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# **Cross-Border Regulatory Issues for Swaps**

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# **Part I – Statutory Authority and Implementation**

# Statutory Authority

- Section 2(i) of the Commodity Exchange Act provides that the swap provisions of Dodd-Frank Act do not apply to activities outside of the United States unless those activities
  - (i) have a “direct and significant” connection with activities in, or effect on, commerce of the United States; or
  - (ii) violate the CFTC’s anti-evasion rules, if any.
- Section 30(c) of the Securities Exchange Act provides that the Act does not apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States except to prevent the evasion of Dodd-Frank.

# CFTC Implementation of 2(i)

- On July 26, 2013, the CFTC published final guidance interpreting Section 2(i) and indicating to market participants when it generally would expect to assert jurisdiction over swap activities (the “Interpretive Guidance”).
- The Interpretive Guidance provides guidance as to
  - who is a (i) US person, (ii) a non-US person, or (iii) what we will call an “intermediate person” i.e., a “conduit affiliate” or a “guaranteed affiliate”; and
  - the application of the CFTC swap regulations in transactions where there is
    - (i) a non-US person or an intermediate person in the trade with a U.S person; or
    - (ii) a non-US swap dealer (“SD”) doing business from within the United States

# CFTC Implementation of 2(i)

- Theory of CFTC Jurisdiction based on Language of 2(i) which has neither close precedent nor any statutory history
- Theory of Jurisdiction Rests on two, arguably fragile, legal supports:
  - Reference to the Foreign Trade Antitrust Improvements Act of 1982, which the CFTC says has “similar language”
    - No basis to believe that anyone in Congress was aware of the Act or the language

Reference to *Wickard v. Fillburn*, holding that wholly intrastate activities may be deemed to constitute “interstate commerce” if the activities taken as a whole would affect interstate commerce

# CFTC Implementation of 2(i)

- **Logic of Wickard v. Fillburn:**
  - any foreign activity may be CFTC-regulated if the type of activity, in the aggregate, could potentially have an effect on U.S. commerce

**This proposition has no internal limitation since any type of commercial activity, aggregating all global activity, of that would meet the standard that the CFTC sets for itself**

**CFTC says it would be mindful of “international comity”**

**Operative Sections of the Interpretative Guidance make no further reference to this jurisdictional discussion beyond references to “international comity”**

# **CFTC Implementation of 2(i)**

- **Issued as “Guidance,” Not a Rule**
- **Did Not Go Through the APA Rulemaking Process**
- **While CFTC made references to “comments” received on prior interpretations, the Interpretative Guidance was in fact far different from the prior interpretations**
- **Could the IG survive a court challenge under the AP that it was in fact a rule?**
- **Statement of Commissioner O’Malia at adopting hearing that “guidance” can not constitute the basis of an enforcement action; CFTC staff at the hearing agreed with this comment**



## **Part II - Related Considerations**

# Policy Considerations

- **Protection of US financial institutions (capital requirements)**
  - **Protection of non-US institutions as check on systemic risk?**
- Protection of end users from failure of US financial institutions (segregation requirements)**
- Sales Practice Regulation**
- Transparency Requirements (Public and Regulatory Reporting)**
- Market Protection Requirements (Position Limits; SEF Trading)**

# Countervailing Considerations

- International Comity/Limits of Jurisdictional Reach
- Costs of Regulation
- U.S. Competitiveness
- Legal Certainty
- Complexity
- Market Fragmentation: Three Worlds
- Product/Entity Fragmentation: Loss of Netting; Operational Issues
- Regulatory Fragmentation

# The Lincoln Amendment

- The Lincoln Amendment (DFA Section 716) bars an FDIC-insured bank from being a registered dealer in swaps and security-based swaps, and imposes a similar bar on a U.S. branch or agency of a foreign bank if it accepts Fed Discount Window advances, subject to certain exceptions:
  - Cleared credit default swaps
  - Swaps referencing assets that are bank-eligible (e.g., investment grade readily marketable corporate debt, currency & FX swaps)
  - Swaps used for bona fide hedging purposes

# The Lincoln Amendment (cont'd)

- **Registered dealers must “push-out” dealing in other swaps / security-based swaps to non-bank affiliates by July 16, 2013**
  - 24 U.S. banks and U.S. branches of foreign banks were granted two-year extensions to permit continued dealing in other swaps / security-based swaps, i.e., until July 16, 2015
- **Several issues in the Lincoln Amendment remain:**
  - Whether U.S. banks and U.S. branches of foreign banks may extend credit to, issue guarantees to, or purchase any assets from entities that have registered as dealers
  - Whether U.S. banks and U.S. branches may own a registered dealer
  - How Lincoln applies to Foreign Banks that are registered as swap dealers that have a U.S. branch that an access the Fed window

