**U.S. COMMODITY FUTURES TRADING COMMISSION**
Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581
www.cftc.gov

CFTC Staff No-Action
Market Participants Division
Division of Clearing and Risk
Division of Market Oversight

**Re: No-Action Position Regarding the U.S. Person and Guarantee Definitions in 17 CFR 23.23(a)[1], the 2013 Cross-Border Guidance[2], and 17 CFR 23.160(a)[3]**

Ladies and Gentlemen:

The Market Participants Division ("**MPD**"), the Division of Clearing and Risk ("**DCR**"), and the Division of Market Oversight ("**DMO**," and together with MPD and DCR, the "**Divisions**") of the Commodity Futures Trading Commission ("**CFTC**" or "**Commission**") are issuing this letter in response to a request from the Institute of International Bankers ("**IIB**"), the International Swaps and Derivatives Association ("**ISDA**"), and the Securities Industry and Financial Markets Association ("**SIFMA**," and together with IIB and ISDA, the "**Associations**") for a no-action letter under Commission regulation 140.99.[4] The Associations request that the Divisions provide a no-action letter stating, among other things discussed below, that the Divisions will not recommend enforcement action against any person for failure to:

(1) Classify a counterparty based on the interpretations or definitions of "U.S. person" and

[1] 17 CFR 23.23(a) contains the definitions of "U.S. person" and "guarantee" for purposes of the cross-border application of certain swap regulations, as specified in 17 CFR 23.23 (the "**2020 Cross-Border Rule**"), including requirements related to calculating the notional amounts of swap transactions for purposes of the swap dealer ("**SD**") registration de minimis threshold, other SD registration requirements, and SD business conduct requirements. *See also Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants,* 85 FR 56924 (Sep. 14, 2020).

[2] *Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations (*the "**2013 Guidance**"), 78 FR 45292 (July 26, 2013). The 2013 Guidance contained the Commission's interpretation of who is to be considered a "U.S. person" for purposes of the application of CEA section 2(i) to many of the Commission's swap regulations, including requirements related to, real-time public reporting, swap data reporting, mandatory clearing, and mandatory trade execution.

[3] 17 CFR 23.160(a) contains the definitions of "U.S. person" and "guarantee" for purposes of the cross-border application of certain uncleared swap margin requirements for SDs and major swap participants ("**MSPs**") specified in 17 CFR 23.160 (the "**Cross-Border Uncleared Margin Rule**"). *See also Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements*, 81 FR 34818 (May 31, 2016).

[4] 17 CFR 140.99.

"guarantee" set forth in the 2013 Guidance or the Cross-Border Uncleared Margin Rule so long as such counterparty is classified based on the definitions of "U.S. person" and "guarantee" set forth in the 2020 Cross-Border Rule; or

(2) Classify a counterparty based on the definitions of "U.S. person" or "guarantee" set forth in the 2020 Cross-Border Rule so long as such counterparty is classified based on representations made by the counterparty pursuant to the interpretations or definitions of "U.S. person" and "guarantee" set forth in either the 2013 Guidance or the Cross-Border Uncleared Margin Rule prior to the effective date of the 2020 Cross-Border Rule.

## I. Regulatory Background

Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (**"CEA"**) to establish a comprehensive framework for regulation of the swap markets, including registration and regulation of SDs and MSPs,[5] swap clearing requirements,[6] trade execution requirements for certain swaps required to be cleared,[7] real-time reporting requirements,[8] and swap data reporting requirements[9] (collectively, the "**Covered Requirements**"). Section 2(i) of the CEA applies the Covered Requirements to activities outside the United States that have a direct and significant connection with activities in, or effect on, commerce of the United States.[10]

### *A. 2013 Guidance*

In July 2013, the Commission published the 2013 Guidance concerning the cross-border application of the Covered Requirements pursuant to section 2(i) of the CEA.[11] The 2013 Guidance turned, in large part, on whether one or both parties to a swap was a U.S. person or guaranteed by a U.S. person. In the 2013 Guidance, the Commission interpreted the term "U.S. 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;

(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 other jurisdiction in the United States or having its principal place of business in the United States;

(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 foreign employees of such entity;

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[5] *See* 7 U.S.C. § 6s and 17 CFR 3.3 and Part 23.

