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27 August 2012

Mr David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581
USA

Dear Mr Stawick,

Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act; Proposed Rule (RIN 3038-AD57)

Thank you for the opportunity to comment on the proposed interpretive guidance and policy statement regarding the cross-border application of the swaps provisions of the Commodity Exchange Act ("proposed guidance").

We have already submitted comments on the proposed Exemptive Order Regarding Compliance with Certain Swap Regulations, and in that letter we said that the proposed guidance goes some way to ameliorating the far reaching scope of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), but in our view does not go far enough, for example:

- Uncertainties still exist, not in the least because of inconsistencies within the proposed guidance itself. Further uncertainty arises from the fact that the SEC's position is not known at this stage.
- Importantly, the concept of substituted compliance is still very vague and there is little guidance on the considerations the Commission would take into account in making a determination.
- It is now clear that the compliance date with the swap dealer registration rule will be 12 October 2012, yet the proposed guidance is unlikely to be finalised before the compliance date. It is imperative that there is clarity on the effect of the final cross-border guidance prior to registration.

Consistent with the principles in the Commodity Exchange Act (CEA) of responsible economic and financial innovation and fair competition, we urge the Commission to provide an extension of time for non-U.S. persons to comply with the requirement to register as a swap dealer/major swap participant, until after the cross-border guidance is finalised. This would promote and facilitate an efficient and orderly implementation of the rules.

We have consulted with the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) on the comparability of the Australian regulatory regime for swaps, and welcome the Commission's continued engagement with the Australian regulators to effect a fair and orderly implementation of the G20 mandate to improve the transparency and robustness of over the counter (OTC) derivative markets. We will work with these agencies to resolve a suitable approach for Australia to the determination of comparability.

1. Timing

If swap dealer registration becomes mandatory before the proposed guidance is final, non-U.S. banks will be in the untenable position of having to register as a swap dealer and commence compliance with the rules without clarity or full knowledge of the consequences of doing so.

The ABA requests that the rules requiring registration as a swap dealer or major swap participant should not apply to non-U.S. persons before the guidance is finalised and the details on how the CFTC plans to assess substituted compliance become clear.

2. Extraterritoriality

The extraterritorial application of the rules must respect the principle of comity between jurisdictions, and as noted in a submission from American banks[1], must also be consistent with:

- The explicit limits on the extraterritorial application of Title VII in Dodd- Frank;
- The general presumption against extraterritorial application of Federal statutes; and
- The Commission's precedent regarding their respective jurisdictional limits (e.g. the Commission and ASIC's cooperation in the supervision of the Australian futures industry's activities to the extent they affect the U.S.).

The current drafting of the proposed guidance does not appear to be wholly consistent with these principles, for example:

> *"the Commission has strong supervisory interests in applying the same rigorous standards, or comparable standards, to non-U.S. swap dealers and non-U.S. MSPs whose swaps activities or positions are substantial enough to require registration under the CEA. Requiring such swap dealers and MSPs to rigorously monitor and address the risks they incur as part of their day-to-day businesses would lower the registrants' risk of default."*[2]

Any application of U.S. regulations to Australian entities should be proportionate to the benefit that can be gained in terms of protection for the U.S. financial system. We believe this is consistent with the intention of legislators to not apply Dodd-Frank to activities outside the United States unless those activities have a direct and significant connection with activities in, or effect on, commerce of the United States.[3]

3. Substituted compliance

The Commission's approach to substituted compliance is critical to the global application of the CEA and the Commission's rules. We support the principle that comparability determinations be consistent with the direction for swaps regulation set by the G20 leaders, and be based on a jurisdiction to jurisdiction model. The Global Financial Markets Association ("GFMA") describes the approach as *regulatory recognition*:

> *"…a principles-based approach in which one regulator relies on the oversight and supervision of the relevant regulated entity by another regulator pursuing the same regulatory objectives…*
>
> *The key components of a regulatory recognition approach are:*

[1] Sullivan&Cromwell on behalf of Bank of America, Citigroup and JP Morgan Chase (http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58372&SearchText=)
[2] III B 4. Application of the Entity-Level Requirements
[3] Section 2(i) of the CEA.

(i) shared values between the two regimes and commonality of objectives designed to be achieved (viewing the relevant regimes in their entirety, and treating common statutory or regulatory principles, such as participation in the G-20 Framework, as strong evidence of the existence of such shared values);

(ii) direct dialogue between the relevant regulators to determine whether a positive regulatory recognition determination should be granted;

(iii) agreement on a Memorandum of Understanding (or expansion of an existing Memorandum of Understanding) between the two jurisdictions to allow ongoing dialogue between regulators as well as sharing of information as needed, including with respect to enforcement; and

(iv) retention by the Commission of an ability to revoke or revise the scope of regulatory recognition following adequate public notice and comment."[4]

Substituted compliance should be determined systematically, based on an overall foreign regulatory regime and the key G20 commitments, rather than on an obligation-by-obligation basis. The latter approach would require an almost identical regime to that imposed under Dodd-Frank. This would go against the principles of international comity which the Commission acknowledges it is seeking to address through substituted compliance.

