

## **U.S. Response: Jurisdictions' Authority and Process for Exercising Deference in Relation to OTC Derivatives Regulation**

### **I. BACKGROUND**

In July 2010, the United States enacted legislation regarding, among other topics, central clearing, trading, reporting, public transparency, and capital and margin for certain derivatives. Specifically, Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”)<sup>1</sup> provides for a comprehensive new regulatory framework for swaps and security-based swaps,<sup>2</sup> including by: (i) providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants (collectively, “Swap Entities”); (ii) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (iii) creating recordkeeping and real-time reporting regimes and public dissemination requirements; and (iv) enhancing the rulemaking and enforcement authorities of the CFTC and SEC. The Dodd-Frank Act authorizes the CFTC, the SEC, or other U.S. prudential regulators,<sup>3</sup> as appropriate, to adopt rules regarding capital requirements for Swap Entities, as well as margin requirements with respect to swaps or security-based swaps that are not cleared by a central counterparty (“CCP”).<sup>4</sup>

Recognizing the global nature and interconnectedness of the over-the-counter (“OTC”) derivatives markets, the CFTC and SEC each have taken specific actions to clarify how and when particular rules and regulations apply to cross-border swap and security-based swap activities.

To address the scope of the cross-border application of the Dodd-Frank Act, the CFTC published for comment its proposed interpretive guidance and policy statement on July 12, 2012 (“CFTC Proposed Cross-Border Guidance”).<sup>5</sup> Among other things, the CFTC Proposed Cross-Border Guidance described the policy and procedural framework under which the CFTC would consider

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (available at: <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>).

<sup>2</sup> Under the Dodd-Frank Act, “swaps” are under the jurisdiction of the Commodity Futures Trading Commission (“CFTC”) and “security-based swaps” are under the jurisdiction of the Securities and Exchange Commission (“SEC”).

<sup>3</sup> The term “prudential regulator” is defined in section 1a(39) of the Commodity Exchange Act (“CEA”), 7 U.S.C. 1a(39), and that definition is incorporated by reference in section 3(a)(74) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. 78c(a)(74). That definition includes the United States’ Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency. Information on accessing relevant sections of the CEA can be found at: <http://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>. Moreover, an amended version of the Exchange Act is available at: <http://www.sec.gov/about/laws/sea34.pdf>.

<sup>4</sup> See Dodd-Frank Act § 731, adding section 4s(e) of the CEA (codified at 7 U.S.C. § 6s(e)); Dodd-Frank Act § 764(a), adding section 15F(e) of the Exchange Act (codified at 15 U.S.C. 78o-10(e)).

<sup>5</sup> See CFTC Proposed Cross-Border Guidance, 77 FR 41214 (July 12, 2012) (available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-16496a.pdf>).

compliance with a comparable and comprehensive regulatory requirement of a foreign jurisdiction as a reasonable substitute for compliance with the attendant requirements of the CEA. In July 2013, the CFTC issued its final Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (“CFTC Guidance”), which addresses various issues described in this letter, including an overview of the principles guiding CFTC comparability determinations and a general description of the process for making such determinations.<sup>6</sup>

In May 2013, the SEC proposed rules and interpretative guidance that would inform parties to a security-based swap transaction which regulatory requirements apply to parties to cross-border security-based swap transactions.<sup>7</sup> Among other things, the SEC Cross-Border Proposal contains rules setting forth a proposed framework that would allow a market participant, under certain circumstances, to comply with the regulatory requirements in its home country in substitution for the requirements promulgated or enforced by the SEC (referred to as “substituted compliance”). On June 25, 2014, the SEC adopted final rules addressing the application of certain statutory definitions and the procedures for submission of substituted compliance applications to the SEC.<sup>8</sup>

## **II. RESPONSES TO SPECIFIC REQUESTS OF THE FSB CHAIR**

### **A. Authorization and Supervision of OTC Derivatives Market Participants; TRs; CCPs; and Exchanges or Electronic Trading Platforms**

