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COMMODITY FUTURES TRADING COMMISSION

Comparability Determination for Japan: Certain Entity-Level Requirements

AGENCY: Commodity Futures Trading Commission

ACTION: Notice of Comparability Determination for Certain Requirements under the Laws of Japan

SUMMARY: The following is the analysis and determination of the Commodity Futures Trading Commission ("Commission") regarding certain parts of a joint request by the Bank of Tokyo-Mitsubishi UFJ, Ltd ("BTMU"), Goldman Sachs Japan Co., Ltd., Merrill Lynch Japan Securities Co., Ltd., and Morgan Stanley MUFG Securities Co., Ltd. that the Commission determine that laws and regulations applicable in Japan provide a sufficient basis for an affirmative finding of comparability with respect to the following regulatory obligations applicable to swap dealers ("SDs") and major swap participants ("MSPs") registered with the Commission: (i) chief compliance officer; (ii) risk management; and (iii) swap data recordkeeping (collectively, the "Internal Business Conduct Requirements").

EFFECTIVE DATE: This determination will become effective immediately upon publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Gary Barnett, Director, 202 418-5977, gbarnett@cftc.gov, Frank Fisanich, Chief Counsel, 202-418-5949, ffisanich@cftc.gov, and Jason Shafer, Special Counsel, 202-418-5097, jshafer@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

On July 26, 2013, the Commission published in the Federal Register its "Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations" (the "Guidance").[1] In the Guidance, the Commission set forth its interpretation of the manner in which it believes that section 2(i) of the Commodity Exchange Act ("CEA") applies Title VII's swap provisions to activities outside the U.S. and informed the public of some of the policies that it expects to follow, generally speaking, in applying Title VII and certain Commission regulations in contexts covered by section 2(i). Among other matters, the Guidance generally described the policy and procedural framework under which the Commission would consider a substituted compliance program with respect to Commission regulations applicable to entities located outside the U.S. Specifically, the Commission addressed a recognition program where compliance with a comparable regulatory requirement of a foreign jurisdiction would serve as a reasonable substitute for compliance with the attendant requirements of the CEA and the Commission's regulations promulgated thereunder.

In addition to the Guidance, on July 22, 2013, the Commission issued the Exemptive Order Regarding Compliance with Certain Swap Regulations (the "Exemptive Order").[2] Among other things, the Exemptive Order provided time for the Commission to consider substituted compliance with respect to six jurisdictions where non-U.S. SDs

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[1] 78 FR 45292 (July 26, 2013). The Commission originally published proposed and further proposed guidance on July 12, 2012 and January 7, 2013, respectively. See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012) and Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 FR 909 (Jan. 7, 2013).

[2] 78 FR 43785 (July 22, 2013).

are currently organized. In this regard, the Exemptive Order generally provided non-U.S. SDs and MSPs in the six jurisdictions with conditional relief from certain requirements of Commission regulations (those referred to as "Entity-Level Requirements" in the Guidance) until the earlier of December 21, 2013, or 30 days following the issuance of a substituted compliance determination.[3]

On June 24, 2013, BTMU submitted a request that the Commission determine that laws and regulations applicable in Japan provide a sufficient basis for an affirmative finding of comparability with respect to certain Entity-Level Requirements, including the Internal Business Conduct Requirements.[4] BTMU provided Commission staff with a supplement on October 8, 2013. On October 29, 2013, the application was further supplemented with corrections and additional materials. On November 12, 2013, Goldman Sachs Japan Co., Ltd., Merrill Lynch Japan Securities Co., Ltd., and Morgan Stanley MUFG Securities Co., Ltd. requested that they be permitted to rely upon BTMU's submission as the basis for their request for a substituted compliance determination (BTMU, Goldman Sachs Japan Co., Ltd., Merrill Lynch Japan Securities Co., Ltd., and Morgan Stanley MUFG Securities Co., Ltd., are referred to herein as, collectively, the "applicants"). The following is the Commission's analysis and determination regarding the Internal Business Conduct Requirements, as detailed below.[5]

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[3] The Entity-Level Requirements under the Exemptive Order consist of 17 CFR 1.31, 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, 23.606, 23.608, 23.609, and parts 45 and 46 of the Commission's regulations.

[4] For purposes of this notice, the Internal Business Conduct Requirements consist of 17 CFR 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, and 23.606. The applicants subsequently submitted a separate application for the applicable Transaction-Level Requirements on September 20, 2013. This notice addresses only the Entity-Level Requirements.

[5] This notice does not address swap data repository reporting ("SDR Reporting"). The Commission may provide a comparability determination with respect to the SDR Reporting requirement in a separate notice.

II. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act[6] ("Dodd-Frank Act" or "Dodd-Frank"), which, in Title VII, established a new regulatory framework for swaps.

Section 722(d) of the Dodd-Frank Act amended the CEA by adding section 2(i), which provides that the swap provisions of the CEA (including any CEA rules or regulations) apply to cross-border activities when certain conditions are met, namely, when such activities have a "direct and significant connection with activities in, or effect on, commerce of the United States" or when they contravene Commission rules or regulations as are necessary or appropriate to prevent evasion of the swap provisions of the CEA enacted under Title VII of the Dodd-Frank Act.[7] In the three years since its enactment, the Commission has finalized 68 rules and orders to implement Title VII of the Dodd-Frank Act. The finalized rules include those promulgated under section 4s of the CEA, which address registration of SDs and MSPs and other substantive requirements applicable to SDs and MSPs. With few exceptions, the delayed compliance dates for the Commission's regulations implementing such section 4s requirements applicable to SDs and MSPs have passed and new SDs and MSPs are now required to be in full compliance with such regulations upon registration with the Commission.[8] Notably, the requirements under Title VII of the Dodd-Frank Act related to SDs and

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[6] Public Law 111-203, 124 Stat. 1376 (2010).

[7] 7 U.S.C. § 2(i).

[8] 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.)

MSPs by their terms apply to all registered SDs and MSPs, irrespective of where they are located, albeit subject to the limitations of CEA section 2(i).

To provide guidance as to the Commission's views regarding the scope of the cross-border application of Title VII of the Dodd-Frank Act, the Commission set forth in the Guidance its interpretation of the manner in which it believes that Title VII's swap provisions apply to activities outside the U.S. pursuant to section 2(i) of the CEA. Among other matters, the Guidance generally described the policy and procedural framework under which the Commission would consider a substituted compliance program with respect to Commission regulations applicable to entities located outside the U.S. Specifically, the Commission addressed a recognition program where compliance with a comparable regulatory requirement of a foreign jurisdiction would serve as a reasonable substitute for compliance with the attendant requirements of the CEA and the Commission's regulations. With respect to the standards forming the basis for any determination of comparability ("comparability determination" or "comparability finding"), the Commission stated:

> In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations, the Commission will take into consideration all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and objectives of the relevant regulatory requirement(s), the comprehensiveness of the foreign regulator's supervisory compliance program, as well as the home jurisdiction's authority to support and enforce its oversight of the registrant. In this context, comparable does not necessarily mean identical. Rather, the Commission would evaluate whether the home jurisdiction's regulatory requirement is comparable to and as comprehensive as the corresponding U.S. regulatory requirement(s).[9]

[9] 78 FR at 45342-45.

Upon a comparability finding, consistent with CEA section 2(i) and comity principles, the Commission's policy generally is that eligible entities may comply with a substituted compliance regime, subject to any conditions the Commission places on its finding, and subject to the Commission's retention of its examination authority and its enforcement authority.[10]

In this regard, the Commission notes that a comparability determination cannot be premised on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction, but rather on whether information relevant to the Commission's oversight of an SD or MSP would be directly available to the Commission and any U.S. prudential regulator of the SD or MSP.[11] The Commission's direct access to the books and records required to be maintained by an SD or MSP registered with the

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[10] See the Guidance, 78 FR at 45342-44.

[11] Under §§ 23.203 and 23.606, all records required by the CEA and the Commission's regulations to be maintained by a registered SD or MSP shall be maintained in accordance with Commission regulation 1.31 and shall be open for inspection by representatives of the Commission, the United States Department of Justice, or any applicable U.S. prudential regulator.

In its Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013), the Commission noted that an applicant for registration as an SD or MSP must file a Form 7-R with the National Futures Association and that Form 7-R was being modified at that time to address existing blocking, privacy, or secrecy laws of foreign jurisdictions that applied to the books and records of SDs and MSPs acting in those jurisdictions. See id. at 871-72 n. 107. The modifications to Form 7-R were a temporary measure intended to allow SDs and MSPs to apply for registration in a timely manner in recognition of the existence of the blocking, privacy, and secrecy laws. In the Guidance, the Commission clarified that the change to Form 7-R impacts the registration application only and does not modify the Commission's authority under the CEA and its regulations to access records held by registered SDs and MSPs. Commission access to a registrant's books and records is a fundamental regulatory tool necessary to properly monitor and examine each registrant's compliance with the CEA and the regulations adopted pursuant thereto. The Commission has maintained an ongoing dialogue on a bilateral and multilateral basis with foreign regulators and with registrants to address books and records access issues and may consider appropriate measures where requested to do so.