[6] *See* 7 U.S.C. § 2(h)(1) and 17 CFR Part 50.

[7] *See* 7 U.S.C. § 2(h)(8).

[8] *See* 7 U.S.C. § 2(a)(13) and 17 CFR Part 43.

[9] *See* 7 U.S.C. §§ 2(h)(5) and 4r and 17 CFR Parts 45 and 46.

[10] *See* 7 U.S.C. § 2(i).

[11] 78 FR 45292 (Jul. 26, 2013).

(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;

(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-U.S. persons and not offered to U.S. 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; 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).[12]

The 2013 Guidance went on to define the term "guarantee" to mean an agreement or arrangement under which a person commits to provide a financial backstop or funding against potential losses that may be incurred by another person in connection with a swap.[13]

Finally, the 2013 Guidance also included a category for a non-U.S. person that was a "conduit affiliate," which the Commission explained it would identify based on consideration of such factors as whether: (i) the non-U.S. person is a majority-owned affiliate of a U.S. person; (ii) the non-U.S. person is controlling, controlled by or under common control with the U.S. person; (iii) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and (iv) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with a third party(ies) to its U.S. affiliates.[14]

### *B. Cross-Border Uncleared Margin Rule*

A bit less than three years later, in May 2016, the Commission adopted the Cross-Border Uncleared Margin Rule,[15] which addressed the cross-border application of its margin requirements for uncleared swaps entered into by nonbank SDs and MSPs. Like the 2013 Guidance, the Cross-Border Uncleared Margin Rule turned, in large part, on whether one or both parties to a swap was a U.S. person or guaranteed by a U.S. person. Regulation 23.160(a)(10) defined a "U.S. person" to mean:

(i) A natural person who is a resident of the United States;

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[12] *Id.* at 45316-17.

[13] *See id.* at 45320, fn. 267; 45355.

[14] *See id.* at 45358-59.

[15] 17 CFR 23.160.

(ii) An estate of a decedent who was a resident of the United States at the time of death;

(iii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of entity similar to any of the foregoing (other than an entity described in paragraph (iv) or (v)) (a "**legal entity**"), in each case that is organized or incorporated under the laws of the United States or that has its principal place of business in the United States, including any branch of such legal entity;

(iv) A pension plan for the employees, officers or principals of a legal entity described in paragraph (iii), unless the pension plan is primarily for foreign employees of such entity;

(v) A 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;

(vi) A 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 owned by one or more persons described in paragraphs (i) through (v) and for which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity, including any branch of the legal entity; or

(vii) An 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 paragraphs (i) through (vi).[16]

When it adopted this definition, the Commission elected to diverge in narrow respects from the 2013 Guidance by eliminating the prong for a U.S. majority-owned fund, eliminating the catchall provision (instead treating the enumerated categories as exclusive), and modifying the unlimited U.S. responsibility prong.[17]

The Cross-Border Uncleared Margin Rule also adopted a new, narrower "guarantee" definition. Specifically, Regulation 23.160(a)(2) defined a "guarantee" to mean an arrangement pursuant to which one party to an uncleared swap has rights of recourse against a guarantor, with respect to its counterparty's obligations under the uncleared swap.[18] For these purposes, a party to an uncleared swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the uncleared swap.[19] In addition, in the case of any arrangement pursuant to which the guarantor has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from any other guarantor with respect to the counterparty's obligations under the uncleared swap, such arrangement will be deemed a guarantee of the counterparty's obligations under the uncleared swap by the other guarantor.[20] The Cross-Border Uncleared Margin Rule did not retain the "conduit affiliate" category from the 2013 Guidance.

