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March 22, 2024

Mr. Christopher Kirkpatrick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street NW  
Washington, DC 20581

**Re: Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Capital and Financial Reporting Requirements of the United Kingdom and Regulated by the United Kingdom Prudential Regulation Authority**

Dear Mr. Kirkpatrick:

The Institute of International Bankers (“**IIB**”), International Swaps and Derivatives Association (“**ISDA**”) and Securities Industry and Financial Markets Association (“**SIFMA**”, and together with IIB and ISDA, the “**Associations**”)¹ appreciate the opportunity to comment on the above-captioned notice by the Commodity Futures Trading Commission (“**CFTC**” or “**Commission**”) regarding an application submitted by the Associations on behalf of registered nonbank swap dealers² (“**nonbank SDs**”) subject to capital and financial reporting requirements of the United Kingdom (“**UK**”), which are licensed as investment firms and designated for prudential supervision by the UK Prudential Regulation Authority (“**PRA**”) (“**PRA-designated UK nonbank SDs**”) requesting that the CFTC determine that they may comply with certain capital and financial reporting requirements under the Commodity Exchange Act (“**CEA**”) and Rules 23.101 and 23.105(d)–(e) thereunder (the “**Commission Capital & Reporting Requirements**”)³ via compliance with corresponding capital and financial reporting requirements of the UK PRA (the “**UK PRA Capital & Reporting Requirements**”), and the proposed order (the “**UK PRA Order**”) providing for the conditional substituted compliance in connection with the application (together, the “**Proposal**”).⁴

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¹ See Appendix for more information on the Associations.

² As used herein, a “nonbank” SD refers to an SD that does not have a Prudential Regulator as defined in Section 1a(39) of the CEA.

³ See *Capital Requirements for Swap Dealers and Major Swap Participants*, 85 FR 57462 (Sept. 15, 2020).

⁴ See *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Capital and Financial Reporting*

The Associations support the Proposal and agree with the Commission’s overall analysis of and determination of comparability of the Commission’s Capital & Reporting Requirements and the UK PRA Capital & Reporting Requirements. The Proposal reflects a thoughtful, holistic approach to substituted compliance. The Proposal includes requests for comment on several specific questions, which the Associations address below.

I. The UK PRA Capital & Reporting Requirements’ Minimum Capital Levels Reflect Similar Regulatory Concerns & Lead to Comparable Regulatory Outcomes as the Commission’s Capital & Reporting Requirements

The Commission seeks public comment on whether the minimum capital requirements under the UK PRA Capital & Financial Reporting Requirements are comparable in purpose and effect to those under the Commission’s requirements. Specifically, the Commission seeks comment on whether the requirements under the UK PRA Capital & Reporting Requirements that PRA-designated UK nonbank SDs calculate an operational risk exposure as part of the firm’s total risk exposure amount and meet separate liquidity requirements are sufficiently comparable in purpose and effect to the CFTC’s requirement for a nonbank SD to hold regulatory capital equal to or greater than 8 percent of its uncleared swap margin amount.<sup>5</sup>

The Commission notes that “[t]he intent of the minimum capital requirement based on a percentage of the nonbank SD’s uncleared margin was to establish a minimum capital requirement that would help ensure that the nonbank SD meets all of its obligations as a SD to market participants, and to cover potential operational risk, legal risk, and liquidity risk in addition to the risks associated with its trading portfolio.”<sup>6</sup> The Associations believe the UK PRA Capital & Reporting Requirements’ minimum capital levels are sound, reflect similar regulatory concerns and lead to comparable regulatory outcomes as the Commission Capital & Reporting Requirements.

The UK PRA’s capital framework imposes bank-like capital requirements that, consistent with the Basel Committee on Banking Supervision international framework for bank capital requirements, requires a PRA-designated UK nonbank SD to calculate the firm’s total risk exposure amount comprised of risk weighted on-balance sheet and off-balance sheet assets and exposures. The categories of risk charges include those reflecting market risk, credit risk, settlement risk, credit valuation adjustment risk of OTC derivatives, and operational risk. PRA-designated UK nonbank SDs are required to hold and maintain regulatory capital ratios expressed as a percentage of total risk exposure amount: (1) a common equity tier 1 capital ratio of 4.5 percent; (2) a tier 1 capital ratio of 6 percent; and (3) a total capital ratio of 8 percent. In addition, PRA-designated UK nonbank SDs are required to maintain a capital conservation buffer of common equity

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*Requirements of the United Kingdom and Regulated by the United Kingdom Prudential Regulation Authority*, 89 Fed. Reg. 8026 (Feb 5, 2024).

<sup>5</sup> See *Id.* At 8047.

