



THE FINANCIAL
SERVICES
ROUNDTABLE

August 12, 2013

Ms. Melissa Jurgens
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comment Letter on the Exemptive Order Regarding Compliance with Certain Swap Regulations (RIN 3038-AE85) and Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (RIN 3038-AD85)

Dear Ms. Jurgens:

The Securities Industry and Financial Markets Association (“**SIFMA**”), the Futures Industry Association (“**FIA**”) and The Financial Services Roundtable (“**The Roundtable**”) (together, the “**Associations**”)¹ appreciate the recent efforts of the Commodity Futures Trading Commission (the “**Commission**”) to phase in compliance with the Commission’s Title VII swap regulatory regime through the Exemptive Order Regarding Compliance with Certain Swap Regulations (the “**Exemptive Order**”).² Since the Exemptive Order provides phase-in compliance for the Commission’s Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (the “**Guidance**”), we are also providing comments on certain aspects of the Guidance. We believe that due consideration of these comments may be useful for the Commission as it considers the Exemptive Order and as it fulfills its commitment to

¹ Further information about the Associations is available in Annex C.

² Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 43,785 (July 22, 2013).

periodically review the Guidance and is critical to achieving an effective and orderly implementation of Title VII and the Commission's regulations.³

We believe that the Exemptive Order and Guidance reflect a number of very challenging implementation issues, which we describe in the first part of this letter. In addition to these conceptual concerns, we have identified significant technical issues and ambiguities that raise serious concerns for our members in seeking to implement Title VII requirements. We present these issues in greater detail, and our recommendations for how the Commission should address them, in Annex A to this letter.

Our Key Conceptual Concerns Regarding Implementation of the Exemptive Order and the Guidance

Implementation Issues. Based on our members' experience in implementing Title VII and the Commission's regulations, it has become clear to us that unnecessarily short implementation time frames, where implementation time frames are available at all, and the lack of a holistic regulatory approach prevent orderly implementation and threaten severe market disruptions. To ensure an orderly implementation process, the Commission must provide sufficient time for market participants to analyze the Exemptive Order and Guidance, categorize themselves and their counterparties, consider the effects on their swap business and implement the necessary changes to business, risk, compliance, legal and other procedures that result.

While we understand that the Exemptive Order was meant to facilitate such an orderly implementation process, we believe that a combination of (i) insufficient phase-in time frames, where a phase-in is available at all, (ii) new conditions on relief without prior notice and (iii) significant technical issues makes it fall short of this goal. For example:

- ***Short Timelines.*** Under the Exemptive Order, market participants only have until October 10, 2013 to analyze and apply the new, complex and ambiguous definition of "U.S. person." Compliance with the definition in the Guidance will require market participants generally, and collective investment vehicles in particular, to obtain new types of information, engage in complex and detailed analyses and modify their structure or operations accordingly.

³ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292, 45,297 (July 26, 2013). ("The Commission understands 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. Although the Commission is issuing the Guidance at this time, the Commission will continue to follow developments as foreign regulatory regimes and the global swaps market continue to evolve. In this regard, the Commission will periodically review this Guidance in light of future developments.").

Similarly, by September 30, many market participants will need to determine whether their counterparties are guaranteed or conduit affiliates. For the reasons presented in this letter, it will be extremely difficult to accomplish this within these short time frames. In particular, significant time should be allotted for the industry to develop an efficient and effective protocol to further market-wide counterparty categorization efforts pursuant to the Guidance, to implement that protocol among global derivatives market participants (many of which may not be currently affected by Dodd-Frank) and to make booking, systems and other changes across the industry to fully address the impact of these new categorizations.

Similarly, under the Exemptive Order, market participants have until October 10, 2013 to come into compliance with the clearing requirement for swaps with foreign branches and non-U.S. swap dealers⁴ (to the extent clearing is required under the Guidance), which is an extremely short period given the documentation and other logistical issues required before clearing is possible. Moreover, the Exemptive Order does not provide sufficient time for the further development of clearing mandates in other jurisdictions or for the Commission to analyze whether those requirements are comparable. As a result, it is possible that market participants may need to engage in significant operational builds to comply with U.S. clearing requirements for the short period of time before they are permitted by the Commission to comply with local clearing requirements under substituted compliance.

For the reasons provided in greater detail in Appendix A, we request that the Commission extend the phase-in periods provided in the Exemptive Order through March 31, 2014 to reasonably provide market participants a sufficient amount of time in which to comply with the requirements set forth in the Guidance.

- ***New Conditions on Relief.*** The Exemptive Order's extension of existing relief for foreign branches of U.S. swap dealers and non-U.S. swap dealers and MSPs is predicated, in many cases, on new conditions introduced with no phase-in period. For example, footnote 43 of the Exemptive Order conditions relief for swaps by and with non-U.S. branches of U.S. swap dealers on stringent requirements first described in the Guidance. Similarly, the Exemptive Order conditions the extension of the SDR reporting relief for certain non-U.S. swap dealers or MSPs on newly applicable recordkeeping requirements. These conditions were introduced with no phase-in period, which may make the relief effectively unavailable.

⁴ Each as defined below.

- **Significant Technical Issues.** While many technical issues with the original version of the Exemptive Order have been addressed in subsequent drafts, a number of significant technical issues and ambiguities remain that raise serious concerns for market participants. For example, the Exemptive Order appears to include no phase-in period for Large Trader Reporting requirements. We provide greater detail on these issues in Appendix A.

Complexity and Lack of Clarity. Successful implementation of Title VII hinges on clear, simple and bright-line rules, based on objective criteria, that can easily be applied by market participants. The Guidance explicitly does not take this approach and includes, in many places, subjective factors that would require market participants to engage in a facts and circumstances analysis. This approach could lead to confused and inconsistent treatment of entities.

This complexity and lack of clarity is potentially most problematic with respect to the definition of “U.S. person.” First, the definition of U.S. person “generally includes, but is not limited to,” those persons covered by the enumerated prongs of the U.S. person definition. This implies that the definition is both narrower (“generally”) and broader than (“not limited to”) the prongs provided in the Guidance. Second, even within the enumerated prongs, the Guidance includes subjective judgments. With respect to the principal place of business of a collective investment vehicle, for example, “the Commission recognizes that the structures of collective investment vehicles are complex and varied, and it does not intend to establish bright-line tests for when the principal place of business of a collective investment vehicle would or would not be within the United States.”

In issuing its cross-border views in the form of guidance, rather than as rules, the Commission does not purport to, and does not, provide definitive rule text on which market participants may rely in determining the Commission’s view on key issues. Moreover, the combination of regulations, guidance, exemptive orders and time-limited and indefinite no-action relief adds additional complexity, particularly for non-U.S. market participants that have less experience with U.S. regulation. Many market participants outside the United States may very well avoid engaging in business with U.S.-regulated firms to avoid this uncertainty.

Substituted Compliance. The regulatory obligations of market participants operating outside the United States depend to a great extent on whether the Commission has made a comparability determination for the relevant non-U.S. regulatory regime. We support the Commission’s view that the substituted compliance concept should entail an outcomes-based approach. We agree that this best balances the Commission’s interest in regulating cross-border transactions with principles of international comity. We also generally support the Commission’s plan to issue no-action letters for market participants that are

subject to the requirements of both Title VII and EMIR, where the relevant requirements under EMIR are deemed to be essentially identical to Commission requirements.⁵

However, given the importance of substituted compliance determinations, the Commission should issue separate, and more detailed, guidance on the process by which it will make a substituted compliance determination. We would expect this guidance to include, at a minimum:

- (i) additional detail regarding the factors the Commission will consider when making a comparability determination;
- (ii) additional detail on the type of analysis an applicant would need to submit to the Commission to sufficiently state that the non-U.S. regulatory regime is comprehensive and that its objectives are comparable to those of the U.S. regulatory regime;
- (iii) a detailed timeline outlining the process for applicants, including specified Commission response periods, expected applicant response times and mandatory Commission action deadlines; and
- (iv) a process for notice and comment on proposed determinations.

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⁵ See *Cross-Border Regulation of Swaps/Derivatives Discussions Between the Commodity Futures Trading Commission and the European Union—A Path Forward* (July 11, 2013); see also *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45,353 (July 26, 2013) (“The Commission intends that a finding of essentially identical generally would be made through Commission action but in appropriate cases could be made through staff no-action.”).

We thank the Commission for its consideration of our comments. Please feel free to contact the Associations should you wish to discuss this letter.

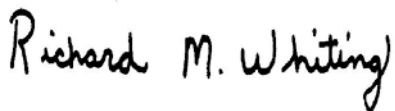
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ken Bentsen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kenneth E. Bentsen, Jr.
President
SIFMA

A handwritten signature in black ink, appearing to read "Walt L. Lukken". The signature is cursive and somewhat stylized, with a long horizontal stroke at the end.

Walt Lukken
President & Chief Executive Officer
Futures Industry Association

A handwritten signature in black ink, appearing to read "Richard M. Whiting". The signature is cursive and clearly legible.

Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable

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Recommendations in Response to Issues Presented in the Exemptive Order and Guidance

I. Issues Presented by the Final Exemptive Order

Issue 1: The short phase-in period for market participants in jurisdictions that have requested substituted compliance determinations is intended to allow market participants to delay compliance with U.S. rules while such substituted compliance determinations are being made. However, we do not believe the phase-in period will be sufficiently long to allow the Commission to complete comparability determinations. As a result, it is possible that market participants could be required to engage in significant operational builds in order to comply with the Commission's regulations for the short period of time between the expiration of the Exemptive Order and the availability of substituted compliance.

Recommendation 1: The Commission should avoid an unnecessary "gap" period by extending the exemptive relief available in jurisdictions where the Commission has received requests for a substituted compliance determination until the Commission has had an opportunity to assess whether the application will be granted and the phase-in period has expired. The Commission should provide the same relief where it or its staff is considering making an essentially identical determination.

The Exemptive Order provides for phased-in compliance for non-U.S. swap dealers and foreign branches of U.S. swap dealers, which, depending on the type of transaction and the requirement, may require compliance as soon as September 30, 2013 and no later than December 21, 2013—including in jurisdictions that have submitted requests for substituted compliance determinations with the Commission.