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[16] 17 C.F.R. § 23.160(a)(10).

[17] *See* Cross-Border Uncleared Margin Rule at 34821-24.

[18] 17 CFR 23.160(a)(2).

[19] *Id.*

[20] *Id.*

### *C. 2020 Cross-Border Rule*

In September 2020, the Commission adopted the 2020 Cross-Border Rule,[21] which superseded the 2013 Guidance with respect to the cross-border application of the registration thresholds and certain requirements applicable to SDs and MSPs.[22] Like the 2013 Guidance and Cross-Border Uncleared Margin Rule, the 2020 Cross-Border Rule turned, in large part, on whether one or both parties to a swap was a U.S. person or guaranteed by a U.S. person.

Regulation 23.23(a)(23) defined a "U.S. person" to mean, subject to an exception for international financial institutions,[23] any person that is:

(A) A natural person resident in the United States;

(B) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;[24]

(C) An account (whether discretionary or non-discretionary) of a U.S. person; or

(D) An estate of a decedent who was a resident of the United States at the time of death.[25]

The 2020 Cross-Border Rule's "U.S. person" definition aligned with the definition used by the Securities and Exchange Commission ("**SEC**") for its parallel rules.[26] It also differed from the definitions in the 2013 Guidance and Cross-Border Uncleared Margin Rule in several respects, including: eliminating the U.S. majority-owned fund prong and catchall provision (like the Cross-Border Uncleared Margin Rule), eliminating the unlimited U.S. responsibility prong, modifying the principal place of business test for collective investment vehicles, eliminating specific prongs for pension plans and trusts, and including an exception for international financial institutions.[27]

The 2020 Cross-Border Rule also adopted a new "guarantee" definition, which was largely consistent with the Cross-Border Uncleared Margin Rule but different from the 2013 Guidance.[28] Like the Cross-Border Uncleared Margin Rule, the 2020 Cross-Border Rule did not retain the "conduit affiliate" category from the 2013 Guidance.

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[21] 17 CFR 23.23.

[22] 2020 Cross-Border Rule at 56931.

[23] Specifically, Regulation 23.23 included an exception from the term "U.S. person" for the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, and their agencies and pension plans. 17 CFR 23.23(a)(23)(iii).

[24] For this purpose, principal place of business means the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle. 17 CFR 23.23(a)(23)(ii).

[25] 17 CFR 23.23(a)(23)(i).

[26] *See* 17 CFR 240.3a71-3(a)(4).

[27] *See* 2020 Cross-Border Rule at 56932-38.

[28] *See* 17 CFR 23.23(a)(9). *See also* 2020 Cross-Border Rule at 56940-41.

In light of those differences, the Commission permitted market participants to continue to rely on representations made pursuant to the "U.S. person" and "guarantee" definitions in the Cross-Border Uncleared Margin Rule and 2013 Guidance prior to the November 13, 2020 effective date of the 2020 Cross-Border Rule.[29] However, the Commission declined to permit such continued reliance on existing representations after December 21, 2027.[30]

Notably, however, the 2020 Cross-Border Rule did not supersede the 2013 Guidance with respect to the swap clearing requirement, trade execution requirement, real-time reporting, or swap data reporting requirements (the "**Unaddressed Requirements**"). As a result, the cross-border application of the Unaddressed Requirements continues to rely on the 2013 Guidance's "U.S. person," "guarantee," and "conduit affiliate" definitions. Similarly, the 2020 Cross-Border Rule did not supersede the Cross-Border Uncleared Margin Rule, and so the cross-border application of margin requirements for uncleared swaps continues to rely on the Cross-Border Uncleared Margin Rule's "U.S. person" and "guarantee" definitions.