<sup>6</sup> See *Id.* At 8040.

tier 1 capital equal to 2.5 percent of the firm’s total risk exposure, separate and independent of the common equity tier 1 capital used to meet the requirement within the 8 percent core capital requirement. Further, a PRA-designated nonbank SD may also be subject to firm specific countercyclical capital buffer requiring an additional amount of common equity tier 1 capital.

PRA-designated UK nonbank SDs that hold significant amounts of non-UK assets are also subject to a leverage ratio floor, which requires each firm to maintain tier 1 capital (aggregate common equity tier 1 capital and additional tier 1 capital) of at least 3.25 percent of on-balance sheet and off-balance sheet exposures without regard to risk weighting. In addition to the minimum leverage ratio of 3.25%, there are two buffers in the leverage ratio framework: the countercyclical leverage ratio buffer and the additional leverage ratio buffer to reflect systemic importance. These requirements are intended to prevent excessive leverage and complement the risk-based minimum capital requirements.

UK PRA capital requirements also impose separate liquidity requirements that are designed to ensure that each PRA-designated UK nonbank SD has sufficient liquidity to fund their operations over various time horizons, including making timely payments to customers and counterparties. Firms are required to hold sufficient liquidity to meet expected obligations under gravely stressed conditions for 30 days and to hold diverse stable instruments sufficient to meet long-term obligations under normal and stressed conditions. Further, they are required to maintain robust strategies, policies, processes, and systems for the identification of liquidity risk over appropriate time horizons, including intra-day.

In addition, the Bank of England, in its role as resolution authority, requires certain investment firms, including PRA-designated UK nonbank SDs to satisfy a firm-specific minimum requirement for own funds and eligible liabilities (“MREL”) if they meet certain requirements. The MREL requirement is separate from the minimum capital requirements imposed on PRA-designated UK nonbank SDs described above and is designed to ensure that firms subject to the requirement, maintain, at all times, sufficient eligible instruments to facilitate the implementation of the preferred resolution strategy. The MREL is intended to permit loss absorption, where appropriate, such that the PRA-designated UK nonbank SD’s capital ratio could be restored to the level necessary for compliance with its capital requirement. The MREL is expressed as the sum of two components: the loss absorption amount, which is equal to a firm’s capital requirement plus its capital buffers and the recapitalization amount.

Considering all of the above, although the UK PRA capital framework does not have a direct analogue to the 8 percent uncleared swap margin requirement, it has various other measures that achieve the same regulatory objective of ensuring that an SD maintains an amount of capital that is sufficient to cover the full range of risks a PRA-designated UK nonbank SD may face.

The Associations believe a similar analysis leads to the same answer in reference to the currently pending capital substituted applications for Japan, Mexico and the European Union (“EU”). As we noted in our responses to the Commission’s proposed orders and requests for comment in regard to those three capital frameworks, although they are not identical to the Commission’s and do not include an 8% of swap margin requirement, we support the finding that taken as a whole, they all achieve the same regulatory objective of ensuring nonbank SDs maintain sufficient capital to cover the full range of risks.<sup>7</sup>

## II. Technical Comments on Notice Filing Conditions

In its proposed order, the Commission requires a PRA-designated UK nonbank SD to comply with certain specified UK laws and regulations, as well as enumerated conditions, to be able to rely on substituted compliance. Below, the Associations provide technical comments and recommendations regarding several of those conditions.

Condition 4 requires PRA-designated UK SDs to comply with the Banking Act 2009. As SIFMA highlighted in its October 5, 2023 letter, internal MREL requirements are set by the Bank of England under its MREL “policy for exercising its power to direct relevant persons to maintain a minimum requirement for own funds and eligible liabilities (MREL) under section 3A(4) and (4B) of the Banking Act 2009.”<sup>8</sup> Because the reference to the Banking Act 2009 is included solely because it imposes MREL on the PRA-designated nonbank SDs and, not in its entirety, we recommend refining the requirement to this specific point by adding as below “with regard to the minimum requirements for own funds and eligible liabilities.”

No.	Condition
4	The PRA-designated UK nonbank SD is subject to and complies with: ...the Banking Act 2009 and its secondary legislation <a href="#">with regard to minimum requirements for own funds and eligible liabilities</a> ,... (collectively the “UK PRA Capital Rules”).

<sup>7</sup> See IIB, ISDA and SIFMA letter dated Oct. 7, 2022 in response to the Commission’s *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination From the Financial Services Agency of Japan*, 87 Fed. Reg. 48092, (Aug. 8, 2022) (“**Proposed Japan Order**”); ISDA and SIFMA letter dated Feb. 13, 2023 in response to the Commission’s *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores*, 87 Fed. Reg. 76374 (Dec. 13, 2022) (“**Proposed Mexico Order**”); and IIB, ISDA and SIFMA letter dated Aug. 24, 2023 (“**EU Capital Sub Comp Letter**”) in response to the Commission’s *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union*, 88 Fed. Reg. 41774 (June 27, 2023) (“**Proposed EU Order**”).

