commission is considering these comments, and intends to address them in preparing final guidance on this issue. However, the Commission believes it is appropriate to provide, in the Final Order, temporary relief from the requirement in Commission regulation 1.3(ggg)(4) to include the swap dealing activities of certain affiliates in the de minimis calculation.

⁷⁴ The representation of the intention to register with the Commission as a swap dealer need not be obtained prior to execution of a swap.

For purposes of the Final Order, the Commission believes that a non-U.S. person that is engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order should not be required to include, in its determination of whether it exceeds the de minimis threshold, the swap dealing transactions of any of its U.S. affiliates.⁷⁵ In addition, the Commission believes it is appropriate that if the non-U.S. person is an affiliate of a person that is registered as an SD, it should not be required to include, in its determination of whether it exceeds the de minimis threshold, the swap dealing transactions of any of its non-U.S. affiliates that engage in swap dealing activities, so long as each such excluded affiliate is either (i) engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order or (ii) registered as an SD.⁷⁶

Where at least one of the entities in the affiliated group registers as an SD, the Commission believes that during the transition period covered by the Final Order, it is not necessary to aggregate the swap dealing transactions of the various affiliates, even if the aggregate amount of such swap dealing transactions among all the unregistered non-U.S. affiliates is above the de minimis threshold. Thus, where at least one of the entities in the affiliated group registers as an SD, another entity in the affiliated group would have

⁷⁵ For this purpose, the Commission construes “affiliates” to include persons under common control as stated in the Final Entities Rules with respect to the term “swap dealer,” which defines control as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.” See Final Entities Rules, 77 FR at 30631, fn. 437.

⁷⁶ The Commission notes that, in any case, the swap dealing transactions of a non-U.S. person’s non-U.S. affiliates that may have to be included in the de minimis determination are the transactions between the non-U.S. affiliates and U.S. person counterparties. In no case would swap dealing transactions between the non-U.S. person’s non-U.S. affiliates and other non-U.S. person counterparties need to be included in the determination.

to register as an SD only if its own swap dealing transactions with U.S. persons, considered individually, were above the de minimis threshold.⁷⁷

As noted above, however, this limited transitional relief is not applicable if a non-U.S. affiliate begins to engage in swap dealing transactions with U.S. persons after the effective date of the Final Order. The Commission believes that this limitation is appropriate for the relatively short time period that the Final Order will be in effect, in order to prevent evasion and abuse of this relief. Without this limitation, new non-U.S. affiliates could be created simply in order to engage in further swap dealing activity with U.S. persons. Moreover, most commenters were clear that limited transitional relief from the aggregation requirement is necessary with respect to their existing swap dealing activities, but is not necessary in order to expand their swap dealing activities in the short term.⁷⁸

Central Booking Entity. In the event an entity operates a “central booking system” where swaps are booked into a single legal entity, whether or not such entity is a counterparty to the swap, the Proposed Guidance stated that the entity that books the swaps would be subject to any applicable SD registration requirement, as if it had entered into such swaps directly, regardless of whether such entity is a U.S. person or whether the booking entity is a counterparty to a swap (has booked the swap directly) or has booked a swap indirectly by way of a back-to-back swap or other arrangement with an affiliate.

The Commission noted that a non-U.S. affiliate or subsidiary may also be required to

⁷⁷ The Commission wishes to make clear that relief from the registration requirement is not available to any person or entity that engages in swap dealing transactions with U.S. persons above the de minimis threshold. The discussion in this section relates only to whether and when non-U.S. persons must aggregate their own swap dealing transactions with the swap dealing of their non-U.S. affiliates.

⁷⁸ See, e.g., Cleary (Aug 16, 2012) at 5-6; SIFMA (Aug 13, 2012) at 4-5.

register as an SD if it independently meets the definition of an SD.⁷⁹ A number of commenters sought clarification of the Commission’s interpretation with respect to the central booking model.⁸⁰

In this situation, the Commission clarifies that a non-U.S. person should not be required to include in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4), any swap to which it is not a party because the swap is entered into by an affiliated central booking entity.

Summary. For purposes of the transitional relief under this Final Order, in determining whether a non-U.S. person is engaged in more than a de minimis level of swap dealing⁸¹ or holds swap positions above any of the MSP thresholds, the non-U.S.

⁷⁹ Section 1.3 (ggg)(3) of the Commission’s regulations permits a person to apply for a limited purpose designation based on a particular type, class, or category of a swap, or to a particular business unit within an entity. See Commission regulation 1.3(ggg)(3); Final Entities Rules, 77 FR at 30645-46. Cleary urged the Commission to recognize limited designation for non-agricultural firms. Specifically, it argued that limited designation should be available to an entity that registers as a firm, and not merely a branch, division, or office. See Cleary (Aug. 16, 2012) at 14. Regarding the two points raised by Cleary, the Commission clarifies that a limited designation is available to any registrant that can demonstrate its ability to comply with applicable requirements; it is not limited to only agricultural firms, and it could be available to an entity that registers as a firm. The Commission believes that further relief at this time regarding limited designations is not justified under the criteria of CEA section 4(c). As noted in the Final Entities Rules, the Commission believes that limited designation is appropriately addressed on a case-by case basis in the context of individual applications for registration. See Final Entities Rules, 77 FR at 30646 (“Any particular limited purpose application will be analyzed in light of the unique circumstances presented by the applicant.”).

⁸⁰ See e.g., Goldman (Aug. 27, 2012) at 6-7; Credit Suisse (Aug. 27, 2012) at 9; IIB (Aug. 27, 2012) at 26 (stating that, although it is not entirely clear, in a central booking arrangement under which a non-U.S. person dealing in swaps with other non-U.S. persons “books” those swaps to a U.S. affiliate (which either directly becomes a party to the swap or indirectly enters a back-to-back arrangement), the Proposed Guidance could be interpreted as requiring the non-U.S. affiliate to separately register as an SD if its activities with non-U.S. persons meet the definition of an SD); and Lloyd’s (Aug. 24, 2012) at 2-3 (requesting clarification as to whether or not non-U.S. institutions (not acting as principal to swaps with U.S. persons) employing central booking models, would be required to register as SDs when they centrally manage market risk for swaps with an affiliated non-U.S. SD and other non-U.S. related swaps activities).

⁸¹ Cleary and SIFMA have asked the Commission to confirm that swap activities that are limited to unwinding “legacy” swap portfolios do not constitute swap dealing. See Cleary (Aug. 16, 2012) at 11-12;

person – whether guaranteed or not by a U.S. person – may exclude and not consider the aggregate notional value of:

- any swap where the counterparty is a non-U.S. person; and
- any swap where the counterparty is a foreign branch of a U.S. person that is registered as an SD or that represents that it intends to register with the Commission as an SD by March 31, 2013; and
- for purposes of SD registration only, any swap to which it is not a party because the swap is entered into by an affiliated central booking entity.

Further, for purposes of the transitional relief under this Final Order, in determining whether a non-U.S. person is engaged in more than a de minimis level of swap dealing, the non-U.S. person may exclude and not consider the aggregate notional value of:⁸²

- any swap dealing transaction of its U.S. affiliates under common control; and

SIFMA (Aug. 27, 2012) at A-31. See also The Clearing House (Aug. 13, 2012) at 11. In a related vein, IIB requested that the Proposed Order be modified to allow certain less active “Transition Affiliates” additional time to transfer swap positions to their principal swap dealing affiliate, see IIB (Aug. 9, 2012) at 7, and Cleary separately asked the Commission to consider whether the aggregation rule should apply to non-U.S. affiliates whose swap dealing activity is already subject to local regulation by a G-20 supervisor, see Cleary (Aug. 16, 2012) at 9-10. In general, the Commission previously concluded that bright-line tests and categorical exclusions from the term “swap dealer” based on the general nature of a person’s business are unwarranted. See Final Entities Rules, 77 FR at 30615. The Commission believes that this approach is equally appropriate here, with regard to the exemptive relief requested in the cross-border context. As noted above, the Commission believes that registration of non-U.S. persons that are within the definition of the term “swap dealer” is a key element of the Dodd-Frank swaps reforms. Therefore the Commission believes, at this time, that blanket relief in this area along the lines suggested by commenters is not in the public interest, and that the determination of whether particular activities constitute swap dealing or otherwise bring a person within the definition of the term “swap dealer,” should proceed along the lines that the Commission adopted in the Final Entities Rules. Under these circumstances, the Commission has determined that it would be inappropriate to provide further relief in this regard under CEA section 4(c). However, the Commission does not intend to preclude its staff from considering appropriate relief in this regard on a case-by-case basis

⁸² As noted above, this further relief is available only where the non-U.S. person is engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order.

- if any of its affiliates under common control is registered as an SD, any swap dealing transaction of any of its non-U.S. affiliates that (i) is engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order or (ii) is registered as an SD.⁸³

D. Entity-Level and Transaction-Level Requirements

1. Categorization of Entity- and Transaction-Level Requirements

Title VII of the Dodd-Frank Act establishes a comprehensive new regulatory framework for SDs and MSPs. This framework is an important element of the “improve[d] financial architecture” that Congress established in the Dodd-Frank Act to reduce systemic risk and enhance market transparency.⁸⁴ Among other things, a registered SD or MSP must comport with certain statutory requirements (and regulations the Commission may promulgate thereunder) governing risk management, internal and external business conduct standards, and reporting. Further, U.S. SDs and MSPs, once registered, are required to comply with all of the requirements applicable to SDs and MSPs for all their swaps, not just the swaps that make them an SD or MSP.

For purposes of the Proposed Order, the Dodd-Frank swap provisions were divided into two categories: (1) Entity-Level Requirements, which apply to all the firm’s activities or transactions; and (2) Transactional-Level Requirements, which apply on a

⁸³ The foregoing summary is based on the term “U.S. person” as it is defined above.

⁸⁴ S. Rep. No. 111-176, at 228 (2010).

transaction-by-transaction basis. For purposes of the Final Order, the Commission will apply the Entity-Level and Transaction-Level Requirements as proposed.⁸⁵

The Entity-Level Requirements consist of: (1) capital adequacy; (2) chief compliance officer; (3) risk management; (4) swap data recordkeeping; (5) SDR reporting; and (6) LTR.⁸⁶ The Entity-Level Requirements apply to registered SDs and MSPs across all their swaps without distinctions as to the counterparty or the location of the swap.⁸⁷

The Transaction-Level Requirements consist of: (1) clearing and swap processing; (2) margining and segregation for uncleared swaps; (3) trade execution; (4) swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; (8) daily trading records; and (9) external business conduct standards.⁸⁸

⁸⁵ To date, the Commission has not adopted final rules relating to the Entity-Level Requirement of capital adequacy, nor the Transaction-Level Requirements of margining (and segregation) for uncleared swaps, and trade execution. See sections 2(h)(8), 4s(e) and 4s(l) of the CEA, 7 U.S.C. 2(h)(8), 6s(e) and 6s(l). No exemptive relief is necessary with respect to Requirements that are not yet in effect and, therefore, the Final Order does not apply to these Requirements. In the event that final rules with respect to any of these Requirements that are issued by the Commission come into effect prior to the expiration of this Final Order, the Commission will consider extending the Final Order to such Requirements at that time. For further details regarding the Entity-Level Requirements and the Transaction-Level Requirements, see the appendices to the Proposed Order.

⁸⁶ Specifically, the Entity-Level Requirements are those set forth in Commission regulations 1.31, 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, 23.606, 23.607, 23.608 and 23.609 and parts 20, 45 and 46.