# The Volcker Rule

- The Volcker Rule prohibits a banking entity (including a bank, BHC, foreign bank with a U.S. branch or agency, and any affiliate) from:
  - acquiring or retaining an ownership interest in, or sponsoring, certain private equity funds (known as *covered funds*)
  - engaging in proprietary trading in *covered financial instruments* (a term that includes securities, derivatives, swaps, and security-based swaps)
  - extending credit to, purchasing assets from, or otherwise entering into certain transactions with, a covered fund that is advised, sponsored, or managed by the banking entity or any affiliate (referred to as *Super 23A/23B*)

# The Volcker Rule (cont'd)

- The prop trading provisions deem any account held by a swap / security-based swap dealer to be a *trading account*
  - This creates a non-rebuttable presumption that trading activity in a dealer's account is *proprietary trading* unless some exemption applies
  - However, few of the Volcker Rule's exemptions seem applicable to swap dealers and security-based swap dealers
    - In particular, the definition of *market-making* was not drafted with swap / security-based swap dealers in mind
  - This presumption applies to non-U.S. entities regardless of registration; given the broad scope of the *dealer* definition, many entities may be caught
  - The CFTC acknowledged this problem in one of its public meetings but no solution has been announced

# BCBS-IOSCO: Margin Framework

- Scope: all uncleared derivatives between financial entities
  - “Financial entity” defined by national regulator
  - Physically-settled FX forwards and swaps excluded from IM but not VM
  - Exception for entities that are part of a consolidated group with swap notionals below € 8 billion
- Basic Requirements:
  - Both parties must collect IM and VM
  - € 50 million threshold applied to consolidated group
  - No VM thresholds



# BCBS-IOSCO: Margin Framework (II)

- **Minimum Margin Requirements:**
  - IM based on one-tailed 99% confidence interval for 10 days
  - IM based on approved model or look-up table
  - Portfolio margining permitted within class
- **Valuations:**
  - Agreement to general valuation process, robust dispute resolution

# BCBS-IOSCO: Margin Framework (III)

- **Segregation:**
  - No segregation of VM
  - Third-party segregation of all IM
  - One-time rehypothecation permitted by sell-side institutions under limited conditions
- **Other:**
  - Eligible margin determined by national regulators
  - Inter-affiliate exception
  - Home country regulator determines collateral that institutions organized within the jurisdiction must collect
  - Phase-in between Dec. 2015 and Dec. 2019

# Legal Requirements for U.S. Implementation

- Dodd-Frank only authorizes regulators to establish margin requirements that apply to SDs and MSPs; the statute would need to be amended to cover swaps between other market participants (and other derivatives?).
- The CFTC would need to revise its ET Guidance to recognize the principle of home-country regulation for margin.
- The SEC would need to accept valuation by agreement and third-party segregation.
- U.S. regulators would need to be more closely coordinated on substantive and jurisdictional requirements than has been the case so far.

# Other Definitions of US Person

- Rule 15a-6
- Regulation S
- Regulation X
- Advisers Act
- CFTC for purposes of futures regulation
- CFTC for purposes of CTA or CPO registration; particularly CFTC Rule 4.7
- With the exception of Regulation X, the definitions of US person are arguably most focused on sales practice issues

## **Part III - Classification of Persons Under the Interpretative Guidance**

# Division of Market Participants Under the Interpretative Guidance

- U.S. Persons That Are Not Swap Dealers
- U.S. Swap Dealers Operating Out of the United States
- U.S. Swap Dealers Operating Out of a Non-U.S. Branch
- Wholly Foreign Persons That are Not Swap Dealers
  - Certain Foreign Persons that are of Intermediate Status
    - Guaranteed Affiliates
    - Conduit Affiliates
  - Foreign Swap Dealers Operating Outside of the United States
  - Foreign Swap Dealers Operating From Within the United States

# Who Is a US Person

- Entity Incorporated Within the United States
- Entity Having its Principal Place of Business (center of “direction, control and co-ordination”) in the United States
- Entity Whose Obligations Are Subject to Unlimited Liability by a US Person
  - This would seem an usual situation; but see fn 213-4
  - CFTC rejected the use of the descriptor “all of”;
  - CFTC distinguishes “unlimited liability” from a guarantee
- Pension Plan for Benefit of the Above, Except if Plan is Primarily for Foreign Employees

