

ClientAlert

Capital Markets—Derivatives

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Final Exemptive Order Regarding Cross-Border Application of Certain Swap Regulations

On July 13, 2013, the Commodity Futures Trading Commission (the “CFTC”) approved a second final exemptive order (the “Final Order”) providing time-limited relief from certain cross-border applications of the swaps provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) and the CFTC’s regulations. The purpose of the Final Order is to facilitate an orderly transition to the new swaps regulatory regime with respect to cross-border activities. On July 17, 2013, the CFTC also issued final guidance¹ (the “Cross-Border Guidance”) with respect to such cross-border activities. The CFTC has recognized that the substituted compliance program under the Cross-Border Guidance could benefit from additional time. In order to provide market participants (both non-US and US) greater certainty regarding their obligations, the CFTC has issued time-limited relief and extended certain aspects of the relief granted under the January 7, 2012 final temporary exemptive order (the “January Order”).² The Final Order should be read in conjunction with the Cross-Border Guidance. We have discussed the Cross-Border Guidance in detail in a separate Client Alert.

The Final Order is effective from July 13, 2013 until December 21, 2013 (or such earlier date specified in the Final Order) and also requests comments on any issues that are not fully addressed in the Final Order. The comment period was open for 30 days.

Summary of Relief Granted Under the Final Order

The Final Order (1) extends the effectiveness of the definition of “US person” contained in the January Order, (2) phases-in the compliance requirements for non-US persons affiliated with a US person and guaranteed by US persons (“guaranteed affiliates”)³ and non-US affiliate conduits of US persons (“affiliate conduits”)⁴ by providing such entities relief from compliance with Transaction-Level Requirements for swaps with non-US persons and foreign branches of US swap dealers (“SDs”) and major swap participants (“MSPs”) until 75 days after the



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¹ 17 CFR Chapter I, Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations (78 FR 45292 (July 26, 2013)).

² On January 7, 2012, the Commission issued a final exemptive order that granted temporary conditional relief with respect to the cross-border application of the swaps provisions under the Dodd-Frank Act (and related CFTC regulations) until July 12, 2013.

³ See Cross-Border Guidance Client Alert for a discussion on the interpretation of a “guaranteed affiliate” by the CFTC. Under the Cross-Border Guidance, the CFTC takes the view that a guarantee could include partial recourse arrangements and that such a guarantee could be an arrangements or agreements in which one party commits to provide a financial backstop or funding against potential losses that may be incurred by the other party such as keepwells, liquidity puts, indemnity agreements, liability or loss transfer or sharing agreements and any other explicit financial support arrangements.

⁴ See Cross-Border Guidance Client Alert for a discussion on the interpretation of an “affiliate conduit” by the CFTC.

Cross-Border Guidance is published in the Federal Register (*i.e.*, October 9, 2013), (3) allows non-US persons (whether or not guaranteed by a US person) to continue to apply the aggregation principles applied under the January Order until October 9, 2013 and (4) allows any non-US person (whether or not guaranteed by a US person) to exclude swaps with a non-US person or swaps with the foreign branch of a US person in its calculations of the aggregate gross notional amount of swaps for purposes of determining whether it exceeds the *de minimis* level of swap dealings (for SDs) or swap positions (for MSPs).

Phase-In of “US Person” Definition and Guaranteed Affiliates and Affiliate Conduits

The Final Order extends the application of the definition of “US person” contained in the January Order. A party may also continue to reasonably rely on its counterparty’s representation in determining whether the counterparty is a US person.⁵ From July 13, 2013 until October 9, 2013, a US person is defined as:

- i. A natural person who is a resident of the United States;
- ii. 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, in each case that is (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or (B) for all such entities other than funds or collective investment vehicles, having its principal place of business in the United States;
- iii. A pension plan for the employees, officers or principals of a legal entity described in (ii) above, unless the pension plan is primarily for foreign employees of such entity;
- iv. An estate of a decedent who was a resident of the United States at the time of death, or 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; or
- v. 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 (i) through (iv) above.

Guaranteed affiliates and affiliate conduits of US persons do not need to comply with Transactional-Level Requirements relating to swaps with non-US persons and foreign branches of US SDs and MSPs until October 9, 2013.

⁵ Cross-Border Guidance, 78 FR at 45315.

Transitional Relief for SD and MSP Determinations

The Final Order provides transitional relief for market participants by extending certain temporary relief under the January Order with respect to SD and MSP determinations.

***De minimis* calculations.** The Final Order extends the temporary relief provided in the January Order for a non-US person (regardless of whether such non-US person’s swap obligations are guaranteed by a US person (such person, a “Guaranteed US Person”)) from the requirement that a person include all of its swaps in its calculation of the aggregate gross notional amount of swaps connected with determining whether it is engaged in more than a *de minimis* level of swap dealing (which takes into account the notional amount of swap dealing activity over the prior 12 months) or holds swap positions above any of the MSP thresholds (determined as of the end of each fiscal quarter). A non-US person (including a Guaranteed US Person) may exclude swaps where the counterparty is a non-US person or any swap where the counterparty is a foreign branch of a US person that is registered as an SD until October 9, 2013.