⁸⁷ IIB and The Clearing House noted that the Proposed Order did not address Commission regulation 1.31, which sets forth certain recordkeeping obligations that apply to all books and records required to be kept under the Commission's regulations. See IIB (Aug. 9, 2012) at 10; and The Clearing House (Aug. 16, 2012) at 14. In the Proposed Order, the Commission proposed generally that recordkeeping requirements would be Entity-Level Requirements but did not explicitly list Commission regulation 1.31 as an Entity-Level Requirement. The Commission clarifies that for purposes of the Final Order, Commission regulation 1.31 is an Entity-Level Requirement and, therefore, subject to the exemptive relief under the Final Order

⁸⁸ Specifically, the Transaction-Level Requirements are those set forth in CEA section 2(h)(8) and Commission regulations 23.202, 23.400 to 23.451, 23.501, 23.502, 23.503, 23.504(a), 23.504(b)(1), (b)(2),

The Commission intends to consider any reclassification of Entity-Level and Transaction-Level requirements, including for the reasons raised by various commenters, in connection with further guidance on cross-border issues. As described below, however, the Commission has considered issues raised by commenters regarding the scope of the proposed exemptive relief from such Requirements -- apart from their ultimate classification.

2. General Comments on the Proposed Order

In response to the Proposed Order, a number of commenters addressed the proposed exemptive relief from the Entity-Level and Transaction-Level Requirements. The Clearing House stated that appropriate phase-in relief requires the Commission to “provide greater flexibility” with respect to the application of the Dodd-Frank requirements to overseas operations and non-U.S. counterparties.⁸⁹ Several other commenters – including IIB, Citigroup and Cleary – recommended that the Commission either delay the compliance date for certain requirements or expand the scope of relief (particularly as to transactions with non-U.S. counterparties) to address certain compliance and operational burdens associated with applying the Dodd-Frank

(b)(3) and (b)(4), 23.506 and 23.610 and part 43. The Proposed Guidance placed one of the Transaction-Level Requirements – external business conduct standards – into a “Subcategory B,” as distinguished from the remaining Transaction-Level Requirements in “Subcategory A.” This distinction is not relevant for purposes of the Final Order, in which all Transaction-Level Requirements are provided the same exemptive relief.

⁸⁹ See The Clearing House (Aug. 13, 2012) at 13-14. To that end, The Clearing House recommended that certain rules currently categorized as entity-level be changed to transaction-level.

requirements to transactions outside the United States.⁹⁰ These comments and the Commission determinations in response thereto are discussed below.

3. SDR Reporting (Part 45 and Part 46) and LTR Requirements

i. Comments

As discussed above, in the Proposed Order, the Commission proposed to allow non-U.S. SDs and MSPs to delay compliance with Entity-Level Requirements subject to specified conditions – except for the Entity-Level Requirements of SDR reporting and LTR requirements. Under the Proposed Order, non-U.S. SDs and MSPs would be required to comply with SDR reporting and LTR requirements for all swaps with U.S. counterparties upon their compliance date. And, with respect to swaps with non-U.S. counterparties, the Commission proposed that only those non-U.S. SDs and MSPs that are not affiliates or subsidiaries of a U.S.-based SD would be permitted to delay compliance with the SDR reporting and LTR requirements. The Commission is adopting this temporary exemptive relief generally as proposed, with certain modifications in response to comments received.

Some commenters requested an extension of the compliance date for SDR reporting and LTR requirements. IIB stated that due to the “expansive” proposed aggregation rule and ambiguities in the proposed U.S. person definition, non-U.S. registrants may not have their systems ready to report their U.S.-facing swaps, which they expect to be relatively few in number.⁹¹ As an initial step, IIB requested that the

⁹⁰ See e.g., IIB (Aug. 13, 2012) at 9-10, Cleary (Aug. 16, 2012) at 14-16; and Citigroup (Aug. 13, 2012) at 4.

⁹¹ See IIB (Aug. 13, 2012) at 10.

Commission further extend the compliance date for SDR reporting and LTR requirements with respect to swaps between non-U.S. registrants and other non-U.S. counterparties (including foreign branches of U.S. persons) under the exemptive relief, pending final interpretive guidance and for a “reasonable” time thereafter.⁹² Similarly, Cleary stated that compliance with part 45 swap data reporting requirements would require U.S. operations overseas (i.e., affiliates and foreign branches) to develop new reporting infrastructures, which requires additional time for implementation. It requested that registrants be permitted to comply with SDR reporting with non-U.S. counterparties by reporting to the Global Trade Repository (“GTR”).⁹³

Other commenters requested broader relief from the reporting requirements. SIFMA argued that non-U.S. registrants should be relieved from complying with SDR reporting for all of their swaps.⁹⁴ SIFMA explained that because the proposed reporting relief is not available for swaps with U.S. counterparties, non-U.S. registrants are effectively required to comply with the full extent of SDR reporting and LTR requirements upon the effectiveness of the rules, nullifying the benefit of any transition period. Therefore, SIFMA urged that the proposed relief for non-U.S. registrants should apply to swaps with all counterparties.

The Clearing House stated that potential registrants - whether U.S. or non-U.S. and irrespective of affiliation or branch status – should not be required to apply SDR

⁹² Id. IIB also said that there may be jurisdictions that restrict the disclosure of even swaps with U.S. persons, and additional relief may be necessary for those jurisdictions.

⁹³ See Cleary (Aug. 16, 2012) at 15-16.

⁹⁴ See SIFMA (Aug. 13, 2012) at 8-9.

reporting rules or LTR requirements to transactions with non-U.S. counterparties.⁹⁵ It explained that for swaps with non-U.S. counterparties, these rules are transaction-specific and further, the cost of developing the necessary reporting infrastructure during the exemptive period would create disadvantages vis-à-vis those potential registrants for which delayed implementation of these requirements would be granted under the Final Order. The Clearing House, like IIB, also cited the fact that under the Proposed Guidance, many non-U.S. entities may be unexpectedly required to register as SDs but lack the operational infrastructure to comply with the reporting requirements.

Several commenters also requested additional time for compliance with part 46 reporting of historical and transition swaps. For example, Citi stated that data for many historical swaps is not available in the format necessary, and that many of the relevant swaps have expired or were terminated.⁹⁶ SIFMA said that allowing additional time for compliance would not materially hinder the Commission's ability to assess systemic risk.⁹⁷ SIFMA requested that the Commission delay for all market participants part 46 historical swap reporting for a particular counterparty and asset class until 120 days after SDR reporting under part 45 is effective for that reporting counterparty and asset class in order to alleviate the difficulties associated with compliance with both reporting requirements.

⁹⁵ See The Clearing House (Aug. 13, 2012) at 13-14. This commenter also stated that where the foreign jurisdiction lacks any parallel transaction-level rules, the registrant should not be required to apply any Dodd-Frank Transaction-Level Requirements with respect to any swap with a non-U.S. counterparty. For jurisdictions with transaction-level requirements, all registrants should be allowed to comply with the local requirements during the exemptive period.

⁹⁶ See Citi (Aug. 13, 2012) at 9.

⁹⁷ See SIFMA (Aug. 13, 2012) at 11.

Finally, as noted above, the Proposed Order stated that the exemptive relief for SDR reporting and LTR requirements for non-U.S. registrants in their swaps with non-U.S. counterparties would not extend to non-U.S. registrants that are affiliates or subsidiaries of U.S. registrants. A number of commenters, including Deutsche Bank, recommended that the Commission eliminate the term “affiliate” and exempt non-U.S. registrants from reporting swaps with non-U.S. counterparties, except where the non-U.S. registrant is a direct subsidiary of a U.S. registrant.⁹⁸ Commenters expressed the concern that this proposed exemptive relief from SDR reporting and LTR requirements was too narrow in that it would not extend to a non-U.S. registrant by virtue of its affiliation with a U.S. SD under the common ownership of a non-U.S. person that is neither an SD nor an MSP.⁹⁹

ii. Commission determination on SDR reporting and LTR requirements

SDR reporting is a fundamental component of Dodd-Frank’s objective to reduce risk, increase transparency, and promote market integrity within the financial system generally, and the swaps market in particular.¹⁰⁰ SDR reporting achieves the statutory objectives of transparency and enhanced price discovery by, among other things, requiring that market participants report swap transaction and pricing data to an SDR. SDR reporting also serves as a valuable regulatory tool. In particular, timely reporting of comprehensive swap transaction data to SDRs will be important to the Commission’s ability to effectively monitor and address the risk exposures of individual market

⁹⁸ See Deutsche Bank (Aug. 13, 2012) at 3; see also Cleary (Aug. 16, 2012) at 14-15.

⁹⁹ See id.

¹⁰⁰ See 7 U.S.C. 2(a)(13)(G).

participants (including SDs and MSPs) and the concentration of risk within the swaps market more generally. Similarly, LTR enables the Commission to promptly and efficiently identify significant traders and collect data on their trading activity so that the Commission can reconstruct market events, conduct investigations, and bring enforcement actions as appropriate. In short, SDR reporting and LTR requirements are vital to ensuring that the Commission has a comprehensive and accurate picture of market activities in order to fulfill its regulatory mandate, including systemic risk mitigation, market monitoring, and market abuse prevention.

The Commission notes that Commission staff has recently granted no-action relief with respect to certain of these reporting requirements. In CFTC Letter No. 12-32, Commission staff provided time-limited no-action relief to SDs “from certain requirements of the Commission’s swap data reporting rules, in order to allow for a common monthly compliance date for swap dealers newly falling within the scope of these rules, and to extend the compliance date for reporting historical swap transaction data pursuant to Part 46 of the Commission’s regulations.”¹⁰¹ In CFTC Letter No. 12-39, Commission staff granted time-limited no-action relief to reporting parties from certain reporting requirements in part 43 and part 45 with respect to bespoke or complex products.¹⁰² The no-action relief granted in these letters is available to both U.S. and non-U.S. persons who may be subject to these reporting obligations.

¹⁰¹ CFTC Division of Swap Dealer and Intermediary Oversight and Division of Market Oversight, Time-Limited No-Action Relief for Swap Dealers from Certain Swap Data Reporting Requirements of Part 43, Part 45, and Part 46 of the Commission’s Regulations, No-Action Letter No. 12-32, dated Nov. 19, 2012.

¹⁰² CFTC Division of Market Oversight, Time-Limited No-Action Relief for Bespoke or Complex Swaps from Certain Swap Data Reporting Requirements of Parts 43 and 45 of the Commission’s Regulations, No-Action Letter No. 12-39, dated Nov. 19, 2012.

The Commission believes that it is necessary to implement these reporting requirements as expeditiously as possible, and in a manner intended to achieve their underlying statutory objectives. Therefore, in light of the relief provided by the Commission staff, the Commission has determined that it would not further the public interest or the purposes of the CEA to further delay compliance with the SDR reporting or LTR requirements for non-U.S. registrants. For similar reasons, the Commission has determined to not extend exemptive relief from the SDR reporting or LTR requirements to U.S. registrants for their transactions with non-U.S. counterparties. Thus, the Commission has determined not to provide relief under CEA section 4(c) in this regard.

Finally, the Commission is clarifying its proposal that only those non-U.S. SDs and MSPs that are not affiliates or subsidiaries of a U.S.-based SD would be permitted to delay compliance with the SDR reporting and LTR requirements with respect to swaps with non-U.S. counterparties. As explained in the preamble of the Proposed Order, this condition was intended to limit the relief to non-U.S. registrants that are not “part of a U.S.-based affiliated group.”¹⁰³ Accordingly, in response to comments received, the Commission is clarifying that the relief from the SDR reporting and LTR requirements is reserved for swaps with non-U.S. counterparties that are entered into by non-U.S. registrants that are not part of an affiliated group in which the ultimate parent entity is a U.S. registrant, bank, financial holding company, or bank holding company.¹⁰⁴ The Commission believes that this modification strikes the appropriate balance between

¹⁰³ 77 FR at 41112.