*Question A.1: What legal capacity, if any, do authorities in your jurisdiction have to defer to another jurisdiction's regulatory framework and/or authorities? Which authorities can exercise this capacity? Please also indicate if/when ‘partial’ or ‘conditional’ deference decisions can be made.*

#### **CFTC**

Section 722(d) of the Dodd-Frank Act provides that the provisions of that statute relating to swaps shall not apply to swaps activities outside the United States unless those activities (i) have a direct and significant connection with activities in, or effect on, commerce in the United States or (ii) contravene such rules or regulations as the CFTC may prescribe or promulgate as are necessary or appropriate to prevent evasion of the swaps provisions of the Dodd-Frank Act.

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<sup>6</sup> See CFTC Guidance, 78 FR 45292 (July 26, 2013) (available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf>).

<sup>7</sup> See Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968 (May 23, 2013) (“SEC Cross-Border Proposal”) (available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf>).

<sup>8</sup> See Application of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities, Exchange Act Release No. 72472 (June 25, 2014) (“SEC Cross-Border Adopting Release”) (available at: <http://www.sec.gov/rules/final/2014/34-72472.pdf>).

## ***Market Participants***

The CFTC generally expects that non-U.S. persons that are registered as swap dealers or major swap participants (“MSPs”) (*i.e.*, those non-U.S. persons that engage in swaps activities with U.S. persons above certain minimum thresholds) may be required to comply with certain CFTC requirements (referred to as “Entity-Level Requirements”).<sup>9</sup> However, in consideration of international comity principles, such persons would be eligible for substituted compliance with regard to certain of those requirements.

Similarly, the CFTC generally expects that non-U.S. person swap dealers and MSPs may be required to comply with certain CFTC requirements (referred to as “Transaction-Level Requirements”) for swaps with U.S. counterparties.<sup>10</sup> However, again in consideration of international comity principles, such persons would be eligible for substituted compliance with regard to certain of those requirements for swaps with certain foreign branches of U.S. banks and non-U.S. persons that are guaranteed or conduit affiliates of U.S. persons. Transaction-Level Requirements generally would not apply to a swap between non-U.S. person swap dealers or MSPs and another non-U.S. person.

On December 21, 2013, the CFTC issued eight comparability determinations for six jurisdictions, as discussed further below. Certain of those determinations contain exceptions to the extent that regulations in the home jurisdiction were determined not to be comparable and comprehensive.<sup>11</sup>

With regard to other types of market participants, under section 4f of the CEA, the CFTC may exempt from registration futures commission merchants, introducing brokers, and floor brokers. One of the factors to be considered in granting an exemption is the nature and extent of domestic or foreign regulation of such person’s activities.

The Dodd-Frank Act does not, however, permit the CFTC to issue exemptions from registration for swap dealers or MSPs.<sup>12</sup>

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<sup>9</sup> Under the CFTC Guidance, Entity-Level Requirements include the following: (i) capital adequacy; (ii) chief compliance officer; (iii) risk management; (iv) swap data recordkeeping; (v) swap data repository reporting; (vi) swap data recordkeeping relating to complaints and marketing and sales materials; and (vii) physical commodity large swaps trader reporting. See CFTC Guidance, 78 FR at 45364-66.

<sup>10</sup> Under the CFTC Guidance, Transaction-Level Requirements include the following: (i) required clearing and swap processing; (ii) margin and segregation requirements for uncleared swaps; (iii) trade execution; (iv) swap trading relationship documentation; (v) portfolio reconciliation and compression; (vi) real-time public reporting; (vii) trade confirmation; (viii) daily trading records; and (ix) external business conduct standards. See CFTC Guidance, 78 FR at 45366-68.

<sup>11</sup> See discussion below and attached summary chart.

<sup>12</sup> Section 721(d) of the Dodd-Frank Act amended the CFTC’s exemptive authority under section 4(c) of the CEA. The amended exemptive authority does not permit the CFTC to grant exemptions with respect to section 4s of the CEA; nor does section 4s authorize exemptions from the registration requirement for swap dealers and MSPs.