# Who is a US Person

- **Natural Person Resident in the United States**
- **Estate of a US Person**
- **Account Beneficially Owned, In any Part, by a US Person**
- **Trust Formed Under US Law Over Which a US Court Can Exercise Primary Jurisdiction**



# Who Is a US Person

- **Special Requirements as to Funds (In addition to the Above)**
  - **Majority US Ownership**
  - **Look Through of Owners (i) Required in the Case of Affiliated Funds; e.g., Master Feeder (ii) Not Required for Non-Affiliated Funds; e.g., Fund of Funds**
  - **Numerous Factors as to Determination of Principal Place of Business:**
    - **Questions where a Principal Adviser and a Subadviser, are located in the United States and Outside**
  - **Outside of Funds, the Location of the Adviser is Not Relevant**
  - **Public Non-US Funds Not Sold in the US are Non-US**

# Who Is an “Intermediate Person”

- **Affiliate Conduit (or Conduit Affiliate)**
- **Defined in the Interpretive Guidance by reference to four factors, with other facts and circumstances relevant.**
  - (1) whether the [foreign] person is majority-owned, directly or indirectly, by a US person;
  - (2) whether the [foreign] person controls, is controlled by, or is under common control with the US person;
  - (3) whether the [foreign] person, in the regular course of business, engages in swaps with non-US third parties for the purpose of hedging or mitigating risks of (or to take positions on behalf of) its US affiliate(s) and enters into offsetting swaps or other arrangements with such US affiliates in order to transfer the risks and benefits of such swaps to the US affiliates;
  - (4) whether the financial results of the [foreign] person are included in the consolidated financial statements of the US person.
  - [Note that the conduit affiliate could be a non-US holding company that is hedging risks of its US business]

# Who is an Intermediate Person

## Guaranteed Affiliates

- Swap Regulations may apply to transactions with non-U.S. persons if such person receives a “guarantee” from a U.S. person.
  - The significance of a “guarantee” is different as to whether (i) the guaranteed entity must register as an SD and (ii) whether counterparties must treat the guaranteed entity as a US person
  - For registration purposes, a foreign entity that is guaranteed by a US person (or that is a conduit affiliate) must count all swaps towards its de minimis level . Whether the counterparty is an affiliate of a swap dealer.
  - Whether the guarantying entity is a “financial entity.”

# Ambiguities In the Definition of US Person

- CFTC says it generally uses the phrase “include, but not be limited to” so that it may include persons “whose circumstances . . . are not fully addressed”
- Circumstances include the strength of the connections between the person’s swap –related activities and US commerce; the extent to which such activities are conducted in the United States; the relative importance of the activity to the US as opposed to another jurisdiction; and the possibility of conflict with another jurisdiction; and principles of international comity
- All of this obviously creates substantial legal uncertainty

# Logic of US Person Definition?

- **Non-US Pension Plan with US Adviser is Non-US**
- **Non-US Hedge Fund with US Adviser is US**
- **Account with 1% US Ownership and Non-US Adviser is US**
- **Foreign Subsidiary of US Entity is Non-US (if not guaranteed)**
- **Hedge Fund with 49% US Ownership is Non-US**
- **Hedge Fund with 51% US Ownership is US**

# Status Determinations

- The basic status determinations that market participants may need to make are:
  - (1) Whether either party is a “U.S. person”;
  - (2) Whether a non-U.S. person counterparty is an “affiliate conduit” of a U.S. person;
  - (3) Whether a non-U.S. person counterparty receives a guarantee from a U.S. person;
    - If a U.S. person does provide a guarantee, whether such person is a “financial entity”;
    - If a guarantee is received, whether such non-U.S. person is affiliated with a swap dealer;
  - (4) Whether a trade may be deemed to be booked to a non-U.S. “branch” of a U.S. bank swap dealer.

# Status Determinations

- The various scenarios addressed by the guidance require a market participant to determine both its status and its counterparty's status in order to determine what legal requirements apply to a swap between them.
- Certain of the status types involve complicated determinations that a third-party may not be able to make.
  - For example, certain determinations may require knowledge of the full scope of a person's business dealings amongst many counterparties, its investors, its offices, etc.
- Many provisions of the guidance, including the guidance as to the term "U.S. person," went into effect on October 9 (*i.e.*, 75 days after the guidance was published).
  - Also note that real-time reporting requirements for non-U.S. Swap Dealers trading with guaranteed affiliates of non-U.S. persons went into effect on September 30.