IOSCO's *Final Report: International Standards for Derivatives Market Intermediary Regulation*[5] sets out five categories of obligations central to a jurisdictional comparability finding in derivative markets. Australia's membership in IOSCO (through ASIC) and efforts to implement and adhere to these standards represent the strong shared values in GFMA component (i) above. The Australian Government is moving quickly to introduce legislation enabling the framework to introduce mandatory obligations for the OTC derivatives market.[6] In addition to the direct dialogue between the Commission and Australian regulators, IOSCO has structures in place to monitor members' adherence with the agreed standards.

We believe that the IOSCO approach should be given due consideration in the design of a comparability assessment framework for the rules relating to swaps.

It is important that the Commission, in conjunction with foreign regulators, develop an interim process that takes into account the development of "comparable" legislation and proposed regulations in foreign jurisdictions.

We also request that the Commission clarify how much time the Commission proposes to provide an applicant to comply with Dodd-Frank requirements where the Commission determines that substituted compliance is not granted.

4. Interaction with local laws

There are differing privacy and confidentiality requirements in every country. For example, in Australia, bankers have a duty to keep confidential certain affairs of the customer, including any information that is obtained from the banking relations of the bank and its customer. Removing the requirement that a reporting counterparty identify its non-U.S. counterparties to each of its trades as currently required under the Dodd-Frank reporting requirements would alleviate many of the home country privacy and confidentiality issues.

[4] http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58363&SearchText=
[5] http://www.iosco.org/library/pubdocs/pdf/IOSCOPD381.pdf
[6] http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Derivative-Transactions

We also recommend that Form 7-R be amended so that the representations and covenants at issue can be made expressly subject to applicable home country laws.

5. U.S. person definition

We recommend that the Commission adopts the SEC's definition of "U.S. person", and that there be no concept of control in relation to this term.

The non-exhaustive element of the proposed U.S. person definition is particularly problematic as it creates uncertainty as to the status of counterparties when banks transact with them. The Commission should amend the definition to be an exhaustive definition.

As entities have never had to organise their client lists and client information according the proposed U.S. person definition, we understand entities globally are facing significant challenges in:

1. Collecting information from counterparties in an orderly and non-intrusive manner where they currently are not kept;
2. Organising this information in a meaningful and useful manner; and
3. Making changes to systems so that this information is accessible and interacts with current systems that entities use when dealing with clients.

We therefore recommend that the Commission include a safe harbour in the final cross-border guidance to allow a non-U.S. swap dealer to remain compliant with the rules where a non-U.S. swap dealer has made reasonable efforts to determine the status of their counterparty, or where a counterparty has provided representations stating that they are or are not a U.S. person, a non-U.S. person with a U.S. guarantee or non-U.S. conduit of a U.S. Person.

6. Requirement for a non-U.S. person to register as a swap dealer

A non-U.S. person (without a guarantee from a "U.S. Person") should only be required to consider whether it is engaged in swap dealing as part of a regular business with respect solely to "U.S. Persons".

The determination of whether a non-U.S. person (without a guarantee from a U.S. affiliate) is a swap dealer should be based on the aggregate notional amount of swap dealing activities with "U.S. Persons" within a particular asset class. Once registered, the swap dealing activities of that non-U.S. swap dealer should no longer be aggregated with its affiliates.

6.1. Exclusions

The definition of "U.S. Person" should exclude infrastructure: namely clearinghouses, swap execution facilities and designated contract markets, from the determination of whether a non-U.S. person is a swap dealer. The only entity relevant to the analysis (other than for certain block trades) should be the executing counterparty. In relation to block trades conducted through an investment manager, we believe that the relevant counterparty should be the investment manager.

We believe that it is appropriate to exclude non-U.S. counterparties who are guaranteed by U.S. Persons from the determination of whether a non-U.S. person qualifies as a swap dealer.

The external business conduct standards should not apply to transactions between two non-U.S. persons.

7. Entity and transaction level requirements

While we understand the dichotomy of requirements the Commission has proposed, we believe the effectiveness and practicality of the regime as a whole would benefit from further clarification:

- The real-time reporting and trade execution requirements should be treated in the same manner as the external business conduct standards and have no application to transactions involving a non-U.S. swap dealer and its non-U.S. counterparties. In principle, we believe transactional-level requirements should have no application to transactions involving two non-U.S. persons.
- Portfolio reconciliation and compression requirements should be categorised as entity-level requirements, as they are central risk mitigation and back-office functions.
- There is confusion as to whether the transaction-level requirements apply to non-U.S. swap dealers in their transactions with offshore branches of U.S. persons or U.S. registered swap dealers. It is important that the Commission provide certainty as to the application of these requirements, in addition to an adequate lead time for compliance before they become effective.