Commission is a core requirement of the CEA[12] and the Commission's regulations,[13] and is a condition to registration.[14]

III. Regulation of SDs and MSPs in Japan

As represented to the Commission by the applicants, swap activities in Japan may be governed by the Banking Act of Japan, No. 59 of 1981 ("Banking Act"), covering banks and bank holding companies, and the Financial Instruments and Exchange Act, No. 25 of 1948 ("FIEA"), covering, among others, Financial Instrument Business Operators ("FIBOs") and Registered Financial Institutions ("RFIs"). The Japanese Prime Minister delegated broad authority to implement these laws to the Japanese Financial Services Agency ("JFSA"). Pursuant to this authority, the JFSA has promulgated the Order for Enforcement,[15] Cabinet Office Ordinance, [16] Supervisory Guidelines[17] and Inspection Manuals.[18] The Securities and Exchange Surveillance Commission ("SESC") is within the JFS and has promulgated, among other things, the Inspection Manual for FIBOs.

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[12] See e.g., sections 4s(f)(1)(C), 4s(j)(3) and (4) of the CEA.

[13] See e.g., §§ 23.203(b) and 23.606.

[14] See supra note 10.

[15] Order for Enforcement of the Banking Act and Order for Enforcement of the Financial Instruments and Exchange Act.

[16] Cabinet Office Ordinance on Financial Instruments Business ("FIB Ordinance") and Cabinet Office Ordinance on Regulation of OTC Derivatives Transaction.

[17] Comprehensive Guideline for Supervision of Major Banks, etc.("Supervisory Guideline for banks") and Comprehensive Guideline for Supervision of Financial Instruments Business Operators, etc.("Supervisory Guideline for FIBOs").

[18] Inspection Manual for Deposit Taking Institutions ("Inspection Manual for banks"), consisting of the Checklist for Business Management (Governance), Checklist for Legal Compliance, Checklist for Customer Protection Management, Checklist for Credit Risk Management, Checklist for Market Risk Management, Checklist for Liquidity Risk Management, Checklist for Operational Risk Management, etc.

These requirements supplement the requirements of the Banking Act and FIEA with a more proscriptive direction as to the particular structural features or responsibilities that internal compliance functions must maintain.

In general, banks are subject to the Banking Act, relevant laws and regulations for banks, Supervisory Guidelines for banks, and Inspection Manual for banks, while FIBOs are subject to the FIEA, relevant laws and regulations for FIBOs, Supervisory Guidelines for FIBOs, and Inspection Manual for FIBOs.

Pursuant to Article 29 of the FIEA, any person that engages in trade activities that constitute "Financial Instruments Business" – which, among other things, includes over-the-counter transactions in derivatives ("OTC derivatives") or intermediary, brokerage (excluding brokerage for clearing of securities) or agency services therefor[19] – must register under the FIEA as a FIBO. Banks that conduct specified activities in the course of trade, including OTC derivatives must register under the FIEA as RFIs pursuant to Article 33-2 of the FIEA. Banks registered as RFIs are required to comply with relevant laws and regulations for FIBOs regarding specified activities. Failure to comply with any relevant laws and regulations, Supervisory Guidelines or Inspection Manuals would subject the applicant to potential sanctions or corrective measures.

The applicants are each registered in Japan as RFIs or FIBOs under the supervision of the JFSA. In addition, each applicant is a member of several self-regulatory organizations, including the Japanese Securities Dealers Association

[19] See Article 2(8)(iv) of the FIEA.

("JSDA"). The JSDA is a "Financial Instruments Firms Association" authorized under FIEA by the Prime Minister of Japan.[20]

IV. Comparable and Comprehensiveness Standard

The Commission's comparability analysis will be based on a comparison of specific foreign requirements against the specific related CEA provisions and Commission regulations as categorized and described in the Guidance. As explained in the Guidance, within the framework of CEA section 2(i) and principles of international comity, the Commission may make a comparability determination on a requirement-by-requirement basis, rather than on the basis of the foreign regime as a whole.[21] In making its comparability determinations, the Commission may include conditions that take into account timing and other issues related to coordinating the implementation of reform efforts across jurisdictions.[22]

In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the corollary requirement(s) under the CEA and Commission regulations, the Commission will take into consideration all relevant factors, including, but not limited to:

- The comprehensiveness of those requirement(s),
- The scope and objectives of the relevant regulatory requirement(s),

[20] Because the applicants' request and the Commissions determinations herein are based on the comparability of Japanese requirements applicable to banks, FIBOs, and RFIs, an SD or MSP that is not a bank, FIBO, or RFI, or is otherwise not subject to the requirements applicable to banks, FIBOs, and RFIs upon which the Commission bases its determinations, may not be able to rely on the Commission's comparability determinations herein.

[21] 78 FR at 45343.

[22] 78 FR at 45343.

- The comprehensiveness of the foreign regulator's supervisory compliance program, and
- The home jurisdiction's authority to support and enforce its oversight of the registrant.[23]

In making a comparability determination, the Commission takes an "outcome-based" approach. An "outcome-based" approach means that when evaluating whether a foreign jurisdiction's regulatory requirements are comparable to, and as comprehensive as, the corollary areas of the CEA and Commission regulations, the Commission ultimately focuses on regulatory outcomes (i.e., the home jurisdiction's requirements do not have to be identical).[24] This approach recognizes that foreign regulatory systems differ and their approaches vary and may differ from how the Commission chose to address an issue, but that the foreign jurisdiction's regulatory requirements nonetheless achieve the regulatory outcome sought to be achieved by a certain provision of the CEA or Commission regulation.

In doing its comparability analysis the Commission may determine that no comparability determination can be made[25] and that the non-U.S. SD or non-U.S. MSP, U.S. bank that is an SD or MSP with respect to its foreign branches, or non-registrant, to

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[23] 78 FR at 45343.

[24] 78 FR at 45343. The Commission's substituted compliance program would generally be available for SDR Reporting, as outlined in the Guidance, only if the Commission has direct access to all of the data elements that are reported to a foreign trade repository pursuant to the substituted compliance program. Thus, direct access to swap data is a threshold matter to be addressed in a comparability evaluation for SDR Reporting. Moreover, the Commission explains in the Guidance that, due to its technical nature, a comparability evaluation for SDR Reporting "will generally entail a detailed comparison and technical analysis." A more particularized analysis will generally be necessary to determine whether data stored in a foreign trade repository provides for effective Commission use, in furtherance of the regulatory purposes of the Dodd-Frank Act. See 78 FR at 45345.

[25] A finding of comparability may not be possible for a number of reasons, including the fact that the foreign jurisdiction has not yet implemented or finalized particular requirements.

the extent applicable under the Guidance, may be required to comply with the CEA and Commission regulations.

The starting point in the Commission's analysis is a consideration of the regulatory objectives of the foreign jurisdiction's regulation of swaps and swap market participants. As stated in the Guidance, jurisdictions may not have swap specific regulations in some areas, and instead have regulatory or supervisory regimes that achieve comparable and comprehensive regulation to the Dodd-Frank Act requirements, but on a more general, entity-wide, or prudential, basis.[26] In addition, portions of a foreign regulatory regime may have similar regulatory objectives, but the means by which these objectives are achieved with respect to swaps market activities may not be clearly defined, or may not expressly include specific regulatory elements that the Commission concludes are critical to achieving the regulatory objectives or outcomes required under the CEA and the Commission's regulations. In these circumstances, the Commission will work with the regulators and registrants in these jurisdictions to consider alternative approaches that may result in a determination that substituted compliance applies.[27]

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[26] 78 FR at 45343.

[27] As explained in the Guidance, such "approaches used will vary depending on the circumstances relevant to each jurisdiction. One example would include coordinating with the foreign regulators in developing appropriate regulatory changes or new regulations, particularly where changes or new regulations already are being considered or proposed by the foreign regulators or legislative bodies. As another example, the Commission may, after consultation with the appropriate regulators and market participants, include in its substituted compliance determination a description of the means by which certain swaps market participants can achieve substituted compliance within the construct of the foreign regulatory regime. The identification of the means by which substituted compliance is achieved would be designed to address the regulatory objectives and outcomes of the relevant Dodd-Frank Act requirements in a manner that does not conflict with a foreign regulatory regime and reduces the likelihood of inconsistent regulatory obligations. For example, the Commission may specify that [SDs] and MSPs in the jurisdiction undertake certain recordkeeping and documentation for swap activities that otherwise is only addressed by the foreign regulatory regime with respect to financial activities generally. In addition, the substituted compliance determination may include provisions for summary compliance and risk reporting to the Commission to

Finally, the Commission will generally rely on an applicant's description of the laws and regulations of the foreign jurisdiction in making its comparability determination. The Commission considers an application to be a representation by the applicant that the laws and regulations submitted are in full force and effect, that the description of such laws and regulations is accurate and complete, and that, unless otherwise noted, the scope of such laws and regulations encompasses the swaps activities[28] of SDs and MSPs[29] in the relevant jurisdictions.[30] Further, as stated in the Guidance, the Commission expects that an applicant would notify the Commission of any material changes to information submitted in support of a comparability determination (including, but not limited to, changes in the relevant supervisory or regulatory regime) as, depending on the nature of the change, the Commission's comparability determination may no longer be valid.[31]

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allow the Commission to monitor whether the regulatory outcomes are being achieved. By using these approaches, in the interest of comity, the Commission would seek to achieve its regulatory objectives with respect to the Commission's registrants that are operating in foreign jurisdictions in a manner that works in harmony with the regulatory interests of those jurisdictions." 78 FR at 45343-44.