# **Part IV – Comparison of CFTC and SEC Classification**



# U.S. Person Comparison

	SEC	CFTC
Corp organized in U.S. or with principal office in U.S.	U.S. person	U.S. person (extensive discussion of principal place of business as to funds, focus on adviser rather than directors)
Natural person resident in U.S.	U.S. person	U.S. person
Account of a U.S. person	U.S. person (implicitly regardless of % ownership)	U.S. person (regardless of % ownership)
International organizations	Non-U.S. person	Not discussed
Foreign Fund with majority U.S. ownership	Non-U.S. person	U.S. Person

# U.S. Person Comparison

	SEC	CFTC
Foreign Entity that is Conduit Affiliate or Guaranteed Affiliate	No status	Intermediate status
Foreign Branch of U.S. Bank	U.S. person (but SEC definition of “transactions conducted within the United States” trade solicited, negotiated, executed or booked in U.S.)	U.S. person (very complicated definition of foreign branch and similarly complicated definition of foreign transaction)
U.S. Branch of Foreign Bank	Foreign person but see “transactions conducted within the United States”	Foreign person but subject to all Transaction-Level Requirements

# U.S. Person Comparison

	<b>SEC</b>	<b>CFTC</b>
Estate	Silent	Tied to decedent
Non-U.S. subsidiary of U.S. entity	Non-U.S.	Non-U.S. (but see “intermediate person” definitions)
Pension Plans	Silent	Generally, tied to status of corporation, with a carve-out for plans for foreign employees

# Foreign Branch of US Bank That is a SD

## Two Factors

- Is the location a “foreign branch”?
- Should the transaction be attributed to the foreign branch?

# Foreign Branch of US Bank That is a SD

Is the location a “foreign branch”?

- The CFTC’s Interpretive Guidance provides factors for defining a “foreign branch” of a U.S. swap dealer:
  - (i) subject to FDIC Regulation K or otherwise designated as a “foreign branch”; (ii) maintains accounts independent of the home office; and (iii) subject to substantive regulation in the offshore location.
- The SEC defines a [foreign] branch as one (i) located outside the United States, (ii) operated for valid business purposes and (iii) subject to substantive banking regulation in the jurisdiction where located.

# Foreign Branch of US Bank That is a SD

- The CFTC Interpretive Guidance provides the following factors for determining whether a swap can be considered to be “with” the foreign branch:
  - (i) employees agreeing to the swap are located in the foreign branch; (ii) the foreign branch is the office for making and receiving payments; (iii) the swap is entered into in the branch’s normal course of business; (iv) the swap is treated as with the foreign branch for tax purposes; and (v) the swap is reflected in the local accounts of the foreign branch.
- Under the SEC’s rules, for a transaction to be conducted through a foreign branch,
  - (i) the foreign branch must be the named counterparty and (ii) the transaction must not be solicited, negotiated or executed by a person within the United States.

# **Part V - Registration Requirements**

# Non-US Persons De Minimis

- **Non-US Person (who is not Conduit Affiliate or Guaranteed Affiliate) Not Required to Count swaps with:**
  - **Foreign Branch of a US Swap Dealer**
  - **Guaranteed Affiliate of a US Person That is a Swap Dealer**
    - Guaranteed or Conduit Affiliate that Is Not a SD, but engages in de minimis Dealing Activity, and That is Affiliated with a SD**
    - Guaranteed Affiliate If Guarantor is not a Financial Entity**
    - Conduit Affiliate**
    - Cleared Swaps Entered into Anonymously on a SEF, DCM or Foreign Board of Trade**



# Non-US Persons De Minimis

- **Non-US Person (who is not CA or GA) Must Count Swaps with:**
  - **Guaranteed Affiliate that Is Neither a Registered Swap Dealer, nor an Affiliate of a Registered Swap Dealer and that receives its Guarantee from a Financial Entity**

# **Part VI – Categorization of Entity- and Transaction-Level Requirements**

# Requirements by Type

- The IG splits CFTC rules into: (i) Entity-Level Requirements (“ELRs”) and (ii) Transaction-Level Requirements (“TLRs”).
  - ELRs are generally those requirements that apply at the “core operations of a firm” and thus to the entity as a whole.
    - ELRs are generally divided into two types: those relating to capital and risk; and those relating to reporting
  - TLRs are generally those requirements that apply to particular swap transactions or the trading relationship between a dealer and its counterparty.
  - TLRs are further subdivided into two types: (i) those relating to matters such as trading and clearing and (ii) business conduct requirements.
  - Certain TLRs (referred to below as “A Prime”) of the first type apply even where neither of the parties to the swap is a swap dealer.