8. Competition

The Lincoln provision (s716) in its current form will have a significant anti-competitive effect. The provision applies to "swap entities" and therefore all foreign entities (who receive Federal assistance) required to register as swap dealers will be caught, and will not have the benefit of the carve outs available to U.S. swap entities. This needs to be rectified as a matter of priority.

Our detailed comments are attached.

Yours sincerely,

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Tony Burke

cc:

Ian Beckett, Treasury, Australia
Denis Gorey, APRA
Rhonda Luo, ASIC

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Q1.	Please provide specific comments regarding the Commission's proposed interpretation of the term "U.S. person."	The Commission's definition of U.S. person should be an exhaustive definition, to facilitate certainty and orderliness in the market. This is important as the application of most of the rules hinges on this definition.
Q1a.	In the Commission's view, the concerns regarding risks associated with the affiliate group structure are heightened where a U.S. person guarantees (or provides similar support) to a foreign affiliate or subsidiary. In such situations, the risk of the swaps executed abroad are effectively transferred to or incurred by the U.S. person. Or stated differently, the risk of the affiliate's swap transactions have a direct and significant connection to, or effect on, the U.S. person that is the guarantor. Under these circumstances, notwithstanding that the U.S. person may be subject to a robust regulatory regime, its financial stability may be put at risk by activities outside the firm. Accordingly, the Commission is considering, and seeks comments on, whether the term "U.S. person" should be interpreted to include a foreign affiliate or subsidiary guaranteed by a U. S. person.	The proposed guidance does not provide for the % threshold that an entity would need to be guaranteed by a U.S. person before it is caught under U.S. regulations. This means that a transaction with an entity that is part guaranteed by a U.S. person and part guaranteed by European person could potentially be subject to both U.S. and European regulations (assuming European regulations use same/similar test). Regulators should coordinate their positions on this to avoid duplicative requirements over the same conduct/transaction. We welcome the Commission's guidance on what it would consider to be the % threshold where the activities are deemed to have a direct and significant connection with activities in, or having an effect on, commerce of the United States.
Q1b.	Several commenters have suggested that the Commission adopt the definition of "U.S. person" in the SEC's Regulation S. Should the Commission interpret the term "U.S. person" in a similar manner notwithstanding that Regulation S has a different focus?	We agree that the Commission should adopt the SEC's definition.
Q1c.	As an alternative to the proposed interpretation of the term "U.S. person," should the Commission interpret the term to include a concept of control under which a non-U.S. person who is controlled by or under common control with a U.S. person would also be considered a U.S. person? If so, how should the Commission define the term "controlled by or under common control?"	The Commission should not include a concept of control in the proposed interpretation of the term "U.S. person". While common control of both a non-U.S. Person and a "U.S. Person" *may* potentially indicate common risk, we consider that the Commission's focus on the ultimate location of the risk to be a more appropriate measure of who should qualify as a "U.S. Person". In addition, determining whether a potential counterparty is controlled by or under common control with a "U.S. Person" would be difficult to ascertain in practice, and would capture every company in a corporate group which

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		has a U.S.-incorporated group member, which would be an excessively wide scope.
Q1d.	Are there other examples of persons or interests that should be specifically identified as a "U.S. person" in the final interpretive guidance?	We consider that under a number of subparts in the current "U.S. Person" definition, it will potentially be difficult to ascertain whether a counterparty meets those requirements and is therefore a U.S. person. This is particularly the case in relation to subparts (iv) and (vii) of the proposed definition, as it will not always be clear whether a counterparty is majority owned, directly or indirectly, by a "U.S. Person" or whether an estate or trust is subject to U.S. income tax. Similar points can be made in relation to (ii)(B) and (iii). We recommend that the Commission include a safe harbour in the final guidance for instances where a non-U.S. SD has made reasonable efforts to determine the status of their counterparty, or where a counterparty has provided representations stating that they are or are not a U.S. person, a non-U.S. person with a U.S. guarantee or non-U.S. conduit of a U.S. Person.
Q2.	Do commenters agree that in determining whether it is a swap dealer, a non-U.S. person without a guarantee from a U.S. person should consider whether it is engaged in swap dealing as part of "a regular business" only with respect to U.S. persons (as opposed to non-U.S. persons)? Why or why not? In such an analysis, would it generally be feasible for the non-U.S. person to distinguish swap dealing activities with U.S. persons from swap dealing activities with non-U.S. persons and are there any practical difficulties in this approach?	Yes. We consider that a non-U.S. person without a guarantee from a "U.S. Person" should only be required to consider whether it is engaged in swap dealing as part of a regular business with respect solely to "U.S. Persons". Were this not the case, the Dodd-Frank Act would end up enforcing requirements on foreign bank franchises with minimal U.S. activity. We believe that it is feasible to distinguish the swap dealing activities of non-U.S. persons and "U.S. Persons"; however this would be made easier if a safe harbour were included to allow for non-U.S. persons to rely on written representations from its counterparties as to their status.
Q3.	Please provide comments regarding all aspects of the Commission's proposed interpretation, including particular alternative interpretations the Commission should consider in assessing whether a non-U.S. person should be required to register as a swap dealer or MSP.	We agree with the Commission's exclusion of swap transactions with foreign branches of U.S. registered swap dealers from the de minimis calculation, and the rationale behind this, However, the Commission should clarify how firms should apply this exclusion given non-U.S. firms will not know for a period of time after registration is required, which of their counterparties are "U.S. registered swap dealers", let alone foreign branches of such entities.