<sup>8</sup> See SIFMA letter dated Oct. 5, 2023, responding to CFTC Staff Questions Regarding Substituted Compliance Application for UK Swap Dealers from CEA Sections 4s(e)–(f) and Rules 23.101 and 23.105(d)–(e), (p)(2), p. 5.

As drafted, three of the conditions, numbers 19, 20 and 21, present the practical challenge of potentially requiring notification prior to the discovery of the relevant failure. Condition 15 of the Proposed Mexico Order already contains our suggested language, “when it knows” to address this practical challenge.<sup>9</sup> The Associations have included to condition 15 in the Proposed Mexico Order in the chart below for reference.

No.	Condition
Mexico condition 15	The Mexican nonbank SD files a notice with the Commission and NFA within 24 hours of <b>when it knows</b> that its regulatory capital is below 120 percent of the minimum capital requirement under the Mexican Capital Rules. The Notice must be prepared in the English language. [ <b>emphasis added</b> ]
19	The PRA-designated UK nonbank SD files a notice with the Commission and NFA within 24 hours <del>if it fails</del> <u>of when it knows it has failed</u> to maintain its minimum requirement for own funds and eligible liabilities (“MREL”), if the PRA-designated nonbank SD is subject to such requirement as set for the by the Bank of England pursuant to the Banking Act 2009, Section 3A and the Bank Recovery and Resolution (No. 2) Order 2014, Part 9;
20	The PRA-designated UK nonbank SD files a notice with the Commission and NFA within 24 hours of when the firm knew <del>or should have known</del> that its regulatory capital fell below 120 percent of its minimum capital requirement, comprised of the firm’s core capital requirements and any applicable capital buffer requirements. For purposes of the calculation, the 20 percent excess capital must be in the form of common equity tier 1 capital. [see below for further a recommendation regarding condition 20]
21	The PRA-designated UK nonbank SD files a notice with the Commission and NFA within 24 hours <del>if it fails</del> <u>of when it knows it has failed</u> to make or keep current the financial books and records.

<sup>9</sup> See Proposed Mexico Order, 76399. Similar comments were made by the International Bankers Association of Japan in its Oct. 6, 2022 letter commenting on the Proposed Japan Order (p.7).

Condition 20 sets an “early warning” level of 120 percent of regulatory capital to trigger a notification requirement. As drafted, however, a PRA-designated UK nonbank SD would calculate the early warning level by applying a buffer of 20 percent in excess capital, in the form of common equity tier 1 capital, on top of the roughly 30 percent capital conservation buffer (2.5 percent of total risk exposure also in the form of common equity tier 1 capital) above 8 percent of total risk exposure, the minimum total capital requirement under Pillar 1 under the UK PRA capital rules.<sup>10</sup> We believe that an aggregate notification trigger of 12.6 percent of total risk exposure is too high to achieve the very important regulatory goal of ensuring the CFTC and NFA are provided with sufficient warning if a PRA-designated UK nonbank SD becomes undercapitalized or experiences a decrease in its excess regulatory capital below a defined level. We therefore recommend that the CFTC set its trigger for notification level at 120 percent of the minimum total capital requirement, as it did in its proposed orders for Japan and Mexico.<sup>11</sup>

No.	Condition
20	The PRA-designated UK nonbank SD files a notice with the Commission and NFA within 24 hours of when the firm knew <del>or should have known</del> that its regulatory capital fell below 120 percent of its minimum <u>total</u> capital requirement, <del>comprised of the firm’s core capital requirements and any applicable capital buffer requirements</del> . For purposes of the calculation, the 20 percent excess capital must be in the form of common equity tier 1 capital.

<sup>10</sup> In addition, as discussed earlier in this letter, PRA-designated UK nonbank SDs are also subject to firm specific and other buffers, which would, under the requirement as drafted, result in an early warning level considerably higher than the 12.6 percent in our example.

<sup>11</sup> See Proposed Japan Order at 48115 and Proposed Mexico Order at 76399. We will submit supplemental comments to our EU Capital Sub Comp Letter on the parallel condition 21 in the Proposed EU Order.