## ***Market Infrastructure***

The CEA has several specific provisions allowing for exemptions or relief in instances where there is comparable, comprehensive supervision and regulation of market infrastructure by a foreign jurisdiction.

The Dodd-Frank Act does not permit the CFTC to issue exemptions from registration for swap data repositories (*i.e.*, TRs).<sup>13</sup> Pending the issuance of a comparability determination, CFTC staff has provided conditional relief until December 2014 from certain swap data reporting requirements to non-U.S. swap dealers and major swap participants in Australia, Canada, the European Union (“EU”), Japan, and Switzerland.

With regard to CCPs, under section 5b(h) of the CEA, the CFTC may exempt, conditionally or unconditionally, a derivatives clearing organization (“DCO”) from registration for the clearing of swaps if the CFTC determines that the DCO is subject to comparable, comprehensive supervision and regulation by the appropriate government authorities in the home country of the organization. Fourteen CCPs are registered with the CFTC as DCOs. Five of those are organized outside of the United States, including three in Europe that have been registered since 2001 (LCH.Clearnet Ltd.); 2010 (ICE Clear Europe Ltd); and 2013 (LCH.Clearnet SA), respectively.

With regard to trading platforms, the Dodd-Frank Act does not permit the CFTC to issue exemptions from registration for designated contract markets. Under section 5h(g) of the CEA, the CFTC may exempt, conditionally or unconditionally, a swap execution facility (“SEF”) from registration if the CFTC finds that the SEF is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the appropriate governmental authorities in the home country of the facility. Twenty-two SEFs have temporarily registered with the CFTC and two applications are pending. Finally, in adopting rules and regulations requiring registration with the CFTC for a foreign board of trade (“FBOT”), section 4(b) of the CEA, allows the CFTC to consider whether a FBOT is subject to comparable, comprehensive supervision and regulation by the appropriate governmental authorities in the FBOT’s home country and any previous CFTC findings that the FBOT is subject to comparable, comprehensive supervision and regulation by the appropriate government authorities in the FBOT’s home country.

## **SEC**

The SEC Cross-Border Proposal contains, among other things, proposed rules and interpretive guidance setting forth when foreign (*i.e.*, non-U.S.) persons are required to register with the SEC as a “security-based swap dealer,” “major security-based swap participant,” “security-based swap clearing agency,” “security-based swap execution facility,” or “security-based swap data repository” (*i.e.*, a TR). The SEC Cross-Border Adopting release finalized certain of the proposed rules and guidance dealing with the question of when a cross-border transaction must

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<sup>13</sup> Generally, U.S. legislation and rulemakings by the CFTC and SEC refer to trade repositories as “swap data repositories” or “security-based swap data repositories,” respectively, whereas the FSB generally refers to them as “trade repositories” or “TRs.” To be consistent with the FSB, we use “trade repositories” and “TRs” in this U.S. Response.

be counted toward the requirement to register as a security-based swap dealer or major security-based swap participant. These proposed and final regulations, which are described in detail in the relevant SEC releases, generally follow a territorial approach, whereby an obligation to register will typically depend on whether one or both of the counterparties to an applicable transaction are “U.S. persons” (as defined in the final rule) and, in some cases, whether certain activities related to a transaction are conducted “within the United States” (as defined in the proposed rule).<sup>14</sup>

The SEC Cross-Border Proposal provides that the persons or entities described above must register with the SEC.<sup>15</sup> It does, however, contain provisions that would permit some participants in the security-based swap market to satisfy Exchange Act requirements related to security-based swaps by complying with comparable foreign requirements. For example, under the proposal the SEC would permit substituted compliance for registered foreign security-based swap dealers in cases where the SEC issues an order stating that compliance with specified requirements under the applicable foreign financial regulatory system by a registered foreign security-based swap dealer satisfies the corresponding requirements in section 15F of the Exchange Act, and the rules and regulations thereunder, that would otherwise apply to such foreign security-based swap dealer.<sup>16</sup>