It is difficult to predict how long it will take the Commission to complete its review of requests for substituted compliance. Setting any specific date for expiration of the Exemptive Order for jurisdictions where substituted compliance requests have been submitted imposes an artificial deadline. If this deadline does not provide the Commission sufficient time to make comparability assessments, non-U.S. swap dealers and foreign branches will need to build the technological, operational and compliance systems necessary to comply with U.S. law for an interim period (likely, a short one) before the Commission issues a determination. This would impose significant and unnecessary costs on these firms and render the benefits of the substituted compliance regime established by the Commission essentially meaningless, as well as harm efforts towards international regulatory coordination and comity. The same concerns exist to the extent the Commission or its staff makes "essentially identical" determinations.

The Commission should avoid an unnecessary "gap" period by extending the exemptive relief available in jurisdictions where the Commission has received requests for a substituted compliance determination until the Commission has had an opportunity to assess whether the application will be granted and the phase-in period has expired. The Commission should provide

the same relief where it or its staff is considering making an essentially identical determination. Providing such relief would allow for smoother transitions, both for regulated entities and the markets in which they operate. It would also provide for better harmonization among U.S. and non-U.S. swap regulations.

Issue 2: The Exemptive Order provides non-U.S. swap dealers, non-U.S. MSPs and foreign branches in jurisdictions that have submitted requests for a substituted compliance determination until the earlier of December 21, 2013 and 30 days after a substituted compliance determination is made to come into compliance with most U.S. swap regulatory requirements. Thirty days is an unrealistically short period for market participants to come into compliance with a substituted compliance determination, given that market participants may need to adapt to a Commission determination that a foreign jurisdiction's requirement is not comparable with the analogous U.S. requirement or come into compliance with conditions the Commission places on the substituted compliance determination.

Recommendation 2: The Commission should provide market participants with at least 90 days after a substituted compliance determination has been made to come into compliance with that determination or Commission rules, as applicable.

The Exemptive Order provides non-U.S. swap dealers, non-U.S. MSPs and foreign branches in jurisdictions that have submitted requests for a substituted compliance determination a phase-in period that depends, in part, on when a substituted compliance determination is granted. Specifically, the Exemptive Order provides relief where substituted compliance may be available until the earlier of December 21, 2013 and 30 days after a substituted compliance determination is made. If the Commission determines that a foreign jurisdiction's requirement is not comparable to the parallel U.S. requirement, market participants will have at most 30 days to come into compliance with U.S. rules. There could be even less time, for example, if such a "non-comparability" determination is made on December 15; in that case, market participants would have six days to come into compliance with U.S. rules. Similarly, if the Commission determines that a foreign jurisdiction's requirement is comparable to the parallel U.S. requirement but imposes conditions on the use of substituted compliance, market participants will have at most 30 days to come into compliance with those conditions. For example, if such a comparability determination is made on December 15, market participants would have six days to come into compliance with the Commission's conditions.

While we appreciate that the Commission acknowledges that non-U.S. swap dealers and MSPs "may require additional time after a Substituted Compliance Determination in order to phase in compliance with the relevant requirements," and that the Commission and its staff may provide for additional transitional relief at the time a substituted compliance determination is made,⁶ we believe that market participants would benefit from additional certainty from the Commission at this time that a reasonable and realistic phase-in period will be provided. The

⁶ Exemptive Order, 78 Fed. Reg. 43788 n.43.

Commission should provide non-U.S. swap dealers, non-U.S. MSPs and foreign branches with a realistic phase-in period to adjust their operations and compliance systems and enter into the necessary arrangements with their counterparties to ensure compliance with U.S. rules. Specifically, the Commission should provide market participants with at least 90 days after a determination has been made that a foreign jurisdiction's requirement is not comparable to come into compliance with the relevant U.S. requirements.

Issue 3: Full compliance with the Commission's swap regulations, as interpreted under the Guidance, requires market participants to engage in two serial processes. First, market participants must determine which regulatory requirements apply to them and their counterparties. This determination will require them to collect significant new information to determine their and their counterparties' status as U.S. persons, *bona fide* foreign branches, guaranteed affiliates or conduit affiliates. Once this first stage is complete, the second stage, implementation of the new requirements, can begin. As evidenced by the Commission's phased-in compliance dates for the underlying regulations, significant time is needed for such implementation, including for operational builds and execution of documentation with counterparties to which the rules newly apply. The phase-in periods provided by the Exemptive Order are far too short for market participants to complete these two processes.

Recommendation 3: The Commission should provide market participants with at least until the expiration of the Exemptive Order on December 21, 2013 to complete the first stage of the compliance process—categorization of themselves and their counterparties to determine which requirements apply under the Guidance. The Commission should provide for market participants to come into compliance with newly applicable requirements until March 31, 2014.

Full compliance with the Commission's swap regulations, as interpreted under the Guidance, requires market participants to engage in two serial processes. In the first stage, market participants will need to classify themselves and their counterparties to determine which regulatory requirements apply. This includes analysis and application of the new, complex and ambiguous definition of "U.S. person," which will require market participants generally, and collective investment vehicles in particular, to obtain new types of information, engage in complex and detailed analyses and modify their structure or operations accordingly. Similarly, market participants will need to determine whether their counterparties are *bona fide* foreign branches, guaranteed affiliates and conduit affiliates. Much of the information needed for such analyses is not currently collected.

Once market participants have determined their and their counterparties' status under the Guidance, they will need to implement the requirements as they apply under the Guidance. Market participants will need to execute new documentation with their counterparties and establish new operational arrangements to meet the requirements. As evidenced by the Commission's phased-in compliance dates for the underlying regulations, such as for external business conduct, clearing, and swap trading relationship documentation, significant time is needed for such implementation.

Under the Exemptive Order, these two stages must be completed in some cases by September 9, 2013, in most cases by October 10, 2013, and in all cases by December 22, 2013. The compliance period provided by the Exemptive Order is insufficient for market participants to complete the first stage of the process, much less for them to complete both stages. The Commission should provide market participants with at least until the expiration of the Exemptive Order on December 21, 2013 to complete the first stage of the compliance process—categorization of themselves and counterparties to determine which requirements apply under the Guidance. The Commission should provide for market participants to come into compliance with newly applicable requirements until March 31, 2014.

Issue 4: The Exemptive Order imposes new conditions on foreign branch transactions with no phase-in period or notice. These conditions may require foreign branches (and the U.S. swap dealers of which they are a part) to engage in information collection efforts and restructure their operations to meet the conditions. However, the Commission has provided no phase-in period for the new conditions.

Recommendation 4: The Exemptive Order should be amended to provide a phase-in period for the foreign branch conditions, both for the foreign branches themselves and for their counterparties, that expires on March 31, 2014.

Both the Exemptive Order and the Guidance,⁷ like the January Order and the Proposed Guidance, allow non-U.S. persons to exclude swaps with foreign branches of U.S. banks that are swap dealers or MSPs (“**foreign branches**”) from their swap dealer *de minimis* calculations and, to a more limited extent, from their MSP calculations. In addition, under the Exemptive Order and the Guidance, market participants transacting from or with a foreign branch of a U.S. swap dealer are provided a phase-in period for compliance with Transaction-Level Requirements and may be eligible for substituted compliance.

However, footnote 43 of the Exemptive Order, which was added to the second published draft of the Exemptive Order, states that in order to benefit from the Exemptive Order’s relief for foreign branches,⁸ “market participants must use the term ‘foreign branch’ and the interpretation of when a swap is with a foreign branch set forth in the Guidance.”⁹ The Guidance, in turn, imposes conditions for a branch to qualify as a foreign branch¹⁰ and sets out factors to be considered in determining when transactions are to be viewed as being conducted with a foreign branch.¹¹ These conditions and factors are substantively different from those contained in the

⁷ Other than, in the case of the Guidance, for guaranteed affiliates and conduit affiliates.

⁸ The term “foreign branch” is as defined in the Guidance, 78 Fed. Reg. at 45,328-29.

⁹ Exemptive Order, 78 Fed. Reg. at 43,789 n.43.

¹⁰ Guidance, 78 Fed. Reg. at 45,329.

¹¹ Guidance, 78 Fed. Reg. at 45,330.

January Order¹² and will require foreign branches (and U.S. swap dealers of which they are a part) to engage in significant information collection efforts and potentially restructure their operations. However, the Commission has provided no phase-in period for the conditions.

The Commission should provide a phase-in period for the new foreign branch conditions, both for the foreign branches themselves and for their counterparties, that expires on March 31, 2014.

Issue 5: Under the January Order, non-U.S. swap dealers were not required to comply with the Commission’s Large Trader Reporting requirements. The Exemptive Order, without notice, applies these rules immediately, providing no phase-in period for non-U.S. swap dealers to build the necessary operational, technological and legal infrastructure.

Recommendation 5: The Exemptive Order should be amended to allow phased-in compliance with Large Trader Reporting requirements so that these requirements come into effect after March 31, 2014.

Under the January Order, non-U.S. swap dealers in non-U.S.-based corporate groups¹³ were permitted to delay compliance with Large Trader Reporting under Part 20 of the Commission’s regulations, for swaps with non-U.S. persons, until July 12, 2013.¹⁴ Although the Exemptive Order appears designed to provide phased-in compliance for non-U.S. swap dealers and non-U.S. MSPs, the Exemptive Order provides no phase-in period for these entities from Large Trader Reporting requirements. These requirements are effective immediately because there is not substituted compliance available for Large Trader Reporting. This explanation does not address the operational challenges of immediate effectiveness without notice or phase in. In addition, there was no indication in the Proposed Guidance that Large Trader Reporting would be treated differently from SDR Reporting, particularly given that substituted compliance was available for Large Trader Reporting in the Proposed Guidance.

We believe that the Exemptive Order should be amended to allow phased-in compliance with Large Trader Reporting requirements, so that these requirements come into effect after March 31, 2014.

¹² Final Exemptive Order Regarding Compliance with Certain Swap Regulations (the “**January Order**”), 78 Fed. Reg. 858 (Jan. 7, 2013).