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Q3a.	Do commenters agree that the Commission should determine whether a non-U.S. person, without a guarantee from a U.S. affiliate, is a swap dealer based solely upon the aggregate notional amount of swap dealing activities with U.S. persons as counterparties? Why or why not?	We consider that the determination of whether a non-U.S. person, without a guarantee from a U.S. affiliate, is a swap dealer should be based on the aggregate notional amount of swap dealing activities with "U.S. Persons" within a particular asset class. As financial institutions are often structured along specialised product lines, their activities in one asset class may be limited, whereas their activities may be extensive in another. Where a non-U.S. entity has limited swap dealing activities in certain asset classes or dealings with purely non-U.S. counterparties or foreign branches of "U.S. Persons", that non-U.S. entity should not be a swap dealer in respect of that asset class.
Q3b.	Do commenters agree that the Commission should determine whether a non-U.S. person is a swap dealer based on the aggregate notional amount of swap dealing activities when the swap dealing obligations of such non-U.S. person are guaranteed by a U.S. person? Why or why not?	
Q3c.	Do commenters agree that in determining whether a non-U.S. person is a swap dealer, the notional amount of swap dealing activities conducted by it and all of its non U.S. affiliates under common control should be aggregated together? Why or why not? Should the Commission further interpret the phrase "under common control" and, if so, how should the Commission define "common control" for aggregation purposes? Should the notional amount of swap dealing activities conducted by its U.S. affiliates also be included?	We generally agree that the notional amount of swap dealing activities with counterparties who are "U.S. Persons" by a non-U.S. person should be aggregated with its non-U.S. affiliates under common control when determining whether an entity within a corporate group meets the de minimis threshold for registration as a swap dealer. However we consider that, once registered, the swap dealing activities of that non-U.S. swap dealer should no longer be aggregated with the activities of its non-U.S. affiliates for the purposes of calculating the de minimis threshold for each of those non-U.S. affiliates.
Q3d.	Are any other aspects of a swap--such as, for example, the place of execution or clearing--relevant to the determination of whether a non-U.S. person is a swap dealer?	The definition of "U.S. Person" should exclude infrastructure: namely clearinghouses, swap execution facilities and designated contract markets, from the determination of whether a non-U.S. person is a swap dealer. The only entity relevant to the analysis (other than for certain block trades) should be the executing counterparty. In relation to block trades conducted through an investment manager, we believe that the relevant counterparty should be the investment manager. Otherwise, components of the block trade could potentially be subject to

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		the laws of multiple jurisdictions, depending on the identity of the individual funds that may be located in those jurisdictions. Similarly, we believe that the place of execution or clearing should not be relevant to the determination of whether a non-U.S. person is a swap dealer. If it were, we consider that this could lead to a bifurcated market, as non-U.S. persons may seek to avoid clearing or executing swaps on infrastructure located in the U.S. where they would otherwise have no U.S. nexus. This would ultimately result in the reduced competitiveness of U.S. infrastructure.
Q3e.	Do commenters agree that the Commission should determine whether a non-U.S. person is an MSP based solely on its swap positions with U.S. persons as counterparties? If not, why?	
Q3f.	Do commenters agree that, in determining whether a non-U.S. person is an MSP, its swap positions guaranteed by a U.S. person should be attributed to such U.S. person and not the non-U.S. person? If not, why? How should the Commission's determination change when some but not all of the non-U.S. person's swap obligations are guaranteed by a U.S. person?	The guarantor should report.
Q3g.	Are any other aspects of a swap- such as the place of execution or clearing-relevant to the determination of whether a non-U.S. person is an MSP?	
Q4.	As noted above, the Commission does not propose that a non-U.S. person should include, in determining whether the swap dealer de minimis threshold is met, the notional value of swap dealing transactions with foreign branches of U.S. swap dealers. Noting the risk-based, as opposed to activities-based, nature of the MSP registration category and related calculations, the Commission seeks comment on whether a non-U.S. person should include, in determining whether it is required to register as an MSP, its swap positions with foreign branches of U.S. swap dealers.	