[28] "Swaps activities" is defined in Commission regulation 23.600(a)(7) to mean, "with respect to a registrant, such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives." The Commission's regulations under 17 CFR Part 23 are limited in scope to the swaps activities of SDs and MSPs.

[29] No SD or MSP that is not legally required to comply with a law or regulation determined to be comparable may voluntarily comply with such law or regulation in lieu of compliance with the CEA and the relevant Commission regulation. Each SD or MSP that seeks to rely on a comparability determination is responsible for determining whether it is subject to the laws and regulations found comparable. Currently, there are no MSPs organized outside the U.S. and the Commission therefore cautions any non-financial entity organized outside the U.S. and applying for registration as an MSP to carefully consider whether the laws and regulations determined to be comparable herein are applicable to such entity.

[30] The Commission has provided the relevant foreign regulator(s) with opportunities to review and correct the applicant's description of such laws and regulations on which the Commission will base its comparability determination. The Commission relies on the accuracy and completeness of such review and any corrections received in making its comparability determinations. A comparability determination based on an inaccurate description of foreign laws and regulations may not be valid.

[31] 78 FR at 45345.

The Guidance provided a detailed discussion of the Commission's policy regarding the availability of substituted compliance[32] for the Internal Business Conduct Requirements.[33]

V. Supervisory Arrangement

In the Guidance, the Commission stated that, in connection with a determination that substituted compliance is appropriate, it would expect to enter into an appropriate memorandum of understanding ("MOU") or similar arrangement[34] with the relevant foreign regulator(s). Although existing arrangements would indicate a foreign regulator's ability to cooperate and share information, "going forward, the Commission and relevant foreign supervisor(s) would need to establish supervisory MOUs or other arrangements that provide for information sharing and cooperation in the context of supervising [SDs] and MSPs."[35]

The Commission is in the process of developing its registration and supervision regime for provisionally-registered SDs and MSPs. This new initiative includes setting

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[32] See 78 FR at 45348-50. The Commission notes that registrants and other market participants are responsible for determining whether substituted compliance is available pursuant to the Guidance based on the comparability determination contained herein (including any conditions or exceptions), and its particular status and circumstances.

[33] This notice does not address § 23.608 (Restrictions on counterparty clearing relationships). The Commission declines to take up the request for a comparability determination with respect to this regulation due to the Commission's view that there are not laws or regulations applicable in Japan to compare with the prohibitions and requirements of § 23.608. The Commission may provide a comparability determination with respect to this regulation at a later date in consequence of further developments in the law and regulations applicable in Japan.

This notice also does not address capital adequacy because the Commission has not yet finalized rules for SDs and MSPs in this area, nor SDR Reporting. The Commission may provide a comparability determination with respect to these requirements at a later date or in a separate notice.

[34] An MOU is one type of arrangement between or among regulators. Supervisory arrangements could include, as appropriate, cooperative arrangements that are memorialized and executed as addenda to existing MOUs or , for example, as independent bilateral arrangements, statements of intent, declarations, or letters.

[35] 78 FR at 45344.

forth supervisory arrangements with authorities that have joint jurisdiction over SDs and MSPs that are registered with the Commission and subject to U.S. law. Given the developing nature of the Commission's regime and the fact that the Commission has not negotiated prior supervisory arrangements with certain authorities, the negotiation of supervisory arrangements presents a unique opportunity to develop close working relationships between and among authorities, as well as highlight any potential issues related to cooperation and information sharing.

Accordingly, the Commission is negotiating such a supervisory arrangement with each applicable foreign regulator of an SD or MSP. The Commission expects that the arrangement will establish expectations for ongoing cooperation, address direct access to information,[36] provide for notification upon the occurrence of specified events, memorialize understandings related to on-site visits,[37] and include protections related to the use and confidentiality of non-public information shared pursuant to the arrangement.

These arrangements will establish a roadmap for how authorities will consult, cooperate, and share information. As with any such arrangement, however, nothing in

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[36] Section 4s(j)(3) and (4) of the CEA and Commission regulation 23.606 require a registered SD or MSP to make all records required to be maintained in accordance with Commission regulation 1.31 available promptly upon request to, among others, representatives of the Commission. See also 7 U.S.C. 6s(f); 17 CFR 23.203. In the Guidance, the Commission states that it "reserves this right to access records held by registered [SDs] and MSPs, including those that are non-U.S. persons who may comply with the Dodd-Frank recordkeeping requirement through substituted compliance." 78 FR at 45345 n. 472; see also id. at 45342 n. 461 (affirming the Commission's authority under the CEA and its regulations to access books and records held by registered SDs and MSPs as "a fundamental regulatory tool necessary to properly monitor and examine each registrant's compliance with the CEA and the regulations adopted pursuant thereto").

[37] The Commission retains its examination authority, both during the application process as well as upon and after registration of an SD or MSP. See 78 FR at 45342 (stating Commission policy that "eligible entities may comply with a substituted compliance regime under certain circumstances, subject, however, to the Commission's retention of its examination authority") and 45344 n. 471 (stating that the "Commission may, as it deems appropriate and necessary, conduct an on-site examination of the applicant").

these arrangements will supersede domestic laws or resolve potential conflicts of law, such as the application of domestic secrecy or blocking laws to regulated entities.

VI. Comparability Determination and Analysis

The following section describes the requirements imposed by specific sections of the CEA and the Commission's regulations for the Internal Business Conduct Requirements that are the subject of this comparability determination, and the Commission's regulatory objectives with respect to such requirements. Immediately following a description of the requirement(s) and regulatory objective(s) of the specific Internal Business Conduct Requirements that the applicants submitted for a comparability determination, the Commission provides a description of the foreign jurisdiction's comparable laws, regulations, or rules and whether such laws, regulations, or rules meet the applicable regulatory objective.

The Commission's determinations in this regard and the discussion in this section are intended to inform the public of the Commission's views regarding whether the foreign jurisdiction's laws, regulations, or rules may be comparable and comprehensive as those requirements in the Dodd-Frank Act (and Commission regulations promulgated thereunder) and therefore, may form the basis of substituted compliance. In turn, the public (in the foreign jurisdiction, in the United States, and elsewhere) retains its ability to present facts and circumstances that would inform the determinations set forth in this notice.

As was stated in the Guidance, the Commission recognizes the complex and dynamic nature of the global swap market and the need to take an adaptable approach to cross-border issues, particularly as it continues to work closely with foreign regulators to

address potential conflicts with respect to each country's respective regulatory regime. In this regard, the Commission may review, modify, or expand the determinations herein in light of comments received and future developments.

A. Chief Compliance Officer (§ 3.3).

Commission Requirement: Implementing section 4s(k) of the CEA, Commission regulation 3.3 generally sets forth the following requirements for SDs and MSPs:

- An SD or MSP must designate an individual as Chief Compliance Officer ("CCO");
- The CCO must have the responsibility and authority to develop the regulatory compliance policies and procedures of the SD or MSP;
- The CCO must report to the board of directors or the senior officer of the SD or MSP;
- Only the board of directors or a senior officer may remove the CCO;
- The CCO and the board of directors must meet at least once per year;
- The CCO must have the background and skills appropriate for the responsibilities of the position;
- The CCO must not be subject to disqualification from registration under sections 8a(2) or (3) of the CEA;
- Each SD and MSP must include a designation of a CCO in its registration application;
- The CCO must administer the regulatory compliance policies of the SD or MSP;

- The CCO must take reasonable steps to ensure compliance with the CEA and Commission regulations, and resolve conflicts of interest;
- The CCO must establish procedures for detecting and remediating non-compliance issues;
- The CCO must annually prepare and sign an "annual compliance report" containing: (i) a description of policies and procedures reasonably designed to ensure compliance; (ii) an assessment of the effectiveness of such policies and procedures; (iii) a description of material non-compliance issues and the action taken; (iv) recommendations of improvements in compliance policies; and (v) a certification by the CCO or chief executive officer that, to the best of such officer's knowledge and belief, the annual report is accurate and complete under penalty of law; and
- The annual compliance report must be furnished to the CFTC within 90 days after the end of the fiscal year of the SD or MSP, simultaneously with its annual financial condition report.

Regulatory Objective: The Commission believes that compliance by SDs and MSPs with the CEA and the Commission's rules greatly contributes to the protection of customers, orderly and fair markets, and the stability and integrity of the market intermediaries registered with the Commission. The Commission expects SDs and MSPs to strictly comply with the CEA and the Commission's rules and to devote sufficient resources to ensuring such compliance. Thus, through its CCO rule, the Commission seeks to ensure firms have designated a qualified individual as CCO that reports directly to the board of directors or the senior officer of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and

procedures reasonably designed to ensure compliance with the CEA and Commission regulations, resolve conflicts of interest, remediate noncompliance issues, and report annually to the Commission and the board or senior officer on compliance of the firm.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as section 4s(k) of the CEA and Commission regulation 3.3.