¹³ Specifically, non-U.S. swap dealers that do not have an ultimate parent that is a U.S. swap dealer, U.S. MSP, U.S. bank, U.S. financial holding company or U.S. bank holding company, could delay compliance with the SDR reporting and LTR requirements for swaps with non-U.S. counterparties. January Order, 78 Fed. Reg at 880.

¹⁴ January Order, 78 Fed. Reg. at 880.

Issue 6: Phased implementation of SDR reporting for non-U.S. swap dealers and MSPs is newly and immediately conditioned on compliance with Commission recordkeeping requirements.

Recommendation 6: The phase-in for SDR reporting should be available to a qualifying non-U.S. swap dealer or MSP that keeps swap data records in accordance with the rules of the home jurisdiction of a non-U.S. swap dealer or MSP.

The Exemptive Order, like the January Order, provides non-U.S. swap dealers and MSPs that are not part of an affiliated group in which the ultimate U.S. parent entity is a swap dealer, MSP, bank, financial holding company or bank holding company with a phase-in period for compliance with Commission swap data repository (“**SDR**”) reporting requirements for swaps with non-U.S. person counterparties.¹⁵ Unlike the January Order, however, in order for a non-U.S. swap dealer or MSP to be eligible for the phase-in relief, it immediately must comply with the swap data reporting and recordkeeping requirements of its home jurisdiction. If the home jurisdiction has no reporting requirements in place, the non-U.S. swap dealer or MSP must “comply with the recordkeeping requirements of Regulations 45.2, 45.6, 46.2 and 46.4.”¹⁶

Under the January Order, SDR reporting relief was not conditioned on the existence of reporting and recordkeeping requirements in the home jurisdiction or compliance with Commission recordkeeping requirements. In addition, the majority of jurisdictions outside the United States has not yet fully implemented a swap data reporting regime. Thus, most non-U.S. swap dealers and MSPs immediately must either (1) comply with the specified Commission recordkeeping requirements or (2) begin reporting swaps with non-U.S. counterparties, in accordance with Commission SDR reporting rules. Complying with either of these options immediately is impracticable, due to the highly technical nature of the requirements, the significant infrastructure and operational adjustments necessary to comply with them and unresolved foreign privacy issues. While we acknowledge the interest of the Commission in ensuring that, during a phase-in period, non-U.S. swap dealers and MSPs keep sufficient records of their swap transactions, we believe that the Commission could better achieve this goal by conditioning the availability of the phase-in period on keeping swap data records in accordance with the rules of the home jurisdiction of a non-U.S. swap dealer or MSP.

¹⁵ Exemptive Order, 78 Fed. Reg. at 43,794.

¹⁶ Exemptive Order, 78 Fed. Reg. at 43,794.

Issue 7: Foreign branches outside the Dealer Jurisdictions generally have smaller operations and will face greater challenges in implementing U.S. rules than those in the Dealer Jurisdictions. However, the phase-in period for Transaction-Level Requirements to foreign branches outside of the Dealer Jurisdictions is shorter than the period provided to foreign branches in the Dealer Jurisdictions.

Recommendation 7: Foreign branches outside of the Dealer Jurisdictions should have a phase-in period at least equal to that of foreign branches in the Dealer Jurisdictions.

The Exemptive Order provides until October 10, 2013 for foreign branches outside of the Dealer Jurisdictions¹⁷ (including foreign branches in Singapore) to come into compliance with Transaction-Level Requirements.¹⁸ This phase-in is shorter than the period provided to foreign branches in the Dealer Jurisdictions (except with respect to mandatory clearing, trade execution and real-time reporting). As operations in the Dealer Jurisdictions are typically larger, further developed and generally subject to local swap regulatory requirements, operations in the non-Dealer Jurisdictions likely will need at least as much time to come into compliance as operations in Dealer Jurisdictions, and should have a phase-in period at least equal to that of foreign branches in the Dealer Jurisdiction.

Issue 8: The phase-in period for application of the clearing requirement to certain swap transactions is insufficient.

Recommendation 8: The phase-in period for the clearing requirement should be extended until March 31, 2014.

Under the January Order, non-U.S. swap dealers and MSPs and foreign branches were not required to comply with the clearing requirement for transactions with non-U.S. counterparties or foreign branches. Under the Guidance, non-U.S. swap dealers and MSPs are subject to this requirement for swaps with guaranteed affiliates and foreign branches, with the possibility of substituted compliance. Foreign branches are subject to the clearing requirement for transactions with other foreign branches, with the possibility of substituted compliance. In addition, some U.S. persons and non-U.S. persons that are guaranteed affiliates, and that are not swap dealers or MSPs, are newly subject to the clearing requirement.

The Exemptive Order provides all market participants until October 10, 2013 to come into compliance with the clearing requirement for these transactions to the extent clearing was not previously required.¹⁹ This period is insufficient given the significant operational, legal,

¹⁷ For purposes of this Letter, “Dealer Jurisdictions” means Australia, Canada, the European Union, Hong Kong, Japan and Switzerland.

¹⁸ Exemptive Order, 78 Fed. Reg. at 43,795.

¹⁹ Exemptive Order, 78 Fed. Reg. at 43,794-95.

documentation-related and other arrangements that must be made before swaps can be cleared.²⁰ Moreover, a disproportionate portion of this burden—in particular, negotiating clearing arrangements with intermediaries, making appropriate arrangements for collateral and negotiating legal agreements—falls on non-registrants that are dealing with non-U.S. swap dealers and foreign branches or that are dealing with other non-registrants. Non-U.S. persons, rather than undertaking to establish the infrastructure needed for clearing now, will seek to avoid being subject to the clearing requirement by moving their swaps business away from U.S.-regulated firms. In addition, clearinghouses and other vendors generally set a deadline for onboarding new clients that is at least several days before the relevant regulatory deadline, thereby further shortening the period that markets have to prepare.

In addition, several jurisdictions are in the process of, but have not yet finalized, swap clearing regimes. If clearing is required by October 10, 2013, it is possible that substituted compliance will not be available for a transition period (likely, short) while these foreign regimes are finalized and become effective. Indeed, under the interaffiliate clearing exemption, the Commission has provided market participants in the European Union, Japan and Singapore until March 2014 to meet the exemption’s requirements through the exchange of variation margin rather than through clearing in those jurisdictions.

We believe that the phase-in period for the clearing requirement should accommodate the potential for substituted compliance and the policy objectives reflected in the interaffiliate clearing exemption. Thus, the phase-in period should be extended until March 31, 2014 to provide sufficient time for non-U.S. jurisdictions to reach accords with the Commission on clearing and other matters of equivalence and substituted compliance.

Issue 9: While the Guidance imposes new SDR reporting and recordkeeping requirements on certain non-U.S. person Non-Registrants, the Exemptive Order provides no phase-in for these Non-Registrants to come into compliance.

Recommendation 9: The Commission should provide Non-Registrants until March 31, 2014 to comply with SDR reporting and recordkeeping requirements to the extent such requirements were not applicable under the January Order.

Under the Guidance, a transaction between two non-swap dealers/MSPs (“**Non-Registrants**”) that are guaranteed affiliates is subject to clearing, trade execution, SDR reporting, real-time reporting, recordkeeping and Large Trader Reporting.²¹ This provision was added to the Guidance without previous notice. While the Exemptive Order grants such Non-Registrants until October 10, 2013 to achieve compliance with the clearing, trade execution and real-time

²⁰ Exemptive Order, 78 Fed. Reg. at 43,794-95.

²¹ Guidance, 78 Fed. Reg. at 45,364.

reporting,²² it provides no phase-in period for SDR reporting and recordkeeping. The approach taken by the Exemptive Order is confusing given that non-U.S. swap dealers and MSPs are provided a phase-in period for those requirements. Non-Registrants should be provided until March 31, 2014 to comply with SDR reporting and recordkeeping requirements to the extent such requirements were not applicable under the January Order.

Issue 10: The Commission provides no phase-in for counterparties whose status as a U.S. person, guaranteed affiliate, conduit affiliate or foreign branch changes over time.

Recommendation 10: The Commission should provide a 90-day phase-in period for a market participant whose status in these categories changes to be treated in accordance with its new categorization.

The Commission's definitions of U.S. person, guaranteed affiliate, conduit affiliate and foreign branch look at an entity's status at a given point in time and, as a result, a counterparty's status may change over time. The Commission provides no phase-in period for such an entity, or its counterparties, to come into compliance with U.S. requirements that apply under the Guidance. For example, Transaction-Level Requirements do not apply to a transaction between a non-U.S. swap dealer and a non-U.S. collective investment vehicle. If the owners of that collective investment vehicle, however, change so that the collective investment vehicle becomes majority-owned by U.S. persons, the collective investment vehicle's status as a non-U.S. person changes under the Guidance so that it becomes a U.S. person. In such a scenario, the Commission does not provide a phase-in period that would allow the newly deemed U.S. collective investment vehicle, or its counterparties, to comply with the relevant Transaction-Level Requirements. To provide market participants with sufficient time to process a change of counterparty status and implement any necessary changes, we believe that any change in counterparty status should only apply to swaps executed 90 days after the counterparty notifies the market participant of its change in status. This would ensure that the swap dealer or MSP, as well as its counterparty, is afforded sufficient time to account for this change in the counterparty's status through amendments to documentation, data capture and internal compliance and other systems.

²² Exemptive Order, 78 Fed. Reg. at 43,793.

II. Issues Presented by the Guidance

A. U.S. Person Definition

Issue 11: The fact that the U.S. person definition “generally includes, but is not limited to,” enumerated prongs creates significant uncertainty as to which entities are U.S. persons.

Recommendation 11: The Commission should remove the language “generally includes, but is not limited to,” and the related facts and circumstances tests from the U.S. person definition.

The definition of U.S. person “generally includes, but is not limited to,” those persons covered by the specific prongs of the U.S. person definition.²³ The use of the word “generally” implies that some entities described by the prongs are nonetheless not U.S. persons, although no further guidance is provided with respect to this point. The use of the “but is not limited to” language implies that there may be entities other than those described by the specific prongs that could be U.S. persons, creating significant ambiguity as to which other persons may be included in the definition. In this regard, the Commission states that “there may be circumstances that are not fully addressed by those prongs, or other situations where the interpretation [does] not appropriately resolve whether a person should be included in the interpretation of the term ‘U.S. person.’” The Guidance thus appears to require market participants to determine their U.S. person status and the U.S. person status of their counterparties (i) by looking to the eight prongs of the U.S. person definition, which themselves raise interpretive questions by incorporating exceptions to the prongs that are not spelled out in the Guidance, and (ii) by engaging in an analysis of the “relevant facts and circumstances and a balancing of the various regulatory interests that may apply,” even when the person is not described by the listed prongs.