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Q5.	Under the aggregation description above, a non-U.S. person, in determining whether the de minimis threshold is met, must include the notional value of dealing swaps by its non-U.S. affiliates under common control. The Commission requests comments on whether, to the extent that any such non-U.S. affiliate is registered with the Commission as a swap dealer, the notional value of dealing swaps entered into by such registered swap dealer should not be aggregated with the notional value of dealing swaps entered into by the other non-U.S. affiliates under common control[7].	As noted above, we generally agree that the notional amount of swap dealing activities with counterparties who are "U.S. Persons" by a non-U.S. person should be aggregated with its non-U.S. affiliates under common control when determining whether an entity within a corporate group meets the de minimis threshold for registration as a swap dealer. However we consider that, once registered, the swap dealing activities of that non-U.S. swap dealer should no longer be aggregated with the activities of its non-U.S. affiliates for the purposes of calculating the de minimis threshold for each of those non-U.S. affiliates. If the aggregation requirement continued to apply following the registration of the swap dealer entity, a small non-U.S. affiliate of that swap dealer would be required to register as soon as it engaged in any transaction that constituted swap dealing activity with a U.S. Person. Such an outcome would substantially increase the supervisory and enforcement workload of the Commission, leading to the regulation of numerous small non-U.S. entities whose activities would have little, if any, impact on the commerce of the U.S..
Q6.	Should the Commission consider any other types of swap dealing transactions by non-U.S. persons to determine whether a non-U.S. person is a swap dealer? If so, which ones?	No. We consider the types of swap dealing transactions required to be included under the current proposal sufficiently extensive. However, as described above, we consider that it would be appropriate to adopt a segmented approach to the de minimis threshold depending on the category of swap. This would allow for a non-U.S. person to limit the swap dealer registration to certain asset classes where there are extensive swap dealing activities, where the relevant entity's swap dealing activities in other asset classes are minimal or are transacted solely with non-U.S. persons or foreign branches of U.S. Persons.
Q7.	Do commenters agree that the Commission should exclude the	We believe that it is appropriate to exclude non-U.S. counterparties who

[7] Thus, within an affiliated group of firms, the dealing activities of any affiliates that are registered with the Commission as swap dealers would not be included in considering whether any of the other affiliates are required to register as a swap dealer. However, all non-US affiliates under common control that are not so registered would have to aggregate the notional value of any swap dealing transactions with US persons (or where the obligations of such non-US affiliates are guaranteed by US persons) to determine if such swap dealing transactions exceed the de minimis threshold of swap dealing activity.

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	swap dealing transactions of a non-U.S. person from the determination of whether such non-U.S. person qualifies as a swap dealer, where the counterparty to such dealing swaps are non-U.S. persons (guaranteed or not)? Should the Commission exclude swap obligations in excess of a capped guaranty provided by a U.S. person (i.e. a guaranty that limits the U.S. person's liability to a capped or maximum amount)? How should the Commission account for the reduced risks assumed by a U.S. person guaranteeing certain or all swaps of a particular non-U.S. person under that non-U.S. person's master agreements with non-U.S. counterparties, where the U.S. person's liability under the guarantee is limited?	are guaranteed by U.S. Persons from the determination of whether a non-U.S. person qualifies as a swap dealer. In practice, it will be difficult to determine which non-U.S. counterparties have the benefit of a guarantee from a U.S. person when aggregating an entire portfolio of trades.
Q8.	Can a limited designation registration as provided for in the statutory definitions of the terms "swap dealer" and "major swap participant" be used to address the Commission's regulatory interests under the Dodd-Frank Act with respect to cross-border swap activities? If so, how?	Yes – and we believe it should be. As noted above, where a non-U.S. entity has a relatively small swap dealing business in a particular category of swaps, or where swap dealings are transacted only with non-U.S. Persons or foreign branches of U.S. Persons, the swap dealer registration and associated obligations should not extend to the activities conducted in that swap category. The Commission should provide more clarity on the process for limited designation registration prior to the requirement for registration, and as soon as possible, as a firm preparing for registration and compliance with Dodd-Frank requirements needs clarity on which parts of its business it should prepare to be compliant with Title VII requirements. The approval of limited designation should also be confirmed prior to registration, for the aforementioned reasons.
Q9.	Please provide comments regarding all aspects of the Commission's proposed grouping of requirements into Entity-Level and Transaction-Level Requirements and application of the same to U.S. and non-U.S. persons as discussed above.	In relation to the Position Limits rule, we believe that in circumstances where there is a non-U.S. person acting as trustee of a non-U.S. fund, it should not be required to aggregate the positions of that fund with those of its other affiliates where there are compliance procedures in place to ensure that the trading personnel of the trustee and its other affiliates have no control or oversight over the investment decisions of the other. This should be independent of any direct or indirect ownership thresholds. However, as proposed, reporting requirements (Part 45 SDR reporting,