The Banking Act, FIEA, Order for Enforcement, Cabinet Office Ordinance, Supervisory Guidelines and Inspection Manuals for banks and FIBOs, collectively, require each bank and FIBO to:

- Designate an individual to serve as a CCO in its registration application as a bank/FIBO;
- Provide the CCO with the responsibility and authority to develop the regulatory compliance policies and procedures of the bank/FIBO;
- Have the CCO report to the board of directors of the bank/FIBO;
- Ensure the CCO has the background and skills appropriate for the position;
- Ensure the CCO is not disqualified from registration;[38]
- Have the CCO administer the regulatory compliance policies of the bank/FIBO;
- Have the CCO take reasonable steps to ensure compliance and resolve conflicts of interest for the bank/FIBO;

[38] See Article 29-4 of FIEA and Article 15-4 of the Order for Enforcement of FIEA, Article 33-5(1)(iii) of FIEA; Article 33-3(1)(vii) of FIEA, Article 47(1)(i) of the FIB Ordinance, Article 33-3(2)(iv) of FIEA, Article 47(1)(i)(ii) of the FIB Ordinance, and Article 4(2)(ii) of Banking Act. Pursuant to Article 33-5(1)(iii) of FIEA and its relevant provisions, RFIs are required to have a personnel structure sufficient to conduct RFI business in an appropriate manner. Accordingly, if the CCO is subject to disqualification, registration for the RFI would be refused.

- Have the CCO detect and remediate non-compliance issues for the bank/FIBO;
- Report regulatory compliance status to the board of directors as necessary and appropriate on behalf of the bank/FIBO; and
- Submit an annual business report to JFSA which contains compliance facts, preventative and corrective actions taken, and other issues regarding the firm's compliance framework.

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to § 3.3 by seeking to ensure firms have designated a qualified individual as the compliance officer that reports directly to a sufficiently senior function of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and procedures reasonably designed to ensure compliance with the CEA and Commission regulations, resolve conflicts of interest, remediate noncompliance issues, and report annually on compliance of the firm.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the CCO requirements of the Japanese standards specified above are comparable to and as comprehensive as § 3.3, with the exception of § 3.3(f) concerning certifying and furnishing an annual compliance report to the Commission.

Notwithstanding that the Commission has not determined that the requirements of Japan's laws and regulations are comparable to and as comprehensive as § 3.3(f), any SD or MSP to which both § 3.3 and the Japanese standards specified above are applicable would generally be deemed to be in compliance with § 3.3(f) if that SD or MSP complies with the Japanese standards specified above, subject to certifying and furnishing the

Commission with the annual report required under the Japanese standards specified above in accordance with § 3.3(f). The Commission notes that it generally expects registrants to submit required reports to the Commission in the English language.

B. Risk Management Duties (§§ 23.600 – 23.609)

Section 4s(j) of the CEA requires each SD and MSP to establish internal policies and procedures designed to, among other things, address risk management, monitor compliance with position limits, prevent conflicts of interest, and promote diligent supervision, as well as maintain business continuity and disaster recovery programs.[39] The Commission adopted regulations 23.600, 23.601, 23.602, 23.603, 23.605, and 23.606 to implement the statute.[40] The Commission also adopted regulation 23.609, which requires certain risk management procedures for SDs or MSPs that are clearing members of a derivatives clearing organization ("DCO").[41] Collectively, these requirements help to establish a robust and comprehensive internal risk management program for SDs and MSPs with respect to their swaps activities,[42] which is critical to effective systemic risk management for the overall swaps market. In making its comparability determination

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[39] 7 U.S.C. § 6s(j).

[40] See Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128 (April 3, 2012) (relating to risk management program, monitoring of position limits, business continuity and disaster recovery, conflicts of interest policies and procedures, and general information availability, respectively).

[41] See Customer Documentation Rule, 77 FR 21278. Also, SDs must comply with Commission regulation 23.608, which prohibits SDs providing clearing services to customers from entering into agreements that would: (i) disclose the identity of a customer's original executing counterparty; (ii) limit the number of counterparties a customer may trade with; (iii) impose counterparty-based position limits; (iv) impair a customer's access to execution of a trade on terms that have a reasonable relationship to the best terms available; or (v) prevent compliance with specified time frames for acceptance of trades into clearing.

[42] "Swaps activities" is defined in Commission regulation 23.600(a)(7) to mean, "with respect to a registrant, such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives." The Commission's regulations under 17 CFR Part 23 are limited in scope to the swaps activities of SDs and MSPs.

with regard to these risk management duties, the Commission will consider each regulation individually.[43]

1. Risk Management Program for SDs and MSPs (§ 23.600)

Commission Requirement: Implementing section 4s(j)(2) of the CEA, Commission regulation 23.600 generally requires that:

- Each SD or MSP must establish and enforce a risk management program consisting of a system of written risk management policies and procedures designed to monitor and manage the risks associated with the swap activities of the firm, including without limitation, market, credit, liquidity, foreign currency, legal, operational, and settlement risks, and furnish a copy of such policies and procedures to the CFTC upon application for registration and upon request;
- The SD or MSP must establish a risk management unit independent from the business trading unit;
- The risk management policies and procedures of the SD or MSP must be approved by the firm's governing body;
- Risk tolerance limits and exceptions therefrom must be reviewed and approved quarterly by senior management and annually by the governing body;
- The risk management program must have a system for detecting breaches of risk tolerance limits and alerting supervisors and senior management, as appropriate;

[43] As stated above, this notice does not address § 23.608 (Restrictions on counterparty clearing relationships). The Commission declines to take up the request for a comparability determination with respect to this regulation due to the Commission's view that there are not laws or regulations applicable in Japan to compare with the prohibitions and requirements of § 23.608. The Commission may provide a comparability determination with respect to this regulation at a later date in consequence of further developments in the law and regulations applicable in Japan.

- The risk management program must account for risks posed by affiliates and be integrated at the consolidated entity level;
- The risk management unit must provide senior management and the governing body with quarterly risk exposure reports and upon detection of any material change in the risk exposure of the SD or MSP;
- Risk exposure reports must be furnished to the CFTC within five business days following provision to senior management;
- The risk management program must have a new product policy for assessing the risks of new products prior to engaging in such transactions;
- The risk management program must have policies and procedures providing for trading limits, monitoring of trading, processing of trades, and separation of personnel in the trading unit from personnel in the risk management unit; and
- The risk management program must be reviewed and tested at least annually and upon any material change in the business of the SD or MSP.

Regulatory Objective: Through the required system of risk management, the Commission seeks to ensure that firms are adequately managing the risks of their swaps activities to prevent failure of the SD or MSP, which could result in losses to counterparties doing business with the SD or MSP, and systemic risk more generally. To this end, the Commission believes the risk management program of an SD or MSP must contain at least the following critical elements:

- Identification of risk categories;
- Establishment of risk tolerance limits for each category of risk and approval of such limits by senior management and the governing body;

- An independent risk management unit to administer a risk management program; and
- Periodic oversight of risk exposures by senior management and the governing body.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as section 4s(j)(2) of the CEA and Commission regulation 23.600.

III-2-3-1-3(1) and III-3-7-1-2(1)(ii) of the Supervisory Guidelines and Inspection Manuals for banks and III-1(1)(ii) of the Supervisory Guideline for FIBOs generally require the board of directors of a bank/FIBO to establish a comprehensive risk management program aligned with the bank's/FIBO's strategic target. The risk management program required by the Supervisory Guidelines and Inspectional Manuals must be designed to monitor and manage risk, including without limitation, market (including foreign currency), credit, liquidity, legal, operational, and settlement risks. [44]

The review of a bank's/FIBO's overall risk management program must take into account how frequently the risk management division reports to the board of directors and whether reports are also filed on an as-needed basis. Pursuant to Article 19 of the Banking Act and Article 46-3 of the FIEA, a bank/FIBO must submit to the JFSA a business report referring to the risk management of derivative transactions annually within three months after the end of year period. In addition, pursuant to Article 24 of

[44] See, e.g. Supervisory Guideline: Checklist for Comprehensive Risk Management, Checklist for Business Management, Checklist for Legal Compliance, Checklist for Market Risk Management, Checklist for Credit Risk Management, Checklist for Liquidity Risk Management, and Checklist for Operational Risk Management.

the Banking Act and Article 56-2 of the FIEA, JFSA requires a bank/FIBO to report to JFSA on a quarterly basis the data of derivative transactions such as the volume and profit and loss amounts within fifty days after the end of every quarter period.

Pursuant to the above Supervisory Guidelines and Inspection Manuals, a bank/FIBO must arrange for the approval of new products in a manner befitting the scale and nature of its business. III-1(1)(iv) of the Supervisory Guidelines for FIBOs and III-2-3-1-3(5)(6) of the Supervisory Guidelines for banks require JSFA to evaluate whether a bank's/FIBO's risk management program established a sufficient internal audit system. As part of this oversight, a bank/FIBO must receive an external audit by corporate auditors at least once a year.