To address the ambiguity and uncertainty created by the “generally includes, but is not limited to” language, we believe that the Commission should remove that phrase and the related facts and circumstances test from the Guidance.

Issue 12: The summary of the U.S. person definition in the Guidance does not seem to follow the clear, definitive statement in the main text of the Guidance that publicly offered funds not offered to U.S. persons are exempt from all prongs of the U.S. person definition.

Recommendation 12: The Commission should clarify its U.S. person definition to reflect its determination that a collective investment vehicle that is publicly offered only to non-U.S. persons and is not offered to U.S. persons does not fall within any of the prongs of the U.S. person definition.

The language of the Guidance and statements made by Commissioners at the July 12, 2013 open meeting at which the Guidance was adopted clearly reflect the Commission’s intent to

²³ Guidance, 78 Fed. Reg. at 45,316-17.

exclude from the definition of U.S. person those funds that are publicly offered to non-U.S. persons, so long as the funds are not offered to U.S. persons. The Guidance unambiguously states that “a collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons generally *would not fall within any of the prongs of the interpretation of the term U.S. person.*”²⁴

Notwithstanding this clear statement in the main text of the Guidance, the summary of the U.S. person definition appears to contain an inadvertent error by including the public fund exception only in the text of prong (vi), which relates to majority ownership by U.S. persons, with no explicit carve-out in prong (iii), which relates to funds organized or having their principal place of business in the United States.²⁵ The CFTC provides no further explanation for this oversight in prong (iii). The Commission should clarify that a collective investment vehicle that is publicly offered only to non-U.S. persons and is not offered to U.S. persons is also carved-out of prong (iii) and all other prongs of the U.S. person definition to be consistent with its clear statement to this effect in the main text of the Guidance.

Issue 13: The Guidance does not discuss how often a market participant must confirm its counterparty’s status as a U.S. person, guaranteed affiliate, conduit affiliate or foreign branch.

Recommendation 13: The determination of a swap counterparty’s status should be made at the inception of the swap based on a representation from the counterparty at that time.

As discussed above, the status of an entity as a U.S. person, guaranteed affiliate, conduit affiliate or foreign branch may change over the course of a given swap transaction. If the change in status of a counterparty required a change in regulatory treatment of an existing transaction, such as posting of margin, the economics of the transaction could be altered in a manner not contemplated by the parties at the swap’s inception. The determination of a counterparty’s status should be made at the inception of the swap, based on the last representation given at that time. The market participant would be able to rely on the representation until it is renewed or changed by the counterparty, provided that the counterparty does not have indications to the contrary.

²⁴ Guidance, 78 Fed. Reg. at 45,314 (emphasis added).

²⁵ Guidance, 78 Fed. Reg. at 45,316-17.

B. Swap Dealer *De Minimis* Calculation

Issue 14: The main text of the Guidance includes an explicit exclusion from the *de minimis* calculation for non-U.S. persons transacting with conduit affiliates even though swap dealing activity with conduit affiliates is not required to be counted in the first instance.

Recommendation 14: The Commission should remove the reference to conduit affiliates in the exclusion from the *de minimis* calculation.

In the exclusion of swaps by non-U.S. persons from the *de minimis* threshold, the main text of the Guidance states that a non-U.S. person that is not a guaranteed or conduit affiliate need not include swaps with “(iii) a [. . .] conduit affiliate that is not a swap dealer and itself engages in *de minimis* swap dealing activity and which is affiliated with a swap dealer.”²⁶ It is unclear why an exclusion would exist for counting transactions with conduit affiliates, since a non-U.S. person that is not a guaranteed or conduit affiliate is generally not required to count swap dealing activity with conduit affiliates toward the *de minimis* threshold. The summary of the swap dealer *de minimis* calculation has no reference to conduit affiliates in its exclusions. The Commission should remove the reference to conduit affiliates in the exclusion from the *de minimis* calculation.

Issue 15: A non-U.S. person is not required to count swap dealing activity with guaranteed affiliate counterparties if, among other exclusions, the guaranteed affiliate “is not a swap dealer and itself engages in *de minimis* swap dealing activity and . . . is affiliated with a swap dealer.” The Guidance does not clarify what it means for the guaranteed affiliate to “[engage] in *de minimis* swap dealing activity.”

Recommendation 15: The Commission should clarify that a guaranteed affiliate will be considered to “itself [engage] in *de minimis* swap dealing activity” if it (i) engages in no swap dealing activities, (ii) engages in swap dealing activities below the *de minimis* threshold or (iii) has exceeded the *de minimis* threshold but has represented that it intends to register as a swap dealer by two months after the end of the month in which it exceeds the *de minimis* threshold, which is the date on which it is required to register as a swap dealer.

In the exclusion for swaps by non-U.S. persons from the *de minimis* threshold, the Guidance states that a non-U.S. person that is not a guaranteed or conduit affiliate need not include swaps with “a guaranteed affiliate that is not a swap dealer and itself engages in *de minimis* swap dealing activity and which is affiliated with a swap dealer.”²⁷ The requirement that the guaranteed affiliate must “[engage] in *de minimis* swap dealing activity” is not explained in the Guidance, and it is unclear whether this requires the guaranteed affiliate to (i) engage in dealing activities that (ii) count toward the guaranteed affiliate’s *de minimis* threshold in order for a non-U.S. person counterparty to exclude the transaction from its *de minimis* threshold count. In

²⁶ Guidance, 78 Fed. Reg. at 45,324.

²⁷ Guidance, 78 Fed. Reg. at 45,324.

addition, it is unclear whether a guaranteed affiliate that has exceeded the *de minimis* threshold on an aggregated basis, but is not yet required to register as a swap dealer,²⁸ would be included in this exclusion. The Commission should clarify that a guaranteed affiliate will be considered to “[engage] in *de minimis* swap dealing activity” if it (i) engages in no swap dealing activities, (ii) engages in swap dealing activities below the *de minimis* threshold or (iii) has exceeded the *de minimis* threshold but has represented that it intends to register as a swap dealer by two months after the end of the month in which it exceeds the *de minimis* threshold, which is the date on which it is required to register as a swap dealer.

C. MSP Calculation

Issue 16: The description of swaps required to be counted by non-U.S. persons that are guaranteed affiliates and conduit affiliates set out in the main text of the Guidance is ambiguous and inconsistent with the text of the summary in several respects.

Recommendation 16: The Guidance should clarify that guaranteed swaps should not be counted twice for MSP threshold purposes and that only swaps actually guaranteed by a guarantor must be attributed to the guarantor.

The main text of the Guidance provides:

[A] guaranteed or conduit affiliate, in calculating whether the applicable MSP threshold is met, would be expected to include, and attribute to the U.S. guarantor, the notional value of: (1) all swaps with U.S. and non-U.S. counterparties, and (2) any swaps between another non-U.S. person and a U.S. person or guaranteed affiliate, if the potential non-U.S. MSP guarantees the obligations of the other non-U.S. person thereunder.²⁹

The summary of the Guidance provides:

A non-U.S. person (including a non-U.S. person that is a guaranteed or conduit affiliate) should consider the aggregate notional value of:

- (i) any swap position between it and a U.S. person;
- (ii) any swap position between it and a guaranteed affiliate (but its swap positions where its own obligations thereunder

²⁸ Under Commission regulation 1.3(ggg)(4)(iii), a person has two months from the end of the month in which it exceeds the *de minimis* threshold before it becomes a swap dealer and is required to register as such.

²⁹ Guidance, 78 Fed. Reg. at 45,320.

are guaranteed by a U.S. person should be attributed to that U.S. person and not included in the non-U.S. person's determination); and

(iii) any swap position between another (U.S. or non-U.S.) person and a U.S. person or guaranteed affiliate, where it guarantees the obligations of the other person thereunder.³⁰

The main text of the Guidance is ambiguous and inconsistent with the text of the summary in two respects. First, the main text does not provide that a non-U.S. guaranteed affiliate or conduit affiliate can exclude swaps that are attributed to a U.S. guarantor, while the summary does. It is unclear whether, under the main text, swaps would need to be counted twice—once by the non-U.S. guaranteed affiliate or conduit affiliate *and again* by the U.S. guarantor. Second, discrepancies between the main text and the summary create significant ambiguities about whether *all* swaps of a non-U.S. guaranteed affiliate or conduit affiliate must be counted by the U.S. guarantor (and whether those swaps can be excluded by the non-U.S. guaranteed affiliate or conduit affiliate) or whether the U.S. guarantor must count only those swaps that it guarantees. The Guidance should clarify that guaranteed swaps should not be counted twice for MSP threshold purposes and that only swaps actually guaranteed by a guarantor must be attributed to the guarantor.

Issue 17: The exclusions from the MSP threshold available to non-U.S. persons are limited to guaranteed affiliates and do not seem to be available to conduit affiliates.

Recommendation 17: The Guidance should provide that the exclusions from counting toward the MSP threshold that are available to “a non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity” are also available to a conduit affiliate.

The exclusions from the MSP threshold available to non-U.S. persons are limited to guaranteed affiliates and do not seem to be available to conduit affiliates. It is unclear why these exclusions are not also available to conduit affiliates, given that conduit affiliates are otherwise treated similarly to guaranteed affiliates under these provisions. The Guidance should provide that the exclusions from counting toward the MSP threshold that are available to “a non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity” are also available to a conduit affiliate.

³⁰ Guidance, 78 Fed. Reg. at 45,326.

Issue 18: The exclusions from the MSP threshold available to a non-U.S. person (that is not a guaranteed or conduit affiliate) for a swap between the non-U.S. person and a guaranteed affiliate are conditioned on the guaranteed affiliate’s collecting “daily variation margin, with no threshold, on its swaps with such non-U.S. person.”

