



U.S. COMMODITY FUTURES TRADING COMMISSION

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Market Participants Division

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To: Non-U.S. Swap Dealers and Non-U.S. Major Swap Participants Relying on Substituted Compliance for Chief Compliance Officer Annual Reports Under the Terms of CFTC Entity-Level Comparability Determinations for Hong Kong, Japan, Switzerland, Canada, and the European Union

Subject: Substituted Compliance for Chief Compliance Officer Annual Reports

The Market Participants Division (“MPD” or “Division”) of the Commodity Futures Trading Commission (“Commission” or “CFTC”) is issuing this advisory to non-U.S. swap dealers (“SDs”) and non-U.S. major swap participants (“MSPs”)¹ relying on substituted compliance under the terms of an applicable CFTC comparability determination with respect to the Commission’s requirement for an annual chief compliance officer report filing pursuant to Commission regulation 3.3(f).²

I. Legal Background

Pursuant to Commission regulation 23.23,³ a non-U.S. SD may satisfy relevant Commission requirements by complying with the applicable standards of a foreign jurisdiction to the extent such standards have been found comparable pursuant to a comparability determination issued by the Commission, subject to any conditions specified therein.⁴ Specifically, any non-U.S. SD that, in accordance with a comparability determination, complies with its foreign jurisdiction’s standards, is deemed to be in compliance with the Commission’s corresponding requirements.⁵ Accordingly, if a non-U.S. SD has failed to comply with the foreign jurisdiction’s standards or the conditions specified in a comparability determination, the Commission may initiate an action for a violation of the Commission’s corresponding requirements.⁶

¹ See 17 CFR 1.3 (defining “swap dealer” and “major swap participant”). Whether an SD or an MSP is considered a non-U.S. SD or MSP is determined by reference to the “U.S. person” definition in Regulation 23.23(a)(23). See 17 CFR 23.23(a)(23). Specifically, an SD or MSP is a non-U.S. SD or MSP if it is not a U.S. person. See 17 CFR 23.23(a)(23) (defining “U.S. person”). As of the date of this advisory, no MSPs are registered with the Commission. Accordingly, for simplicity, this advisory only refers to “non-U.S. SDs.” The advisory should nevertheless be understood to apply to both non-U.S. SDs and non-U.S. MSPs.

² 17 CFR 3.3(f).

³ See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (Sept. 14, 2020) (Final Cross-Border Rule); 17 CFR 23.23.

⁴ See 17 CFR 23.23(f).

⁵ 17 CFR 23.23(g)(5).

⁶ *Id.*

In December 2013, the Commission issued a series of comparability determinations with respect to certain CFTC requirements, including the requirements under Commission regulation 3.3, for six foreign jurisdictions: Hong Kong, Japan, Switzerland, Canada, the European Union (“EU”), and the United Kingdom (“UK”).⁷ Relevant to this advisory, in the Comparability Determinations, the Commission determined that the laws and regulatory requirements of the six jurisdictions are comparable to, and are as comprehensive as, the requirements in Commission regulation 3.3, with the exception of the Chief Compliance Officer Annual Report (“CCO Annual Report”) certification requirement contained in Commission regulation 3.3(f).⁸ Notably, the Commission provided that a non-U.S. SD would generally be deemed to be in compliance with Commission regulation 3.3(f) provided that it certifies and furnishes to the Commission the annual compliance report required under the standards of the relevant foreign jurisdiction identified in the specific comparability determination.⁹

II. Division Advisory

In the years since the Commission issued the Comparability Determinations, MPD staff has observed significant deviation from the terms of the Comparability Determinations with respect to the CCO Annual Report requirement.

The vast majority of CCO Annual Reports submitted by non-U.S. SDs contain a representation that they are relying on a Comparability Determination with respect to the preparation of the CCO Annual Report. Accordingly, consistent with the terms of the Comparability Determinations, MPD staff would expect such non-U.S. SDs to be furnishing to the Commission the annual compliance report that is required under the standards of the relevant foreign jurisdiction (“home regulator report”), but that expectation is not often met. Instead, the reports furnished by these non-U.S. SDs typically fall into one of two categories: (1) reports that purport to be home regulator reports, but that are altered or redacted; or (2) reports that are clearly not a home regulator report, but rather appear to have been prepared for the Commission in a format that mimics the requirements of Commission regulation 3.3(e), but that often fail

