

CLIENT MEMORANDUM

CFTC Issues Guidance and Temporary Exemptive Relief Regarding Cross-Border Swap Regulations

July 22, 2013

AUTHORS

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The CFTC has issued final guidance regarding the cross-border application of the swap provisions of the Commodity Exchange Act.¹ The Guidance, among other things, (i) provides a definition of the term “U.S. person” to be used by swap dealers and major swap participants,² (ii) discusses swap dealer and major swap participant registration requirements and the “entity-level” and “transaction-level” requirements that apply to such registrants and (iii) provides a general framework for compliance with the regulatory requirements of a foreign jurisdiction in lieu of those of the CFTC, subject to certain

¹ *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45292 (July 26, 2013) (the “Guidance”). For more information regarding swaps, please see our client memoranda entitled [CFTC and SEC Adopt Definition of “Swap” and “Security-Based Swap”](#) and [Treasury Excludes FX Swaps and FX Forwards from Most CFTC Oversight](#), dated August 23, 2012 and November 20, 2012, respectively.

² For more information regarding swap dealers, major swap participants, and certain of the CFTC regulations that apply to them, please see our client memoranda entitled [New Swap Data Recordkeeping and Reporting Rules](#), [CFTC Adopts Final Business Conduct Standards for Swap Dealers & Major Swap Participants](#), [Swap Dealer and Security-Based Swap Dealer Defined](#) and [CFTC and SEC Define “Major Swap Participant” and “Major Security-Based Swap Participant”](#), dated March 7, 2012, March 7, 2012, May 8, 2012 and June 25, 2012, respectively.

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conditions. The Guidance is effective immediately upon its publication in the Federal Register; however, the CFTC has issued a related exemptive order that grants market participants additional time to comply with certain swap regulations.³

The Guidance

Definition of "U.S. person"

The swap provisions of the Commodity Exchange Act (the "CEA") generally do not apply to swap activities⁴ outside of the United States unless such activities (i) have a direct and significant connection with activities in, or an effect on, commerce in the United States; or (ii) contravene CFTC regulations adopted to ensure compliance with the swap provisions of the CEA added by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Swap activities conducted outside of the United States by or with a "U.S. person," as defined in the Guidance, will be deemed to satisfy this jurisdictional requirement. According to the nonexclusive definition provided in the Guidance, a "U.S. person" includes:⁵

- (i) any natural person who is a resident of the U.S.;
- (ii) any estate of a decedent who was a resident of the U.S. 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 U.S. or having its principal place of business in the U.S.;⁶

³ *Exemptive Order Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 43785 (July 22, 2013) (the "July Order").

⁴ "Swap activities" include activities of a registered swap dealer or major swap participant related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives.

⁵ The definition of "U.S. person" in the Guidance is intended to be used for the sole purpose of determining the CFTC's jurisdiction with respect to cross-border swap activities. The Guidance specifically states that the "U.S. person" definition is not intended to address how the term "person" or "U.S. person" should be interpreted in connection with any other CEA provisions or CFTC regulations.

⁶ The Guidance distinguishes between the "principal place of business" of an operating company and a collective investment vehicle (such as a commodity pool).

The "principal place of business" of an operating company is described as the place where the corporation's highest level officers direct, control and coordinate the corporation's activities, i.e., the "nerve center" of the corporation. Generally, this will be where the operating company has its headquarters.

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- (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;
- (v) any trust governed by the laws of a state or other jurisdiction in the U.S., if a court within the U.S. 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 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).

In light of the Guidance, swap dealers will likely reach out to their swap counterparties to obtain representations as to such counterparties' U.S. person status. In addition, such counterparties may be required to complete the ISDA Dodd-Frank Protocols so that their swap dealers can incorporate additional provisions into their trading documentation.⁷

Entity-Level and Transaction-Level Requirements

Entity-level requirements relate to a registrant's capital requirements, chief compliance officer requirements, risk management practices, swap data recordkeeping, swap data repository reporting, and physical commodity large swap trader reporting.

Transaction-level requirements relate to a registrant's required clearing and swap processing, margining (and segregation) for uncleared swaps, mandatory trade execution, swap trading relationship documentation, portfolio

In determining the "principal place of business" of a collective investment vehicle, the locations where the vehicle has registered offices, holds board meetings or maintains books and records is generally not relevant. Instead, the vehicle's center of direction, control and coordination may be the location of the senior personnel who determined the vehicle's place of organization (i.e., the vehicle's sponsor) or who implement its investment and trading strategy and manage its risks (i.e., the vehicle's investment adviser).

⁷ For more information regarding the ISDA Dodd-Frank Protocol, please see our client memoranda entitled [ISDA August 2012 Dodd-Frank Protocol](#) and [July Adherence Deadline for ISDA March 2013 Dodd-Frank Protocol](#), dated August 20, 2012 and May 29, 2013, respectively.

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reconciliation and compression, real-time public reporting, trade confirmation, daily trading records, and external business conduct standards.

In the Guidance, the CFTC clarified when entity-level requirements and transaction-level requirements would apply, depending on the U.S. person status of one or both parties to a particular swap.

Substituted Compliance Determinations

The CFTC has decided to permit an entity to comply with the regulatory requirements of a foreign jurisdiction in lieu of those of the CFTC under certain circumstances. Among other things, the CFTC must first determine that the laws and regulations of the foreign jurisdiction are comparable to and as comprehensive as a corresponding category of U.S. laws and regulations. The CFTC included in the Guidance a process for making a substituted compliance determination. Entities eligible for substituted compliance, however, would remain subject to CFTC examination and enforcement authority.

The July Order

Among other things, the July Order provides targeted, time-limited relief from certain regulations relating to swap dealer and major swap participant threshold calculations, swap dealer registration, and entity-level and transaction-level requirements when dealing with non-U.S. persons. Market participants are also permitted to continue to rely on the limited definition of "U.S. person" provided by the CFTC in an exemptive order issued on January 13, 2013. The relief in the July Order expires 75 days from the date the Guidance is published in the Federal Register, or, in some cases, on December 21, 2013.

If you have any questions concerning the matters described in this memorandum, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Jack I. Habert (212-728-8952, jhabert@willkie.com), Marc T. Foster (202-303-1151, mfoster@willkie.com), Jonathan C. Burwick (212-728-8108, jburwick@willkie.com) or the Willkie attorney with whom you regularly work.

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