Aggregation. The Final Order also allows all non-US persons to apply the aggregation principles applied in the January Order until October 9, 2013. Under the transitional relief of the Final Order, in determining whether a non-US person is engaged in more than a *de minimis* level of swap dealing, a non-US person that is engaged in swap dealing activities with US persons as of December 21, 2012 is not required to include and may exclude and not consider the aggregate notional value of:

- Any swap dealing transactions of its US affiliates under common control;
- Any swap dealing transactions of its non-US affiliates under common control with other non-US persons; and
- If any of its affiliates under common control is registered as an SD, any swap dealing transaction of any of its non-US affiliates that (i) is engaged in swap dealing activities with US persons as of December 21, 2012 or (ii) is registered as an SD.

Transitional Relief for Swap Dealer Registration

A non-US person that was previously exempt from registration as an SD because of the temporary relief extended to such person under the January Order, but that is required to register because of changes to the US person definition or *de minimis* calculations under the Cross-Border Guidance, is not required to register as an SD until two months after the end of the month in which such person exceeds the *de minimis* threshold for SD registration. Such non-US persons would begin accounting for these swaps on October 9, 2013 (*i.e.*, the date on which the 75-day relief period expires) and as a result would not be required to register until two months after the end of October.

Table A below summarizes the application of **Entity-Level Requirements** to non-US SDs and non-US MSPs under the Final Order.

SD/MSP	Affiliation	Counterparty	Relief	Expiration of Relief and Substituted Compliance ⁸
Non-US SD/MSP established in a Relief Jurisdiction⁹	Not part of a US Affiliated Group ¹⁰	Non-US person	Delay in compliance with Entity-Level Requirements (other than SDR Reporting) Delay in compliance with SDR reporting with respect to swaps with non-US persons, <i>provided the following condition is satisfied</i> : Entity must comply with the swap data recordkeeping and reporting requirements of the home jurisdiction or CFTC recordkeeping requirements under CFTC Regulation Parts 45 & 46 ¹¹ in the absence of home jurisdiction requirements	The earlier of December 21, 2013 or 30 days following the issuance of a Substituted Compliance Determination ¹² for the relevant Entity-Level Requirement
		US person	Delay in compliance with Entity-Level Requirements (other than SDR Reporting)	The earlier of December 21, 2013 or 30 days following the issuance of a Substituted Compliance Determination for the relevant Entity-Level Requirement
	Part of a US Affiliated Group	US person	Delay in compliance with Entity-Level Requirements (other than SDR Reporting)	The earlier of December 21, 2013 or 30 days following the issuance of a Substituted Compliance Determination for the relevant Entity-Level Requirement
Non-US SD/MSP not established in a Relief	No relief under Final Order Must comply with Entity-Level Requirements in accordance with the Cross-Border Guidance			

6 The Entity-Level Requirements consist of: (1) capital adequacy; (2) chief compliance officer; (3) risk management; (4) swap data recordkeeping; and (5) swap data repository reporting ("SDR Reporting"). Because, as described in the Cross-Border Guidance, substituted compliance is not possible for Large Trader reporting requirements, such requirements are excluded from the term "Entity-Level Requirements" for purposes of the Final Order.

7 The Transaction-Level Requirements consist of: (1) clearing and swap processing; (2) margin and segregation for uncleared swaps; (3) trade execution; (4) swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; (8) daily trading records; and (9) external business conduct standards. The CFTC notes that if final rules are issued for capital adequacy or margin and segregation for uncleared swaps prior to December 21, 2013, non-US SDs and non-US MSPs must comply with any compliance date provided in the final rulemaking. 78 FR at 43788 (July 22, 2013).

8 Comply with any laws and regulations of the home jurisdiction where such entity is established (and only to the extent required by such jurisdiction) in lieu of complying with any Entity-Level Requirement for which substituted compliance would be possible under the Commission's Guidance.

9 Market participants or regulators in each of Australia, Canada, the European Union, Hong Kong, Japan and Switzerland (each a "Relief Jurisdiction") have recently submitted requests for Substituted Compliance Determinations. Given the contemporaneous timing of the issuance of the Cross-Border Guidance, the CFTC decided to issue temporary relief to each of the Relief Jurisdictions to assist with the transition to the substituted compliance regime.

10 A "US Affiliated Group" refers to herein as an affiliated group in which the ultimate parent entity is a US SD, US MSP, US bank, US financial holding company or US bank holding company.