¹⁰⁴ Accordingly, swaps with non-U.S. counterparties that are entered into by non-U.S. registrants that are part of an affiliated group in which the ultimate parent entity is a U.S. registrant, bank, financial holding company, or bank holding company, are subject to the SDR reporting and LTR requirements.

facilitating such non-U.S. registrants' phasing in of their reporting obligations and achieving the critical statutory and regulatory objectives of the SDR reporting and LTR requirements as discussed above. Therefore, the Commission has determined that this provision of the Final Order, as modified, is consistent with the public interest and the purposes of the CEA and, therefore, is appropriate for temporary exemptive relief pursuant to CEA section 4(c).

4. Privacy and Confidentiality Laws

i. Comments

A number of commenters, both market participants and foreign regulators, stated that certain Dodd-Frank requirements - namely, SDR reporting and LTR requirements, and U.S. regulators' access to books and records - may conflict with local privacy and data protection laws.¹⁰⁵ They further noted that potential solutions to such blocking statutes, such as mutual assistance agreements and/or client consents, may be available but will require time to implement. Certain commenters, including UBS, Citi, and Societe Generale, specifically requested that compliance with the reporting requirements for non-U.S. persons with non-U.S. counterparties, including foreign branches of U.S. persons, be delayed pending final interpretive guidance (and for a reasonable time thereafter). As an alternative, SIFMA suggested that at least during the term of the exemptive relief, all market participants (including futures commission merchants) should be permitted to mask client information from any reporting requirements,

¹⁰⁵ See e.g., SIFMA (Aug. 13, 2012) at 14; Citi (Aug. 13, 2012) at 7; UBS AG ("UBS") (June 13, 2012) at 1; IIB (Aug. 9, 2012) at 10; Societe Generale (Aug. 9, 2012) at 8; ISDA (Aug. 10, 2012) at 7; Swiss Financial Market Supervisory Authority ("FINMA") (July 16, 2012) at 2; Hong Kong Banks (Aug. 27, 2012) at 2-3.

including SDR reporting and LTR, where the failure to do so would violate applicable foreign laws and regulations.

ii. Commission determination on privacy and confidentiality laws

The Commission believes that, given the importance of the subject reporting requirements to market transparency and integrity, it is critical to apply these requirements to all registered SDs and MSPs.¹⁰⁶ However, the Commission recognizes the potential challenges that non-U.S. firms may face in jurisdictions with conflicting privacy and confidentiality laws. As a result of these challenges, the Commission staff recently granted time-limited no-action relief from provisions of parts 20, 45, and 46 of the Commission's regulations that require the reporting of certain information revealing the identity of a counterparty or affiliated group where reporting such information would violate the privacy laws of a non-U.S. jurisdiction.¹⁰⁷ In light of the Commission staff's decision to provide no-action relief with respect to this issue, the Commission has

¹⁰⁶ See also the discussion of the importance of SDR reporting in section III.D.3.ii., above

¹⁰⁷ See CFTC Division of Market Oversight, Re: Time-Limited No-Action Relief for Part 20 Reporting Entities Regarding Identifying Information and Time-Limited No-Action Relief for Part 45 and Part 46 Reporting Counterparties Regarding Legal Entity Identifiers, Other Enumerated Identifiers, or Other Identifying Terms, No-Action Letter No.12-46, Dec. 7, 2012. Further, in response to comments, the Commission is revising Form 7-R. This is the Commission form that a firm uses to apply for registration with the Commission. By signing Form 7-R, the firm makes a set of certifications, acknowledgments and undertakings. In addition, if the applicant is a foreign firm, the firm agrees to provide its books and records for inspection by the Commission, NFA, or the U.S. Department of Justice ("DOJ") upon request and in a specified manner. Included is a statement that the foreign firm is not subject to any blocking, privacy or secrecy laws, and that failure to provide the books and records in the manner specified could result in enforcement action, denial or revocation of registration, or other consequences.

Certain foreign firms that will be required to register with the Commission as SDs by a date certain may be subject to blocking, privacy, or secrecy laws in their home jurisdictions that could limit or prevent production by those firms of their books and records in accordance with the procedures they would be agreeing to by signing Form 7-R. In order to permit these firms to register as required by U.S. law, without violating their home country laws, the Commission is making the terms of the agreement in Form 7-R that a firm produce its books and records upon request of the Commission, NFA, or DOJ, subject to the provisions of any applicable blocking, privacy or secrecy laws. See Form 7-R at page 42, which may be found on NFA's website at <http://www.nfa.futures.org/NFA-registration/templates-and-forms/Form7-R-entire.pdf>.

determined that it would not further the public interest or the purposes of the CEA to grant further relief with respect to the reporting requirements solely on the basis of potentially conflicting privacy and data protection laws. Therefore, the Commission declines to provide relief under CEA section 4(c) in this regard.

Similarly, the Commission views its access to a registrant's books and records as a fundamental regulatory tool necessary to properly monitor and examine the registrant's compliance with the CEA. Consistent with existing practice, the Commission intends to exercise its right to access a registrant's books and records and maintain its right to examine a registrant, regardless of the registrant's location.¹⁰⁸ In this regard, the Commission believes that mutual cooperation with other regulators is equally important to achieve the effective and efficient supervision of cross-border activities. In recognition of the importance of such mutual cooperation, the Commission will endeavor to achieve an understanding with each relevant regulator and memorialize such understanding in a supervisory arrangement. In the Commission's view, this is a balanced and flexible approach that will ensure that the agency has access to information critical to fulfilling its statutory responsibilities, but achieved in a manner designed to ensure continuing cooperative relationships with its counterparts overseas.

5. Exemptive Relief for U.S. Swap Dealers

i. Comments

¹⁰⁸ Under Commission regulation 23.603(i), a registered SD or MSP must make all records required to be maintained in accordance with Commission regulation 1.31 available promptly upon request to representatives of the Commission. Under the Final Order, the Commission reserves this right to access records held by registered SDs and MSPs, regardless of the registrant's location.

The Proposed Order would permit non-U.S. registrants and foreign branches of U.S. registrants to delay compliance with Transaction-Level Requirements with respect to swaps with non-U.S. persons.¹⁰⁹ The relief would not be available to U.S. SDs (with the exception of foreign branches). SIFMA requested that the Commission extend the relief from compliance with the Entity-Level Requirements (including SDR reporting) to U.S. registrants transacting with non-U.S. persons since it will be difficult, if not impossible, to collect the counterparty information that is necessary to effect compliance with certain of these requirements.¹¹⁰ SIFMA also supported granting U.S. SDs relief from swap data recordkeeping and internal conflicts requirements for swaps with non-U.S. persons.¹¹¹ ISDA similarly argued that the rationale for exemptive relief applies equally to a U.S. SD transacting directly with non-U.S. persons.¹¹² Cleary raised concerns about the disparate treatment extended to U.S. SDs and non-U.S.-SDs under the Proposed Order in respect to Transaction-Level Requirements as applied to transactions with non-U.S. persons.¹¹³ Cleary requested that in the interim, for the duration of the

¹⁰⁹ The Proposed Order provided that non-U.S. registrants may comply with Transaction-Level Requirements for transactions with non-U.S. counterparties only as required by the home jurisdiction (or in the case of foreign branches of a U.S. registrant, the foreign location of the branch). Cleary requested that compliance with the host jurisdiction also be permitted. See Cleary (Aug. 16, 2012) at 16. In response, the Commission is clarifying the Final Order to allow the non-U.S. registrant (or branch of a U.S. registrant) to comply with only the applicable requirements of the local jurisdiction.

¹¹⁰ See SIFMA (Aug. 13, 2012) at 10 (arguing that, otherwise, U.S. SDs would be at a competitive disadvantage and that U.S. SDs face the same operational difficulties as non-U.S. SDs when transacting in the U.S. with non-U.S. counterparties).

¹¹¹ Id. at 9.

¹¹² See ISDA (Aug. 10, 2012) at 7 (“in the interest of competitive parity between US and non-US entities, ISDA recommends that the Commission align the domestic and extraterritorial compliance dates of all requirements”).

¹¹³ See Cleary (Aug. 16, 2012) at 11 (“during the exemption’s phase-in period . . . the CFTC should ensure competitive parity by exempting all [SDs] from transaction-level requirements in connection with transactions with non-US counterparties”).

exemptive relief, the Commission should exempt all SDs from Transaction-Level Requirements for transactions with non-U.S. persons.

ii. Commission determination on relief for U.S. swap dealers

The Commission believes that extension of this relief to U.S. SDs' activities would not only be contrary to the directive in CEA section 2(i), but also detrimental to the Commission's strong supervisory interests in swap activities occurring inside the United States. Nevertheless, the Commission has carefully considered the potential consequences of disparate treatment of U.S. and non-U.S. registrants and, where possible, has attempted to minimize the disparity between these registrants. A notable example of this is the relief from the Transactional-Level Requirements, which applies equally to both non-U.S. persons and the overseas operations of U.S. persons (i.e., foreign branches or non-U.S. affiliates).

In the Commission's view, it would be contrary to the public interest and the purposes of the CEA to address commenters' concerns about regulatory disparity by diminishing the regulatory requirements that apply to swap activities inside the United States. Rather, the Commission believes that this issue is more appropriately addressed by working closely with its overseas counterparts, including continued participation in international groups to adopt and enforce robust and consistent standards across jurisdictions.¹¹⁴

¹¹⁴ Where appropriate, however, the Commission has provided relief to both U.S. and non-U.S. registrants. For example, the Commission recently approved interim final rules for SDs and MSPs that would otherwise be required to comply with certain business conduct and documentation requirements in provisions of subpart F, subpart H, and subpart I to part 23 of the Commission's Regulations. Specifically, the compliance date for Commission regulations 23.502 and 23.504 is deferred until July 1, 2013. Additionally, the compliance date for Commission regulations 23.201(b)(3)(ii); 23.402; 23.401(c); 23.430; 23.431(a)-(c); 23.432; 23.434(a)(2), (b), and (c); 23.440; 23.450; and 23.505 is deferred until May 1, 2013. The compliance dates for all other provisions of subpart F, subpart H, and subpart I of part 23 remain

6. Relief for Transactions Involving Non-Registrants

i. Comments

As noted above, the Proposed Order would not extend relief to swap counterparties that are neither SDs nor MSPs. Certain commenters, such as SIFMA and Deutsche Bank, asserted that this would lead to an anomalous result. By way of illustration, they noted that a swap between a non-U.S. person and a foreign branch of an SD would be exempt from applicable Transaction-Level Requirements, but a swap between the same non-U.S. person and a foreign branch of a U.S. bank that is not a registered SD would not be eligible for the relief.¹¹⁵ They asked that the Commission extend exemptive relief to non-U.S. persons who enter into swaps with foreign branches of U.S. persons, regardless of whether the U.S. person is a registered SD or MSP.

ii. Commission determination on transactions involving non-registrants

The Commission believes that it would not be appropriate to extend temporary exemptive relief to swaps by a non-U.S. person with a foreign branch of a U.S. person that is not a registrant. As explained above, in crafting the scope of relief to be granted under CEA section 4(c), the Commission carefully balanced the need to implement the Dodd-Frank swap provisions as expeditiously as possible and the need to mitigate undue disruptions to market practices. Consistent with that objective, the Commission's determination to exclude swaps between non-U.S. persons and foreign branches of U.S. registrants from certain requirements was based on the fact that the U.S. registrant (of

unchanged. See Business Conduct and Documentation Requirements for Swap Dealers and Major Swap Participants, Interim Final Rules, Dec. 18, 2012, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister121812.pdf>.