Under the proposed approach, a substituted compliance determination could be conditional or unconditional. For example, in the case of foreign security-based swap dealers the SEC could condition the substituted compliance determination by limiting it to a particular class or classes of foreign security-based swap dealers. Further, the SEC Cross-Border Proposal contemplates that the SEC would generally take a category-by-category approach to substituted compliance, meaning that a determination could be made with respect to a particular regulatory requirement, but not as to another, so long as the different requirements are not so interrelated or interconnected as to warrant a need to consider them together. Additional information related to the process by which the SEC makes a substituted compliance determination for security-based swap dealers, including the standard and findings applicable to the decision, is provided below.

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<sup>14</sup> While the SEC Cross-Border Adopting Release did not address the proposed provisions regarding the cross-border application of the security-based swap dealer definition to “transactions conducted within the United States,” the SEC noted that it “anticipate[s] soliciting additional public comment on potential approaches for applying the dealer definition to non-U.S. persons in connection with activity between two non-U.S. persons where one or both are conducting dealing activity that occurs within the United States.” See SEC Cross-Border Adopting Release at 78.

<sup>15</sup> Specifically, the SEC Cross-Border Proposal contains a proposed rule that expressly prohibits the SEC from making a substituted compliance determination with respect to the registration of security-based swap dealers, noting that to do so could undermine certain key functions of the SEC’s registration process, including the facilitation of notice to the SEC that a security-based swap dealer is engaged in dealing activity in excess of the applicable *de minimis* threshold. See SEC Cross-Border Proposal, 78 FR at 31089.

<sup>16</sup> See 15 U.S.C. 78o-10. Section 15F of the Exchange Act contains both the statutory requirement to register with the SEC as a security-based swap dealer and the particular regulatory requirements that apply to registered security-based swap dealers at both a transaction level (*e.g.*, requirements relating to external business conduct standards) and at an entity level (*e.g.*, capital, risk management, recordkeeping and reporting, supervision, and designation of a chief compliance officer).

*Question A.2: Please provide a brief description of the standards that need to be met in coming to a decision as to whether to exercise any such deference, and the criteria/inputs used in assessing whether these standards have been met (e.g. whether “similar outcomes” is the standard used; whether an analysis of enforcement regimes or authority is included as part of the assessment; whether reference is made to implementation of international standards; etc.).*

## **CFTC**

In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the corresponding requirement(s) under the CEA and CFTC regulations, the CFTC takes into consideration all relevant factors, including, but not limited to: (i) the comprehensiveness of those requirement(s), (ii) the scope and objectives of the relevant regulatory requirement(s), (iii) the comprehensiveness of the foreign regulator’s supervisory compliance program, and (iv) the home jurisdiction’s authority to support and enforce its oversight of the registrant.<sup>17</sup>

In part, because many foreign jurisdictions have been implementing OTC derivatives reforms in an incremental manner, the CFTC’s comparability determinations are made on a requirement-by-requirement basis, rather than on the basis of the foreign regime as a whole. The CFTC engages in a comparability analysis of specific foreign requirements against specific related CEA provisions and CFTC regulations. The approach used in making comparability determinations is an outcomes-based approach.<sup>18</sup> Thus, the home jurisdiction’s requirements do not have to be identical to the CEA requirements, rather they must be comparable and comprehensive. Entities relying on substituted compliance may be required to comply with certain of the CEA’s requirements where comparable and comprehensive regulation in their home jurisdiction is determined by the CFTC to be lacking.