11 CFTC Regulation Parts 45.2, 45.6, 46.2 and 46.4.

12 The Commission will review the request for and issue an applicable substituted compliance determination as detailed in the Cross-Border Guidance ("Substituted Compliance Determination") for the relevant Entity-Level Requirement or Transaction-Level Requirement of the jurisdiction in which the non-US swap dealer or non-US MSP is established.

Transitional Relief for Compliance With Entity-Level and Transaction-Level Requirements

The Final Order continues to provide some relief for Entity-Level Requirements⁶ and Transaction-Level Requirements⁷ for non-US SDs and non-US MSPs and foreign branches of US SDs and US MSPs. Such relief is summarized in the tables that follow. Note that the Final Order does not provide relief for US SDs/MSPs. Such US persons must comply with all the Entity-Level and Transaction-Level Requirements.

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Table B below summarizes application of the **Transaction-Level Requirements** to non-US SDs/MSPs, foreign branches of US SDs/MSPs and Non-Registrants under the Final Order.

SD/MSP	Counterparty	Relief	Expiration of Relief
Non-US SD/MSP established in a Relief Jurisdiction	Non-US person	Compliance with home jurisdiction laws and regulations for relevant Transaction-Level Requirement other than clearing requirement ¹³ , trade execution requirement ¹⁴ or real-time reporting requirement ¹⁵ for swaps with guaranteed affiliates	The earlier of December 21, 2013 or 30 days following the issuance of a Substituted Compliance Determination
		Delay in compliance with clearing requirements if exempt under the January Order	75 days after the publication of the Guidance in the Federal Register (<i>i.e.</i> , October 9, 2013)
	Guaranteed affiliates	Compliance with home jurisdiction laws and regulations for real-time reporting requirements	September 30, 2013
	US person	No relief under the Final Order Must comply with Transaction-Level Requirements in accordance with the Cross-Border Guidance	
Non-US SD/MSP not established in a Relief Jurisdiction	Non-US person	Delay in compliance with clearing requirements if exempt under the January Order	75 days after the publication of the Guidance in the Federal Register (<i>i.e.</i> , October 9, 2013)
		No other relief provided under the Final Order	
	Guaranteed affiliates	Compliance with home jurisdiction laws and regulations	
US person	No relief under the Final Order Must comply with Transaction-Level Requirements in accordance with the Cross-Border Guidance		
Foreign branch of a US SD/MSP located in a Relief Jurisdiction	Non-US person	Compliance with home jurisdiction laws and regulations for relevant Transaction-Level Requirement other than clearing trade execution or real-time reporting requirement with guaranteed affiliates of a US person	The earlier of December 21, 2013 or 30 days following the issuance of a Substituted Compliance Determination
	Non-US person & foreign branch of a US SD/MSP	Delay in compliance with clearing requirements if exempt under the January Order	75 days after the publication of the Guidance in the Federal Register (<i>i.e.</i> , October 9, 2013)
	Guaranteed affiliates	Compliance with home jurisdiction laws and regulations for real-time reporting requirements	September 30, 2013
	US person	No relief under the Final Order Must comply with Transaction-Level Requirements in accordance with the Cross-Border Guidance	
Foreign branch of a US SD/MSP not located in a Relief Jurisdiction	Non-US person	Compliance with home jurisdiction laws and regulations for relevant Transaction-Level Requirement	75 days after the publication of the Guidance in the Federal Register (<i>i.e.</i> , October 9, 2013)
	Non-US person & foreign branch of a US SD/MSP	Delay in compliance with clearing requirements if exempt under the January Order	75 days after the publication of the Guidance in the Federal Register (<i>i.e.</i> , October 9, 2013)
	US person	No relief under the Final Order Must comply with Transaction-Level Requirements in accordance with the Cross-Border Guidance	
Non-registrants¹⁶	Non-registrants	Compliance with home jurisdiction laws and regulations for relevant Transaction-Level Requirement	75 days after the publication of the Guidance in the Federal Register (<i>i.e.</i> , October 9, 2013)

13 CFTC Regulation Part 50 and Part 23.506.

14 CFTC Regulation 37.12 or 38.11.

15 CFTC Regulation Part 43.

16 "Non-registrants," in this context, refers to a guaranteed affiliate of a US person (established in any jurisdiction outside the United States) that is not registered as an SD or MSP.

Scope of the Relief of the Final Order

The time-limited relief provided in the Final Order: (A) does not affect, with respect to any swap within the scope of the Final Order, the applicability of any other CEA provision or CFTC regulation; (B) shall not limit the applicability of any CEA provision or CFTC regulation to any person, entity or transaction except as provided in the Final Order; (C) shall not affect the applicability of any provision of the CEA or CFTC regulations to futures contracts, or options on future contracts; and (D) shall not affect any effective or compliance date set forth in any Dodd-Frank Act rulemaking by the CFTC.

The Final Order also does not affect or eliminate the obligation of any party to comply with the conditions of the Inter-Affiliate Exemption where one of the counterparties is electing the Inter-Affiliate Exemption.

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