

CFTC Issues Interpretive Guidance Regarding the Cross-Border Application of US Swap Regulations

On July 12, 2013, the US Commodity Futures Trading Commission (“CFTC”) approved the issuance of an interpretive guidance and policy statement (the “Guidance”) regarding the cross-border application of the swaps provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).¹ Although the CFTC may continue to refine its approach to the cross-border regulation of swaps, the Guidance is intended to finalize the proposed interpretive guidance and policy statement issued on July 12, 2012 (the “Proposed Guidance”).² Like the Proposed Guidance before it, the Guidance represents the CFTC’s attempt to meet its statutory mandate to (1) regulate swaps that “have a direct and significant connection with activities in, or effect on, commerce of the United States” and (2) prevent the evasion of the swaps provisions of the Dodd-Frank Act.³

In brief, the Guidance: (1) defines “US person” and “non-US person,” which are key for applying the CFTC’s extraterritorial framework; (2) establishes the calculation and aggregation methodologies used for determining whether non-US persons engage in swap transactions at levels that trigger swap dealer (“SD”) or major swap participant (“MSP”) registration; (3) categorizes “Entity-Level Requirements” and “Transaction-Level Requirements” and describes their extraterritorial application; (4) discusses the “substituted compliance” framework; and (5)

describes the requirements applicable to non-registered swap participants (“Non-Registrants”).

The CFTC also issued an exemptive order (the “Order”) that effectively provides for the phased implementation of certain aspects of the Guidance.⁴ The Order, in many respects, builds upon relief granted in prior CFTC exemptive orders.⁵

Notably, the Guidance was issued solely by the CFTC, despite recent calls in Congress for a harmonized approach with respect to cross-border application of Title VII of the Dodd-Frank Act.⁶ While the Guidance states that the CFTC consulted with the US Securities and Exchange Commission (the “SEC”) and considered the SEC’s recently proposed rules and interpretive guidance that address the cross-border regulation of security-based swaps, the CFTC continues to chart a different course from that of the SEC (and non-US regulators).⁷

I. Definition of “US Person” and “Non-US Person”

US Person. Several commenters recommended that the CFTC adopt the definition of US person contained in the SEC’s Regulation S and limit the broad scope of the prefatory phrase “includes, but is not limited to” found in the Proposed Guidance. The CFTC rejected these comments and interprets the term “US person” largely the same as in the Proposed Guidance (except as noted below), and therefore more

broadly than the intervening definition contained in its December Order.⁸ The Guidance defines “US person” “generally to include, but not be limited to”:

- i. any natural person who is a resident of the United States;
- ii. any estate of a decedent who was a resident of the United States at the time of death (changed from Proposed Guidance by looking to the status of the decedent at the time of death instead of whether the estate is subject to US income tax);
- iii. any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a “legal entity”), in each case that is organized or incorporated under the laws of a state or the United States or having its principal place of business in the United States;⁹
- iv. any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension plan is primarily for non-US employees of such entity (changed from the Proposed Guidance by adding the non-US employee carve-out);
- v. any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust (changed from the Proposed Guidance by looking to whether US law governs/a US court has jurisdiction over a trust instead of whether a trust is subject to US income tax);
- vi. any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), except any commodity pool, pooled account, investment fund, or other

collective investment vehicle that is publicly offered only to non-US persons and not offered to US persons (changed from the Proposed Guidance by insertion of the exception for vehicles publicly offered only to non-US persons);

- vii. any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (changed from Proposed Guidance by requiring majority ownership by US persons with unlimited liability);¹⁰ and
- viii. any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi), or (vii) (changed from Proposed Guidance by inclusion of joint accounts).

The Guidance omits a prong from the Proposed Guidance that would have treated as a US person any commodity pool operated by a person subject to CFTC registration as a commodity pool operator.

The Guidance retains the “single entity” approach to branches and agencies and, thus, includes foreign branches and agencies of US persons as being covered by the “US person” definition, because branches “are neither separately incorporated nor separately capitalized and, more generally, the rights and obligations of a branch are rights and obligations of its principal entity.”¹¹ However, notwithstanding this adherence to the single entity doctrine, foreign branches and agencies of US SDs are, in certain contexts, treated differently from the US principal office (e.g., for *de minimis* calculation purposes, as discussed below).