Recommendation 18: The Guidance should provide that the exclusions’ condition that the guaranteed affiliate must “collect daily variation margin, with no threshold, on its swaps with such non-U.S. person” is analyzed on an agreement-by-agreement, rather than a counterparty-by-counterparty, basis.

The Guidance should provide that the exclusions for swaps with guaranteed affiliates for which variation margin is collected should not be limited to those swaps for which there is no threshold.

The Guidance should provide that, to the extent that the existence of a threshold requires a swap to be counted toward the MSP calculation, the amount of the threshold, rather than the full notional amount of the swap, should be counted toward the MSP calculation.

With respect to the condition that a swap between a non-U.S. person (that is not a guaranteed or conduit affiliate) and a guaranteed affiliate can be excluded from the non-U.S. person’s MSP calculations if the guaranteed affiliate collects daily variation margin, the main text of the Guidance provides that:

[A] non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity generally does not have to count towards its MSP threshold its exposure under swaps with foreign branches of a U.S. swap dealer or guaranteed affiliates that are swap dealers; provided, that the swap is either cleared, or the documentation of the swap requires the foreign branch or guaranteed affiliate to collect daily variation margin, with no threshold, on its swaps with such non-U.S. person.³¹

The summary of the Guidance provides:

A non-U.S. person (including a non-U.S. person that is a guaranteed or conduit affiliate) should consider the aggregate notional value of:

- (i) any swap position between it and a U.S. person;
- (ii) any swap position between it and a guaranteed affiliate (but its swap positions where its own obligations thereunder are guaranteed by a U.S. person should be attributed to that U.S.

³¹ Guidance, 78 Fed. Reg. at 45,324-25.

person and not included in the non-U.S. person's determination); and

(iii) any swap position between another (U.S. or non-U.S.) person and a U.S. person or guaranteed affiliate, where it guarantees the obligations of the other person thereunder.

A non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity would generally not have to count towards its MSP thresholds its exposure under swaps with foreign branches of U.S. swap dealers or guaranteed affiliates that are swap dealers, provided that the swap is either cleared, or the documentation of the swap requires the foreign branch or guaranteed affiliate to, and the swap dealer actually does, collect variation margin, on its swaps with the non-U.S. person.³²

The main text of the Guidance is ambiguous and is inconsistent with the summary. First, it is unclear whether the variation margin requirement applies to all swaps with the calculating counterparty, or only swaps under the particular netting agreement in question. With respect to swaps subject to the exclusion because they are cleared, the Guidance unambiguously looks only to the swap in question. The condition that the guaranteed affiliate must “collect daily variation margin, with no threshold, on its swaps with such non-U.S. person” should be analyzed on an agreement-by-agreement, rather than counterparty-by-counterparty, basis.

Second, the main text provides that a non-U.S. person that is not a guaranteed affiliate and is a financial entity may exclude from its MSP threshold swaps with a foreign branch and with a guaranteed affiliate that is a swap dealer if the “foreign branch or guaranteed affiliate . . . collect[s] daily variation margin, *with no threshold*, on its swaps with such non-U.S. person.”³³ The requirement that variation margin may not be subject to a threshold is only included in the main text, but not the summary. The Commission should clarify that the exclusion for swaps with guaranteed affiliates for which variation margin is collected should not be limited to those swaps for which there is no threshold.

Third, the treatment of thresholds in the main text is inconsistent with how thresholds are treated for purposes of determining whether a swap is marked-to-market daily under the MSP calculation provisions of Commission Regulation 1.3(hhh). Under Regulation 1.3(hhh), a swap can be considered to be marked-to-market daily for purposes of the reduction in potential future exposure even if there is a threshold, though the threshold must count towards the total current

³² Guidance, 78 Fed. Reg. at 45,326-27.

³³ Guidance, 78 Fed. Reg. at 45,325 (July 26, 2013) (emphasis added).

uncollateralized exposure plus potential future exposure.³⁴ In the main text of the Guidance, the exception for swaps with foreign branches and guaranteed affiliates is not available for a swap for which there is a variation margin threshold. To the extent that the existence of a threshold requires a swap to be counted towards the MSP calculation, the amount of the threshold, rather than the full notional of the swap, should be counted towards the MSP calculation.³⁵

Issue 19: The Guidance contains several ambiguities and discrepancies in its discussion of which swaps are attributable to a guarantor.

Recommendation 19: The Guidance should clarify that a U.S. person subsidiary, rather than its non-U.S. person guarantor, should count toward the MSP threshold a transaction between the U.S. person and a non-U.S. person that is not a guaranteed affiliate or conduit affiliate.

The Commission should omit from the Guidance the reference to allowing a non-U.S. guarantor to not attribute to itself swaps of a U.S. person that is an MSP that the non-U.S. person guarantees. The Final Entity Definitions Rule already permits a guarantor to ignore positions of a guaranteed entity that is registered with the Commission as an MSP, so the reference is superfluous and confusing.

The Commission should either clarify or omit the phrase “so long as all of the swaps positions that would trigger MSP registration are subject to the MSP registration and regulatory requirements” in determining that swaps of non-U.S. persons that are guaranteed by other non-U.S. persons may be attributed to either the non-U.S. guarantor or the guaranteed non-U.S. person.

The Commission should clarify that a non-U.S. person is not required to count a swap towards its MSP threshold where the swap is attributed to the guarantor in all cases.

The main text of the Guidance provides:

[A]s applied to non-U.S. persons, where there is no guarantee or recourse to another person under the swap, the swap should generally be attributed to the person who enters into the swap, and there generally would be no attribution or aggregation of the swaps position with the swaps positions of the person’s affiliates. On the other hand, where the counterparty to the swap would have recourse to another person, such as a parent guarantor, the swap should generally be attributed to the person to whom there is recourse. Thus, if a U.S. person enters into a swap guaranteed by a non-U.S. person, the swap should generally be attributed to the non-U.S. person, and if a non-U.S. person enters into a swap

³⁴ Commission Regulation 1.3(hhh).

³⁵ We also note that the Commission’s margin requirements are not yet effective and do not otherwise require swap dealers to collect variation margin on swaps.

guaranteed by a U.S. person, the swap should generally be attributed to the U.S. person. . . .

[W]here the swaps of a U.S. person are guaranteed by a non-U.S. person, the Commission would consider the possibility that registration of the non-U.S. person would not be required if the U.S. person registers as an MSP, and there may be circumstances where registration of the U.S. person would be preferable. . . .

[T]he Commission would be willing to consider that the swaps positions of non-U.S. persons that are guaranteed by other non-U.S. persons may be attributed to either the non-U.S. guarantor or the guaranteed non-U.S. person so long as all of the swaps positions that would trigger MSP registration are subject to the MSP registration and regulatory requirements.³⁶

The summary of the Guidance provides:

A non-U.S. person (including a non-U.S. person that is a guaranteed or conduit affiliate) should consider the aggregate notional value of:

- (i) any swap position between it and a U.S. person;
- (ii) any swap position between it and a guaranteed affiliate (but its swap positions where its own obligations thereunder are guaranteed by a U.S. person should be attributed to that U.S. person and not included in the non-U.S. person's determination); and
- (iii) any swap position between another (U.S. or non-U.S.) person and a U.S. person or guaranteed affiliate, where it guarantees the obligations of the other person thereunder.³⁷

The main text of the Guidance is ambiguous and inconsistent with the text of the summary in the following respects:

- It is unclear from the summary whether a non-U.S. person must count for MSP threshold purposes a transaction between its U.S. person subsidiary and a non-U.S. person that is not a guaranteed affiliate or conduit affiliate. The reference to the non-

³⁶ Guidance, 78 Fed. Reg. at 45,326.

³⁷ Guidance, 78 Fed. Reg. at 45,326.

U.S. person guaranteeing the obligations “of the other person” creates ambiguity about whether the limitation to U.S. persons or guaranteed affiliates relates to the guaranteed person or to its counterparty. The Guidance should clarify that a U.S. person subsidiary, rather than its non-U.S. person guarantor, should count towards the MSP threshold a transaction between the U.S. person and a non-U.S. person that is not a guaranteed affiliate or conduit affiliate.

- It is unclear why the Guidance notes that the Commission will consider allowing a non-U.S. guarantor to not attribute to itself swaps of a U.S. person that is an MSP that the non-U.S. person guarantees, since the Final Entity Definitions Rule allows a guarantor to ignore positions of a guaranteed entity that is registered with the Commission as an MSP.³⁸ The Commission should omit this reference from the Guidance.
- It is unclear what is meant by the qualification “so long as all of the swaps positions that would trigger MSP registration are subject to the MSP registration and regulatory requirements” in determining that swaps of non-U.S. persons that are guaranteed by other non-U.S. persons may be attributed to either the non-U.S. guarantor or the guaranteed non-U.S. person. The Commission should either clarify or omit this phrase.
- It is unclear why the exclusion for a non-U.S. person from counting a swap toward its MSP threshold where such swap is attributed to the guarantor of the swap is included in prong (ii) of the summary but not in prong (i). The Commission should clarify that a non-U.S. person is not required to count a swap towards its MSP threshold where the swap is attributed to the guarantor in all cases.

D. Entity-Level Requirements

Issue 20: It is unclear whether swaps between a non-U.S. swap dealer or MSP and a guaranteed or conduit affiliate would be eligible for Substituted Compliance with respect to Second Category Entity-Level Requirements.

Recommendation 20: The Commission should confirm that Substituted Compliance is available for swaps between a non-U.S. swap dealer or MSP and all non-U.S. persons, including non-U.S. persons that are guaranteed or conduit affiliates.

The Guidance states that “with respect to SDR Reporting, the Commission interprets CEA section 2(i) such that substituted compliance may be available to non-U.S. swap dealers and non-U.S. MSPs (whether or not such swap dealers or MSPs are affiliates of or are guaranteed by U.S.