¹¹⁵ See SIFMA (Aug. 13, 2012) at 12; Deutsche Bank (Aug. 13, 2012) at 3-4 (citing SDR reporting as an example of such disparities).

which the foreign branch is an integral part, not a separate entity) would be subject to various prudential requirements as part of the overall requirements applicable to registrants. In the Commission's view, these requirements provide a sufficient level of regulatory safeguards with respect to the U.S. registrants to allow for temporary relief from the Transactional-Level Requirements with respect to the foreign branches of those U.S. registrants.

In contrast, where the foreign branch is not part of a U.S. registrant, the Dodd-Frank requirements applicable to that foreign branch are greatly reduced and may, in some cases, be absent. Accordingly, the Commission believes that it would not further the public interest to grant relief from applicable Transaction-Level Requirements with respect to foreign branches of other classes of U.S. persons, and therefore declines to issue such exemptive relief under CEA section 4(c).

7. Expiration Date for the Relief

i. Comments

A number of commenters, including ISDA and SIFMA, stated that the expiration of the Final Order should be tied to the publication of the final guidance, and not simply one year after the publication of the Proposed Order.¹¹⁶ According to SIFMA, any transition period is meaningful only if measured from the date that the full scope of the exemptive relief is disclosed, *i.e.*, the date of the publication of the final guidance.¹¹⁷

¹¹⁶ See ISDA (Aug. 10, 2012) at 17; SIFMA (Aug. 13, 2012) at 14-15.

¹¹⁷ See SIFMA (Aug. 13, 2012) at 14-15.

Cleary recommended that the Commission align the duration of the exemptive relief with implementation in other G-20 jurisdictions.¹¹⁸

ii. Commission determination on expiration date for the relief

The Commission declines to adopt the commenters' suggestion. The Final Order maintains the expiration date in the Proposed Order. However, as noted in the Proposed Order, the Commission is committed to an orderly transition to the Dodd-Frank Act's regulatory regime.¹¹⁹ Consistent with this commitment to an orderly phase-in of the cross-border application of Dodd-Frank requirements, "[s]hould the Commission deem it appropriate to extend any exemptive relief, the Commission will be in a better position to tailor any exemption at that time."¹²⁰

8. Foreign Branches of a U.S. Swap Dealer

i. Comments

SIFMA commented that the Commission should clarify that relief from the Transaction-Level Requirements is available to a foreign branch of a U.S. SD that enters

¹¹⁸ See Cleary (Aug. 16, 2012) at 17. Cleary suggested, for example that the Commission consider a jurisdiction-by-jurisdiction approach under which the relief would expire for non-U.S. registrants as their home (or host) jurisdictions implement comparable requirements.

¹¹⁹ See Proposed Order, 77 FR at 41112. The Commission's commitment in this regard also was recently reflected in the Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-border OTC Derivatives Market, included in CFTC Press Release 6439-12, Dec. 4, 2012, which is signed by CFTC Chairman Gensler and the leaders of 11 other regulatory authorities ("We will consider providing appropriate transitional implementation periods for entities in jurisdictions that are implementing comparable regulations, supervision, and comprehensive oversight. In order to facilitate an orderly transition with respect to new OTC derivatives regulatory requirements when promulgating regulations with cross-border applicability, we agree to a reasonable, limited transition period to facilitate the implementation of such cross-border regulatory requirements in appropriate circumstances and in consultation with other jurisdictions.").

¹²⁰ "Effective Date for Swap Regulation," 76 FR 42508, 42514, Jul. 19, 2011.

into a swap with a non-U.S. SD.¹²¹ Citi requested that the Commission extend relief to swaps between foreign branches of U.S. SDs.¹²²

ii. Commission determination on foreign branches of a U.S. swap dealer

The Commission clarifies that relief from the Transaction-Level Requirements is available to a swap between a foreign branch of a U.S. registrant and a non-U.S. SD.

That is, for purposes of this relief, the non-U.S. SD may treat the foreign branch as a non-U.S. person.

On the other hand, as discussed above, the Commission believes that a swap between two foreign branches of U.S. registrants is a swap between two U.S. persons, and such transactions are fully subject to the Transaction-Level Requirements.

Nevertheless, the Commission has determined that it would be appropriate to provide relief during the effectiveness of the Final Order so that foreign branches of U.S.

registrants¹²³ may comply only with transaction-level requirements as may be required in the location of the foreign branch while the Commission further considers, and works

¹²¹ See SIFMA (Aug., 13, 2012) at 10 (noting that the Proposed Order makes clear that a foreign branch of a U.S. SD is eligible for such relief with respect to swaps with a non-U.S. counterparty, but the definition of U.S. person (which includes branches) makes the treatment of swaps between a foreign branch of a U.S. SD and a non-U.S. SD unclear).

¹²² See Citi (Aug. 13, 2012) at 2-3 (noting that, under the Proposed Order, relief from the Transaction-Level Requirements would not be available in this scenario because a branch is deemed a U.S. person, and arguing that this result would make it difficult for such branches to hedge risk in local markets, and reduce liquidity for non-U.S. SDs, because U.S. SDs would be limited in their ability to make markets abroad via their overseas branches).

¹²³ For purposes of this relief from Transactional-Level Requirements for a swap between foreign branches of U.S. registrants, a swap is with the foreign branch of a U.S. person when (i) the personnel negotiating and agreeing to the terms of the swap are located in the jurisdiction of such foreign branch; (ii) the documentation of the swap specifies that the counterparty or “office” for the U.S. person is such foreign branch and (iii) the swap is entered into by such foreign branch in its normal course of business. If the swap does not meet these three criteria, it will be treated as a swap of the U.S. person and not as a swap of the foreign branch of the U.S. person, and the swap will not be eligible for this relief from Transaction-Level Requirements.

with international regulators regarding, the treatment of foreign branches of U.S. registrants.

As part of its further consideration of this issue, the Commission is considering additional requirements to determine if a swap is with the foreign branch of a U.S. person. These requirements could include, for example, that the foreign branch is the location of employment of the employees negotiating the swap for the U.S. person or, if the swap is executed electronically, the employees managing the execution of the swap, that the U.S. person treats the swap as a swap of the foreign branch for tax purposes, that the foreign branch operates for valid business reasons and is not only a representative office of the U.S. person, and that the branch is engaged in the business of banking or financing and is subject to substantive regulation in the jurisdiction where it is located. The Commission seeks comment from market participants and other interested parties regarding whether it is appropriate to include these or other requirements in the determination of when a swap is with the foreign branch of a U.S. person.

9. Compliance Plans and Good-Faith Compliance

The Proposed Order required that a person seeking relief under the order would submit to the NFA a compliance plan addressing how it plans to comply with applicable requirements under the CEA and related regulations. Commenters on this aspect of the Proposed Order questioned the value of the compliance plan and requested clarifications of the Commission's expectations concerning compliance plans.¹²⁴ Upon further consideration of the regulatory implementation process, the Commission has determined that the submission of a compliance plan should not be necessary in connection with

¹²⁴ See, e.g., SIFMA (Aug. 27, 2012), at A-52 - A-53; IIB (Aug. 9, 2012) at 9.

phasing in compliance with the Dodd-Frank requirements in the cross-border context during the limited time frame in which the Final Order will be in effect. Therefore, the Final Order does not require submission of a compliance plan.

Market participants have raised the concern that, despite their best efforts at compliance, there could be “practical or technical limitation or interpretive uncertainty” that might need to be resolved before an SD’s or MSP’s full compliance with the Dodd-Frank requirements is practically feasible.¹²⁵ In light of these concerns, the Commission believes it is appropriate to provide market participants guidance regarding its intentions concerning its enforcement authority when an SD or MSP is making diligent, good faith implementation efforts in this period of transition. The Commission does not intend to bring an enforcement action against an SD or MSP for failing to fully comply with applicable Dodd-Frank requirements prior to July 12, 2013, provided that there is a practical or technical impediment to compliance that results in an inability to comply with relevant compliance deadlines, or uncertainty in interpreting, particular Dodd-Frank requirement(s) and the SD or MSP is acting reasonably and in good faith to fully comply with the applicable Dodd-Frank requirements, which would include, at a minimum, (i) material progress toward timely implementation and compliance; (ii) identification of any implementation or interpretive issue as soon as reasonably possible; (iii) timely elevation of such issue(s) to the SD’s or MSP’s senior management for consideration and

¹²⁵ See joint letter from FIA, IIB and SIFMA (Nov. 30, 2012) at 11; see also SIFMA (Aug. 27, 2012) at A-25, A-44; Cleary (Aug. 16, 2012) at 4.

resolution; and (iv) timely consultation with other industry participants and the Commission as necessary to seek resolution of any such issue(s).¹²⁶

10. Relief for Principals/Associated Persons

i. Comments

Under Commission regulation 3.10(a)(2), each applicant for SD or MSP registration must file, together with Form 7-R, a Form 8-R executed by each natural person that qualifies as a “principal” of the applicant. As part of this process, each principal is required to submit a fingerprint card, as well as submit to a detailed background check. Commission regulation 23.22 prohibits an SD or MSP from permitting an associated person subject to statutory disqualification (as defined by the CEA) from being involved in effecting swaps on behalf of such registrant. Citing difficulties associated with differences in the standards for statutory disqualification among jurisdictions and privacy issues associated with collecting information about individuals, commenters requested that only those individuals directly involved in the solicitation or acceptance of swaps (or supervising such individuals) be regarded as “associated persons.”¹²⁷

Commenters, such as IIB and Societe Generale, urged the Commission to exclude directors and senior officers (but not those in charge of the business unit subject to regulation by the Commission) from principal status.¹²⁸ Cleary contended that globally

¹²⁶ This expression of intent does not confer upon any party any rights or defenses in any investigation or in any action that may be brought by the Commission. As always, the Commission will weigh all facts and circumstances in determining whether to commence an enforcement action.

¹²⁷ See e.g., Cleary (Aug. 16, 2012) at 13.

¹²⁸ See IIB (Aug. 9, 2012) at 7-8; and Societe Generale (Aug. 9, 2012) at 11.

active banks operate under a paradigm that differs from traditional Commission registrants and noted the differences in governance structures and the roles of boards of directors in foreign jurisdictions.¹²⁹ Under these circumstances, Cleary requested that the Commission grant relief, on an interim basis, from registration for associated persons, and from requirements applicable to principals, of non-U.S. registrants. Specifically, Cleary said, the Commission should treat as principals only those individuals directly engaged in the activities giving rise to registration.¹³⁰

ii. Commission determination on relief for principals/associated persons

The Commission does not believe, at this time, that blanket relief from requirements applicable to principals or from associated person registration to address these concerns is appropriate pursuant to the standards required for exemptive relief under CEA section 4(c). Rather, the Commission believes that any relief from these requirements is appropriately addressed through staff action.¹³¹ The Commission views the registration of individuals to be an important facet of ensuring the integrity of the firm itself, and a staff process will permit Commission staff to tailor relief as appropriate and necessary.

IV. Section 4(c) of the CEA

¹²⁹ See Cleary (Aug. 16, 2012) at 13. Cleary stated that, in this connection, the Commission may wish to consider recognizing comparable foreign requirements for principal and associated person registration and obligations.

¹³⁰ See id.