Non-US Persons. “Non-US person” was not formally defined in the Proposed Guidance. As a clarification, the CFTC states in the Guidance that it will interpret the term “non-US person” to refer to any person that is not a “US person.”¹²

Timing. The Order states that market participants may continue to rely on the definition of a US person from the December Order until 75 days after publication of the Guidance in the Federal Register, i.e., October 9, 2013.¹³

II. SD and MSP Registration

SD De Minimis Calculation for US

Persons. The Guidance requires US persons, non-US persons who are “guaranteed affiliates” of a US person, and non-US persons who are “conduit affiliates” of a US person to count all of their swap dealing activity, whether with US or non-US counterparties, toward their *de minimis* threshold calculation.

SD De Minimis Calculation for Non-US

Persons. The Guidance provides that non-US persons who are not guaranteed or conduit affiliates of a US person generally should count only swaps with US persons (other than swaps with foreign branches of registered US SDs) and certain swaps with guaranteed affiliates of US persons toward the *de minimis* threshold.¹⁴ Non-US persons also may exclude cleared swaps that are anonymously entered into on a designated contract market (“DCM”), swap execution facility (“SEF”), or foreign board of trade (“FBOT”).

Foreign Branches. The Guidance undertakes to clarify what is meant by the term “foreign branch” and when a swap will be deemed to be “with the foreign branch” of a US SD. The two-part clarification is complex and generally requires a foreign branch to satisfy all of the conditions. A foreign branch of a US SD or US MSP generally would include, but is not limited to, any “foreign branch” of a US bank that:

- is subject to Regulation K or the FDIC’s International Banking Regulation (Part 347), or otherwise designated as a “foreign branch” by the US bank’s primary regulator;
- maintains accounts independently of the home office and of the accounts of other foreign branches, with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and
- is subject to substantive regulation in banking or financing in the jurisdiction where it is located.

A swap generally will be considered to be “with the foreign branch” of a US SD if the following conditions are satisfied:

- The employees negotiating and agreeing to the terms of the swap (or, if the swap is executed electronically, managing the execution of the swap) are located in the foreign branch or in another foreign branch of the US SD. Purely clerical or ministerial functions may be performed by US employees.
- The foreign branch or another foreign branch is the office through which the US SD makes and receives payments and deliveries under the swap pursuant to a master netting agreement, and the documentation of the swap specifies that the office for the US SD is the foreign branch.
- The swap is entered into by the foreign branch in its normal course of business.
- The swap is treated as a swap of the foreign branch for tax purposes.
- The swap is reflected in the local accounts of the foreign branch.

Affiliate Aggregation. Under the aggregation rules adopted in the Guidance, non-US persons will be required to include in their *de minimis* calculation the swap dealing activities of all US *and* non-US affiliates other than those that are registered as SDs. This represents an expansion of the CFTC’s prior aggregation rules for non-US persons because it includes US affiliates, whereas under the December Order, non-US

entities aggregated only with their non-US affiliates. The Guidance preserves the approach from the December Order of excluding the swap dealing activities of a registered SD from the *de minimis* calculation for other affiliated entities.¹⁵

MSP Threshold Calculations. The Guidance includes a complicated approach to the MSP calculation with respect to non-US persons. It would require non-US persons who are not guaranteed or conduit affiliates of US persons to include in their calculation the aggregate notional value of (i) any swap position with a US person; (ii) any swap position with a guaranteed affiliate of a US person; and (iii) any swap position between a person guaranteed by the non-US person and a US person or guaranteed affiliate of a US person. If the non-US person is a guaranteed affiliate of a US person, it would follow the same analysis except it would not have to include swaps with a guaranteed affiliate of a US person, because the first non-US person's guarantor would include the exposure in its own calculations.

The Guidance also provides that a non-US "financial entity" that is not a guaranteed affiliate of a US person would exclude from its MSP calculation exposure from a swap with a foreign branch of a US SD or guaranteed affiliate that is a SD if the swap is cleared or subject to daily margining. If the non-US person is not a financial entity, it may exclude from its MSP calculations swaps with foreign branches of US SDs or guaranteed affiliates that are SDs without condition.

For example, if a German bank enters into a swap with the London branch of a US swap dealer, the German bank would include the aggregate notional value of the swap in its MSP calculation unless the swap is cleared or subject to daily margining.