# Compliance Requirements

- **U.S. Requirements Apply and Must be Met**
- **U.S. Requirements Apply but Substituted Compliance Potentially Available**
- **U.S. Requirements Do Not Apply**
  
- **For Banks, Capital and Margin Requirements Set By Banking Regulators**
- **For Non-U.S. Banks, U.S. Banking Regulators Generally Defer to Non-U.S. Regulators**

# “Entity-Level” Requirements: Category 1

- **Capital Adequacy** (no rules adopted yet; note that U.S. banks will be subject to U.S. banking rules and non-U.S. banks to non-U.S. regulators): CEA 4s(e)(2)(B)
- Chief Compliance Officer: CEA 4s(k); CFTC Rule 3.3
- Risk Management: CEA 4s(j); CFTC Rules 23.601, .602, .603, .605, .606, .609
- Swap Data Recordkeeping (except two items below): CEA 4s(f)(1)(B); 4s(g)(1) and (4); CFTC Parts 43, 45 and 46

# “Entity-Level” Requirements: Category 2

- SDR Reporting: CEA 2(a)(13)(G); CEA 21; CFTC Part 45 and Appendix 1; CFTC Part 46
- Recordkeeping (as to complaints and sales materials): CEA 4s(f)(1); CFTC Rule 23.201(b)(3) and (4)
- Large Trader Reporting (no substituted compliance available): CEA 4E; CFTC Part 20

# “Transaction-Level” Requirements: Category A

- Required Clearing and Swap Processing: CEA(2)(h)(1); CFTC Rules 50.2 and 50.4, 23.506, 23.610 and 39.12
  - Includes requirement to submit certain swaps for clearing or use end-user exception, as well as related requirements.
- **Margin and Segregation for Uncleared Swaps (not adopted): CEA 4s(e)**
- Trade Execution: CEA 2(h)(8); CFTC Rules 37.10 and 38.12
  - Relates to the requirement that certain swaps that have been made “available to trade” must be executed on a DCM or SEF.
  - **Currently, no swaps have been made “available to trade.”**
- Swap Trading Relationship Documentation: CEA Section 45(i); CFTC Rules 23.504 and 23.505

# **“Transaction-Level” Requirements: Category A**

- **Portfolio Reconciliation and Compression: CEA 4(s)(i); CFTC Rules 23.502 and 23.503**
  - Requirement for parties to engage in periodic exercises to confirm the terms and valuations of transactions and to ensure appropriate processing and netting.
  - Compression is only required for SD/MSP to SD/MSP transactions.
  - SD/MSPs must have policies and procedures reasonably designed to ensure they engage in reconciliation for non-SD/MSP counterparties.
- **Real-Time Public Reporting of Swap Transaction Data: CEA 2(a)(13); CFTC Part 43**
- **Trade Confirmation Requirements: CEA 4(s)(i); CFTC Rule 23.501**
- **Daily Trading Records: CEA 4s(g); CFTC Rule 23.202**



# “Transaction-Level” Requirements: Category B

- External Business Conduct Standards: CEA 4(s)(h); [77 Fed. Reg. 2822-29]
  - Generally those rules relating to customer due diligence, sales practices, transaction disclosures, suitability, trading with special entities, etc.

# **Part VII - How do the Requirements Apply?**

# Applications of Transaction-Level Requirements

	<b>US-SD in United States</b>	<b>US-SD from Foreign Branch</b>	<b><u>U.S. Person</u></b>	<b><u>Intermediate Person (GA or CA)</u></b>	<b>FSD in United States</b>	<b>FSD from Foreign Location</b>	<b><u>Foreign Person</u></b>
US-SD in United States	A	A	A	A	A	A	A
	B	B	B	B	B	B	B
US-SD from Foreign Branch	A	SC	A	SC	A	SC	SC
	A	B	B	B	B	B	B
U.S. Person Not a Swap Dealer	A	A	A Prime	A Prime	A	A	A Prime
	B	B	NA	NA	B	B	A Prime
Intermediate Person (GA or CA)	A	SC	A Prime	SC	A	SC	NA
	B	B	NA	NA	B	NA	NA
FSD in United States	A	A	A	A	A	A	A
	B	B	B	B	B	B	B
FSD from Foreign Location	A	SC	A	SC	A	NA	NA
	B	NA	B	NA	B	NA	NA
Foreign Person Not a Swap Dealer	A	SC	A Prime	NA	A	NA	NA
	B	NA	NA	NA	B	NA	NA