³⁸ Final Entity Definitions Rule, 77 Fed. Reg. at 30,689.

persons) for swaps with non-U.S. counterparties.”³⁹ To the contrary, two paragraphs prior, the Guidance states that “swap dealers or MSPs that are not U.S. persons generally would be eligible for substituted compliance only with respect to swaps where the counterparty is a non-U.S. person that is not a guaranteed or conduit affiliate.”⁴⁰ In addition, Appendix C states that substituted compliance for Second Category Entity-Level Requirements is only available for swaps between non-U.S. swap dealers or MSPs and non-U.S. persons that are not guaranteed or conduit affiliates. The Commission should confirm that Substituted Compliance is available for swaps between a non-U.S. swap dealer or MSP and a non-U.S. person, regardless of whether such non-U.S. person is a guaranteed or conduit affiliate.

Issue 21: The location of an entity’s principal place of business for purposes of prong (iii) of the U.S. person definition should not apply for other purposes under Commission regulations, including for Regulation 23.203(a)(1).

Recommendation 21: The Commission should clarify that a swap dealer or MSP’s “principal place of business” or “other principal office” for purposes of Regulation 23.203(a)(1) is a separate inquiry from the “principal place of business” test under the U.S. person definition.

Regulation 23.203(a)(1) requires a swap dealer or MSP to keep required records at “the principal place of business” or “other such principal office” as designated by the swap dealer or MSP. A swap dealer or MSP may keep its required records in accordance with 23.203(a)(1) at a location that is different from its principal place of business for purposes of the U.S. person definition. The Commission should clarify that a swap dealer or MSP’s “principal place of business” or “other principal office” for purposes of Regulation 23.203(a)(1) is a separate inquiry from the U.S. person definition “principal place of business.”

E. Transaction-Level Requirements

Issue 22: It is unclear why the 5% Exemption applies only to foreign branches outside of the Dealer Jurisdictions, and not to foreign branches in the Dealer Jurisdictions for which no comparability determination has been made, or for which a comparability determination has been made for some, but not all, requirements.

Recommendation 22: The 5% Exemption for foreign branches should be available in any jurisdiction where substituted compliance is not available for all requirements.

The Guidance provides that where a U.S. swap dealer or MSP transacts with a non-U.S. person (other than a guaranteed affiliate) through a foreign branch located outside of the Dealer Jurisdictions, the foreign branch may comply with local law, and not Transaction-Level Requirements, if the aggregate notional value of all of the swaps of the foreign branches in the

³⁹ Guidance, 78 Fed. Reg. at 45,349.

⁴⁰ Guidance, 78 Fed. Reg. at 45,349.

Dealer Jurisdictions does not exceed 5% of all of the U.S. Swap Dealer’s swaps (measured quarterly), and the U.S. swap dealer maintains records supporting that it meets the 5% condition (the “**5% Exemption**”).⁴¹ The 5% Exemption is only available to those foreign branches located outside of the Dealer Jurisdictions. Thus, where substituted compliance is not available for a foreign branch for all requirements in a Dealer Jurisdiction, the foreign branch would need to comply with U.S. rules for those requirements that have not been deemed comparable, even if it would not be subject to those rules if it was outside of the Dealer Jurisdictions. We believe that the same logic supporting the 5% Exemption applies to any jurisdiction for which a comparability determination has not yet been made, or for which a comparability determination has been made for some, but not all, requirements, whether or not the jurisdiction in question is a Dealer Jurisdiction. Thus, the 5% Exemption for foreign branches should be available in any jurisdiction where substituted compliance is not available for all requirements.

Issue 23: It is unclear whether the 5% Exemption is available to a U.S. swap dealer that chooses to comply with Title VII regulations in a sufficient number of jurisdictions to bring its remaining swap activity outside of the Non-Dealer Jurisdictions below the 5% threshold.

Recommendation 23: The Commission should clarify that a U.S. swap dealer can exclude from the 5% Exemption calculation all swap dealing in jurisdictions for which it complies with Title VII requirements.

A U.S. swap dealer may engage in more than 5% of its overall swap activity through branches outside of the Dealer Jurisdictions, but may have a subset of those branches whose aggregate activity would remain below the 5% threshold if the most active foreign branches were excluded. For example, a U.S. swap dealer may engage in 4% of its total activity in a branch in Jurisdiction A, 2% in Jurisdiction B and 2% in Jurisdiction C, each of which are located outside of a Dealer Jurisdiction. It is unclear whether, if the U.S. swap dealer voluntarily complies with U.S. law in Jurisdiction A, it can operate in Jurisdictions B and C under the 5% Exemption. The Commission should clarify that a U.S. swap dealer can exclude from the 5% Exemption calculation all swap dealing in jurisdictions for which it complies with Title VII requirements.

Issue 24: Appendix D contains two notes regarding the applicability of swap trading relationship documentation and portfolio compression requirements that are inconsistent with the main text of the Guidance and for which no explanation is given.

Recommendation 24: The Commission should delete the two notes from Appendix D.

The Guidance provides that Category A Transaction-Level Requirements, including swap trading relationship documentation and portfolio compression, do not apply to a transaction between a non-U.S. swap dealer or MSP and a non-U.S. person that is not a guaranteed or conduit affiliate. However, two notes to Appendix D state that:

⁴¹ Guidance, 78 Fed. Reg. at 45,351.

NOTES:

¹ The swap trading relationship documentation requirement applies to all transactions with registered swap dealers and MSPs.

² Participation in multilateral portfolio compression exercises is mandatory for dealer to dealer trades.

Neither the text of the Guidance nor Appendix D explains these notes or describes how either affects the application of these requirements as otherwise provided in the Guidance. The Commission should delete the two notes from Appendix D.

Issue 25: The reference in Appendix E to differential treatment of a U.S. swap dealer or MSP “when it solicits or negotiates through a foreign subsidiary or affiliate” is unclear.

Recommendation 25: The Commission should elaborate on the potential exclusion available from the external business conduct rules to a U.S. swap dealer or MSP “when it solicits and negotiates through a foreign subsidiary or affiliate.”

Appendix E includes a row addressing the applicability of Category B Transaction-Level Requirements (External Business Conduct Requirements) to a U.S. swap dealer or MSP “when it solicits and negotiates through a foreign subsidiary or affiliate.” This row states that Category B Transaction-Level Requirements do not apply to a U.S. swap dealer or MSP for transactions with foreign branches and non-U.S. persons when such U.S. swap dealer or MSP solicits or negotiates the swap through a foreign subsidiary and affiliate. However, there is no further discussion of this potential exclusion in the text of the Guidance. The Commission should elaborate on the potential exclusion available from Category B Transaction-Level Requirements to a U.S. swap dealer or MSP “when it solicits and negotiates through a foreign subsidiary or affiliate.”

Issue 26: The Guidance is inconsistent in exempting swaps with international financial institutions from the Transaction-Level Requirements.

Recommendation 26: The Commission should clarify that international financial institutions are not U.S. persons, or in the alternative, should clarify that non-U.S. swap dealers or MSPs and foreign branches need not comply with Transaction-Level Requirements for swaps with international financial institutions and that non-U.S. swap dealers or MSPs need not comply with the second category of Entity-Level Requirements in transactions with these institutions.

The Guidance does not provide an exclusion from the U.S. person definition for international financial institutions (“**IFIs**”). Instead, the Guidance provides that non-U.S. swap dealers and MSPs need not comply with Category A and B Transaction-Level Requirements for swaps with IFIs, even if the principal place of business of the IFI is located in the United States.⁴² The

⁴² Guidance, 78 Fed. Reg. at 45,353 n.531, 45,360 n.598.

Guidance further provides relief from only Category B Transaction-Level Requirements for foreign branches' transactions with IFIs⁴³ and relief for Non-Registrants' transactions with IFIs with respect to the requirements that apply to transactions between Non-Registrants.⁴⁴ Not included in the Guidance, however, is relief from: (i) Category A Transaction-Level Requirements for foreign branches for swaps with IFIs and (ii) Second Category Entity-Level Requirements for non-U.S. swap dealers and MSPs for swaps with IFIs. The Commission should clarify that international financial institutions are not U.S. persons or, in the alternative, it should clarify that non-U.S. swap dealers and MSPs and foreign branches need not comply with Transaction-Level Requirements for swaps with international financial institutions and that non-U.S. swap dealers and MSPs need not comply with the second category of Entity-Level Requirements in transactions with these institutions.

Issue 27: The Guidance is unclear as to whether substituted compliance is available for a swap in which one of the counterparties is eligible for substituted compliance and the other is not.

Recommendation 27: The Commission should clarify that both parties may use substituted compliance for a swap where either is eligible for substituted compliance.

Under the Guidance, there are some situations in which one counterparty to a transaction, but not both, appears eligible to use substituted compliance. The Guidance does not clarify the eligibility of such a transaction for substituted compliance treatment. The Commission should clarify that both parties may use substituted compliance for a swap where either is eligible for substituted compliance.

F. Swaps Between Non-U.S. Non-Registrants

Issue 28: Appendix F mischaracterizes the requirements applicable to swaps between Non-U.S. Non-Registrants where one or neither is a guaranteed or conduit affiliate.

Recommendation 28: The Commission should amend Appendix F to reflect that Large Trader Reporting and the conditions of the inter-affiliate exemption, if it is elected, may apply to such transactions.

Appendix F provides that no requirements apply where one or neither Non-U.S. Non-Registrant is a guaranteed or conduit affiliate. The text of the Guidance, however, requires compliance with Large Trader Reporting and compliance with the conditions of the inter-affiliate exemption, to the extent it is elected, for each of these counterparty scenarios. The Commission should amend Appendix F to reflect that Large Trader Reporting and the conditions of the inter-affiliate exemption, if it is elected, may apply to such transactions.

⁴³ See Guidance, 78 Fed. Reg. at 45,360 n.595.

⁴⁴ Guidance, 78 Fed. Reg. at 45,361 n.605.

Issue 29: The Guidance does not allow Non-U.S. Non-Registrants to benefit from substituted compliance for swap data recordkeeping requirements for transactions with U.S. person counterparties.

Recommendation 29: As is the case for non-U.S. swap dealers and MSPs, the Commission should allow Non-U.S. Non-Registrants to comply with the Entity-Level Non-Registrant Requirements through substituted compliance regardless of the U.S. person status of a Non-U.S. Non-Registrant’s counterparty.