¹³¹ See CFTC Division of Swap Dealer and Intermediary Oversight, Re: Relief for Swap Dealers and Major Swap Participants from Compliance with Regulation 23.22(b) with Respect to: (1) Non-Domestic Associated Persons who Deal only with Non-Domestic Swap Counterparties; and (2) Persons Employed in a Clerical or Ministerial Capacity, No-Action Letter No.12-43, Dec. 7, 2012.

After considering the complete record in this matter, the Commission has determined that the requirements of CEA section 4(c) have been met with respect to the exemptive relief described above. First, in enacting section 4(c), Congress noted that the purpose of the provision “is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.”¹³² As noted in the Proposed Order, the Commission is issuing this relief in order to ensure an orderly transition to the Dodd-Frank regulatory regime and to provide greater legal certainty to market participants regarding their obligations under the CEA with respect to their cross-border swap activities.

This exemptive relief also will advance the congressional mandate concerning harmonization of international standards with respect to swaps, consistent with section 752(a) of the Dodd-Frank Act. In that section, Congress directed that, in order to “promote effective and consistent global regulation of swaps and security-based swaps,” the Commission, “as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation” of swaps and security-based swaps.¹³³ This relief, by providing non-U.S. registrants the latitude necessary to develop and modify their compliance plans as the regulatory structure in their respective home jurisdiction changes, will promote the adoption and enforcement of robust and consistent standards across jurisdictions.

¹³² House Conf. Report No. 102-978, 1992 U.S.C.C.A.N. 3179, 3213.

¹³³ See section 752(a) of the Dodd-Frank Act.

The Commission emphasizes that the Final Order is temporary in duration and reserves the Commission's enforcement authority, including its anti-fraud and anti-manipulation authority. As such, the Commission has determined that the Final Order is consistent with the public interest and purposes of the CEA. For similar reasons, the Commission has determined that the Final Order will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA. Finally, the Commission has determined that the Final Order is limited to appropriate persons within the meaning of CEA section 4c(3), since the SDs and MSPs eligible for the relief are likely to be the types of entities enumerated in that section and active in the swaps market. Therefore, upon due consideration, pursuant to its authority under section 4(c) of the CEA, the Commission hereby issues the Final Order.

V. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA")¹³⁴ imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

In connection with the Proposed Order, the Commission requested review and approval by OMB of a new collection of information titled "Exemptive Order Regarding

¹³⁴ 44 U.S.C. 3501 et seq.

Compliance with Certain Swap Regulations.”¹³⁵ This collection of information would have related to the compliance plans to be submitted to the NFA by persons seeking relief under the exemptive order. No comments were received on the paperwork burden associated with this information collection request. Because the Final Order does not require the submission of a compliance plan, it does not require a collection of information from any persons or entities.¹³⁶

VI. Cost-Benefit Considerations relating to the Final Order

Section 15(a) of the CEA¹³⁷ requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

A. Background

¹³⁵ The Commission’s notice was published in the Federal Register. See 77 FR 43271, Jul. 24, 2012. On August 13, 2012, OMB approved the Commission’s initial information collection request until February 28, 2013, and assigned OMB control number 3038-0098.

¹³⁶ On November 7, 2012, the Commission, by separate notice in the Federal Register, announced an opportunity for public comment on the proposed extension of OMB approval of the prior information collection request, with a 60-day comment period that expires on January 7, 2013. See 77 FR 66819 Nov. 7, 2012. Because the Final Order does not require submission of a compliance plan, this extension is no longer relevant.

¹³⁷ 7 U.S.C. 19(a).

Throughout the Dodd-Frank rulemaking process, the Commission has strived to ensure that new regulations designed to achieve Dodd-Frank's protections be implemented in a manner that is both timely and also minimizes unnecessary market disruption. In its effort to implement the Dodd-Frank regulations on a cross-border basis, the Commission's approach has not been different. In this respect, the Commission has attempted to be responsive to industry's concerns regarding implementation and the timing of new compliance obligations, and thereby ensure that market practices would not be unnecessarily disrupted during the transition to the new swap regulatory regime. At the same time, however, the Commission has endeavored to comply with the Congressional mandate to implement the new SD and MSP regulatory scheme in a timely manner. The Commission, therefore, also seeks to ensure that the implementation of these requirements is not subject to undue delay. The Commission believes that the Final Order strikes the proper balance between promoting an orderly transition to the new regulatory regime under the Dodd-Frank Act, while appropriately tailoring relief to ensure that market practices are not unnecessarily disrupted during such transition.

The Final Order also reflects the Commission's recognition that international coordination is essential in this highly interconnected global market, where risks are transmitted across national borders and market participants operate in multiple jurisdictions.¹³⁸ The Final Order would allow market participants to implement the calculations related to SD and MSP registration on a uniform basis and to delay compliance with certain Dodd-Frank requirements while the Commission continues to

¹³⁸ See generally CFTC-SEC Joint Report on International Swap Regulation Required by Section 719(c) of the Dodd Frank Act (Jan. 31, 2012) at 105-09.

work closely with other domestic financial regulatory agencies and its foreign counterparts in an effort to further harmonize the cross-border regulatory framework.

B. Summary of Proposed Consideration of the Costs and Benefits of the Exemptive Order

In terms of costs, in the Proposed Order the Commission considered the potential costs incurred by swap entities to submit a compliance plan in order to obtain exemptive relief. As noted above, the Final Order does not require submission of a compliance plan and therefore these potential costs are no longer relevant to the Final Order

Apart from the direct costs of submitting a compliance plan, the Commission noted in the Proposed Order that it may result in indirect costs to the public, including the costs of continuing systemic risk to U.S. taxpayers due to delayed compliance with the Entity-Level Requirements and, to a more limited extent, Transaction-Level Requirements of the Dodd-Frank Act. The Commission proposed that these costs are not, however, susceptible to meaningful quantification due to a lack of data regarding several key variables.

In terms of benefits, the proposal stated that the exemptive order would provide a benefit in that it would allow affected entities additional time to transition into the new regulatory regime in a more orderly manner, which promotes stability in the markets as that transition occurs. Another benefit proposed was the increase in international harmonization because the proposed relief provided U.S. and non-U.S. registrants the latitude necessary to develop and modify their compliance plans as the regulatory structure in their home jurisdiction changes, which would promote greater regulatory consistency and coordination with international regulators.

The Commission explained that one of the key benefits of the proposed compliance plan condition is that it would ensure that non-U.S. persons claiming the exemption would be actively and demonstrably considering and planning for compliance with the Entity-Level and Transaction-Level Requirements under the CEA, as may be applicable. In addition, the Commission stated that relief as proposed would allow foreign branches of U.S. SDs and MSPs to comply only with those requirements as may be required in the jurisdiction where the foreign branch is located for swaps with non-U.S. counterparties, effective concurrently with the date upon which such SDs and MSPs must first apply for registration until 6 months following the publication of the proposed order in the Federal Register.

C. Comments

The Commission requested comments on all aspects of its proposed consideration of costs and benefits and any alternatives to the same. As discussed and considered throughout this release, the Commission received 26 comments on the Proposed Order, many addressing the potential economic and competitive effects of the proposed exemption in qualitative terms. None, however, provided additional data or information from which the Commission could modify and/or expand upon its dollar cost estimates of the conditions to the exemption.

In the paragraphs that follow, the Commission summarizes and responds to the comments received that relate to the enumerated cost and benefit considerations set forth in CEA section 15(a), most notably considerations of protection of the market participants and the public, and considerations of competitiveness. The Commission believes that, while it is possible that the estimated dollar costs will increase or decrease

as a result of the modifications to the proposal in this final order, the Commission does not expect any such changes to be significant.

While most commenters expressed support for the Commission's objective in the Proposed Order – that is, ensuring an orderly transition to Dodd-Frank's regulatory framework and providing greater legal certainty for market participants by providing a phase-in of certain requirements, other commenters expressed caution that delayed implementation could leave the public unprotected from the types of risk the Dodd-Frank Act and the Commission's implementing regulations are intended to address.

Public interest groups including Americans for Financial Reform, Public Citizen's Congress Watch, and Better Markets stated that the proposed delayed implementation of the Dodd-Frank derivatives regime, where there is a clear and direct U.S. taxpayer exposure, would deprive taxpayers of the protections required by the statute, such as clearing and margin, which these commenters believe should go into effect as rapidly as possible. AFR further states that although the risk to U.S. taxpayers related to European banks is somewhat less direct, it is real and has been significant, as shown by the U.S. taxpayer bailouts that benefitted foreign counterparties to AIG Financial Products during the 2008 crisis.¹³⁹

Industry commenters urged the Commission to avoid potential undue disruption and market dislocation by carefully phasing in implementation in a manner that “appropriately balances the competing objectives and obstacles facing the Commission and the private sector and that avoids adverse market and economic impacts.”¹⁴⁰ IIB, for

¹³⁹ See AFR (Aug. 13, 2012) at 2. See also Better Markets (Aug. 16, 2012) at 1.

¹⁴⁰ Cleary (Aug. 16, 2012) at 3.

example, said that requiring non-U.S. SDs and MSPs to comply with all applicable Dodd Frank requirements at the time of registration or shortly thereafter would “create unrealistic and unwarranted compliance burdens” and therefore the Commission should provide additional time for compliance.¹⁴¹ Commenters also said that if the Commission adopts interim requirements that would apply for only a short time, it should take care that market participants would not be unnecessarily required to incur costs to comply with requirements that are subject to change.¹⁴²

Commenters also addressed the perceived competitive effects of the Proposed Order. Better Markets stated that, as a general matter, it would be inappropriate and contrary to law for the Commission to delay implementation of the Dodd-Frank Act to allow “the rest of the world to catch up” to the U.S.¹⁴³ In contrast, ISDA believes that the Commission should align the compliance dates for U.S. and non-U.S. SDs and MSPs in order to avoid the “profound effect[s] on transactional relationships” that may result from “a framework under which the Commission imposes on [U.S. SDs and MSPs] a substantially earlier rollout of Entity-level requirements and Transaction level requirements with non-U.S. persons in certain cases.”¹⁴⁴ This view was shared by other industry commenters, which recommended that “during the exemption’s phase-in period, while transaction-level requirements have not yet come into effect outside the U.S., the

¹⁴¹ IIB (Aug. 9, 2012) at 2.

¹⁴² See SIFMA (Aug. 13, 2012) at 5. See also letter to Chairman Gensler from Reps. Scott Garrett and Randy Neugebauer (June 20, 2012) at 2 (requesting that the Commission formalize any cross border guidance through a rule making that includes the appropriate cost-benefit analysis that the law requires).

¹⁴³ Better Markets (Aug. 16, 2012) at 2.

¹⁴⁴ ISDA (Aug. 10, 2012) at 7.

Commission should ensure competitive parity by exempting all SDs from transaction level requirements in connection with transactions with non-U.S. counterparties.”¹⁴⁵

Regarding the Proposed Order’s treatment of SDR Reporting and LTR requirements, The Clearing House stated that differential treatment between foreign SDs and non-U.S. affiliates or subsidiaries of U.S. SDs would create a competitive disadvantage for overseas branches and affiliates of U.S. entities and would not serve the Commission’s purpose of mitigating risk to the U.S.¹⁴⁶ Deutsche Bank pointed out that because the Proposed Order would not provide relief to non-U.S. SDs and MSPs that are affiliates of U.S. SDs, members of an affiliated group that is based outside the U.S. but in which one of the members is a U.S. SD (such as, potentially, the Deutsche Bank group) would not benefit from the Proposed Order.¹⁴⁷ In this context, Deutsche Bank stated that affiliates, particularly in different countries, frequently use different and unrelated technology systems, and therefore a non-U.S. SD or MSP with a U.S. SD affiliate may not be able to easily use the reporting systems of its U.S. SD affiliate.¹⁴⁸

D. Consideration of Costs and Benefits of the Final Order

The Final Order permits, subject to the conditions specified therein, market participants outside the United States (i) to apply a limited, interim definition of the term “U.S. person” for a period of six months, (ii) to determine SD and MSP registration requirements in a uniform manner, (iii) to apply the SD de minimis aggregation

¹⁴⁵ Cleary (Aug 16, 2012) at 11.

