

CLIENT ALERT

# CFTC Advisory Reminds Non-U.S. Swap Dealers of Their Chief Compliance Officer Reporting Obligations

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## AUTHORS

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On December 2, 2022, the Commodity Futures Trading Commission's ("CFTC") Market Participants Division issued an advisory concerning non-U.S. swap dealers and non-U.S. major swap participants that rely on substituted compliance to meet their annual compliance report obligations under CFTC regulation 3.3(f).<sup>1</sup> The Advisory notes that many non-U.S. swap dealers have produced deficient reports that fail to meet the requirements established in comparability determinations for annual compliance reports under CFTC Rule 3.3(f).<sup>2</sup> The Advisory serves as a reminder for non-U.S. swap dealers to revisit their existing processes for submitting their annual compliance reports in order to ensure they meet the expectations of the Staff.

## Background

Pursuant to CFTC Rule 3.3(f), the chief compliance officer of a swap dealer (among other registrants) is required to furnish a Chief Compliance Officer Annual Report ("CCO Report") to the CFTC concerning the entity's compliance program.<sup>3</sup> The CFTC's rules permit non-U.S. swap dealers to submit an alternative to the CCO Report, provided that the

<sup>1</sup> CFTC Staff Letter No. 22-17 (the "Advisory"), *available* [here](#).

<sup>2</sup> The Advisory notes that as of the date of its issuance, there are no MSPs registered with the CFTC. However, the Advisory's guidance applies to both non-U.S. swap dealers, as well as non-U.S. MSPs. *Id.* at 1 n.1.

<sup>3</sup> 17 C.F.R. § 3.3(f).

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alternative report complies with the non-U.S. swap dealer's home regulatory requirements and the CFTC has determined that the foreign regulatory requirements are comparable to those of the CFTC.

In December 2013, the CFTC issued a number of comparability determinations with respect to certain CFTC regulations for Hong Kong, Japan, Switzerland, Canada, the European Union, and the United Kingdom. These comparability determinations found that a non-U.S. swap dealer "would generally be deemed to be in compliance with CFTC Rule 3.3(f) provided that it certifies and furnishes to the CFTC the annual compliance report required under the standards of the relevant foreign jurisdiction identified in the specific comparability determination."<sup>4</sup>

### Staff Advisory: Annual CCO Report

According to the Advisory, since the CFTC issued comparability determinations for the six jurisdictions, non-U.S. swap dealers have failed to satisfy their reporting obligations pursuant to CFTC Rule 3.3(f). Per the CFTC's comparability determinations, reporting entities are required to furnish the CFTC with the same compliance report required under the regulations of the relevant foreign jurisdiction identified in the applicable comparability determination. However, CFTC Staff explain that certain reports, submitted to the CFTC in lieu of a CCO Report prepared pursuant to the content requirements of CFTC Rule 3.3(e), do not meet the standard for substituted compliance. In some instances, the reports purport to be the same reports required by the non-U.S. swap dealer's home regulator, but are altered or redacted. In others, the reports appear to have been prepared specifically for the CFTC and not a foreign regulator, and are missing key information required by CFTC Rule 3.3(e), such as material noncompliance issues identified in the applicable year.<sup>5</sup>

The Advisory explains that CFTC Staff expect non-U.S. swap dealers to submit the same annual report submitted to a foreign regulator – without redactions or alterations. In particular, the Advisory notes that even the redaction of sensitive or irrelevant information means that the report does not comply with the terms of the comparability determinations with respect to the CCO Report. To the extent an entity feels compelled to redact, alter, or remove certain information from a report provided to its home regulator prior to submitting the report to the CFTC, the Advisory states that the "only alternative is to prepare, certify, and furnish to the Commission a CCO Annual Report in full compliance with the content requirements in Commission regulation 3.3(e)."<sup>6</sup>

### Commissioner Pham's Statement on the Advisory

Commissioner Caroline Pham encouraged non-U.S. firms that intend to rely upon substituted compliance for the CCO Report to be proactive with the CFTC Staff prior to filing the upcoming annual report.<sup>7</sup> She also argued that the contents of any home regulator report submitted pursuant to substituted compliance should be limited to compliance matters

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<sup>4</sup> Advisory at 2.

<sup>5</sup> *Id.* at 2–3.

<sup>6</sup> *Id.*

<sup>7</sup> Statement of Commissioner Caroline D. Pham on Non-U.S. Swap Dealer Annual Compliance Reports, Dec. 2, 2022, [available here](#).

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concerning swap dealing activities. Notwithstanding her position, the Advisory explicitly provides that a participant must submit an un-redacted version of the home regulator report in order to rely upon substituted compliance with respect to the CCO Report requirement.

### Implications

While the Advisory is intended to remind affected parties of their reporting obligations and does not commence any new enforcement action, non-U.S. swap dealers should be on notice that, going forward, CFTC Staff will be more closely scrutinizing CCO Reports to ensure compliance with CFTC regulations and any applicable comparability determinations.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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