A comparability analysis begins with a consideration of the regulatory objectives of a foreign jurisdiction’s regulation of swaps and swaps market participants. In this regard, the CFTC first looks to a foreign regulator’s swap-specific regulations. The CFTC recognizes, however, that jurisdictions may not have swap-specific regulations in some areas, and instead may have regulatory or supervisory regimes that achieve comparable and comprehensive regulatory objectives as the CEA requirements, but on a more general, entity-wide, or prudential, basis. In addition, portions of a foreign regulatory regime may have similar regulatory objectives, but the means by which these objectives are achieved with respect to swaps market activities may not be clearly defined, or may not expressly include specific regulatory elements that the CFTC concludes are critical to achieving the regulatory objectives or outcomes required under the CEA and the CFTC’s regulations. In these circumstances, as part of its broader efforts to consult and coordinate with foreign jurisdictions, the CFTC may work with the regulators and registrants in these jurisdictions to consider alternative approaches that may result in a determination that substituted compliance applies.<sup>19</sup>

With regard to international standards, in several of its rulemakings and other policy statements, the CFTC has relied upon the Principles for Financial Market Infrastructure (“PFMIs”), the

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<sup>17</sup> See CFTC Guidance, 78 FR at 45342-45.

<sup>18</sup> See *id.* at 45342.

<sup>19</sup> See *id.* at 45343.

international standards for CCPs as adopted by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions. For example, the CFTC permits FBOTs to clear through CCPs that are either registered with the CFTC as DCOs or observe the PFMIs.<sup>20</sup> The CFTC also has indicated publicly that, if it were to exercise its authority to exempt foreign-based CCPs from DCO registration, it might condition such exemptions on, among other things, the CCP having been assessed to be in compliance with the PFMIs.<sup>21</sup>

## **SEC**

Under the approach outlined in the SEC Cross-Border Proposal, the SEC would be able make a substituted compliance determination only if it finds that the requirements of the relevant foreign financial regulatory system are comparable to otherwise applicable requirements, after taking into account factors that the SEC determines appropriate, such as, for example, the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a foreign financial regulatory authority or authorities in such system to support its oversight of the applicable registered entity (or class of registered entities).

Under the proposed framework, the SEC would expect to take a holistic approach in making substituted compliance determinations, whereby the analysis would ultimately focus on regulatory outcomes as a whole with respect to the requirements within the same category, rather than a rule-by-rule comparison. In addition, the SEC indicated that it also would expect to consider the extent to which applicable principles, regulations, or rules in one category may bear on a determination with respect to another category, as well as how its actions may affect the policy decisions of these other regulators as they seek to address potential conflicts or duplication in the regulatory requirements that apply to market participants under their authority, including those that were adopted as part of a jurisdiction's efforts to implement the G20 commitments with respect to OTC derivatives reforms. In this respect, the SEC's proposal stated that it could also consider and provide for substituted compliance – where applicable and appropriate – to address the effect of conflicting or duplicative regulations on competition and market efficiency and to facilitate a well-functioning global security-based swap market.

*Question A.3: Please provide a brief description of the process by which a decision to defer to another jurisdiction is taken, including any action that needs to be initiated to begin the process (e.g. an application from a jurisdiction or an entity), the general time frame for coming to a decision, any processes in place for reviewing a decision, and whether any other agreements or conditions need to be met in order for an affirmative decision to be taken (e.g. confidentiality agreements, supervisory cooperation, or reciprocal arrangements).*

## **CFTC**

The comparability analysis process, in most cases, involves consultation with the regulators in each jurisdiction for which a substituted compliance application has been submitted so that the

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<sup>20</sup> See *id.* at 45345.

<sup>21</sup> See, e.g., CFTC Guidance, 78 FR at 45345-46.

CFTC better understands and is able to analyze the compliance regime of a jurisdiction. Consultations are particularly important because many jurisdictions are in the process of finalizing and implementing their OTC derivatives reforms incrementally, and the CFTC needs to take into account the timing of regulatory reforms that have been proposed or finalized, but not yet implemented.