# **Part VII – Substituted Compliance**

# Substituted Compliance: End Result

- Compliance with Foreign Law would constitute compliance with comparable U.S. Law

# Substituted Compliance: Goals

**CFTC's Goal:** Ensuring the high level of regulation contemplated by Dodd-Frank and avoiding potential conflicts between U.S. regulations and foreign laws consistent with international comity.

**SEC's Goal:** Increase the efficiency of the market and promote competition by helping to avoid duplicative or conflicting regulations while achieving the objectives of Dodd-Frank.

# Substituted Compliance: CFTC Process

- CFTC may determine certain laws and regulations of a foreign jurisdiction are comparable to and as comprehensive as.
- Outcomes based approach taking into account foreign jurisdiction's regulatory objectives, authority to support and enforce, comprehensiveness of the foreign regulator's compliance program.
- Determinations made across 13 categories of regulatory compliance.
- Determinations re-evaluated every 4 years.

# Substituted Compliance: CFTC Conditions

- Retention of CFTC examination authority.
- Records retained in compliance with CFTC Rule 1.31
- MOV with foreign regulation relating to information sharing, procedures for continuing oversight activities, access to information, on-site visits and notification procedures.
- For SDRs, real-time direct legal access to information without impediment, ability to use data, data permits comparison with U.S. data.



# Substituted Compliance: SEC Process

- SEC recognizes that difference regulatory regimes may be able to achieve regulatory outcomes [comparable to Dodd-Frank] by using more- or few- specific requirements.
- Would not look to specific rules and regulations but rather to achieving comparable regulatory outcomes.
- Would take into account the number and nature of market participants as well as other market practices.
- Determinations of comparability made across four categories (registered dealers, reporting, clearing and trade execution).
- Asks whether ongoing review would be required.

# Substituted Compliance: SEC Conditions

- Retention of SEC examination activity.
- Prompt access to firm's books and records.
- Supervisory and enforcement MOV with appropriate foreign regulatory.

# **Part IX – Comparison of CFTC and SEC Regulatory Requirements**

# Swap Transaction Reporting (“STR”) and Public Dissemination (“PD”)

	SEC Proposal	CFTC Guidance
<b>Reporting Required</b>	<p>STR:</p> <ul style="list-style-type: none"> <li>• Transaction conducted in U.S.</li> <li>• One U.S. person is a party or a guarantor</li> <li>• One party or guarantor is a SD/MSP</li> <li>• Cleared in U.S.</li> </ul> <p>PD:</p> <ul style="list-style-type: none"> <li>• Transaction conducted in U.S.</li> <li>• U.S. person as party or guarantor on each side</li> <li>• One U.S. person is a party (not a non-U.S. branch)</li> <li>• Non-U.S. SD is party or guarantor and U.S. person is counterparty or guarantor</li> <li>• Cleared in U.S.</li> </ul>	<p>STR/PD:</p> <ul style="list-style-type: none"> <li>• One U.S. person (other than a non-U.S. branch) is a party</li> <li>• One party is an SD/MSP</li> <li>• Two guaranteed/conduit affiliates</li> </ul>

# Swap Transaction Reporting (“STR”) and Public Dissemination (“PD”)

	SEC Proposal	CFTC Guidance
<b>Substituted Compliance</b>	One party is a non-U.S. person or branch that does not conduct transaction in U.S. (non-U.S. depository must also publicly disseminate)	<p>STR:</p> <ul style="list-style-type: none"> <li>• Non-U.S. SD/MSP and non-U.S. person</li> <li>• Two guaranteed/conduit affiliates</li> </ul> <p>PD:</p> <ul style="list-style-type: none"> <li>• Two non-U.S. branches of SDs/MSPs</li> <li>• Non-U.S. branch of SD/MSP and non-U.S. person counterparty</li> <li>• Non-U.S. SD/MSP and Non-U.S. branch of SD/MSP</li> <li>• Non-U.S. SD/MSP and guaranteed or conduit affiliate</li> <li>• two guaranteed/conduit affiliates</li> </ul>