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to § 23.600 by requiring a system of risk management that seeks to ensure that firms are adequately managing the risks of their swaps activities to prevent failure of the SD or MSP, which could result in losses to counterparties doing business with the SD or MSP, and systemic risk more generally. Specifically, the Commission finds that the Japanese standards specified above comprehensively require SDs and MSPs to establish risk management programs containing the following critical elements:

- Identification of risk categories;
- Establishment of risk tolerance limits for each category of risk and approval of such limits by senior management and the governing body;
- An independent risk management unit to administer a risk management program; and

- Periodic oversight of risk exposures by senior management and the governing body.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the risk management program requirements of Japan's laws and regulations, as specified above, are comparable to and as comprehensive as § 23.600, with the exception of § 23.600(c)(2) concerning the requirement that each SD and MSP produce a quarterly risk exposure report and provide such report to its senior management, governing body, and the Commission.

Notwithstanding that the Commission has not determined that the requirements of Japan's laws and regulations are comparable to and as comprehensive as § 23.600(c)(2), any SD or MSP to which both § 23.600 and the Japanese standards specified above are applicable would generally be deemed to be in compliance with § 23.600(c)(2) if that SD or MSP complies with the Japanese standards specified above, subject to compliance with the requirement that it produce quarterly risk exposure reports and provide such reports to its senior management, governing body, and the Commission in accordance with § 23.600(c)(2). The Commission notes that it generally expects reports furnished to the Commission by registrants to be in the English language.

2. Monitoring of Position Limits (§ 23.601)

Commission Requirement: Implementing section 4s(j)(1) of the CEA, Commission regulation 23.601 requires each SD or MSP to establish and enforce written policies and procedures that are reasonably designed to monitor for, and prevent violations of, applicable position limits established by the Commission, a designated

contract market ("DCM"), or a swap execution facility ("SEF").[45] The policies and procedures must include an early warning system and provide for escalation of violations to senior management (including the firm's governing body).

Regulatory Objective: Generally, position limits are implemented to ensure market integrity, fairness, orderliness, and accurate pricing in the commodity markets. Commission regulation 23.601 thus seeks to ensure that SDs and MSPs have established the necessary policies and procedures to monitor the trading of the firm to prevent violations of applicable position limits established by the Commission, a DCM, or a SEF. As part of its Risk Management Program, § 23.601 is intended to ensure that established position limits are not breached by the SD or MSP.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as section 4s(j)(1) of the CEA and Commission regulation 23.601.

IV-2-3 of the Supervisory Guidelines for FIBOs and III-2-3-3-2(2)(vii) and (viii) of the Supervisory Guideline for banks of the Inspection Manuals generally require a bank/FIBO to establish internal position limits, risk limits, and loss limits for all financial products, including derivatives. The policies established by the bank/FIBO must provide a system to provide "alarm points" to the board of directors. Moreover, in accordance with Article 29-2 of the Business Rules of Japan Securities Clearing Corporation ("JSCC") with respect to listed products, JSCC can take an appropriate action against

[45] The setting of position limits by the Commission, a DCM, or a SEF is subject to requirements under the CEA and Commission regulations other than § 23.601. The setting of position limits and compliance with such limits is not subject to the Commission's substituted compliance regime.

clearing participants (RFIs or FIBOs) if JSCC finds their position is excessive compared with their net assets. Therefore, clearing participants have to monitor their positions in relation to their net assets. CCP's Business Rules, which are subject to JFSA's approval, are legally binding requirements.

The applicants represent that the position limits set internally by banks and FIBOs may not exceed position limits set by applicable law, including position limits set by the Commission, SEFs, or DCMs.[46]

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to § 23.601 by requiring SDs and MSPs to establish necessary policies and procedures to monitor the trading of the firm to prevent violations of applicable position limits established by applicable laws and regulations, including those of the Commission, a DCM, or a SEF. Specifically, the Commission finds that the Japanese standards specified above, while not specific to the issue of position limit compliance, nevertheless comprehensively require SDs and MSPs to monitor for regulatory compliance generally, which includes monitoring for compliance with position limits set pursuant to applicable law and the responsibility of senior management (including the board of directors) for such compliance.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the compliance monitoring requirements of the Japanese standards, as specified above, are comparable to and as comprehensive as § 23.601. For the avoidance of doubt, the Commission notes that this determination may not be relied

[46] See III-3-10 of the Supervisory Guideline for banks and IV-5-2(i) of the Supervisory Guideline for FIBOs for rules regarding management of overseas business by banks and FIBOs.

on to relieve an SD or MSP from its obligation to strictly comply with any applicable position limit established by the Commission, a DCM, or a SEF.

3. Diligent Supervision (§ 23.602)

Commission Requirement: Commission regulation 23.602 implements section 4s(h)(1)(B) of the CEA and requires each SD and MSP to establish a system to diligently supervise all activities relating to its business performed by its partners, members, officers, employees, and agents. The system must be reasonably designed to achieve compliance with the CEA and CFTC regulations. Commission regulation 23.602 requires that the supervisory system must specifically designate qualified persons with authority to carry out the supervisory responsibilities of the SD or MSP for all activities relating to its business as an SD or MSP.

Regulatory Objective: The Commission's diligent supervision rule seeks to ensure that SDs and MSPs strictly comply with the CEA and the Commission's rules. To this end, through § 23.602, the Commission seeks to ensure that each SD and MSP not only establishes the necessary policies and procedures that would lead to compliance with the CEA and Commission regulations, but also establishes an effective system of internal oversight and enforcement of such policies and procedures to ensure that such policies and procedures are diligently followed.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as section 4s(h)(1)(B) of the CEA and Commission regulation 23.602.

III-1-2-1-(2)(xi) and III-1-2-1-(2)(xiii) of the Supervisory Guideline for banks, the Checklist for Business Management (Governance) of the Bank Inspection Manual, III-1(1)(ii)C and IV-1-2-(1)(i) of the Supervisory Guideline for FIBOs, and II-1-1-3(3) and II-2-1 of the FIBO Inspection Manual generally require a bank/FIBO to ensure appropriate officers and employees are in place in order to properly conduct business, and to establish legal compliance and internal control systems.

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to § 23.602 because such standards seek to ensure that SDs and MSPs strictly comply with applicable law, which would include the CEA and the Commission's regulations.[47]

Through the Supervisory Guidelines and Inspection Manuals, Japan's laws and regulations seek to ensure that each SD and MSP not only establishes the necessary policies and procedures that would lead to compliance with applicable law, which would include the CEA and Commission regulations, but also establishes an effective system of internal oversight and enforcement of such policies and procedures to ensure that such policies and procedures are diligently followed.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the internal supervision requirements set forth in the Japanese standards, as specified above, are comparable to and as comprehensive as § 23.602.

[47] See III-3-10 of the Supervisory Guideline for banks and IV-5-2(i) of the Supervisory Guideline for FIBOs for rules regarding management of overseas business by banks and FIBOs.

4. Business Continuity and Disaster Recovery (§ 23.603)

Commission Requirement: To ensure the proper functioning of the swaps markets and the prevention of systemic risk more generally, Commission regulation 23.603 requires each SD and MSP, as part of its risk management program, to establish a business continuity and disaster recovery plan that includes procedures for, and the maintenance of, back-up facilities, systems, infrastructure, personnel, and other resources to achieve the timely recovery of data and documentation and to resume operations generally within the next business day after the disruption.

Regulatory Objective: Commission regulation 23.603 is intended to ensure that any market disruption affecting SDs and MSPs, whether caused by natural disaster or otherwise, is minimized in length and severity. To that end, this requirement seeks to ensure that entities adequately plan for disruptions and devote sufficient resources capable of carrying out an appropriate plan within one business day, if necessary.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as Commission regulation 23.603.

IV-3-1-6 of the Supervisory Guideline for FIBOs and sections III-6-1 and III-6-2(2)(i)(iii)-(v) of the Supervisory Guideline for banks require a bank/FIBO to establish a crisis management manual and a business continuity and disaster recovery plan that include procedures for, and the maintenance of, back-up facilities, systems, infrastructure, personnel, and other resources to achieve the timely recovery of data and documentation and to resume operations.

Pursuant to III-8-2-(2)-(v) of the Supervisory Guideline for banks, JFSA requires banks to resume operation within the day of the event, especially for important settlement functions. Pursuant to IV-3-1-6(2) of the Supervisory Guideline for FIBOs, JFSA checks whether a FIBO's business continuity plan ensures quick recovery from damage caused by acts of terrorism, large-scale disasters, etc., as well as continuance of the minimum necessary business operations and services for the maintenance of the functions of the financial system.

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to § 23.603 because such standards seek to ensure that any market disruption affecting SDs and MSPs, whether caused by natural disaster or otherwise, is minimized in length and severity. To that end, the Commission finds that the Japanese standards specified above seek to ensure that entities adequately plan for disruptions and devote sufficient resources capable of carrying out an appropriate plan in a timely manner.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the business continuity and disaster recovery requirements of the Japanese standards, as specified above, are comparable to and as comprehensive as § 23.603.

5. Conflicts of Interest (§ 23.605)

Commission Requirement: Section 4s(j)(5) of the CEA and Commission regulation 23.605(c) generally require each SD or MSP to establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity or swap are separated by

appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision.