Timing. The Order states that market participants may continue to rely on the method for calculating the SD and MSP registration thresholds from the December Order until 75

days after the publication of the Guidance in the Federal Register, i.e., October 9, 2013. Going forward, if a non-US person must register as an SD because of changes made to the Guidance, they will not be required to register until two months after the end of the month in which the person exceeds the *de minimis* threshold.¹⁶

III. Entity-Level and Transaction-Level Requirements

Entity-Level Requirements. The Guidance generally adopts the framework of Entity-Level and Transaction-Level Requirements from the Proposed Guidance. Entity-Level Requirements are those that relate to the core operations of a firm and should be applied to the firm as a whole. The Guidance further divides the Entity-Level Requirements into two categories, the "First Category" and the "Second Category." The First Category of Entity-Level Requirements includes capital adequacy, chief compliance officer, risk management, and swap data recordkeeping under CFTC regulations 23.201 and 23.203 (except certain aspects of swap data recordkeeping relating to complaints and sales materials). The Second Category of Entity-Level Requirements consists of SDR reporting (including historical reporting), certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials under CFTC regulations 23.201(b)(3) and 23.201(b)(4) and large trader reporting.

The applicability of the Entity-Level Requirements to US and non-US SDs and MSPs is summarized in Appendix A to this Legal Update. Entity-Level Requirements, other than swap data recordkeeping, SDR reporting and large trader reporting, do not apply to Non-Registrants.

Transaction-Level Requirements. The Transaction-Level Requirements of Title VII, which apply on a transaction-by-transaction basis, are divided into "Category A" requirements and "Category B" requirements, as indicated below. The CFTC clarified in the

Guidance that the position limits and anti-manipulation provisions are neither Entity-Level nor Transaction-Level requirements, as they relate to market integrity and would apply regardless of the counterparty's status.

Category A of the Transaction-Level Requirements includes required clearing and swap processing, margining (and segregation) for uncleared swaps, mandatory trade execution, swap trading relationship documentation, portfolio reconciliation and compression, real-time public reporting, trade confirmation, and daily trading records. Category B of the Transaction-Level Requirements consists solely of the external business conduct standards.

Appendix B to this alert describes via a chart how the Category A and Category B Transaction-Level Requirements will be applied under the Guidance to US and non-US SDs and MSPs.¹⁷

IV. Substituted Compliance

Overview. “Substituted compliance” is compliance by non-US SDs and MSPs with local, non-US swap regulations determined to be comparable to US regulation by the CFTC, in place of compliance with US regulation. In describing the process by which the CFTC will make the necessary comparability determinations, the Guidance largely tracks the approach of the Proposed Guidance, although the CFTC has now expressed a clear willingness to focus on comparable, albeit undefined, outcomes rather than conducting a specific requirement-by-requirement comparison.

Eligibility. A non-US regulator, an individual or group of non-US entities, a US bank that is an SD or MSP with respect to its foreign branches, or a trade association composed of similarly-situated entities may apply to the CFTC for a comparability determination as to whether one or more of the thirteen categories of regulatory obligations are satisfied by comparable and comprehensive non-US regulatory requirements. This is an expansion of the

eligibility criteria from the Proposed Guidance in that the CFTC added trade associations to the list of persons eligible to request a comparability determination.

Comparability Analysis. The Guidance states that the CFTC will use an outcomes-based approach to review the requirements of a non-US jurisdiction for rules that are comparable to and as comprehensive as the requirements of the Dodd-Frank Act, but it will not require that the non-US jurisdiction have identical requirements. The CFTC will take into consideration all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and objectives of the relevant regulatory requirement(s), the comprehensiveness of the non-US regulator's supervisory compliance program, as well as the home jurisdiction's authority to support and enforce its oversight of the registrant.

However, if the CFTC finds that the non-US regulatory requirements lack critical elements, it will work with the non-US regulator and registrants in the jurisdiction to consider alternative approaches that may result in a determination that substituted compliance applies. These, alternative approaches may include (i) coordinating with the non-US regulators in developing appropriate regulatory changes or new regulations, particularly where changes or new regulations already are being considered or proposed by the non-US regulators or legislative bodies or (ii) including in the substituted compliance determination a description of the means by which certain swap market participants can achieve substituted compliance within the construct of the non-US regulatory regime.