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		Part 43 Real-time public reporting) fall into both entity-level and transaction-level requirements, and are applicable as soon as a firm becomes a swap dealer. The operation of this is quite inconsistent from a non-U.S. swap dealer's perspective, as Part 45 reporting requirements are effective for all swap transactions, where Part 43 reporting requirements are effective for U.S.-facing transactions. In addition, the recordkeeping requirements in Part 45 have a 12 month relief attached. The application of these rules is complex and inconsistent.
Q10.	Are there any Entity-Level Requirements that should be reclassified as Transaction-Level Requirements, or vice versa? In particular, the Commission is interested in comments on whether portfolio reconciliation and compression requirements, as central risk mitigation and back-office functions, could or should be categorized as entity-level requirements. Similarly, the Commission is interested in comments on whether clearing and margin and segregation for uncleared swaps should be categorized as Entity-Level requirements.	Aspects of the rules on margin for uncleared transactions are not appropriate to be considered "transactional" and not eligible for substituted compliance when facing U.S. entities. For example, a non-U.S. entity should be able to have a model for calculating IM approved by its home prudential regulator, or other home regulator. This is consistent with the principles set out in the recently released BCBS-IOSCO paper. It is also difficult to see how a foreign entity could apply different sets of IM models rules for different counterparties (i.e. U.S. vs non-U.S. counterparties), which is the consequence of what the proposed guidance is providing. Portfolio reconciliation and compression requirements should be categorised as entity-level requirements, as they are central risk mitigation and back-office functions.
Q10a.	Should the Commission group the Entity-Level Requirements and Transaction-Level Requirements differently for swap dealers and MSPs? If so, how and why?	This would be unnecessarily complex for firms to comply - for firms that are swap dealers and major swap participants, as well as firms that are dealing with swap dealers and major swap participants - and for the Commission and the NFA to determine which requirements apply to each entity, and which requirements are eligible for substituted compliance.
Q10b.	Should the real-time reporting and trade execution requirements be treated in the same manner as the external business conduct standards?	We believe that the real-time reporting and trade execution requirements should be treated in the same manner as the external business conduct standards and have no application to transactions involving a non-U.S. swap dealer and its non-U.S. counterparties.
Q11.	Please provide specific comments regarding the proposed application of the Transaction-Level Requirements to swaps with counterparties that are U.S. persons. Should the Commission	There is confusion as to whether the transaction-level requirements apply to non-U.S. swap dealers in their transactions with offshore branches of U.S. persons or U.S. registered swap dealers. For example:

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	permit substituted compliance for swaps between a non-U.S. swap dealer or non-U.S. MSP with a U.S. person?	"The Commission does not propose, however, that a non-U.S. person should include, in determining whether the de minimis threshold is met, the notional value of dealing transactions with foreign branches of registered U.S. swap dealers. This is intended to address the concerns of non-U.S. persons who may be required to register as a swap dealer, notwithstanding the fact that their dealing activities with U.S. persons as counterparties are limited to foreign branches of registered U.S. swap dealers. In such cases, the Dodd-Frank Act transactional requirements (or comparable requirement) would nevertheless apply to swaps with those foreign branches and, thus, there is little concern that this exclusion could be used to engage in swap activities outside of the Dodd-Frank Act (comparable) requirements. Accordingly, the Commission believes that it would be appropriate and consistent with section 2(i) to allow non-U.S. persons to conduct swap dealing activities with registered U.S. swap dealers outside the United States (through their foreign branches), without triggering registration as a swap dealer as a result." (page 21). "Accordingly, the Commission proposes to interpret section 2(i) in a manner so as to require non-U.S. swap dealers and non-U.S. MSPs to comply with Transaction-Level Requirements for all of their swaps with U.S. persons, other than foreign branches of U.S. persons, as counterparties." (page 52) The Commission should provide certainty as to the application of these requirements and adequate lead time for compliance before they become effective.
Q12.	Please provide specific comments regarding the proposed application of the Transaction-Level Requirements to swaps with counterparties that are non-U.S. persons.	We consider that the Transaction-Level Requirements should never apply to swaps between counterparties that are both non-U.S. persons.
Q13.	Market participants may not be able to determine, in certain cases, whether their counterparties are U.S. persons, non-U.S. persons with a guarantee from U.S. persons, or non U.S. persons without guarantees. How should the Commission address this	As noted above, we consider that the Commission should include a safe harbour in the final Cross-Border Interpretive Guidance for instances where a non-U.S. SD has made reasonable efforts to determine the status of their counterparty, or where a counterparty has provided