# Swap Transaction Reporting (“STR”) and Public Dissemination (“PD”)

	SEC Proposal	CFTC Guidance
<b>Reporting Not Required</b>	<p>STR:</p> <ul style="list-style-type: none"> <li>No U.S. person or SD/MSP is a party or guarantor, Transaction not conducted or cleared in U.S.</li> </ul> <p>PD:</p> <ul style="list-style-type: none"> <li>No direct counterparty is a U.S. person (other than a non-U.S. branch), one side has no U.S. person party or guarantor, Transaction not conducted or cleared in U.S. and not U.S. party or guarantor on one side and SD on other side.</li> </ul>	<p>No U.S. person parties, provided not more than one is a guaranteed/conduit affiliate</p>

# Mandatory Clearing Requirements

	SEC Proposal	CFTC Guidance
<b>Clearing Required</b>	One U.S. person is a party or guarantor, or the Transaction is conducted in the U.S., (unless an exception applies)	<ul style="list-style-type: none"> <li>• One U.S. person (other than a non-U.S. branch) is a party</li> <li>• Non-U.S. branch SD and non-U.S. branch SD or non-U.S. person</li> <li>• Non-U.S. SD and guaranteed/conduit affiliate</li> <li>• Two-guaranteed/conduit affiliates</li> </ul>
<b>Substituted Compliance</b>	Available whenever clearing is required (Clearinghouse must not have U.S. members)	<ul style="list-style-type: none"> <li>• Non-U.S. branch SD and non-U.S. branch SD or non-U.S. person</li> <li>• Non-U.S. SD and guaranteed/affiliate conduit</li> <li>• Two-guaranteed/conduit affiliates</li> </ul>

# Mandatory Clearing Requirements

	SEC Proposal	CFTC Guidance
<b>Clearing Not Required</b>	<ul style="list-style-type: none"><li>• No U.S. person is a party or guarantor, Transaction is not conducted in U.S.</li><li>• Transaction not conducted in U.S. where (i) one party is non-U.S. branch or non-U.S. person (may have a U.S. guarantor) and (ii) the other party is non-U.S. person that does not have a U.S. person guarantee and is not a SD.</li><li>• Transaction conducted in U.S. but neither party (i) is a U.S. person, (ii) has a U.S. person guarantor or (iii) is a SD.</li></ul>	No U.S. persons, provided not more than one is a guaranteed/conduit affiliate



# Trade Execution Requirements

	SEC Proposal	CFTC Guidance
<b>Trade Execution Required</b>	One U.S. person is a party or guarantor, or the Transaction is conducted in the U.S., (unless an exception applies)	<ul style="list-style-type: none"> <li>• One U.S. person (other than a non-U.S. branch) is a party</li> <li>• Non-U.S. branch SD and non-U.S. branch SD or non-U.S. person</li> <li>• Non-U.S. SD and guaranteed/affiliate conduit</li> <li>• Two-guaranteed/conduit affiliates</li> </ul>
<b>Substituted Compliance</b>	One party is a non-U.S. person or branch and the transaction is not conducted in the U.S. on behalf of such party	<ul style="list-style-type: none"> <li>• Non-U.S. branch SD and non-U.S. branch SD or non-U.S. person</li> <li>• Non-U.S. SD and guaranteed/affiliate conduit</li> <li>• Two-guaranteed/conduit affiliates</li> </ul>

# Trade Execution Requirements

	SEC Proposal	CFTC Guidance
<b>Trade Execution Not Required</b>	<ul style="list-style-type: none"> <li>• No U.S. person is a party or guarantor, Transaction is not conducted in U.S.</li> <li>• Transaction not conducted in U.S. where (i) one party is non-U.S. branch or non-U.S. person (may have a U.S. guarantor) and (ii) the other party is non-U.S. person that does not have a U.S. person guarantee and is not a SD.</li> <li>• Transaction conducted in U.S. but neither party (i) is a U.S. person, (ii) has a U.S. person guarantor or (iii) is a SD.</li> </ul>	No U.S. persons, provided not more than one is a guaranteed/conduit affiliate