In addition, section 4s(j)(5) of the CEA and Commission regulation 23.605(d)(1) generally prohibits an SD or MSP from directly or indirectly interfering with or attempting to influence the decision of any clearing unit of any affiliated clearing member of a derivatives clearing organization (DCO) to provide clearing services and activities to a particular customer, including:

- Whether to offer clearing services to a particular customer;
- Whether to accept a particular customer for clearing derivatives;
- Whether to submit a customer's transaction to a particular DCO;
- Whether to set or adjust risk tolerance levels for a particular customer; or
- Whether to set a customer's fees based on criteria other than those generally available and applicable to other customers.

Commission regulation 23.605(d)(2) generally requires each SD or MSP to create and maintain an appropriate informational partition between business trading units of the SD or MSP and clearing units of any affiliated clearing member of a DCO to reasonably ensure compliance with the Act and the prohibitions set forth in § 23.605(d)(1) outlined above.

The Commission observes that § 23.605(d) works in tandem with Commission regulation 1.71, which requires FCMs that are clearing members of a DCO and affiliated with an SD or MSP to create and maintain an appropriate informational partition between business trading units of the SD or MSP and clearing units of the FCM to reasonably

ensure compliance with the Act and the prohibitions set forth in § 1.71(d)(1), which are the same as the prohibitions set forth in § 23.605(d)(1) outlined above.

Finally, § 23.605(e) requires that each SD or MSP have policies and procedures that mandate the disclosure to counterparties of material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a swap execution facility or designated contract market (DCM) or to clear a derivative through a DCO.

Regulatory Objective: Commission regulation 23.605(c) seeks to ensure that research provided to the general public by an SD or MSP is unbiased and free from the influence of the interests of an SD or MSP arising from the SD's or MSP's trading business.

In addition, the § 23.605(d) (working in tandem with § 1.71) seeks to ensure open access to the clearing of swaps by requiring that access to and the provision of clearing services provided by an affiliate of an SD or MSP are not influenced by the interests of an SD's or MSP's trading business.

Finally, § 23.605(e) seeks to ensure equal access to trading venues and clearinghouses, as well as orderly and fair markets, by requiring that each SD and MSP disclose to counterparties any material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a SEF or DCM, or to clear a derivative through a DCO.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as Commission regulation 23.605.

Regulations Concerning the Handling of Analysts Reports have been developed by the JSDA to require JSDA members to appropriately manage the content of any unpublished analyst report that is considered to have a material impact on investors (to include the presentation of any conflicts) and to establish an appropriate compensation system to ensure the independence of the opinions of analysts.

More generally, FIEA and the Financial Instruments Business Ordinance require a FIBO/RFI to conduct business "in good faith and fairly to customers." Specifically, I.2.(3)(iv) of the Checklist for Legal Compliance of the Bank Inspection Manual and II-1-2-1(4)(iii) of the FIBO Inspection Manual require each bank/FIBO to establish firewalls and take other measures to block the flow of information when necessary. Article 70-3(1)(ii)(d) of the Financial Instruments Business Ordinance and IV-1-3(3)(i)C of the Supervisory Guidelines for FIBOs require a FIBO/RFI to develop a control environment wherein it can choose or combine appropriate method(s), for example, notifying the customer of a conflict risk to establish a system for protection of customers.

The JFSA has informed the Commission that, in the process of its oversight and enforcement of the foregoing Japanese standards for FIBOs and RFIs, any SD or MSP would be subject to such standards and required to resolve or mitigate conflicts of interests in the provision of clearing services by a clearing member of a DCO that is an affiliate of the SD or MSP, or the decision of a counterparty to execute a derivative on a SEF or DCM, or clear a derivative through a DCO, through appropriate information firewalls and disclosures.

Commission Determination: The Commission finds that the Japanese standards specified above with respect to conflicts of interest that may arise in producing or

distributing research are generally identical in intent to § 23.605(c) because such standards seek to ensure that research provided to the general public by an SD is unbiased and free from the influence of the interests of an SD arising from the SD's trading business.

With respect to conflicts of interest that may arise in the provision of clearing services by an affiliate of an SD or MSP, the Commission further finds that although the general conflicts of interest prevention requirements under the Japanese standards specified above do not require with specificity that access to and the provision of clearing services provided by an affiliate of an SD or MSP not be improperly influenced by the interests of an SD's or MSP's trading business, such general requirements would require prevention and remediation of such improper influence when recognized or discovered. Thus such standards would ensure open access to clearing.

Finally, although not as specific as the requirements of § 23.605(e) (Undue influence on counterparties), the Commission finds that the general disclosure requirements of the Japanese standards specified above would ensure equal access to trading venues and clearinghouses by requiring that each SD and MSP disclose to counterparties any material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a SEF or DCM, or to clear a derivative through a DCO.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the requirements found in Japan's laws and regulations specified above in relation to conflicts of interest are comparable to and as comprehensive as § 23.605.

6. Availability of Information for Disclosure and Inspection (§ 23.606)

Commission Requirement: Commission regulation 23.606 implements sections 4s(j)(3) and (4) of the CEA, and requires each SD and MSP to disclose to the Commission, and an SD's or MSP's U.S. prudential regulator (if any) comprehensive information about its swap activities, and to establish and maintain reliable internal data capture, processing, storage, and other operational systems sufficient to capture, process, record, store, and produce all information necessary to satisfy its duties under the CEA and Commission regulations. Such systems must be designed to provide such information to the Commission and an SD's or MSP's U.S. prudential regulator within the time frames set forth in the CEA and Commission regulations and upon request.

Regulatory Objective: Commission regulation 23.606 seeks to ensure that each SD and MSP captures and maintains comprehensive information about their swap activities, and is able to retrieve and disclose such information to the Commission and its U.S. prudential regulator, if any, as necessary for compliance with the CEA and the Commission's regulations and for purposes of Commission oversight, as well as oversight by the SD's or MSP's U.S. prudential regulator, if any.

The Commission observes that it would be impossible to meet the regulatory objective of § 23.606 unless the required information is available to the Commission and any U.S. prudential regulator under the foreign legal regime. Thus, a comparability determination with respect to the information access provisions of § 23.606 would be premised on whether the relevant information would be available to the Commission and any U.S. prudential regulator of the SD or MSP, not on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as Commission regulation 23.606.

Under the JFSA annual supervisory policies for banks and FIBOs for program year 2013, a bank/FIBO is required to enhance their management information systems through various initiatives such as implementing BCBS ”Principles for effective risk data aggregation and risk reporting,” which enable banks/FIBOs to meet the information requests of relevant regulators.

III-3-3(6) of Supervisory Guideline for FIBOs states that each FIBO must maintain electronic media storage systems that can accommodate internal audits and be responsive to client referrals and questions. Moreover, III.1.(6) of the Checklist for Market Risk Management of the Bank Inspection Manual requires that records be readily available for reconciliation with trade tickets, etc.

III-3-10-2(3) (iv) of Supervisory Guideline for banks specifically requires banks to have the personnel and systems to respond in a timely and appropriate manner to inspections and supervision provided by overseas regulatory authorities. In view of maintaining direct dialog and smooth communications with the relevant overseas regulatory authorities, this provision ensures the establishment of a reporting system which enables timely and appropriate reporting.

Similarly, IV-5-2(i) of Supervisory Guideline for FIBOs would ensure the availability of information to a regulator promptly upon request. Under this provision, the JFSA assesses whether a parent company of a FIBO ensures group-wide compliance

with the relevant laws, regulations and rules of each country in which it does business by establishing an appropriate control environment for legal compliance in accordance with the size of its overseas bases and the characteristics of its business operations.

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to § 23.606 because such standards seek to ensure that each SD and MSP captures and stores comprehensive information about their swap activities, and are able to retrieve and disclose such information as necessary for compliance with applicable law and for purposes of regulatory oversight.

In addition, the Commission finds that the Japanese standards specified above would ensure Commission access to the required books and records of SDs and MSPs by requiring personnel and systems necessary to respond in a timely and appropriate manner to inspections and supervision provided by overseas regulatory authorities.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the requirements of the Japanese standards with respect to the availability of information for inspection and disclosure, as specified above, are comparable to, and as comprehensive as, § 23.606.

7. Clearing Member Risk Management (§ 23.609)

Commission Requirement: Commission regulation 23.609 generally requires each SD or MSP that is a clearing member of a DCO to:

- Establish risk-based limits based on position size, order size, margin requirements, or similar factors;
- Screen orders for compliance with the risk-based limits;
- Monitor for adherence to the risk-based limits intra-day and overnight;

- Conduct stress tests under extreme but plausible conditions of all positions at least once per week;
- Evaluate its ability to meet initial margin requirements at least once per week;
- Evaluate its ability to meet variation margin requirements in cash at least once per week;
- Evaluate its ability to liquidate positions it clears in an orderly manner, and estimate the cost of liquidation; and
- Test all lines of credit at least once per year.