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	issue?	representations stating that they are or are not a U.S. person, a non-U.S. person with a U.S. guarantee or non-U.S. conduit of a U.S. Person.
Q14.	Please provide comments regarding the Commission's proposed interpretation with respect to non-U.S. swap counterparties whose swap obligations are guaranteed by U.S. persons. Should the interpretation for swaps between non-U.S. swap dealers or non-U.S. MSPs and non-U.S. counterparties whose swap obligations are guaranteed by U.S. persons be different than with respect to swaps between non-U.S. swap dealers or non-U.S. MSPs and U.S. persons (e.g. should fewer Transaction-Level Requirements apply)? If so, how (e.g. which Transaction-Level Requirements should apply)? Should the Commission not permit substituted compliance with respect to the Entity-Level and Transaction-Level Requirements in connection with transactions with non-U.S. persons?	The Commission needs to clarify whether non-U.S. swap counterparties whose obligations are guaranteed by U.S. persons are themselves considered to be 'U.S. Persons' under part ii(B) of the definition of U.S. Person.
Q14a.	Should the Commission permit substituted compliance for some requirements but not others? If so, which ones? Should the applicable requirements be different for non U.S. swap dealers as compared to non-U.S. MSPs?	Substituted compliance should be available on a jurisdiction by jurisdiction basis, rather than on an obligation by obligation basis. Determining which obligations are eligible for substituted compliance, for which swap transactions (e.g. those facing U.S. persons, offshore branches of U.S. persons, non-U.S. persons guaranteed by U.S. persons) is unnecessarily complex and unduly burdensome for firms. It will also be burdensome for Commission staff, NFA staff and foreign regulator staff to determine which obligations their constituents must comply with, and for foreign regulators, how the enforcement of their regulations should apply to particular firms. If the Commission chooses to permit substituted compliance on an obligation by obligation basis, substituted compliance should be available for all Entity-level requirements. Transactional-level requirements should have no application to transactions involving two non-U.S. persons.
Q15.	For Entity-Level Requirements, should the Commission not permit substituted compliance for U.S. persons?	Substituted compliance should be available to a U.S.-based SD in limited circumstances, where the Swap Dealer: • is owned and controlled by a foreign Swap Dealer that has been approved by the Commission for substituted compliance; and

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		• is subject to the same regulations as the foreign Swap Dealer.
Q16.	The Commission is aware that some non-U.S. swap dealers or MSPs may be prohibited from reporting swap transaction data to an SDR as a result of their home country's privacy laws, especially with respect to such swap dealer's or MSP's swaps with non-U.S. persons. How should the Commission address the application of the SDR Reporting requirement with respect to these swaps? Should the Commission address the application of such requirements differently with respect to non-U.S. swap dealers and non-U.S. MSPs?	Removing the requirement that a non-U.S. swap dealer identify its non-U.S. counterparties to each of its trades as currently required under the Dodd-Frank reporting requirements would alleviate many of the home country privacy and confidentiality issues.
Q17.	The Commission seeks comments concerning the proposed disapplication of the external business conduct standards to swaps involving non-U.S. persons. Would it be consistent with the expectations of non-U.S. persons to not apply these requirements to swaps with their local swap dealer, irrespective of whether such dealer is a foreign- or U.S.-based person? Should such requirements apply only to swaps involving the foreign branches or affiliates of a U.S.-based swap dealer?	We agree with the current approach. The external business conduct standards should not apply to transactions between two non-U.S. persons.
Q18.	Should the Commission interpret section 2(i) so as to not apply the Transaction-Level requirements to the foreign branches of U.S.-swap dealers operating in the emerging markets? If so, is it appropriate to condition eligibility for such an exception in the manner discussed above? Should the Commission permit a higher or lower percentage of swaps to be executed through foreign branches of U.S. registrants in emerging market jurisdictions without comparable regulation? If so, why and what percentage would be appropriate?	We consider that it is necessary for the Commission to further define what it means by the term "emerging markets". We would not consider it appropriate for an "emerging market" in this context to include a small but well-established and well regulated market. As noted in the comments on Question 11, there is some uncertainty as to whether or not the Transaction-level requirements apply to non-U.S. swap dealers' transactions with offshore branches of U.S. persons. The Commission should clarify whether the Transaction-Level requirements apply to non-U.S. swap dealers' activities with foreign branches of non-U.S. swap dealers, as well foreign branches of non-U.S. swap dealers in "emerging markets". Where foreign branches of U.S. swap dealers operating in an "emerging market" benefit from an exception, we consider that this should be extended to foreign branches of non-U.S. swap dealers as well.