⁷ Comparability Determination for the European Union: Certain Entity-Level Requirements, 78 FR 78923 (Dec. 27, 2013) (“EU Determination”) (at the time of the determination, the United Kingdom (“UK”) was a part of the EU); Comparability Determination for Canada: Certain Entity-Level Requirements, 78 FR 78839 (Dec. 27, 2013); Comparability Determination for Switzerland: Certain Entity-Level Requirements, 78 FR 78899 (Dec. 27, 2013); Comparability Determination for Japan: Certain Entity-Level Requirements, 78 FR 78890 (Dec. 27, 2013); Comparability Determination for Hong Kong: Certain Entity-Level Requirements, 78 FR 78852 (Dec. 27, 2013) (collectively, “Comparability Determinations”). The Commission has approved a comparability determination with respect to certain entity-level requirements for SDs established under the laws of Australia, but under that comparability determination, SDs are required to prepare and sign CCO Annual Reports in accordance with Regulation 3.3(e). See Comparability Determination for Australia: Certain Entity-Level Requirements, 78 FR 78864 (Dec. 27, 2013). Following the exit of the UK from the EU, MPD issued no-action relief for registered SDs that comply with the laws and regulations of the UK in the same manner and subject to the same conditions contained in the EU Determination. See Extended and Revised No-Action Positions in Connection with Certain Previously Granted Commission Determinations and Exemptions, in Response to the Withdrawal of the United Kingdom from the European Union, CFTC Letter No. 22-16 (Dec. 1, 2022). It should be noted that the Commission stated in the Final Cross-Border Rule that the rule did not affect the validity of the Comparability Determinations. See Final Cross-Border Rule at 56977, which states that “[t]he Final Rule does not affect the effectiveness of any existing Commission comparability determinations that were issued consistent with the Guidance, which will remain effective pursuant to their terms.”

⁸ See Comparability Determinations, supra note 7.

⁹ See, e.g., EU Determination, 78 FR at 78928. The Commission further noted that it generally expects registrants to submit required reports to the Commission in the English language. See, e.g., id.

to meet important substantive requirements of that rule, such as excluding any discussion of areas for improvement or material non-compliance issues.

MPD believes that reports falling into either of the two aforementioned categories do not comply with the terms of the Comparability Determinations regarding furnishing the Commission with the report “required under the standards” of the relevant foreign jurisdiction due to the above-described alterations. To meet that requirement and be deemed in compliance with Commission regulation 3.3, non-U.S. SDs must submit the report as it was prepared or provided to the relevant home regulator, with the only alteration being to translate it into English if the report was provided to that home regulator in another language.

MPD acknowledges that some non-U.S. SDs may believe information in their home regulator report to be particularly sensitive or not relevant to the Commission’s regulatory purview. However, the terms of the Comparability Determinations do not provide non-U.S. SDs the discretion to redact or amend their home regulator reports (other than to translate them, as noted above).¹⁰ Should such non-U.S. SDs wish not to provide certain information contained in a home regulator report to the Commission, their only alternative is to prepare, certify, and furnish to the Commission a CCO Annual Report in full compliance with the content requirements in Commission regulation 3.3(e). MPD encourages such non-U.S. SDs to reach out to MPD staff for guidance on how to draft a CCO Annual Report that meets these requirements.

This Advisory is intended to remind the affected parties of their obligations under the CEA, Commission regulations, and the terms and conditions of the Comparability Determinations. It is not intended to create any enforceable rights, any new binding rules or regulations, or to amend existing rules or regulations. This Advisory represents only the views of MPD and does not necessarily represent the views of the Commission or of any other division or office of the Commission. MPD staff will continue to review CCO Annual Report filings made pursuant to the relevant Comparability Determination for compliance with the terms of said determination. MPD staff will also notify non-U.S. SDs that fail to comply with the applicable requirements. For questions concerning this advisory, please contact Pamela M. Geraghty, Deputy Director at 202-418-5634 or pgeraghty@cftc.gov; Fern Simmons, Associate Director at 202-418-5901 or fsimmons@cftc.gov; or Samantha Ostrom, Special Counsel at 202-418-5065 or sostrom@cftc.gov.

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¹⁰ MPD acknowledges that some information contained in a home regulator report may be subject to certain legal limitations imposed by a foreign jurisdiction with respect to a non-U.S. SD’s ability to share that information with the Commission. To the extent that the laws or regulations of a foreign jurisdiction impact the ability of a non-U.S. SD to file an unredacted home regulator report with the Commission, MPD would encourage such non-U.S. SDs to contact the Division to discuss the specific situation prior to filing any redacted home regulator report with the Commission.