Regulatory Objective: Through Commission regulation § 23.609, the Commission seeks to ensure the financial integrity of the markets and the clearing system, to avoid systemic risk, and to protect customer funds. Effective risk management by SDs and MSPs that are clearing members is essential to achieving these objectives. A failure of risk management can cause a clearing member to become insolvent and default to a DCO. Such default can disrupt the markets and the clearing system and harm customers.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as Commission regulation 23.609.

III-2-3-2-1-2 (9) and (10)(i) of the Supervisory Guideline for banks and III.(8) and (9)(i) of the Checklist for Credit Risk Management of the Inspection Manual for banks generally require a bank to properly manage the credit risks of major counterparties to derivatives transactions, as well as the risks associated with the clearing

of derivatives transactions with a central counterparty. More specifically, the Supervisory Guidelines for banks require a bank to properly manage the risks associated with cleared derivative transactions with central counterparties ("CCPs"), including the inherent risk of transactions with a CCP, the risk associated with material defects of regulations or supervisory schemes to which a CCP is subject, and the risk of loss of the bank's contribution to the default fund of a CCP.

IV-2-4 of the Supervisory Guideline for FIBOs and I-2-(4) of the Inspection Manual for FIBOs require FIBOs to properly manage counterparty risk. Counterparty risk is the risk of incurring losses due to a failure by a counterparty to fulfill its contractual obligations.

The JFSA evaluates a FIBO on whether it properly manages counterparty risk by developing a comprehensive control environment for risk management, properly recognizing and evaluating the risks, conducting internal screening when a new product or a new business is introduced and establishing a system of checks and balances based on the clear allocation of roles and responsibilities.

The JFSA strives to identify and keep track of the status of a FIBO's counterparty risk and its risk management through monthly offsite monitoring reports and hearings based thereon and, when necessary, requiring FIBOs to submit a report based on Article 56-2(1) of the FIEA and urge it to make improvement efforts.

The foregoing requirements apply to bank and FIBO risk management as clearing members.

In addition, if FIBOs/RFIs are clearing members of the JSCC, in accordance with the business rules of the JSCC, they are required to develop an appropriate structure for management of the risk of loss.

Finally, the JFSA has represented to the Commission that, in the process of its oversight and enforcement of the foregoing Japanese standards for banks, FIBOs, and RFIs, any SD or MSP subject to such standards that is a clearing member of a DCO would be required to comply with clearing member risk management requirements comparable to Commission regulation 23.609.

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to § 23.609 because such standards seek to ensure the financial integrity of the markets and the clearing system, to avoid systemic risk, and to protect customer funds.

The Commission notes that the Japanese standards specified above are not as specific as § 23.609 with respect to ensuring that SDs and MSPs that are clearing members of a DCO establish detailed procedures and limits for clearing member risk management purposes. Nevertheless, the Commission finds that the general requirements under the Japanese standards, implemented in the context of clearing member risk management and pursuant to the representations of the JFSA, meet the Commission's regulatory objective specified above.

Based on the foregoing and the representations above, the Commission hereby determines that the clearing member risk management requirements of the Japanese standards specified above are comparable to and as comprehensive as § 23.609.

C. Swap Data Recordkeeping (§§ 23.201 and 23.203)

Commission Requirement: Sections 4s(f)(1)(B) and 4s(g)(1) of the CEA, and Commission regulation 23.201 generally require SDs and MSPs to retain records of each transaction, each position held, general business records (including records related to complaints and sales and marketing materials), records related to governance, financial records, records of data reported to SDRs, and records of real-time reporting data along with a record of the date and time the SD or MSP made such reports. Transaction records must be kept in a form and manner identifiable and searchable by transaction and counterparty.

Commission regulation 23.203, requires SDs and MSPs to maintain records of a swap transaction until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of five years after such date. Records must be "readily accessible" for the first 2 years of the 5 year retention period (consistent with § 1.31).

The Commission notes that the comparability determination below with respect to §§ 23.201 and 23.203 encompasses both swap data recordkeeping generally and swap data recordkeeping relating to complaints and marketing and sales materials in accordance with § 23.201(b)(3) and (4).[48]

Regulatory Objective: Through the Commission's regulations requiring SDs and MSPs to keep comprehensive records of their swap transactions and related data, the

[48] See the Guidance for a discussion of the availability of substituted compliance with respect to swap data recordkeeping, 78 FR at 45332-33.

Commission seeks to ensure the effectiveness of the internal controls of SDs and MSPs, and transparency in the swaps market for regulators and market participants.

The Commission's regulations require SDs and MSPs to keep swap data in a level of detail sufficient to enable regulatory authorities to understand an SD's or MSP's swaps business and to assess its swaps exposure.

By requiring comprehensive records of swap data, the Commission seeks to ensure that SDs and MSPs employ effective risk management, and strictly comply with Commission regulations. Further, such records facilitate effective regulatory oversight.

The Commission observes that it would be impossible to meet the regulatory objective of §§ 23.201 and 23.203 unless the required information is available to the Commission and any U.S. prudential regulator under the foreign legal regime. Thus, a comparability determination with respect to the information access provisions of § 23.203 would be premised on whether the relevant information would be available to the Commission and any U.S. prudential regulator of the SD or MSP, not on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction.

Comparable Japanese Law and Regulations: The applicants have represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as sections 4s(f)(1)(B) and 4s(g)(1) of the CEA and §§ 23.201 and 23.203.

A FIBO/RFI is required by provisions set forth in the FIEA, the OTC Derivatives Ordinance, and the Financial Instruments Business Ordinance to retain all records related to swaps transactions.

Articles 371, 381, 394, 396, and 436 of the Company Act require governance records including minutes of board of directors and audit reports of auditors to be retained for ten years. Also, Article 432, 435, and 444 of the Company Act require financial records including financial statements, business reports, and annexed detailed statements to be retained for five years.

Articles 12-3 and 52-71 of the Banking Act and Articles 37-7 and 156-48 of the FIEA further require each bank/FIBO to prepare and maintain records as part of its "complaint processing procedures." Specific details regarding the storage of records detailing customer complaints are set forth in III-3-5-2-2(5)(ii) of the Supervisory Guideline for banks, II-2.1(3-4) and III-2.1(4) of the Checklist for Customer Protection Management of the Bank Inspection Manual, III-2-5 of the Supervisory Guideline for FIBOs, and II-1-2-1(7) of the FIBO Inspection Manual.

Article 37 of the FIEA and Article 72 of the Financial Instruments Business Ordinance require maintenance of records regarding marketing and sales materials.

III-3-3(6) of Supervisory Guideline for FIBOs states that each FIBO must maintain electronic media storage systems that can accommodate internal audits and be responsive to client referrals and questions. Moreover, III.1.(6) of the Checklist for Market Risk Management of the Bank Inspection Manual requires the records be readily available for reconciliation with trade tickets, etc.

FIEA and the Financial Instruments Business Ordinance generally require records to be kept for a minimum of five years, but certain records must be maintained from seven to ten years. III-1(vi) of the Checklist for Market Risk Management of the Bank Inspection Manual assesses whether voice recordings are maintained for all traders on a

24-hour basis and retained "under the control of an organization segregated from the market and back-office divisions."

III-3-10-2(3) (iv) of Supervisory Guideline for banks specifically requires banks to have the personnel and systems to respond in a timely and appropriate manner to inspections and supervision provided by overseas regulatory authorities. In view of maintaining direct dialog and smooth communications with the relevant overseas regulatory authorities, this provision ensures the establishment of a reporting system which enables timely and appropriate reporting.

Similarly, IV-5-2(i) of Supervisory Guideline for FIBOs would ensure the availability of information to a regulator promptly upon request. Under this provision, the JFSA assesses whether a parent company of a FIBO ensures group-wide compliance with the relevant laws, regulations and rules of each country in which it does business by establishing an appropriate control environment for legal compliance in accordance with the size of its overseas bases and the characteristics of its business operations.

Commission Determination: The Commission finds that the Japanese standards specified above are generally identical in intent to §§ 23.201 and 23.203 because such standards seek to ensure the effectiveness of the internal controls of SDs and MSPs, and transparency in the swaps market for regulators and market participants.

In addition, the Commission finds that the Japanese standards specified above require SDs and MSPs to keep swap data in a level of detail sufficient to enable regulatory authorities to understand an SD's or MSP's swaps business and to assess its swaps exposure.

Further, the Commission finds that the Japanese standards specified above, by requiring comprehensive records of swap data, seek to ensure that SDs and MSPs employ effective risk management, seek to ensure that SDs and MSPs strictly comply with applicable regulatory requirements (including the CEA and Commission regulations), and that such records facilitate effective regulatory oversight.

Finally, the Commission finds that the Japanese standards specified above would ensure Commission access to the required books and records of SDs and MSPs by requiring personnel and systems necessary to respond in a timely and appropriate manner to inspections and supervision provided by overseas regulatory authorities.

Based on the foregoing and the representations of the applicants, the Commission hereby determines that the Japanese requirements with respect to swap data recordkeeping, as specified above, are comparable to, and as comprehensive as, §§ 23.201 and 23.203.

Issued in Washington, DC on December 20, 2013, by the Commission.

Melissa D. Jurgens,

Secretary of the Commission

Appendices to Comparability Determination for Japan: Certain Entity-Level Requirements

Appendix 1 – Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative. Commissioner O'Malia voted in the negative.