## II. Summary of Request for No-Action Position

The Associations argue that even though all of the Covered Requirements are part of a single, comprehensive swap regulatory framework governed by the same statutory provision—section 2(i) of the CEA—the patchwork established by the 2013 Guidance, Cross-Border Uncleared Margin Rule, and 2020 Cross-Border Rule effectively interprets section 2(i) differently for different groups of Covered Requirements. The Associations believe that there is no clear rationale for those differences; for example, it is not clear why a U.S. majority-owned fund should be classified as a "U.S. person" for required clearing purposes but not for purposes of registering as an SD or MSP or exchanging margin for uncleared swaps.

Thus, the Associations argue that the multiplicity of overlapping, slightly differing cross-border definitions employed by the Commission results in undue paperwork and other burdens for market participants. To classify their counterparties, SDs must collect representations designed to conform to three different CFTC rulesets, in addition to SEC rules and the rules of the prudential regulators.[31] The Associations represent that counterparties to SDs, particularly those based outside the United States, frequently express confusion about this complex web of rules, which the Associations claim discourages these counterparties from trading with Commission registrants and harms the competitive position of the United States.

In addition, the Associations complain that because the Commission adopted its cross-border rules at different times, SDs have been forced to collect representations from these counterparties multiple times, stating that the situation will worsen when the 2020 Cross-Border Rule's safe harbor for reliance on prior representations expires at the end of 2027, at which time market participants will need to collect updated representations once again. The Associations further argue that the rationale for such expiry has never been clear, as the Commission itself acknowledged that the 2020 Cross-Border Rule's definitions were narrower than the prior definitions.[32]

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[29] *See* 17 CFR 23.23(a)(9) and 23.23(a)(23)(iv). *See also* 2020 Cross-Border Rule at 56938-39 and 56941-42.

[30] *See id.*

[31] *See* ISDA U.S. Self-Disclosure Letter Information Request, *available at* https://www.isda.org/book/isda-us-self-disclosure-letter/.

[32] *See* 2020 Cross-Border Rule at 56938 and 56941.

***Request for No-Action Position***

To eliminate undue burdens, as well as to promote harmonization with the SEC, the Associations request that the Divisions issue a no-action letter pursuant to Commission Regulation 140.99 under which market participants could choose to follow the "U.S. person" and "guarantee" definitions in the 2020 Cross-Border Rule for all of the Covered Requirements and continue to rely on previously collected counterparty representations after the end of 2027. Specifically, the Associations request that the Divisions confirm that, both before and following December 31, 2027, they will not recommend enforcement action to the Commission against a market participant that:

(i) For purposes of determining applicability of the Unaddressed Requirements and CFTC margin requirements for uncleared swaps, elects to classify a counterparty based on the definitions of "U.S. person" and "guarantee" set forth in 17 CFR 23.23; or

(ii) For purposes of the Group B requirements and Group C requirements (each as defined by the 2020 Cross-Border Rule),[33] elects to classify a counterparty based on:

  (a) Representations made pursuant to the "U.S. person" and "guarantee" definitions in Commission Regulation 23.160 if the counterparty initially made the representation prior to the effective date of the 2020 Cross-Border Rule; or

  (b) Representations made pursuant to the interpretations of the terms "U.S. person" and "guarantee" in the 2013 Guidance if the counterparty initially made the representation prior to the effective date of the 2020 Cross-Border Rule.

In addition, the Associations request that DCR and DMO confirm that they will not recommend enforcement action to the Commission against a market participant that, for purposes of determining applicability of the Unaddressed Requirements, does not include non-U.S. person counterparties that are conduit affiliates.

The Associations add a further request that the requested no-action letter supersede prior no-action letters to the extent that those prior letters cross-referenced the 2013 Guidance or the Cross-Border Margin Rule in ways that would be inconsistent with the requested no-action letter,[34] and that the requested no-action letter expire only upon the compliance date of Commission rules addressing the cross-border application of the Covered Requirements.