The Guidance makes substituted compliance available to Non-Registrants only for transactions between Non-Registrants that are both either guaranteed or conduit affiliates, rather than making substituted compliance available for all Non-Registrant Requirements. Thus, a Non-U.S. Non-Registrant could not rely on substituted compliance to meet its obligations under the Commission’s swap recordkeeping requirements when transacting with a U.S. person counterparty. In contrast, non-U.S. swap dealers and MSPs may use substituted compliance for Entity-Level Requirements, including swap recordkeeping, regardless of the U.S. person status of the counterparty to the transaction. Where a foreign regulatory regime has been deemed comparable by the Commission, there appears to be no policy basis for allowing Non-U.S. swap dealers and MSPs, but not their Non-Registrant counterparts, to comply with local law that is comparable to the Commission’s regulations. The Commission should allow Non-U.S. Non-Registrants to comply with the Entity-Level Non-Registrant Requirements through substituted compliance regardless of the U.S. person status of a Non-U.S. Non-Registrant’s counterparty.

III. Technical Fixes to the Exemptive Order and the Guidance

Issue 30: The Exemptive Order and Guidance include additional technical issues.

Recommendation 30: The Commission should issue a correction addressing these issues.

Technical fixes for the Exemptive Order:

- The Exemptive Order is ambiguous as to whether swaps that are cleared, but are not required to be cleared, are meant to be included in the relief from the clearing-related requirements provided in paragraphs 8 and 12, which cover “a swap that is subject to the clearing requirement under the CEA” Specifically, if a non-U.S. swap dealer or MSP voluntarily clears a swap, it is possible to read paragraphs 8 and 12 to say that the swap would not be subject to the phase-in period for clearing submission timing requirements of Commission Regulation 23.506.⁴⁵ The Commission should clarify that a swap voluntarily submitted for clearing, rather than subject to mandatory clearing, would be eligible for the phase-in period.

⁴⁵ Exemptive Order, 78 Fed. Reg. at 43,794-95.

- It is unclear whether there is any substantive implication from the limitation of the relief for non-U.S. swap dealers and MSPs from Transaction-Level Requirements to a swap that is not subject to mandatory clearing and not subject to mandatory trade execution, even though a swap cannot be subject to mandatory trade execution unless it is subject to mandatory clearing. The Guidance should omit the reference to mandatory trade execution.

Technical fixes for the Guidance:

- Commission Regulation 23.205, which imposes recordkeeping and compliance requirements on swap dealers and MSPs in connection with Part 43 real-time reporting, is included as a Transaction-Level Requirement. However, the analogous rule relating to recordkeeping and compliance requirements for swap dealers and MSPs in connection with Part 45 SDR reporting requirements, Commission Regulation 23.204, is omitted from both the Entity-Level and Transaction-Level Requirements lists.
- At 78 Fed. Reg. 45,319, there is a missing word or phrase as follows: “. . . swaps positions above the MSP threshold, entered into [sic] such non-U.S. persons with other non-U.S. persons”⁴⁶
- At 78 Fed. Reg. 45,338, which discusses the First Category Entity-Level Requirements, there is an incorrect reference to Part 43, which is a Transaction-Level Requirement, instead of Part 45, which is a First Category Entity-Level Requirement. The text should be corrected as follows: “. . . except that the Commission’s policy is to treat swap data recordkeeping under part ~~4543~~ and part 46 of the Commission’s regulations”⁴⁷
- At 78 Fed. Reg. 45,324, there is a missing word or phrase as follows: “. . . then it is appropriate to generally permit such non-U.S. [sic] not to count its swap dealing transactions”⁴⁸
- In row 2, column 3 of Appendix D, the reference to footnote 2 should be omitted. Both the main text of the Guidance and footnote 2 itself make clear that the 5% exemption is not available for transactions with guaranteed or conduit affiliates.

⁴⁶ Guidance, 78 Fed. Reg. at 45,319.

⁴⁷ Guidance, 78 Fed. Reg. at 45,338.

⁴⁸ Guidance, 78 Fed. Reg. at 45,324.

**Summary Chart of Recommendations in Response to
Issues Presented in the Exemptive Order and Guidance**

Issue Number	Issues and Recommendations	Page in Letter
Issues Presented by the Final Exemptive Order		
Issue 1	<p>Issue: The short phase-in period for market participants in jurisdictions that have requested substituted compliance determinations is intended to allow market participants to delay compliance with U.S. rules while such substituted compliance determinations are being made. However, we do not believe the phase-in period will be sufficiently long to allow the Commission to complete comparability determinations. As a result, it is possible that market participants could be required to engage in significant operational builds in order to comply with the Commission’s regulations for the short period of time between the expiration of the Exemptive Order and the availability of substituted compliance.</p> <p>Recommendation: The Commission should avoid an unnecessary “gap” period by extending the exemptive relief available in jurisdictions where the Commission has received requests for a substituted compliance determination until the Commission has had an opportunity to assess whether the application will be granted and the phase-in period has expired. The Commission should provide the same relief where it or its staff is considering making an essentially identical determination.</p>	A-1
Issue 2	<p>Issue: The Exemptive Order provides non-U.S. swap dealers, non-U.S. MSPs and foreign branches in jurisdictions that have submitted requests for a substituted compliance determination until the earlier of December 21, 2013 and 30 days after a substituted compliance determination is made to come into compliance with most U.S. swap regulatory requirements. Thirty days is an unrealistically short period for market participants to come into compliance with a substituted compliance determination, given that market participants may need to adapt to a Commission determination that a foreign jurisdiction’s requirement is not comparable with the analogous U.S. requirement or come into compliance with conditions the Commission places on the substituted compliance determination.</p>	A-2

Issue Number	Issues and Recommendations	Page in Letter
	<p>Recommendation: The Commission should provide market participants with at least 90 days after a substituted compliance determination has been made to come into compliance with that determination or Commission rules, as applicable.</p>	
Issue 3	<p>Issue: Full compliance with the Commission’s swap regulations, as interpreted under the Guidance, requires market participants to engage in two serial processes. First, market participants must determine which regulatory requirements apply to them and their counterparties. This determination will require them to collect significant new information to determine their and their counterparties’ status as U.S. persons, <i>bona fide</i> foreign branches, guaranteed affiliates or conduit affiliates. Once this first stage is complete, the second stage, implementation of the new requirements, can begin. As evidenced by the Commission’s phased-in compliance dates for the underlying regulations, significant time is needed for such implementation, including for operational builds and execution of documentation with counterparties to which the rules newly apply. The phase-in periods provided by the Exemptive Order are far too short for market participants to complete these two processes.</p> <p>Recommendation: The Commission should provide market participants with at least until the expiration of the Exemptive Order on December 21, 2013 to complete the first stage of the compliance process—categorization of themselves and their counterparties to determine which requirements apply under the Guidance. The Commission should provide for market participants to come into compliance with newly applicable requirements until March 31, 2014.</p>	A-3
Issue 4	<p>Issue: The Exemptive Order imposes new conditions on foreign branch transactions with no phase-in period or notice. These conditions may require foreign branches (and the U.S. swap dealers of which they are a part) to engage in information collection efforts and restructure their operations to meet the conditions. However, the Commission has provided no phase-in period for the new conditions.</p> <p>Recommendation: The Exemptive Order should be amended to provide a phase-in period for the foreign branch conditions, both for the</p>	A-4

Issue Number	Issues and Recommendations	Page in Letter
	foreign branches themselves and for their counterparties, that expires on March 31, 2014.	
Issue 5	<p>Issue: Under the January Order, non-U.S. swap dealers were not required to comply with the Commission’s Large Trader Reporting requirements. The Exemptive Order, without notice, applies these rules immediately, providing no phase-in period for non-U.S. swap dealers to build the necessary operational, technological and legal infrastructure.</p> <p>Recommendation: The Exemptive Order should be amended to allow phased-in compliance with Large Trader Reporting requirements so that these requirements come into effect after March 31, 2014.</p>	A-5
Issue 6	<p>Issue: Phased implementation of SDR reporting for non-U.S. swap dealers and MSPs is newly and immediately conditioned on compliance with Commission recordkeeping requirements.</p> <p>Recommendation: The phase-in for SDR reporting should be available to a qualifying non-U.S. swap dealer or MSP that keeps swap data records in accordance with the rules of the home jurisdiction of a non-U.S. swap dealer or MSP.</p>	A-6
Issue 7	<p>Issue: Foreign branches outside the Dealer Jurisdictions generally have smaller operations and will face greater challenges in implementing U.S. rules than those in the Dealer Jurisdictions. However, the phase-in period for Transaction-Level Requirements to foreign branches outside of the Dealer Jurisdictions is shorter than the period provided to foreign branches in the Dealer Jurisdictions.</p> <p>Recommendation: Foreign branches outside of the Dealer Jurisdictions should have a phase-in period at least equal to that of foreign branches in the Dealer Jurisdictions.</p>	A-7
Issue 8	Issue: The phase-in period for application of the clearing requirement to certain swap transactions is insufficient.	A-7

Issue Number	Issues and Recommendations	Page in Letter
	Recommendation: The phase-in period for the clearing requirement should be extended until March 31, 2014.	
Issue 9	Issue: While the Guidance imposes new SDR reporting and recordkeeping requirements on certain non-U.S. person Non-Registrants, the Exemptive Order provides no phase-in for these Non-Registrants to come into compliance.	A-8
	Recommendation: The Commission should provide Non-Registrants until March 31, 2014 to comply with SDR reporting and recordkeeping requirements to the extent such requirements were not applicable under the January Order.	
Issue 10	Issue: The Commission provides no phase-in for counterparties whose status as a U.S. person, guaranteed affiliate, conduit affiliate or foreign branch changes over time.	A-9
	Recommendation: The Commission should provide a 90-day phase-in period for a market participant whose status in these categories changes to be treated in accordance with its new categorization.	
Issues Presented by the Guidance		
<i>U.S. Person Definition</i>		
Issue 11	Issue: The fact that the U.S. person definition “generally includes, but is not limited to” enumerated prongs creates significant uncertainty as to which entities are U.S. persons.	A-10
	Recommendation: The Commission should remove the language “generally includes, but is not limited to” and the related facts and circumstances tests from the U.S. person definition.	
Issue 12	Issue: The summary of the U.S. person definition in the Guidance does not seem to follow the clear, definitive statement in the main text of the Guidance that publicly offered funds not offered to U.S. persons are exempt from all prongs of the U.S. person definition.	A-10