The CFTC expects that, in connection with a determination that substituted compliance is appropriate, it would enter into an appropriate MOU or similar arrangement with the relevant non-US regulator(s), not only as to information-sharing and enforcement arrangements, but also for supervisory cooperation and coordination.¹⁸

Timing. Under the Order, non-US SDs and MSPs that are established in Australia, Canada, the European Union, Hong Kong, Japan or Switzerland (the “Six Jurisdictions”) do not need to comply with Entity-Level Requirements for which substituted compliance is possible before the earlier of December 21, 2013, or 30 days following the CFTC’s issuance of a substituted compliance determination. SDs and MSPs and foreign branches of a US SD or MSP located in one of the Six Jurisdictions may comply with mandatory home jurisdiction laws in lieu of any Transaction-Level Requirements for which substituted compliance is permitted (with some exceptions) until the earlier of December 21, 2013 or 30 days following the issuance of the relevant substituted compliance determination.¹⁹

Non-US SDs and non-US MSPs (including guaranteed and conduit affiliates) that are not located in one of the Six Jurisdictions may comply with any mandatory laws and regulations of the home jurisdiction where they are established when transacting swaps with a guaranteed affiliate of a US person, in lieu of any Transaction-Level Requirements for which substituted compliance would be possible under the Guidance, until October 9, 2013. Non-US foreign branches of US SDs and MSPs that are not located one of the Six Jurisdictions may comply with any mandatory laws and regulations of the home jurisdiction where they are established, in lieu of any Transaction-Level Requirements for which substituted compliance would be possible under the Guidance, until October 9, 2013.

V. Regulation of Non-Registrants

US Non-Registrant. If at least one party to the swap is a US person and neither party is an SD or MSP, both parties would be expected to comply with (i) clearing; (ii) trade execution; (iii) real-time public reporting; (iv) large trader reporting; (v) SDR reporting (including historical reporting); and (vi) swap data recordkeeping. Substituted compliance generally

would not be available. A swap anonymously executed on a DCM, SEF, or FBOT between two Non-Registrants that is cleared on a derivatives clearing organization (“DCO”) would not need to comply with the remainder of the Non-Registrant Requirements.

Non-US Non-Registrants. If both of the parties are non-US Non-Registrants, Title VII swap regulations generally would not apply to the transaction (with the limited exception of large trader reporting in the case of non-US clearing members with significant positions in swaps linked to specified US-listed physical commodity futures contracts).²⁰ If both of the parties are also guaranteed or conduit affiliates, they would be required to comply with (i) clearing; (ii) trade execution; (iii) real-time public reporting; (iv) large trader reporting; (v) SDR reporting (including historical reporting); and (vi) swap data recordkeeping, and all except the large trader reporting requirement would be eligible for substituted compliance.²¹

For more information about any of the issues raised in this Legal Update, please contact any of the following lawyers:

Joshua Cohn

+1 212 506 2539

jcohn@mayerbrown.com

Curtis A. Doty

+1 212 506 2224

cdoty@mayerbrown.com

Jerome J. Roche

+1 202 263 3773

jroche@mayerbrown.com

David R. Sahr

+1 212 506 2540

dsahr@mayerbrown.com

Donald S. Waack

+1 202 263 3165

dwaack@mayerbrown.com

Matthew Bisanz

+1 202 263 3434

mbisanz@mayerbrown.com

Endnotes

- ¹ Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) (the Guidance became effect on July 13, 2013, subject to the phase-in periods described in the exemptive order discussed below), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf>.
- ² *See* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214 (proposed July 12, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16496.pdf>. *See also* our Update “Proposed CFTC Guidance Regarding the Cross-Border Application of US Swap Regulations,” *available at* <http://www.mayerbrown.com/Proposed-CFTC-Guidance-Regarding-the-Cross-Border-Application-of-US-Swaps-Regulations-07-02-2012/>. The CFTC also proposed further guidance on certain aspects of the Proposed Guidance in December 2012. *See* Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 909 (Jan. 7, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-01-07/pdf/2012-31734.pdf>. *See also* our Update “CFTC Issues a Final, Time-Limited Exemptive Order and Proposes Further Guidance Regarding Cross-Border Regulation of Swaps,” *available at* <http://www.mayerbrown.com/CFTC-Issues-a-Final-Time-Limited-Exemptive-Order-and-Proposes-Further-Guidance-Regarding-Cross-Border-Regulation-of-Swaps-12-31-2012/>.
- ³ Section 2(i) of the Commodity Exchange Act (as amended by the Dodd-Frank Act).
- ⁴ Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 43,785 (July 22, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-07-22/pdf/2013-17467.pdf>. For more information, see our Update “The CFTC’s July 12, 2013 Cross-Border Exemptive Order,” *available at* <http://www.mayerbrown.com/The-CFTCs-July-12-2013-Cross-Border-Exemptive-Order-07-17-2013/>.
- ⁵ *See* Exemptive Order Regarding Compliance With Certain Swap Regulations, 77 Fed. Reg. 41,110 (July 12, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16498.pdf>, and Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013) (the “December Order”), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-01-07/pdf/2012-31736.pdf>. For more information, see our update “CFTC Proposes Phased Compliance Program for Certain Swaps,” *available at* <http://www.mayerbrown.com/CFTC-Proposes-Phased-Compliance-Program-for-Certain-Swaps/>.
- ⁶ *See, e.g.*, Swap Jurisdiction Certainty Act, H.R. 1256, 113th Cong. (2013), *available at* <http://hdl.loc.gov/loc.uscongress/legislation.113hr1256>.
- ⁷ Cross-Border Security-Based Swap Activities, Exchange Act Release No. 69,490, 78 Fed. Reg. 30,968 (proposed May 23, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf>.
- ⁸ The Guidance provides that parties may reasonably rely on written representations from counterparties as to the counterparty’s US person status in the absence of indications to the contrary.
- ⁹ The Guidance generally defines a principal place of business as where the entity’s “officers direct, control, and coordinate the corporation’s activities” or where it maintains its “nerve center”; which is normally where the company maintains its actual headquarters. The Guidance also includes a specific interpretation of how a collective investment vehicle would determine its principal place of business. Under this interpretation, a collective investment vehicle’s principal place of business is generally in the United States if the senior personnel responsible for the formation and promotion of the vehicle or implementation of the vehicle’s investment strategy are located in the United States (notwithstanding, for example, where its named directors and officers may be located, where the vehicle has registered offices, or where its books and records are maintained).
- ¹⁰ While this prong excludes owners of limited liability companies, limited liability partnerships, and other similar entities from consideration, it would apply to general partners of limited partnerships.
- ¹¹ Guidance, 78 Fed. Reg. at 45315.
- ¹² Guidance, 78 Fed. Reg. at 45317. This was the approach taken in the December Order.
- ¹³ The December Order defined a US person using the same prongs that are used in the Guidance for a natural person, pension plan, estate, trust, and individual or joint account and a different prong that incorporated a corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, that in each case was (A) organized or incorporated under the laws of a state or other jurisdiction in the US or (B) effective as of

April 1, 2013 for all such entities other than funds or collective investment vehicles, had its principal place of business in the US.

- 14 Non-US persons who are not guaranteed or conduit affiliates of US persons do not need to include swaps with (i) guaranteed affiliates that are registered as SDs, (ii) guaranteed affiliates that are guaranteed by non-financial entities, or (iii) guaranteed affiliates who are not SDs, but engage in *de minimis* levels of swap dealing activity and are affiliated with a registered SD.
- 15 The CFTC suggested that once an affiliated group reached the *de minimis* threshold, one or more members would register as SDs, thus bringing the group's calculation below the *de minimis* threshold.
- 16 The CFTC noted in the Guidance that commenters had requested that swaps with international financial institutions, such as the World Bank and International Monetary Fund, should not be included in threshold calculations. However, the CFTC did not provide clarification in the Guidance as to how such entities should be treated in registration threshold calculations.
- 17 Despite the single entity approach, the CFTC stated that a US branch of a non-US SD or MSP would be subject to all of the Transaction-Level Requirements with respect to swaps with US and non-US persons. Substituted compliance would not be available to a US branch.
- 18 The Guidance states that the CFTC expects that it would have real time direct electronic access to all of the reported swap data elements that are stored in a non-US trade repository as part of making a comparability evaluation and to determine whether the data may be effectively used in furtherance of the purposes of the Dodd-Frank Act. The Guidance recognizes that the CFTC's expected level of access may be in conflict with blocking, privacy, or secrecy laws of other jurisdictions. The Guidance indicates that the CFTC will consider reasonable alternatives and strongly encourages regulators and registrants to consult directly with CFTC staff.
- 19 A non-US SD or MSP or foreign branch that was not required to clear under the December Order may delay complying with clearing requirements until October 10, 2013. Relief as to the real-time reporting requirements for swaps with a guaranteed non-US affiliate of a US person will terminate on September 30, 2013.
- 20 Non-US, non-clearing members with significant positions in swaps linked to specified US-listed physical commodity futures contracts would need to maintain records of such swaps in the format used in the normal course of business operations for inspection by the CFTC.

