

ClientAlert

Capital Markets/Derivatives

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Exemptive Order Regarding Compliance With Certain Swap Regulations



Pursuant to its authority under Section 4(c)(1) of the Commodity Exchange Act (the “CEA”),¹ on June 29, 2012 the Commodity Futures Trading Commission (the “CFTC”) published an Exemptive Order Regarding Compliance With Certain Swap Regulations² (the “Order”). The Order provides temporary exemptive relief with respect to compliance with certain entity-level and transaction-level requirements³ of the CEA that would otherwise apply to registered swap dealers (“SDs”) and major swap participants (“MSPs”). By virtue of the Order, non-US SDs and non-US MSPs as well as foreign branches of US SDs and US MSPs will be eligible to comply with the requirements of their home jurisdiction (i.e., the home jurisdiction of the foreign SD/MSP or the foreign branch) in place of compliance with certain entity-level and transaction-level requirements for a limited time. The exemptive relief will be effective upon the date that the non-US SD or non-US MSP or, in the case of a foreign branch, the date upon which the related US SD or US MSP applies for registration with the CFTC, and will expire upon the date that is 12 months from the publication of the Order in the Federal Register.⁴

The Order also grants relief to US SDs and US MSP from certain entity-level and transaction-level requirements by allowing US SDs and US MSPs to delay their compliance until January 1, 2013.

Cross-Border Application of Dodd-Frank

The CFTC recently published cross-border interpretive guidance⁵ (the “Interpretive Guidance”) to provide greater clarity regarding the compliance by non-US persons with the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) with regard to cross-border activities. The Interpretive Guidance addresses, among other things, whether non-US persons must register with the CFTC as SDs or MSPs and to what extent such non-US SDs or non-US MSPs (or foreign branches, subsidiaries, agencies and affiliates of US SDs and MSPs) must comply with the requirements of the Dodd-Frank Act.

1. Section 4(c)(1) of the CEA authorizes the CFTC to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of transaction from any of the provisions of the CEA (subject to certain exceptions) where the CFTC determines that the exemption would be consistent with the public interest.

2. 77 FR 41110

3. For more details regarding the entity-level and transaction-level requirements, please see our Client Alert “CFTC Publishes Proposed Interpretive Guidance with respect to the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act” which is available [here](#).

4. The Order was published on July 12, 2012.

5. 77 FR 41213

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Registered SDs and MSPs (whether US or non-US) must comply with risk management requirements, internal and external business conduct rules, and reporting and recordkeeping requirements. In the Interpretative Guidance, the CFTC has divided these requirements into “entity-level” and “transaction-level” requirements and the Order incorporates this subdivision.

Entity-Level Requirements

The entity-level requirements are as follows:

- Capital adequacy
- Appointment of Chief Compliance Officer
- Risk management
- Swap data recordkeeping
- Swap data reporting to a registered swap data repository (“SDR Reporting”)
- Physical commodity swaps reporting (“Large Trader Reporting”)

The entity-level requirements apply to all registered SDs and MSPs across all swaps without distinction as to the counterparty or the location of the swap. In the Interpretative Guidance, the CFTC further subdivided the entity-level requirements into two subcategories. In one subcategory are the requirements related to capital adequacy, Chief Compliance Officer, risk management and swap data recordkeeping, which can be distinguished as the “risk control” category. In the other subcategory, the “reporting” category, are the requirements related to swap data reporting and Large Trader Reporting.

Pursuant to the Order, non-US SDs and non-US MSPs will be permitted to delay compliance with certain entity-level requirements, subject to the conditions outlined below. No relief is available with respect to the reporting category of entity-level requirements where the counterparty is a US person. Non-US SDs and non-US MSPs will be required to comply with SDR Reporting and Large Trader Reporting requirements for all swaps in which the counterparty is **a US person** as of the applicable compliance date. Non-US SDs and non-US MSPs that are not affiliates or subsidiaries of a US SD/MSP are permitted to delay compliance with SDR Reporting and Large Trader Reporting where they face **non-US counterparties**.⁶ Note that the relief does not apply to non-US SDs or non-US MSPs that are affiliates or subsidiaries of US SD/MSPs.

In respect of US SDs and US MSPs, the Order allows delayed compliance with entity-level requirements, other than SDR Reporting and Large Trader Reporting, until January 1, 2013. SDR Reporting and Large Trader Reporting requirements must be complied with by US SDs and US MSPs in respect of all swaps.

Transaction-Level Requirements

The transaction-level requirements are as follows:

- Clearing and swap processing
- Margining and segregation for uncleared swaps
- Trade execution
- Trade confirmation
- Swap trading relationship documentation
- Portfolio reconciliation and compression
- Real-time public reporting
- Daily trading records
- External business conduct standards

Pursuant to the Order, the CFTC is granting temporary relief to non-US SDs and non-US MSPs and foreign branches of US SDs and US MSPs **for swaps with non-US counterparties**. In lieu of compliance with the transaction-level requirements, such entities must comply with applicable regulations in the relevant home jurisdiction (i.e., the home jurisdiction of the non-US SD/MSP or the foreign branch). Note that the relief does not apply to either US SDs/MSPs or non-US SDs/MSPs facing US counterparties; if the counterparty is a US person, compliance with the transaction-level requirements is required. For non-US SDs/MSPs, the relief becomes effective on the compliance date for registration and expires 12 months following the publication of the Order in the Federal Register. Unlike the relief granted with respect to the entity-level requirements, no delayed compliance is afforded to US SDs/MSPs with respect to transaction-level requirements.

6. For such trades, SDR Reporting and LTR Reporting will become effective on expiry of the Order which will occur 12 months following the publication of the Order in the Federal Register.

Conditions

To obtain the relief under the Order, the relevant non-US SD/MSP must:

- Apply to become registered with the CFTC as an SD/MSP, as applicable, when registration is required.
- Within 60 days of applying for registration, submit to the National Futures Association a compliance plan addressing how it plans to comply, in good faith, with all applicable requirements under the CEA and related rules and regulations upon the effective date of the Interpretative Guidance. At a minimum, such plan must provide, for each entity-level and transaction-level requirement, a description of: (1) whether the non-US SD or non-US MSP plans to comply with each of the entity-level and transaction-level requirements that are in effect at such time or plans to seek a comparability determination⁷ and rely on compliance with one or more of the requirements of the home jurisdiction, as applicable; and (2) to the extent that the non-US SD or non-US MSP would seek to comply with one or more of the requirements of the home jurisdiction, a description of such requirements.

A US SD or US MSP whose foreign branch seeks to rely on the exemptive relief with respect to swaps with non-US counterparties must submit a compliance plan addressing how it plans to comply, in good faith, with all applicable transaction-level requirements under the CEA upon the expiration of the Order.

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7. For further details regarding comparability determinations by the CFTC, please see our Client Alert "*CFTC Publishes Proposed Interpretative Guidance With Respect to the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act*" which is available [here](#).