Issue Number	Issues and Recommendations	Page in Letter
	<p>Recommendation: The Commission should clarify its U.S. person definition to reflect its determination that a collective investment vehicle that is publicly offered only to non-U.S. persons and is not offered to U.S. persons does not fall within any of the prongs of the U.S. person definition.</p>	
Issue 13	<p>Issue: The Guidance does not discuss how often a market participant must confirm its counterparty’s status as a U.S. person, guaranteed affiliate, conduit affiliate or foreign branch.</p>	A-11
	<p>Recommendation: The determination of a swap counterparty’s status should be made at the inception of the swap based on a representation from the counterparty at that time.</p>	
<i>Swap Dealer De Minimis Calculation</i>		
Issue 14	<p>Issue: The main text of the Guidance includes an explicit exclusion from the <i>de minimis</i> calculation for non-U.S. persons transacting with conduit affiliates even though swap dealing activity with conduit affiliates is not required to be counted in the first instance.</p>	A-12
	<p>Recommendation: The Commission should remove the reference to conduit affiliates in the exclusion from the <i>de minimis</i> calculation.</p>	
Issue 15	<p>Issue: A non-U.S. person is not required to count swap dealing activity with guaranteed affiliate counterparties if, among other exclusions, the guaranteed affiliate “is not a swap dealer and itself engages in de minimis swap dealing activity and ... is affiliated with a swap dealer.” The Guidance does not clarify what it means for the guaranteed affiliate to “[engage] in de minimis swap dealing activity.”</p>	A-12
	<p>Recommendation: The Commission should clarify that a guaranteed affiliate will be considered to “itself [engage] in de minimis swap dealing activity” if it (i) engages in no swap dealing activities, (ii) engages in swap dealing activities below the <i>de minimis</i> threshold or (iii) has exceeded the <i>de minimis</i> threshold but has represented that it intends to register as a swap dealer by two months after the end of the</p>	

Issue Number	Issues and Recommendations	Page in Letter
	month in which it exceeds the <i>de minimis</i> threshold, which is the date on which it is required to register as a swap dealer.	
<i>MSP Calculation</i>		
Issue 16	<p>Issue: The description of swaps required to be counted by non-U.S. persons that are guaranteed affiliates and conduit affiliates set out in the main text of the Guidance is ambiguous and inconsistent with the text of the summary in several respects.</p>	A-13
	<p>Recommendation: The Guidance should clarify that guaranteed swaps should not be counted twice for MSP threshold purposes and that only swaps actually guaranteed by a guarantor must be attributed to the guarantor.</p>	
Issue 17	<p>Issue: The exclusions from the MSP threshold available to non-U.S. persons are limited to guaranteed affiliates and do not seem to be available to conduit affiliates.</p>	A-14
	<p>Recommendation: The Guidance should provide that the exclusions from counting toward the MSP threshold that are available to “a non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity” are also available to a conduit affiliate.</p>	
Issue 18	<p>Issue: The exclusions from the MSP threshold available to a non-U.S. person (that is not a guaranteed or conduit affiliate) for a swap between the non-U.S. person and a guaranteed affiliate are conditioned on the guaranteed affiliate’s collecting “daily variation margin, with no threshold, on its swaps with such non-U.S. person.”</p>	A-15
	<p>Recommendation: The Guidance should provide that the exclusions’ condition that the guaranteed affiliate must “collect daily variation margin, with no threshold, on its swaps with such non-U.S. person” is analyzed on an agreement-by-agreement, rather than a counterparty-by-counterparty, basis.</p> <p>Recommendation: The Guidance should provide that the exclusions for swaps with guaranteed affiliates for which variation margin is</p>	

Issue Number	Issues and Recommendations	Page in Letter
	<p>collected should not be limited to those swaps for which there is no threshold.</p> <p>Recommendation: The Guidance should provide that, to the extent that the existence of a threshold requires a swap to be counted toward the MSP calculation, the amount of the threshold, rather than the full notional amount of the swap, should be counted toward the MSP calculation.</p>	
Issue 19	<p>Issue: The Guidance contains several ambiguities and discrepancies in its discussion of which swaps are attributable to a guarantor.</p> <p>Recommendation: The Guidance should clarify that a U.S. person subsidiary, rather than its non-U.S. person guarantor, should count toward the MSP threshold a transaction between the U.S. person and a non-U.S. person that is not a guaranteed affiliate or conduit affiliate.</p> <p>Recommendation: The Commission should omit from the Guidance the reference to allowing a non-U.S. guarantor to not attribute to itself swaps of a U.S. person that is an MSP that the non-U.S. person guarantees. The Final Entity Definitions Rule already permits a guarantor to ignore positions of a guaranteed entity that is registered with the Commission as an MSP, so the reference is superfluous and confusing.</p> <p>Recommendation: The Commission should either clarify or omit the phrase “so long as all of the swaps positions that would trigger MSP registration are subject to the MSP registration and regulatory requirements” in determining that swaps of non-U.S. persons that are guaranteed by other non-U.S. persons may be attributed to either the non-U.S. guarantor or the guaranteed non-U.S. person.</p> <p>Recommendation: The Commission should clarify that a non-U.S. person is not required to count a swap towards its MSP threshold where the swap is attributed to the guarantor in all cases.</p>	A-17

Issue Number	Issues and Recommendations	Page in Letter
<i>Entity-Level Requirements</i>		
Issue 20	<p>Issue: It is unclear whether swaps between a non-U.S. swap dealer or MSP and a guaranteed or conduit affiliate would be eligible for Substituted Compliance with respect to Second Category Entity-Level Requirements.</p>	A-19
	<p>Recommendation: The Commission should confirm that Substituted Compliance is available for swaps between a non-U.S. swap dealer or MSP and all non-U.S. persons, including non-U.S. persons that are guaranteed or conduit affiliates.</p>	
Issue 21	<p>Issue: The location of an entity’s principal place of business for purposes of prong (iii) of the U.S. person definition should not apply for other purposes under Commission regulations, including for Regulation 23.203(a)(1).</p>	A-20
	<p>Recommendation: The Commission should clarify that a swap dealer or MSP’s “principal place of business” or “other principal office” for purposes of Regulation 23.203(a)(1) is a separate inquiry from the “principal place of business” test under the U.S. person definition.</p>	
<i>Transaction-Level Requirements</i>		
Issue 22	<p>Issue: It is unclear why the 5% Exemption applies only to foreign branches outside of the Dealer Jurisdictions, and not to foreign branches in the Dealer Jurisdictions for which no comparability determination has been made, or for which a comparability determination has been made for some, but not all, requirements.</p>	A-20
	<p>Recommendation: The 5% Exemption for foreign branches should be available in any jurisdiction where substituted compliance is not available for all requirements.</p>	
Issue 23	<p>Issue: It is unclear whether the 5% Exemption is available to a U.S. swap dealer that chooses to comply with Title VII regulations in a sufficient number of jurisdictions to bring its remaining swap activity outside of the Non-Dealer Jurisdictions below the 5% threshold.</p>	A-21

Issue Number	Issues and Recommendations	Page in Letter
	<p>Recommendation: The Commission should clarify that a U.S. swap dealer can exclude from the 5% Exemption calculation all swap dealing in jurisdictions for which it complies with Title VII requirements.</p>	
Issue 24	<p>Issue: Appendix D contains two notes regarding the applicability of swap trading relationship documentation and portfolio compression requirements that are inconsistent with the main text of the Guidance and for which no explanation is given.</p>	A-21
	<p>Recommendation: The Commission should delete the two notes from Appendix D.</p>	
Issue 25	<p>Issue: The reference in Appendix E to differential treatment of a U.S. swap dealer or MSP “when it solicits or negotiates through a foreign subsidiary or affiliate” is unclear.</p>	A-22
	<p>Recommendation: The Commission should elaborate on the potential exclusion available from the external business conduct rules to a U.S. swap dealer or MSP “when it solicits and negotiates through a foreign subsidiary or affiliate.”</p>	
Issue 26	<p>Issue: The Guidance is inconsistent in exempting swaps with international financial institutions from the Transaction-Level Requirements.</p>	A-22
	<p>Recommendation: The Commission should clarify that international financial institutions are not U.S. persons, or in the alternative, should clarify that non-U.S. swap dealers or MSPs and foreign branches need not comply with Transaction-Level Requirements for swaps with international financial institutions and that non-U.S. swap dealers or MSPs need not comply with the second category of Entity-Level Requirements in transactions with these institutions.</p>	
Issue 27	<p>Issue: The Guidance is unclear as to whether substituted compliance is available for a swap in which one of the counterparties is eligible for substituted compliance and the other is not.</p>	A-23

Issue Number	Issues and Recommendations	Page in Letter
	<p>Recommendation: The Commission should clarify that both parties may use substituted compliance for a swap where either is eligible for substituted compliance.</p>	
<i>Swaps Between Non-U.S. Non-Registrants</i>		
Issue 28	<p>Issue: Appendix F mischaracterizes the requirements applicable to swaps between Non-U.S. Non-Registrants where one or neither is a guaranteed or conduit affiliate.</p>	A-23
	<p>Recommendation: The Commission should amend Appendix F to reflect that Large Trader Reporting and the conditions of the inter-affiliate exemption, if it is elected, may apply to such transactions.</p>	
Issue 29	<p>Issue: The Guidance does not allow Non-U.S. Non-Registrants to benefit from substituted compliance for swap data recordkeeping requirements for transactions with U.S. person counterparties.</p>	A-24
	<p>Recommendation: As is the case for non-U.S. swap dealers and MSPs, the Commission should allow Non-U.S. Non-Registrants to comply with the Entity-Level Non-Registrant Requirements through substituted compliance regardless of the U.S. person status of a Non-U.S. Non-Registrant’s counterparty.</p>	
Technical Fixes to the Exemptive Order and the Guidance		
Issue 30	<p>Issue: The Exemptive Order and Guidance include additional technical issues.</p>	A-24
	<p>Recommendation: The Commission should issue a correction addressing these issues.</p>	

About the Signatories

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