¹⁴⁶ See The Clearing House (Aug. 13, 2012) at 16.

¹⁴⁷ See Deutsche Bank (Aug. 13, 2012) at 3.

¹⁴⁸ Id.

requirements in a limited manner, an (iv) to delay compliance with certain Dodd Frank requirements specified in the Final Order until July 12, 2013. The Final Order reflects the Commission's determination to protect U.S. persons and markets through the cross-border application of the provisions of the Dodd-Frank Act and the Commission's regulations in a manner consistent with section 2(i) of the CEA and longstanding principles of international comity. By carefully tailoring the scope and extent of the phasing-in provided by the Final Order, the Commission believes that it achieves an appropriately balanced approach to implementation that mitigates the costs of compliance while avoiding open-ended delay in protecting the American public from swaps activities overseas. To be sure, the conditions attached to the Final Order are not without cost, but the Commission believes that phasing-in of certain Dodd-Frank requirements as permitted by the Final Order will reduce overall costs to market participants.

In the absence of the Final Order, non-U.S. SDs or MSPs would be required to be fully compliant with the Dodd-Frank regulatory regime without further delay. The Final Order delays compliance with a number of these requirements until July 12, 2013. With respect to these entities, therefore, the benefits include not only the avoided costs of compliance with certain requirements during the time that the Final Order is in effect, but also increased efficiency because the additional time allowed to phase in compliance will allow market participants more flexibility to implement compliance in a way that is compatible with their systems and practices. The additional time provided by the Final Order will also give foreign regulators more time to adopt regulations covering similar topics, which could increase the likelihood that substituted compliance will be an option for market participants. Thus, the Final Order is expected to help reduce the costs to

market participants of implementing compliance with certain Dodd Frank requirements. These and other costs and benefits are considered below.

1. Costs

A potential cost of the Final Order, albeit one that is difficult to quantify, is the potential that the relief from certain SD de minimis aggregation requirements and the delay in compliance permitted by the Final Order will leave market participants without certain protections flowing from the Dodd Frank Act for the period during which the Final Order applies. The Final Order may also, as discussed above, leave U.S. taxpayers exposed to systemic risks during that time period.¹⁴⁹ The Commission believes that these costs are mitigated, however, by the relatively short time period of the Final Order's application, by the fact that certain key Dodd Frank requirements will apply during this time, and by the limitation of the Final Order's scope to non-U.S. persons. The Commission notes, however, that concerns about these costs are one of the bases for the limited nature of the Final Order, and that adoption of many of the modifications suggested by commenters to expand the order would potentially increase such costs.

The Commission has also considered the possibility, raised by commenters, that competitive disparities will result from the delay in compliance permitted to non-U.S. market participants during the effectiveness of the Final Order. In general, the effect of the Final Order is that while U.S. SDs and MSPs will begin to comply with certain Dodd Frank requirements when they apply to be registered (which will begin at the end of 2012

¹⁴⁹ In this context, the Commission considered whether additional costs could result from the provisions of the exemptive order that provide additional time for historical swap reporting. The Commission does not believe that providing additional time for historical swap reporting will result in any significant costs because the required data will still be provided within a relatively short period of time.

and continue through the first part of 2013),¹⁵⁰ non-U.S. market participants will not have to comply with such requirements, to the extent provided under the Final Order, until July 12, 2013. This delay raises the potential that the earlier imposition of certain requirements on U.S. SDs and MSPs could also impose a competitive disadvantage on them. The Commission believes, however, that any potential competitive disadvantage from the Final Order is uncertain, and there are factors indicating it is unlikely to be significant. Moreover, the Commission's staff is minimizing, through a variety of no-action letters and staff guidance, the potential for competitive disparities by affording U.S. and non-U.S. market participants time-limited relief to achieve compliance with certain regulatory requirements before staff would recommend enforcement action by the Commission.¹⁵¹ For example, CFTC Letter No. 12-32 provides relief regarding compliance with certain requirements of the Commission's swap data reporting rules. In so doing, Commission staff allows for a common monthly compliance date for SDs newly within the scope of those rules, and to extend the compliance date for reporting historical swap transaction data pursuant to Part 46 of the Commission's regulations.¹⁵²

The potential disadvantage is uncertain because it is unknown whether the Dodd Frank requirements imposed on U.S. SDs and MSPs in the first half of 2013 will

¹⁵⁰ See CFTC Staff Responds to Questions on Timing of Swap Dealer Registration Rules, CFTC Press Release 6348-12, September 10, 2012.

¹⁵¹ For a listing of all relevant no-action letters and staff guidance, see: <http://www.cftc.gov/LawRegulation/DoddFrankAct/GuidanceQandA/index.htm>.

¹⁵² See CFTC Letter No. 12-32.

discourage potential counterparties from engaging in swaps with them.¹⁵³ Specifically, it is unknown whether the compliance expenses incurred during that time will directly affect swap terms in a manner that would impose a significant disadvantage.¹⁵⁴ Also, the Commission cannot estimate with certainty the likelihood that potential competitive disadvantages arising from the Final Order will be significant for U.S. SDs and MSPs. A variety of factors influence a person's choice of potential swap counterparties, and therefore whether the earlier imposition of certain Dodd Frank requirements on U.S. SDs and MSPs will cause a significant shift of swap business away from them is uncertain. It may be that a person seeking to enter into relatively few swaps would perceive a transitory advantage in dealing with a more lightly regulated non-U.S. person while the exemptive order is in effect. The Commission also considered that if a person has in place relationships with multiple counterparties (both U.S. and non-U.S.), the person may be more likely to enter into swaps with the non-U.S. counterparties while the Final Order is in effect, and the higher level of swap activity with non-U.S. counterparties may continue after the order expires. Also, U.S. SDs and MSPs may be driven to accept lower profit margins on swaps in order to prevent such shifts to non-U.S. counterparties.

These negative competitive effects on U.S. SDs and MSPs would be more likely if compliance expenses incurred by U.S. SDs and MSPs in the first half of 2013 negatively affect the swap terms they offer, and if swap users are more sensitive to such

¹⁵³ The Commission notes, for example, that certain Dodd Frank requirements, such as margin and capital rules, have not been finalized and are unlikely to apply to U.S. SDs and MSPs in the first half of 2013. Also, other requirements, such as the clearing requirement, will be phased in during that time.

¹⁵⁴ For example, while the Commission acknowledges that the requirement to have a chief compliance officer in place does impose costs, it is unknown whether shifting the time that this requirement will go into effect by approximately six months will significantly alter the financial terms at which SDs and MSPs subject to that requirement would enter into swaps.

changes in swap terms. On the other hand, many relationships between SDs and their counterparties are connected with other financial arrangements that are reflected in complex documentation and are difficult to modify quickly.¹⁵⁵ This difficulty would attenuate the likelihood of a significant shift of swap counterparties away from U.S. SDs and MSPs during the relatively short period that the Final Order is in effect.

The Commission has considered the potential negative competitive effects of the Final Order on U.S. SDs and MSPs. However, since it is difficult to isolate the effects of the Final Order from all other factors that may affect how swap users choose counterparties and the terms at which they enter into swaps, it is difficult to estimate on a quantitative basis the potential costs that could result for U.S. SDs and MSPs from the potential negative competitive effects of the Final Order. Thus, the Commission cannot reach a definitive conclusion about the effect of the Final Order on competition. In any event, commenters who raised the potential competitive effect of the Proposed Order did not provide any specific facts, examples or analysis to facilitate a detailed consideration of these concerns.

Regarding the comments on the Proposed Order's treatment of the SDR reporting and LTR requirements, the Commission believes that allowing non-U.S. SDs and MSPs that are not part of an affiliated group in which the ultimate parent entity is a U.S. registrant, bank, or financial or bank holding company to forego reporting of swaps with non-U.S. counterparties during the effectiveness of the Final Order is not likely to impose a significant competitive disadvantage on those SDs and MSPs that are required to report

¹⁵⁵ In fact, the complexity of these arrangements and documentation is one of the reasons that foreign potential registrants have requested more time to come into compliance with the Dodd Frank requirements.

such swaps with non-U.S. counterparties. Although it is possible that some non-U.S. counterparties may have concerns about reporting of their swap activities and may therefore prefer to enter into swaps with SDs and MSPs that are not subject to these requirements, any resulting advantage to those SDs and MSPs will last only until the Final Order expires on July 12, 2013, and as noted above the likelihood of significant customer shifts during that time is uncertain. As for the point that the relief in the Final Order should be available to members of an affiliated group that is based outside the U.S. but in which one of the members is a U.S. SD, the Final Order has been modified to provide this availability. Last, the commenter's point that affiliates in different countries may use different and unrelated technology systems illustrates one of the reasons that the Commission is providing the relief in the Final Order – i.e., to give affiliates in different countries time to mitigate any incompatibilities in their systems.

In connection with the interim definition of the term “U.S. person” which may be applied by non-U.S. market participants covered by the Final Order, the Commission has considered the potential that costs could arise from applying this interim definition and then transitioning to a different definition at expiration of the Final Order. To mitigate transition costs, the Commission intends that during the transitional period during which the Final Order is in effect, market participants will make the system and operational changes necessary to implement any final definition of U.S. person.

2. Benefits

The primary benefit of this Final Order is that it affords entities additional time to come into compliance with certain of the Commission's regulations. The Commission has considered the comments regarding the complex issues faced by non-U.S. SDs and

MSPs in complying with the applicable Dodd-Frank requirements, and it believes that this additional time will be of benefit to market participants beyond simply delaying the time at which they will have to incur the costs of complying with the regulations. More importantly, this additional time will permit market participants to implement the Commission's regulations more flexibly, so that each market participant's implementation activities can be more closely coordinated with its particular situation, including factors such as the type of swaps it uses, the characteristics of its counterparties, and the nature of its internal swap processes and systems. Reduced costs may occur as the result of phasing in new systems, operational patterns, legal agreements, or other business arrangements over a longer period of time, particularly for SDs and MSPs outside the U.S. For example, different jurisdictions may have varying documentation requirements or business practices that would lengthen the time needed to come into compliance. The Final Order provides time for this.

The Commission understands that if all market participants world-wide were required to comply with all applicable requirements upon applying to register as SDs and MSPs (which will begin at the end of 2012), some market participants would have to rush to implement compliance. The Commission is cognizant that compliance costs may be increased simply by the need to implement compliance quickly, which could entail, for example, retaining outside consultants rather than having in-house employees effect the necessary implementation steps. Thus, the Commission believes that by giving non-U.S. market participants additional time to come into compliance with certain of its regulations, the overall cost of compliance implementation will be reduced, not just delayed.

The Final Order also benefits entities by providing categories of entities the same relief, which eliminates the need for entities to seek individualized determinations by the Commission's staff regarding their particular transactions or operations. Providing additional time to all the non-U.S. market participants covered by the Final Order may facilitate action by industry groups to assist in compliance efforts and encourage cooperation among market participants.