# External Business Conduct Rules

	SEC Proposal	CFTC Guidance
<b>Required</b>	<ul style="list-style-type: none"> <li>• U.S. SD and any counterparty (except when the SD transacts through a non-U.S. branch as noted below)</li> <li>• Non-U.S. SD and any U.S. person (other than a non-U.S. branch)</li> <li>• Non-U.S. SD and any counterparty if transaction conducted in U.S.</li> <li>• U.S. MSP and any counterparty</li> <li>• Non-U.S. MSP and any U.S. person</li> </ul>	<ul style="list-style-type: none"> <li>• U.S. SD/MSP and any counterparty (except when the SD/MSP transacts through a non-U.S. affiliate or branch as noted below)</li> <li>• Any SD/MSP and a U.S. person counterparty (other than a non-U.S. branch of a U.S. SD/MSP)</li> </ul>
<b>Substituted Compliance</b>	Generally available to non-U.S. SDs. Not available to MSPs.	N/A

# External Business Conduct Rules

	SEC Proposal	CFTC Guidance
<b>Not Required</b>	<ul style="list-style-type: none"> <li>• Non-U.S. SD and a Non-U.S. person or branch, provided transaction is not conducted in U.S.</li> <li>• Non-U.S. branch of U.S. SD and Non-U.S. person or branch</li> <li>• Non-U.S. MSP and non-U.S. person</li> </ul>	<p>Any combination of the following: SD/MSP that is:</p> <ul style="list-style-type: none"> <li>• transacting through a non-U.S. affiliate</li> <li>• transacting through a Non-U.S. branch</li> <li>• Non-U.S. person</li> </ul> <p>Counterparty that is:</p> <ul style="list-style-type: none"> <li>• Non-U.S. branch of SD</li> <li>• Non-U.S. person</li> </ul>

# Segregation (Uncleared Swaps)

	SEC Proposal	CFTC Guidance
<b>Required</b>	<ul style="list-style-type: none"> <li>• U.S. SD and any counterparty</li> <li>• Non-U.S. SD that is a BD and any counterparty</li> <li>• Non-U.S. SD that is not a BD and a U.S. person counterparty.</li> </ul>	<ul style="list-style-type: none"> <li>• U.S. SD/MSP and any counterparty</li> <li>• Any SD/MSP and a U.S. person counterparty</li> </ul>
<b>Substituted Compliance</b>	Generally available to non-U.S. SDs.	<ul style="list-style-type: none"> <li>• Two non-U.S. branches of SDs/MSPs</li> <li>• Non-U.S. branch of SD/MSP and non-U.S. person counterparty</li> <li>• Non-U.S. SD/MSP and Non-U.S. branch of SD/MSP</li> <li>• Non-U.S. SD/MSP and guaranteed or conduit affiliate</li> </ul>
<b>Not Required</b>	<ul style="list-style-type: none"> <li>• Non-U.S. SD that is not a BD and a Non-U.S. person</li> <li>• Non-U.S. branch of U.S. SD and Non-U.S. person or branch</li> </ul>	Non-U.S. SD/MSP and non-U.S. person Counterparties

# Capital, Risk Management, CCO, and Recordkeeping

	SEC Proposal	CFTC Guidance
<b>Required</b>	All SDs/MSPs	All SDs/MSPs
<b>Substituted Compliance</b>	Non-U.S. SDs	Non-U.S. SDs/ MSPs
<b>Not Required</b>	N/A	N/A

# Records of Complaints and Marketing and Sales Materials

	<b>SEC Proposal</b>	<b>CFTC Guidance</b>
<b>Required</b>	All SDs/MSPs	All SDs/MSPs
<b>Substituted Compliance</b>	Non-U.S. SDs	Non-U.S. SDs/MSPs and non-U.S. person counterparties
<b>Not Required</b>	N/A	N/A

# Margin, STRD, Portfolio Reconciliation and Compression, Confirmations, Daily Trading Records

	SEC Proposal	CFTC Guidance
<b>Required</b>	All SDs/MSPs	<ul style="list-style-type: none"> <li>• U.S. SD/MSP and any counterparty</li> <li>• Any SD/MSP and a U.S. person counterparty</li> </ul>
<b>Substituted Compliance</b>	Non-U.S. SDs	<ul style="list-style-type: none"> <li>• Two non-U.S. branches of SDs/MSPs</li> <li>• Non-U.S. branch of SD/MSP and non-U.S. person counterparty</li> <li>• Non-U.S. SD/MSP and Non-U.S. branch of SD/MSP</li> <li>• Non-U.S. SD/MSP and guaranteed or conduit affiliate</li> </ul>
<b>Not Required</b>	N/A	Non-U.S. SD/MSP and non-U.S. person Counterparties