## III. Divisions' No-Action Positions

In consideration of the foregoing, the Divisions agree with the Associations that the Commission's various interpretations and rulemakings defining or interpreting the terms "U.S. person" and "guarantee" in the context of cross-border swap trading present undue burdens to market participants. The Divisions also agree that the Associations' requested no-action positions would promote harmonization with the SEC. Accordingly, until such time as the Commission promulgates rules

[33] *See* 17 CFR 23.23(a)(7) (defining "Group B requirements" to mean the requirements set forth in 17 CFR 23.202 and 17 CFR 23.501 through 23.504) and 23.23.(a)(8) (defining "Group C requirements" to mean the requirements set forth in 17 CFR 23.400 through 23.451 and 17 CFR 23.700 through 23.704).

[34] For example, the requested no-action letter would supersede references to the 2013 Guidance and/or Commission Regulation 23.160 contained in CFTC Staff Letters 20-18 (pertaining to certain listed warrants), 20-21 (addressing the withdrawal of Staff Advisory 13-69), 21-09 (Brexit-related relief), and 25-16 (pertaining to the cross-border application of Parts 45 and 46).

addressing the disparate cross-border definitions of "U.S. person" and "guarantee" as described above, the Divisions, both before and following December 31, 2027, will not recommend that the Commission commence enforcement action against any person solely as a result of the person doing any of the following:

(1) For purposes of determining applicability of the Unaddressed Requirements and CFTC margin requirements for uncleared swaps, the person elects to classify a counterparty based on the definitions of "U.S. person" and "guarantee" set forth in 17 CFR 23.23 (i.e., the 2020 Cross-Border Rule);

(2) For purposes of determining the applicability of the Group B requirements and Group C requirements (each as defined by the 2020 Cross-Border Rule), the person elects to classify a counterparty based on:

   (a) Representations made pursuant to the "U.S. person" and "guarantee" definitions in Commission Regulation 23.160 (i.e., the Cross-Border Uncleared Margin Rule) if the counterparty initially made the representation prior to the effective date of the 2020 Cross-Border Rule; or

   (b) Representations made pursuant to the interpretations of the terms "U.S. person" and "guarantee" in the 2013 Guidance if the counterparty initially made the representation prior to the effective date of the 2020 Cross-Border Rule; or

(3) For purposes of determining applicability of the Unaddressed Requirements, the person does not include non-U.S. person counterparties that are conduit affiliates, as such term was interpreted in the 2013 Guidance.

The Divisions also hereby confirm that the foregoing no-action positions supersede any prior no-action letters issued by any of the Divisions to the extent that those prior letters cross-referenced the 2013 Guidance or the Cross-Border Uncleared Margin Rule in ways that would be inconsistent with the no-action positions set forth above.

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This letter, and the positions taken herein, represent the views of the Divisions only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. This letter and the no-action positions taken herein are not binding on the Commission.[35] Further, this letter, and the positions taken herein, are based upon the facts and circumstances presented to staff of the Divisions. Any different, changed or omitted material facts or circumstances might render the positions taken in this letter void. Finally, as with all staff letters, the Divisions retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the positions taken herein, in their discretion.

Questions concerning this no-action letter may be directed to Frank Fisanich, Deputy Director, MPD, ffisanich@cftc.gov; Nora Flood, Senior Advisor, DMO, nflood@cftc.gov; or Sarah Josephson, Deputy Director, DCR, sjosephson@cftc.gov.

[35] *See* 17 CFR 140.99(a)(2) ("A no-action letter binds only the issuing Division . . . and not the Commission or other Commission staff.").

Sincerely,

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Thomas J. Smith
Acting Director
Market Participants Division

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Richard Haynes
Acting Director
Division of Clearing and Risk

_____
Rahul Varma
Acting Director
Division of Market Oversight

cc: Kathleen Clapper, NFA Compliance
National Futures Association, Chicago

Michael Otten, OTC Derivatives
National Futures Association, New York