In addition, the Commission believes that the delay provided by the Final Order may permit some non-U.S. jurisdictions to adopt regulatory requirements that are similar to certain of the Commission regulations and therefore may potentially be the basis for substituted compliance by market participants in those jurisdictions. Based on discussions with market participants, the Commission expects that substituted compliance would in some circumstances be less costly than compliance with Commission regulations, and therefore the Final Order has the potential to reduce costs by providing a greater opportunity for substituted compliance.

E. Section 15(a) Factors

1. Protection of Market Participants and the Public

The exemptive relief provided in this Final Order will protect market participants and the public by facilitating a more orderly transition to the new regulatory regime than might otherwise occur in the absence of this order. In particular, non-U.S. persons are afforded additional time to come into compliance than would otherwise be the case, which contributes to greater stability and reliability of the swap markets during the transition process.

2. Efficiency, Competitiveness, and Financial Integrity of the Markets

The Commission believes that the efficiency and integrity of the markets will be furthered by the additional compliance time provided in this order and the condition that entities submit a compliance plan. As discussed above, the Commission is mindful of the claims that the final order could potentially cause competitive disparities, and has taken steps to mitigate those potential costs where doing so would be consistent with the Dodd-Frank Act and the Commission's policy objectives.

3. Price Discovery

The Commission has not identified any costs or benefits of the proposed order with respect to price discovery.

4. Risk Management

Entity level risk-management and capital requirements could be delayed by operation of the Final Order, which could weaken risk management. However, such potential risk is limited by the fact that the exemptive order is applicable for a finite time.

5. Other Public Interest Considerations

The Commission has not identified any other public interest costs or benefits of the proposed order.

VII. Final Order

The Commission, in order to provide for an orderly implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), and consistent with the determinations set forth above, which are incorporated in this Final Order by reference, hereby grants, pursuant to section 4(c) of the Commodity Exchange Act ("CEA"), time-limited relief to non-U.S. swap dealers ("SDs") and major

swaps participants (“MSPs”) and to foreign branches of U.S. SDs and MSPs, from certain swap provisions of the CEA, subject to the terms and conditions below.¹⁵⁶

(1) Phase-in of “U.S. Person” Definition: All market participants, including a prospective or registered SD or MSP, must apply for purposes of this Final Order a “U.S. person” definition which would define the term as:

- (i) A natural person who is a resident of the United States;
- (ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or (B) effective as of April 1, 2013 for all such entities other than funds or collective investment vehicles, having its principal place of business in the United States;
- (iii) A pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is primarily for foreign employees of such entity;
- (iv) An estate of a decedent who was a resident of the United States at the time of death, or a trust governed by the laws of a state or other jurisdiction in the United States if a court within the United States

¹⁵⁶ As used in this Order, the terms “Entity-Level Requirements” refer to the requirements set forth in Commission regulations 1.31, 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, 23.606, 23.607, 23.608 and 23.609 and parts 20, 45 and 46 and “Transaction-Level Requirements” refer to the requirements set forth in CEA section 2(h)(8) and Commission regulations 23.202, 23.400 to 23.451, 23.501, 23.502, 23.503, 23.504(a), 23.504(b)(1), (b)(2), (b)(3) and (b)(4), 23.506 and 23.610 and part 43. To date, the Commission has not adopted final rules relating to the Entity-Level Requirements of capital adequacy, nor the Transaction-Level Requirements of margining (and segregation) for uncleared swaps. See sections 4s(e) and 4s(l) of the CEA, 7 U.S.C. 6s(e), 6s(l).

is able to exercise primary supervision over the administration of the trust; or

- (v) An individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in (i) through (iv) above.

Any person not listed in (i) to (v) above is a “non-U.S. person” for purposes of this Final Order.

(2) De Minimis and MSP Threshold Calculations. A non-U.S. person is not required to include, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4), or in its calculation of whether it is an MSP for purposes of Commission regulation 1.3(hhh), (i) any swap where the counterparty is not a U.S. person, or (ii) any swap where the counterparty is a foreign branch of a U.S. person that is registered as an SD or that represents that it intends to register with the Commission as an SD by March 31, 2013. A non-U.S. person is not required to include, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4), any swap to which it is not a party because the swap is entered into by an affiliated central booking entity.

(3) Aggregation for Purposes of the De Minimis Calculation. A non-U.S. person that is engaged in swap dealing activities with U.S. persons as of the effective date of this Order is not required to include, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of

Commission regulation 1.3(ggg)(4), the aggregate gross notional amount of swaps connected with the swap dealing activity of its U.S. affiliates under common control.¹⁵⁷ Further, a non-U.S. person that is engaged in swap dealing activities with U.S. persons as of the effective date of this Order and is an affiliate under common control with a person that is registered as an SD is also not required to include, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4), the aggregate gross notional amount of swaps connected with the swap dealing activity of any non-U.S. affiliate under common control that is either (i) engaged in swap dealing activities with U.S. persons as of the effective date of this Order or (ii) registered as an SD. Also, a non-U.S. person is not required to include, in its calculation of the aggregate gross notional amount of swaps connected with its swap dealing activity for purposes of Commission regulation 1.3(ggg)(4), the aggregate gross notional amount of swaps connected with the swap dealing activity of its non-U.S. affiliates under common control with other non-U.S. persons as counterparties.

(4) Non-U.S. SDs and MSPs: A non-U.S. SD or non-U.S. MSP may delay compliance with respect to Entity-Level Requirements that are in effect as of the effective date of this Order (subject to the condition in paragraph (5) below).

(5) Notwithstanding paragraph (4), (i) non-U.S. SDs and non-U.S. MSPs shall be required to comply with the swap data repository (“SDR”) reporting and LTR

¹⁵⁷ For this purpose, the Commission construes “affiliates” to include persons under common control as stated in the Commission’s final rule further defining the term “swap dealer,” which defines control as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.” See Final Entities Rules, 77 FR at 30631, fn. 437.

requirements for all swaps with U.S. counterparties, upon their respective compliance dates; and (ii) non-U.S. SDs and Non-U.S. MSPs that are part of an affiliated group in which the ultimate parent entity is a U.S. SD, U.S. MSP, U.S. bank, U.S. financial holding company, or U.S. bank holding company shall be required to comply with the SDR reporting and Large Trader Reporting requirements for swaps with non-U.S. counterparties, upon their respective compliance dates. However, during the pendency of this Final Order, non-U.S. SDs and non-U.S. MSPs that are not part of an affiliated group in which the ultimate parent entity is a U.S. SD, U.S. MSP, U.S. bank, U.S. financial holding company or U.S. bank holding company may delay compliance with the SDR reporting and LTR requirements for swaps with non-U.S. counterparties in accordance with paragraph (4).

(6) With respect to Transaction-Level Requirements as applied to transactions with a non-U.S. counterparty, non-U.S. SDs and non-U.S. MSPs may comply with such Requirements only as may be required by the local jurisdiction of such registrants; provided, however, that such registrants shall comply with such requirements that are in effect for all swaps with U.S. counterparties.

(7) U.S. Registrant: A U.S. person shall apply to register as an SD or MSP by the date such registration is required and shall comply with all applicable Entity-Level and Transaction-Level Requirements that are in effect, except that: (A) with respect to Transaction-Level Requirements as applied to swaps with a non-U.S. counterparty (including a non-U.S. SD or non-U.S. MSP), a foreign branch of a U.S. SD or U.S. MSP may comply with those requirements only as may be required by the local jurisdiction of such branches and (B) with respect to Transaction-Level

Requirements as applied to swaps between foreign branches of U.S. SDs or foreign branches of U.S. MSPs,¹⁵⁸ such foreign branches may comply with those requirements only as may be required by the local jurisdiction of such foreign branches.

(8) Expiration of Relief: The relief provided to non-U.S. SDs and non-U.S. MSPs (and foreign branches of a U.S. SD or MSP) in this order shall be effective upon approval by the Commission and expire on July 12, 2013.

(9) Scope of Relief: The time-limited relief provided in this Order: (A) shall not affect, with respect to any swap within the scope of this Order, the applicability of any other CEA provision or Commission regulation (i.e., those outside the Entity-Level and Transaction-Level Requirements); (B) shall not limit the applicability of any CEA provision or Commission regulation to any person, entity or transaction except as provided in this Order; (C) shall not affect the applicability of any provision of the CEA or Commission regulations to futures contracts, or options on future contracts; and (D) shall not affect any effective or compliance date set forth in any Dodd-Frank Act rulemaking by the Commission.

Finally, the Commission may, in its discretion, condition, suspend, terminate, or otherwise modify this Final Order, as appropriate, on its own motion.

¹⁵⁸ For purposes of this relief from Transactional-Level Requirements with respect to a swap between foreign branches of U.S. registrants, a swap is with the foreign branch of a U.S. person when (i) the personnel negotiating and agreeing to the terms of the swap are located in the jurisdiction of such foreign branch; (ii) the documentation of the swap specifies that the counterparty or “office” for the U.S. person is such foreign branch and (iii) the swap is entered into by such foreign branch in its normal course of business.

Issued in Washington, DC on December 21, 2012, by the Commission.

Sauntia S. Warfield

Assistant Secretary of the Commission

Appendices to Final Exemptive Order Regarding Compliance with Certain Swap Regulations—Commission Voting Summary and Statements of Commissioners

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O’Malia and Wetjen voted in the affirmative; Commissioner Sommers voted in the negative

Appendix 2—Statement of Chairman Gary Gensler

I support the Final Exemptive Order Regarding Compliance with Certain Swap Regulations (Final Order). With this Commission action another important step has been taken to make swaps market reform a reality.

Starting at the end of this month, domestic and foreign swap dealers will register. Once registered, swap dealers will report their trades to both regulators and the public. Foreign swap dealers will report their trades with U.S. persons. With these steps, the bright lights of transparency will, for the first time, shine on the swaps market. Swap dealers also will be required to implement sales practice standards that prohibit fraud, treat customers fairly and improve transparency. The public and our economy will benefit.

The Final Order provides phased compliance for foreign swap dealers (including overseas affiliates of U.S. persons) and overseas branches of U.S. swap dealers with respect to certain requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Since the enactment of the Dodd-Frank Act, the Commission has worked steadfastly toward a transition from an opaque unregulated marketplace to a transparent, regulated swaps marketplace and has phased in the timing for compliance to give market participants time to adjust to the new regulatory regime and smooth the transition.

Today's Order is a continuation of the Commission's commitment to this phasing of compliance – in this case for foreign market participants -- and is consistent with the phase-in order proposed in July 2012.

The Order will remain in effect until July, 2013, as proposed in the July 12 order, and is intended to complement other Commission and staff actions that facilitate an orderly transition.

During this transition period, a foreign swap dealer may phase in compliance with certain entity-level requirements. In addition, those entities (as well as foreign branches of U.S. swap dealers) are provided time-limited relief from specified transaction-level requirements when transacting with overseas affiliates guaranteed by U.S. entities (as well as with foreign branches of U.S. swap dealers).

The relief period provides time for the Commission to work with foreign regulators as they implement comparable requirements and as the Commission develops a substituted compliance program. Substituted compliance, where appropriate, would allow for foreign swap dealers to meet the reform requirements of the Dodd Frank Act by complying with comparable and comprehensive foreign regulatory requirements.

With respect to any transaction with a U.S. person, though, compliance will be required in accordance with previously issued rules and staff guidance.

The Order incorporates a definition of “U.S. person,” that benefits from helpful comments of market participants to our initial proposal and continuing discussions with the international regulatory community.

Under the Order, a foreign person will not be required to include in its calculation of swap dealing activities any swap with a non-U.S. person, as well as with foreign branches of U.S. swap dealers.