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Q19.	With respect to the exception for foreign branches of a U.S. swap dealer operating in the emerging markets with respect to swaps with a non-U.S. person guaranteed by a U.S. person, should the Commission change the baseline from the aggregate notional value of a firm's swap activities to $8 billion (or certain fixed numerical threshold) so as to not disadvantage small swap dealers?	As stated above, we consider that it is necessary for the Commission to further define what it means by the term "emerging markets". We would not consider it appropriate for an "emerging market" in this context to include a small but well-established and well regulated market, irrespective of the notional size of the relevant entity's swap dealing activities in that market.
Q20.	The Commission requests comment on its proposed approach of applying the Transaction-Level Requirements to a conduit's swaps as if counterparty were a non-U.S. person that is guaranteed by a U.S. person (i.e., Transaction-Level Requirements will apply, with substituted compliance permitted).	
Q21.	The Commission requests comment on its proposed definition of "conduit." Are the three prongs of that definition appropriate? If not, how should they be modified? Should the second prong include language that limits application of the conduit test to "regular" inter-affiliate transactions moving economic risk, in whole or in part, to the United States? Should the definition of conduit distinguish between different types of counterparties or registration status of such counterparties?	
Q22.	The Commission requests comment on: (i) the prevalence of cross-border inter-affiliate swaps and the mechanics of moving swap-related risks between U.S. and non-U.S. affiliated entities for risk management and other purpose~; (ii) risk implications of cross-border inter-affiliate conduit swaps for the U.S. markets; and (iii) specific means to address the risk issues potentially presented by cross-border conduit arrangements.	
Q23.	The Commission proposed anti-evasion provisions in proposed rule 1.6 of the product definitions joint rulemaking with the SEC. To what extent would inter affiliate conduit transactions be undertaken for purposes of evasion as described in proposed rule 1.6?	

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Q24.	The Commission requests comments on whether substituted compliance should be permitted for swaps entered between a foreign branch of a U.S. person with another foreign branch of a U.S. person.	
Q25.	Please provide comments regarding the Commission's substituted compliance proposal, including the appropriate standard and degree of comparability and comprehensiveness that should be applied to make such determination.	Substituted compliance should be determined systematically based on an overall foreign regulatory regime and the key G20 commitments, rather than on an obligation-by-obligation basis. Otherwise, such an approach would require an almost identical regime to that imposed under Dodd-Frank. This would go against the principles of international comity which the Commission acknowledges it is seeking to address through substituted compliance. It is also not clear how much time the Commission proposes to provide an applicant to comply with Dodd-Frank requirements where the Commission determines that substituted compliance is not granted.
Q26.	What are some of the factors or elements of a supervisory program that the Commission should consider in making a comparability finding?	In the interests of international comity, regard should be had to IOSCO's Final Report: International Standards for Derivatives Market Intermediary Regulation. That report sets out five categories of obligations central to a jurisdictional comparability finding in derivative markets. The five categories are requirements relating to capital, business conduct, business supervision, and record keeping.
Q26a.	Should the Commission take a different approach with respect to swap dealers as compared to MSPs?	
Q27.	How should the Commission address potential inconsistencies or conflicts between U.S. and non-U.S. requirements with respect to the oversight of non-U.S. swap dealers and non-U.S. MSPs?	It is the responsibility of the Commission and other regulators to work jointly in this effort. As noted above in the response to Q25, substituted compliance should be determined systematically, based on the complete foreign regulatory regime and the key G20 commitments, rather than on an obligation-by-obligation basis. This would minimise the inconsistencies and conflicts between U.S. and non-U.S. requirements with respect to non-U.S. swap dealers and major swap participants.
Q28.	Many foreign jurisdictions are in the process of implementing major changes to their oversight of the swaps market. Assuming	Yes. Such an approach addresses concerns both regarding international comity and, in practice, the Commission's ability to adequately supervise

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	that a foreign jurisdiction has adopted swaps legislation but has yet to finalize implementing regulations, should the Commission develop an interim process that takes into account the development of "comparable" legislation and proposed regulations?	the activities of not only U.S. Persons but also non-U.S. entities that would otherwise be subject to their own domestic regulatory regimes. It would ensure that international regulators are able to take a considered and consultative approach to regulation and allow sufficient time for domestic market participants to become compliant with the regime.
Q29.	How should the Commission ensure that prior comparability determinations remain appropriate over time?	We believe that there should be a provision in any Commission/foreign regulator MOU for the foreign regulator to notify the Commission of any material changes that occur in the non-U.S. jurisdiction that would cause comparability determinations relating to that jurisdiction to no longer be appropriate.
Q30.	Please provide comments regarding all aspects of the Commission's interpretation of CEA section 2(i) with respect to the proposed application of the Transaction-Level Requirements. The Commission is particularly interested in commenters' views on the impact on U.S. persons as a result of the proposed application of the Dodd-Frank Act's trading requirements.	
Q31.	What, if any, competitive or economic affects on U.S. commerce, including U.S. persons, should the Commission consider when interpreting CEA section 2(i)? What, if any, competitive or economic effects on non-U.S. persons should the Commission consider when interpreting CEA section 2(i)?	The Lincoln provision (s716) in its current form will have a significant anti-competitive effect. The provision applies to "swap entities" and therefore all foreign entities required to register as swap dealers will be caught, and will not have the benefit of the carve-outs available to U.S. swap entities. This needs to be rectified as a matter of priority.