Condition 22 establishes a notification requirement for the occurrence of four instances (sub paragraphs (i) – (iv)) of failures to post or pay initial and/or variation margin measured as a percent to a PRA-designated nonbank SD’s minimum capital requirement. We understand the term used - “minimum capital requirement” - to mean an amount equal to 8 percent of total risk exposure as required under Pillar 1 under the UK PRA capital rules and recommend using the term “minimum total capital requirement” for clarity.<sup>12</sup>

No.	Condition
22	<p>The PRA-designated UK nonbank SD files a notice with the Commission and NFA within 24 hours of the occurrence of any of the following:</p> <ul style="list-style-type: none"> <li>(i) a single counterparty, or group of counterparties under common ownership or control, fails to post required initial margin or pay required variation margin on uncleared swap and non-cleared security-based swap positions that, in the aggregate, exceeds 25 percent of the PRA-designated UK nonbank SD’s minimum <u>total</u> capital requirement;</li> <li>(ii) counterparties fail to post required initial margin or pay required variation margin to the PRA-designated UK nonbank SD for uncleared swap and non-cleared security based swap positions that, in the aggregate, exceeds 50 percent of the PRA-designated UK nonbank SD’s minimum <u>total</u> capital requirement;</li> <li>(iii) the PRA-designated UK nonbank SD fails to post required initial margin or pay required variation margin for uncleared swap and non-cleared security-based swap positions to a single counterparty or group of counterparties under common ownership and control that, in the aggregate, exceeds 25 percent of the PRA-designated UK nonbank SD’s minimum <u>total</u> capital requirement; or</li> <li>(iv) the PRA-designated UK nonbank SD fails to post required initial margin or pay required variation margin to counterparties for uncleared swap and non-cleared security-based swap positions that, in the aggregate, exceeds 50 percent of the PRA-designated UK nonbank SD’s minimum <u>total</u> capital requirement;</li> </ul>

<sup>12</sup> We will submit supplemental comments to our EU Capital Sub Comp Letter on the parallel condition 23 in the Proposed EU Order.

In regard to Condition 24, we reiterate the recommendation in our response to the Proposed EU Order to remove “proposed or final” before “material changes” because the notification should be triggered by actual material changes to the relevant rules.<sup>13</sup> Upon further consideration, however, we also believe it is confusing to differentiate between rules that are “imposed on” and those that “apply to” PRA-designated UK nonbank SDs, and therefore recommend deleting the duplicative clause as provided below.<sup>14</sup>

No.	Condition
24	<p>The PRA-designated UK nonbank SD or an entity acting on its behalf notifies the Commission of any material changes to the information submitted in the application for capital comparability determination, including, but not limited to, material changes to the UK PRA Capital Rules or UK PRA Financial Reporting Rules imposed on PRA-designated UK nonbank SDs; <del>or the PRA’s supervisory authority or supervisory regime over PRA-designated UK nonbank SDs; and proposed or final material changes to the UK PRA Capital Rules or UK PRA Financial Reporting Rules as they apply to PRA-designated UK nonbank SDs;</del> and</p>

### III. Compliance Date: At Least 6 Months from Issuance of Comparability Order

The Commission also seeks public comment on the compliance dates for the reporting conditions that the UK PRA Order imposes on PRA-designated UK nonbank SDs. The Associations respectfully request the Commission set the compliance date at least six months following the issuance of the final comparability determination order. We believe a six-month period is necessary to adequately prepare for compliance with the reporting conditions.

\* \* \*


<sup>13</sup> See EU Capital Sub Comp Letter, p. 5.

<sup>14</sup> We note that these same edits should be made to condition 25 in the Proposed EU Order, condition 20 in the Proposed Mexico Order and condition 21 in the Proposed Japan Order.



The Associations appreciate the opportunity to comment on the Proposal and the Commission's consideration of our views. We look forward to continuing dialogue with the Commission regarding substituted compliance. If you have questions or would like additional information, please contact the undersigned.

Very truly yours,



Stephanie Webster  
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IIB



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Global Head of Public Policy  
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Kyle L Brandon  
Managing Director, Head of Derivatives Policy  
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cc: The Honorable Rostin Behnam, Chairman  
The Honorable Kristin N. Johnson, Commissioner  
The Honorable Christy Goldsmith Romero, Commissioner  
The Honorable Summer K. Mersinger, Commissioner  
The Honorable Caroline D. Pham, Commissioner  
Ms. Amanda Olear, Director, Market Participants Division  
Mr. Thomas Smith, Deputy Director  
Mr. Rafael Martinez, Associate Director  
Ms. Liliya Bozhanova, Special Counsel

## Appendix

The **Institute of International Bankers** represents internationally headquartered financial institutions from over thirty-five countries around the world doing business in the United States. The membership consists principally of international banks that operate branches, agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States. The IIB works to ensure a level playing field for these institutions, which are an important source of credit for U.S. borrowers and comprise the majority of U.S. primary dealers. These institutions enhance the depth and liquidity of U.S. financial markets and contribute greatly to the U.S. economy through direct employment of U.S. citizens, as well as through other operating and capital expenditures.

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