Appendix 2 – Statement of Chairman Gary Gensler and Commissioners Chilton and Wetjen

We support the Commission's approval of broad comparability determinations that will be used for substituted compliance purposes. For each of the six jurisdictions that has registered swap dealers, we carefully reviewed each regulatory provision of the foreign jurisdictions submitted to us and compared the provision's intended outcome to the Commission's own regulatory objectives. The resulting comparability determinations for entity-level requirements permit non-U.S. swap dealers to comply with regulations in their home jurisdiction as a substitute for compliance with the relevant Commission regulations.

These determinations reflect the Commission's commitment to coordinating our efforts to bring transparency to the swaps market and reduce its risks to the public. The comparability findings for the entity-level requirements are a testament to the comparability of these regulatory systems as we work together in building a strong international regulatory framework.

In addition, we are pleased that the Commission was able to find comparability with respect to swap-specific transaction-level requirements in the European Union and Japan.

The Commission attained this benchmark by working cooperatively with authorities in Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland to reach mutual agreement. The Commission looks forward to continuing to collaborate with both

foreign authorities and market participants to build on this progress in the months and years ahead.

Appendix 3 – Dissenting Statement of Commissioner Scott D. O'Malia

I respectfully dissent from the Commodity Futures Trading Commission's ("Commission") approval of the Notices of Comparability Determinations for Certain Requirements under the laws of Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland (collectively, "Notices"). While I support the narrow comparability determinations that the Commission has made, moving forward, the Commission must collaborate with foreign regulators to harmonize our respective regimes consistent with the G-20 reforms.

However, I cannot support the Notices because they: (1) are based on the legally unsound cross-border guidance ("Guidance");[1] (2) are the result of a flawed substituted compliance process; and (3) fail to provide a clear path moving forward. If the Commission's objective for substituted compliance is to develop a narrow rule-by-rule approach that leaves unanswered major regulatory gaps between our regulatory framework and foreign jurisdictions, then I believe that the Commission has successfully achieved its goal today.

Determinations Based on Legally Unsound Guidance

As I previously stated in my dissent, the Guidance fails to articulate a valid statutory foundation for its overbroad scope and inconsistently applies the statute to different activities.[2] Section 2(i) of the Commodity Exchange Act ("CEA") states that

[1] Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (Jul. 26, 2013).

[2] http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b.

the Commission does not have jurisdiction over foreign activities unless "those activities have a direct and significant connection with activities in, or effect on, commerce of the United States …"[3] However, the Commission never properly articulated how and when this limiting standard on the Commission's extraterritorial reach is met, which would trigger the application of Title VII of the Dodd-Frank Act[4] and any Commission regulations promulgated thereunder to swap activities that are outside of the United States. Given this statutorily unsound interpretation of the Commission's extraterritorial authority, the Commission often applies CEA section 2(i) inconsistently and arbitrarily to foreign activities.

Accordingly, because the Commission is relying on the legally deficient Guidance to make its substituted compliance determinations, and for the reasons discussed below, I cannot support the Notices. The Commission should have collaborated with foreign regulators to agree on and implement a workable regime of substituted compliance, and then should have made determinations pursuant to that regime.

Flawed Substituted Compliance Process

Substituted compliance should not be a case of picking a set of foreign rules identical to our rules, determining them to be "comparable," but then making no determination regarding rules that require extensive gap analysis to assess to what extent each jurisdiction is, or is not, comparable based on overall outcomes of the regulatory regimes. While I support the narrow comparability determinations that the Commission has made, I am concerned that in a rush to provide some relief, the Commission has made

[3] CEA section 2(i); 7 U.S.C. 2(i).

[4] Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

substituted compliance determinations that only afford narrow relief and fail to address major regulatory gaps between our domestic regulatory framework and foreign jurisdictions. I will address a few examples below.

First, earlier this year, the OTC Derivatives Regulators Group ("ODRG") agreed to a number of substantive understandings to improve the cross-border implementation of over-the-counter derivatives reforms.[5] The ODRG specifically agreed that a flexible, outcomes-based approach, based on a broad category-by-category basis, should form the basis of comparability determinations.[6]

However, instead of following this approach, the Commission has made its comparability determinations on a rule-by-rule basis. For example, in Japan's Comparability Determination for Transaction-Level Requirements, the Commission has made a positive comparability determination for some of the detailed requirements under the swap trading relationship documentation provisions, but not for other requirements.[7] This detailed approach clearly contravenes the ODRG's understanding.

Second, in several areas, the Commission has declined to consider a request for a comparability determination, and has also failed to provide an analysis regarding the extent to which the other jurisdiction is, or is not, comparable. For example, the Commission has declined to address or provide any clarity regarding the European Union's regulatory data reporting determination, even though the European Union's

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[5] http://www.cftc.gov/PressRoom/PressReleases/pr6678-13.

[6] http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/odrgreport.pdf. The ODRG agreed to six understandings. Understanding number 2 states that "[a] flexible, outcomes-based approach should form the basis of final assessments regarding equivalence or substituted compliance."

[7] The Commission made a positive comparability determination for Commission regulations 23.504(a)(2), (b)(1), (b)(2), (b)(3), (b)(4), (c), and (d), but not for Commission regulations 23.504(b)(5) and (b)(6).

reporting regime is set to begin on February 12, 2014. Although the Commission has provided some limited relief with respect to regulatory data reporting, the lack of clarity creates unnecessary uncertainty, especially when the European Union's reporting regime is set to begin in less than two months.

Similarly, Japan receives no consideration for its mandatory clearing requirement, even though the Commission considers Japan's legal framework to be comparable to the U.S. framework. While the Commission has declined to provide even a partial comparability determination, at least in this instance the Commission has provided a reason: the differences in the scope of entities and products subject to the clearing requirement.[8] Such treatment creates uncertainty and is contrary to increased global harmonization efforts.

Third, in the Commission's rush to meet the artificial deadline of December 21, 2013, as established in the Exemptive Order Regarding Compliance with Certain Swap Regulations ("Exemptive Order"),[9] the Commission failed to complete an important piece of the cross-border regime, namely, supervisory memoranda of understanding ("MOUs") between the Commission and fellow regulators.

I have previously stated that these MOUs, if done right, can be a key part of the global harmonization effort because they provide mutually agreed-upon solutions for differences in regulatory regimes.[10] Accordingly, I stated that the Commission should be able to review MOUs alongside the respective comparability determinations and vote on

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[8] Yen-denominated interest rate swaps are subject to the mandatory clearing requirement in both the U.S. and Japan.

[9] Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 43785 (Jul. 22, 2013).

[10] http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-29.

them at the same time. Without these MOUs, our fellow regulators are left wondering whether and how any differences, such as direct access to books and records, will be resolved.

Finally, as I have consistently maintained, the substituted compliance process should allow other regulatory bodies to engage with the full Commission.[11] While I am pleased that the Notices are being voted on by the Commission, the full Commission only gained access to the comment letters from foreign regulators on the Commission's comparability determination draft proposals a few days ago. This is hardly a transparent process.

Unclear Path Forward

Looking forward to next steps, the Commission must provide answers to several outstanding questions regarding these comparability determinations. In doing so, the Commission must collaborate with foreign regulators to increase global harmonization.

First, there is uncertainty surrounding the timing and outcome of the MOUs. Critical questions regarding information sharing, cooperation, supervision, and enforcement will remain unanswered until the Commission and our fellow regulators execute these MOUs.

Second, the Commission has issued time-limited no-action relief for the swap data repository reporting requirements. These comparability determinations will be done as separate notices. However, the timing and process for these determinations remain uncertain.

[11] http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b.

Third, the Commission has failed to provide clarity on the process for addressing the comparability determinations that it declined to undertake at this time. The Notices only state that the Commission may address these requests in a separate notice at a later date given further developments in the law and regulations of other jurisdictions. To promote certainty in the financial markets, the Commission must provide a clear path forward for market participants and foreign regulators.

The following steps would be a better approach: (1) the Commission should extend the Exemptive Order to allow foreign regulators to further implement their regulatory regimes and coordinate with them to implement a harmonized substituted compliance process; (2) the Commission should implement a flexible, outcomes-based approach to the substituted compliance process and apply it similarly to all jurisdictions; and (3) the Commission should work closely with our fellow regulators to expeditiously implement MOUs that resolve regulatory differences and address regulatory oversight issues.

Conclusion

While I support the narrow comparability determinations that the Commission has made, it was my hope that the Commission would work with foreign regulators to implement a substituted compliance process that would increase the global harmonization effort. I am disappointed that the Commission has failed to implement such a process.

I do believe that in the longer term, the swaps regulations of the major jurisdictions will converge. At this time, however, the Commission's comparability determinations have done little to alleviate the burden of regulatory uncertainty and duplicative compliance with both U.S. and foreign regulations.

The G-20 process delineated and put in place the swaps market reforms in G-20 member nations. It is then no surprise that the Commission must learn to coordinate with foreign regulators to minimize confusion and disruption in bringing much needed clarity to the swaps market. For all these shortcomings, I respectfully dissent from the Commission's approval of the Notices.