In addition, based upon comments received on the cross-border interpretive guidance proposed last July, the Final Order also provides time-limited relief from aggregation requirements with respect to the de-minimis calculation for swap dealer registration. Specifically, the Final Order provides time-limited relief from the requirement that a non-U.S. person include the swap dealing transactions of its U.S. affiliates under common control (or any of its foreign affiliates that are currently dealing) in its calculation for determining whether or not it has exceeded the de minimis threshold.

The Commission is separately seeking additional public comment on cross-border issues related to the term “U.S. person,” the aggregation requirements for foreign persons, as well as the definition of a “foreign branch”.

Today’s Commission action assists foreign swap dealers to comply with the Dodd-Frank Act in an orderly fashion.

Earlier this week in a separate action, the Commission issued an interim final rule allowing for more time to come into compliance on specific documentation requirements, providing swap dealers an additional four months with respect to sales practice documentation and six months with respect to relationship documentation.

The Commission recognizes the importance of international cooperation and coordination in the regulation of this highly interconnected global market. To this end, the Commission staff has actively engaged in substantive discussions with foreign counterparts in an effort to better understand and develop a more harmonized cross-border regulatory framework.

The Final Order also reflects comments from foreign market participants. For example, foreign banks requested a phase-in for the application of entity-level requirements. At the same time, foreign banks stated that the transaction-level requirements would apply to their transactions with U.S. persons.

This Final Order reflects this on-going consultation with foreign regulatory counterparts who provided comments on the proposed exemptive order issued in July 2012. During this period of phased compliance, the Commission will continue to engage with foreign counterparts. As set forth in a December 4 joint press statement of market regulators, the Commission will meet regularly with foreign regulators to consult on, among other topics, the basis for substituted compliance, timing and sequencing of rules, clearing determinations, and options to address potential conflicting, inconsistent, and duplicative rules.

As the Commission and the international regulatory community move forward, we all recognize that risk has no geographic boundary and money can move in and out of markets and jurisdictions in milliseconds. For the public to be protected, swaps market reform must cover transactions of overseas branches and overseas affiliates guaranteed by U.S. entities.

The 2008 financial crisis demonstrated this when financial aftershocks spread throughout the globe and swaps executed offshore by U.S. financial institutions sent risk straight back to our shores. As a result of the crisis, eight million Americans lost their jobs, millions of families lost their homes, and small businesses across the country folded.

Congress and the President responded with the Dodd-Frank Act, including the cross-border provisions of the law. Section 722(d) of the Dodd-Frank Act states that swaps reforms shall not apply to activities outside the United States unless those activities have “a direct and significant connection with activities in, or effect on, commerce of the United States.” Congress provided that reforms should account for risks that may come from abroad.

Failing to bring swaps market reform to transactions with overseas branches and overseas affiliates guaranteed by U.S. entities would mean American jobs and markets would likely move offshore, but, particularly in times of crisis, risk would come crashing back to our economy.

The nature of modern finance is that large financial institutions set up hundreds, if not thousands of “legal entities” around the globe.

They do so in an effort to respond to customer needs, funding opportunities, risk management and compliance with local laws. They do so as well, though, to lower their taxes, manage their reported accounting, and to minimize regulatory, capital and other requirements, so-called “regulatory arbitrage.” Many of these far-flung legal entities, however, are still directly connected back to their U.S. affiliates.

During a default or crisis, the risk that builds up offshore inevitably comes crashing back onto U.S. shores. When an affiliate of a large, international financial group has problems, the markets accept this will infect the rest of the group.

This was true with AIG. Its subsidiary, AIG Financial Products, brought down the company and nearly toppled the U.S. economy. It was run out of London as a branch of a French-registered bank, though technically was organized in the United States.

Lehman Brothers was another example. Among its complex web of affiliates was Lehman Brothers International (Europe) in London. When Lehman failed, the London affiliate had more than 130,000 outstanding swaps contracts, many of them guaranteed by Lehman Brothers Holdings back in the United States.

Yet another example was Citigroup, which set up numerous structured investment vehicles (SIVs) to move positions off its balance sheet for accounting purposes, as well as to lower its regulatory capital requirements. Yet, Citigroup had guaranteed the funding of these SIVs through a mechanism called a liquidity put. When the SIVs were about to fail, Citigroup in the United States assumed the huge debt, and taxpayers later bore the brunt with two multi-billion dollar infusions. The SIVs were launched out of London and incorporated in the Cayman Islands.

Bear Stearns is another case. Bear Stearns' two sinking hedge funds it bailed out in 2007 were incorporated in the Cayman Islands. Yet again, the public assumed part of the burden when Bear Stearns itself collapsed nine months later.

A decade earlier, the same was true for Long-Term Capital Management. When the hedge fund failed in 1998, its swaps book totaled in excess of \$1.2 trillion notional. The vast majority were booked in its affiliated partnership in the Cayman Islands.

This year's events of JPMorgan Chase, where it executed swaps through its London branch, are a stark reminder of this reality of modern finance.

As there have been these and other financial institution failures in the past, in our free markets, we must be prepared for when other firms fail in the future. Dodd-Frank reform is about protecting the public from such failures in the future.

It's my firm belief that if reforms were not to cover the branches and overseas affiliates of U.S. entities, either directly or through substituted compliance, the public will be left without the benefits and protections that Congress intended with Dodd-Frank.

Foreign governments and their taxpayers also will be concerned about the risks engendered by the cross-border activities of financial institutions.

The Final Order approved today benefitted from consultation with foreign regulatory counterparts. The Commission also received constructive comment from the public and Members of Congress.

I am grateful to the staff of the Commission for their tireless work on this Order and the Commission's broader effort to implement swaps market reform. In accordance the directives of Congress and the Commission's final rules, swaps market reform is taking shape. I look forward to working with my colleagues to complete this important task.

Appendix 3—Statement of Commissioner Jill E. Sommers

Although I am very supportive of granting temporary relief from certain provisions of the Dodd-Frank Act, I disagree with the approach and am concerned that the Commission continues to insert unnecessary complexities into the cross-border determinations. As I have said a number of times, the Commission has worked for

decades to establish relationships with our foreign counterparts based on respect, trust and information sharing, which has resulted in a long and successful history of mutual recognition. All G20 nations have agreed to a comprehensive set of principles for regulating the over-the-counter derivatives markets. Instead of recognizing these commitments and resolving to work towards mutual recognition of comparable regulatory regimes, keeping in mind the core policy objectives of the G20 commitments, the Commission has embarked on a cross-border analysis that I fear is taking us down a path of regulatory detail that is overly burdensome, complicated, and unnecessary.

Moreover, it is a mistake to require registration and compliance with certain regulations before our final guidance has been issued. Foreign entities will not have the basic information they need to make informed decisions regarding the ultimate obligations of engaging in swaps activities with U.S. persons (the definition of which continues to shift) prior to having to make the decision to register. There is no reason why the Commission could not have issued broader relief until these issues are settled. We have simply chosen not to.

I have consistently supported harmonization with both foreign and domestic regulators. Over the past few months we have received invaluable input from many global regulators, who have agreed to meet in early 2013 to inform each other on the progress made in finalizing reforms in their respective jurisdictions and to consult on possible transition periods. Future meetings will explore options for addressing conflicts, inconsistencies, and duplicative rules and examine ways in which comparability assessments and appropriate cross-border supervisory and enforcement arrangements may be made. It is my hope that these meetings will lead the Commission to listen to the

concerns being raised by regulators around the world and to adopt a more reasonable approach when it finalizes the cross-border guidance.

Appendix 4—Statement of Commissioner Bart Chilton

As we have set out to do from the beginning of the Dodd-Frank rulemaking process, we are cognizant of the need for regulators around the globe to harmonize rules to the extent possible in order to avoid market disruption and regulatory arbitrage.

In responding to a letter from Members of the House Agriculture Committee's Subcommittee on General Farm Commodities and Risk Management, I pointed out that I expect the Commission will act imminently to ensure the following three broad objectives:

- narrow the definition of U.S. person so that our extraterritorial reach is not too broad;
- provide sensible aggregation requirements so that foreign banks won't automatically have to become U.S. swaps dealers just because they do business with foreign affiliates of U.S. banks;
- provide for a phased-in compliance to July 2013 to allow time for other jurisdictions to implement derivative market reforms.

In addition, we must ensure that, in this interim period, U.S. swap dealers and major swap participants can avoid a Dodd-Frank compliance-related enforcement action by working to comply reasonably and in good faith.

Derivatives reform in the U.S. isn't taking place in a vacuum. And, regulators on several continents are moving at different speeds. Like an orchestra playing holiday music, not all sections of instruments necessarily start a number at the same time. Yet,

they wind up in harmony. So too it must be in global financial reform. Ending up in harmony is critical to achieving our overarching purpose: making global financial markets safer, more transparent, and more effective.

Appendix 5—Statement of Commissioner Scott D. O’Malia

I respectfully concur with the Commission’s approval of this Order. The relief provided in the Order is timely and helps provide some level of clarity in the short term to market participants as they transition to the Commission’s new swap regulatory regime. Crucially, it also provides time for the Commission to engage with foreign regulators in order to develop a coordinated, harmonized approach to regulating the global swap markets in the long term.

While I generally support the relief provided, the Order should have done much more to provide clarity and consistency and to ensure a level playing field for market participants. In particular, I would like to note that the definition of “U.S. Person” contained in this Order is the third different definition articulated by the Commission within the past six months: the expansive definition in the Commission’s July proposed guidance,¹⁵⁹ the narrower “territorial” definition in an October staff no-action letter,¹⁶⁰ and now this modified territorial definition. The industry cannot get too used to this definition either, as there will be, remarkably, a fourth definition next year when the Commission finalizes its cross-border guidance. This is a regrettable lack of consistency

¹⁵⁹ Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012).

¹⁶⁰ CFTC Division of Swap Dealer and Intermediary Oversight, Re: Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant, No-Action Letter No.12-22, Oct. 12, 2012.

for a concept that is so central to foreign swap market participants' ability to determine their compliance obligations.

This Order expires July 12, 2013. The Commission should use the time between now and then to do two things. First, as mentioned above, it should actively engage with other regulators. I was encouraged by the joint statement released earlier this month by a group of international derivatives regulators (including the Commission),¹⁶¹ which emphasized the importance of coordination and committed the signatories to consult one another with regard to the timing and sequencing of regulation; comparability determinations; clearing determinations; and conflicting, inconsistent and duplicative rules. But these consultations over the next several months cannot merely be an exercise in going through the motions. Rather, they must be substantive, and they should ultimately lead to a final Commission cross-border guidance that addresses the strong concerns raised by fellow regulators about the Commission's July proposal. For their part, fellow regulators can make this engagement process more effective by providing detailed plans of their existing and upcoming regulations as well as concrete, specific blueprints for potential comparability and substituted compliance determinations.

Second, the Commission should use the next several months to revisit and revise the grossly overbroad conception of extraterritorial reach that it argued for in the July proposed guidance. Most important, the Commission needs to articulate a clear, logical interpretation of the "direct and significant" connection required by the statute as a prerequisite to applying our regulations to entities and activities abroad.¹⁶² As I have

¹⁶¹ Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-border OTC Derivatives Market, December 4, 2012.

¹⁶² 7 U.S.C. 2(i).

noted before, the statutory language is a limitation on the Commission's authority, but the proposed guidance interpreted it as the opposite. If the Commission develops a sufficient rationale for the "direct and significant" standard, it will have gone a long way toward appropriately determining the scope of its extraterritorial reach.