²¹ Where at least one of the parties is a conduit affiliate, the CFTC expects the parties to comply with the conditions of the inter-affiliate exemption (if elected) and part 43 real-time reporting requirements.

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Appendix A

Application of Entity-Level Requirements²²

APPLICATION OF THE ENTITY-LEVEL REQUIREMENTS TO SDS AND MSPS			
	US person counterparty	Non-US person counterparty who is a guaranteed or conduit affiliate	Non-US person counterparty who is not a guaranteed or conduit affiliate
US SD or MSP (including affiliates of non-US persons or when a US SD or MSP is acting through a foreign branch)	First and Second Categories of Entity-Level Requirements apply and may not be satisfied through substituted compliance	First and Second Categories of Entity-Level Requirements apply and may not be satisfied through substituted compliance	First and Second Categories of Entity-Level Requirements apply and may not be satisfied through substituted compliance
Non-US SD or MSP (including an affiliate of a US person)	<p>First Category of Entity-Level Requirements apply and may be satisfied through substituted compliance.</p> <p>Second Category of Entity-Level requirements apply for US person counterparties and may not be satisfied through substituted compliance.</p>	<p>First Category of Entity-Level Requirements apply and may be satisfied through substituted compliance.</p> <p>Second Category of Entity-Level requirements apply and all except large trader reporting.</p>	<p>First Category of Entity-Level Requirements apply and may be satisfied through substituted compliance.</p> <p>Second Category of Entity-Level requirements apply and all except large trader reporting may be satisfied through substituted compliance.²³</p>

²² Tables adapted from appendices to the Guidance, which may be inconsistent or incomplete without reference to the text of the Guidance.

²³ The SDR reporting requirement may be satisfied through substituted compliance only if the CFTC has direct access to the swap data stored at the foreign trade repository.

Appendix B

Application of Transaction-Level Requirements

APPLICATION OF CATEGORY A TRANSACTION-LEVEL REQUIREMENTS TO SDS AND MSPS				
	US person (other than a foreign branch of a US bank that is an SD or MSP)	Foreign branch of a US bank that is an SD or MSP	Non-US person who is a guaranteed affiliate or conduit affiliate of a US person	Non-US person who is not a guaranteed affiliate or a conduit affiliate of a US person
US SD or MSP	Applies	Applies	Applies	Applies
Foreign branch of a US bank that is an SD or MSP	Applies	Applies and may satisfy through substituted compliance	Applies and may satisfy through substituted compliance	Applies and may satisfy through substituted compliance
Non-US SD or MSP (including an affiliate of a US person)	Applies	Applies and may satisfy through substituted compliance	Applies and may satisfy through substituted compliance	Does not apply

APPLICATION OF CATEGORY B TRANSACTION-LEVEL REQUIREMENTS TO SDS AND MSPS				
	US person (other than a foreign branch of a US bank that is an SD or MSP)	Foreign branch of a US bank that is an SD or MSP	Non-US person who is a guaranteed affiliate or conduit affiliate of a US person	Non-US person who is not a guaranteed affiliate or a conduit affiliate of a US person
US SD or MSP (including an affiliate of a non-US person)	Applies	Applies	Applies	Applies
US SD or MSP (when it solicits and negotiates through a non-US subsidiary or affiliate)	Applies	Does not apply	Does not apply	Does not apply
Foreign branch of a US bank that is an SD or MSP	Applies	Does not apply	Does not apply	Does not apply
Non-US SD or MSP (including an affiliate of a US person)	Applies	Does not apply	Does not apply	Does not apply