The CFTC seeks to achieve its regulatory objectives with respect to the CFTC's registrants operating in foreign jurisdictions in a manner that works in harmony with the regulatory interests of those foreign jurisdictions. To that end, the CFTC accepts requests for a comparability determination from (i) foreign regulators; (ii) an individual non-U.S. entity, or group of non-U.S. entities; (iii) a U.S. bank that is a swap dealer or MSP with respect to its foreign branches; or (iv) a trade association, or other group, on behalf of similarly-situated entities. Persons requesting a comparability determination may coordinate their application with other market participants and their home regulators to simplify and streamline the process. Once a comparability determination is made for a jurisdiction, it applies for all entities or transactions in that jurisdiction to the extent provided in the determination.<sup>22</sup>

Cooperation with overseas regulators is an essential component in developing and implementing the CFTC's cross-border regulatory approach. For example, the CFTC's comparability analysis process for swap dealers and MSPs involves consultation with the regulators in each jurisdiction for which a substituted compliance application has been submitted so that the CFTC may better understand the compliance regime of a jurisdiction.

With respect to the standards forming the basis for any determination of comparability, the CFTC takes into account all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and objectives of the relevant regulatory requirement(s), the comprehensiveness of the foreign regulator's supervisory compliance program, as well as the home jurisdiction authority to support and enforce its oversight of the registrant. As noted above, comparable does not necessarily mean identical. Rather, the CFTC evaluates whether the home jurisdiction's regulatory requirement is comparable to and as comprehensive as the corresponding U.S. regulatory requirement(s).

While many factors ultimately weigh in to the prioritization and the length of time to review a specific application, the CFTC staff generally takes cognizance of the order in which applications are submitted.

Within four years of issuing any comparability determination, the CFTC plans to reevaluate its initial determination to ascertain whether any changes should be made to its finding and may reissue the relevant CFTC action.<sup>23</sup>

The CFTC has taken the view that, in order to facilitate the establishment of a substituted compliance framework, a memorandum of understanding ("MOU") or similar supervisory arrangement should be negotiated with the relevant foreign regulator(s) of a swap dealer or

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<sup>22</sup> See CFTC Guidance, 78 FR at 45344.

<sup>23</sup> See id. at 45345.



MSP.<sup>24</sup> To this end, the CFTC executed supervisory arrangements with the Monetary Authority of Singapore in December 2013, the Japanese Financial Services Agency in March 2014, and the Alberta Securities Commission, the British Columbia Securities Commission, the Ontario Securities Commission, and the Autorité des marchés financiers du Québec in March 2014.<sup>25</sup> The CFTC currently is negotiating arrangements with regulators in a number of jurisdictions.

## SEC

The SEC Cross-Border Proposal included proposed new Rule 0-13 under the Exchange Act, and this rule was finalized in the SEC Cross-Border Adopting Release. Rule 0-13 sets forth the general procedures for submission of requests for substituted compliance determinations. These procedures include the requirement that all applications for substituted compliance determinations must, among other things, be in writing in the form of a letter and include any supporting documents necessary to make the application complete. Applications may be submitted to the SEC either electronically or in paper format, and all filings and supporting documentation filed pursuant to this proposed rule must be in or translated into the English language. The final rule further provides that applications may be submitted by a party that potentially would comply with requirements under the Exchange Act pursuant to a substituted compliance order, or by the relevant foreign financial regulatory authority or authorities. Under Rule 0-13, if an application is incomplete, the SEC may request that the application be withdrawn unless the applicant can justify, based on all the facts and circumstances, why supporting materials have not been submitted and undertakes to submit promptly the omitted materials.

Pursuant to Rule 0-13, after the filing of an application for a substituted compliance determination is complete, SEC staff will review the application and, after resolving any questions or issues arising from the application, make a recommendation to the SEC. The SEC will then consider the recommendation and the Office of the Secretary will issue an appropriate response and notify the applicant. The rule also provides that the SEC will publish in the Federal Register a notice that a complete application has been submitted and invite public comment on the application. The SEC may also, in its sole discretion, schedule a hearing on the matter addressed by the application.<sup>26</sup>

In addition, the proposed framework for security-based swap dealers contemplates that, as a pre-condition to making a substituted compliance determination, the SEC must have entered into a supervisory and enforcement MOU or other arrangement with the appropriate financial regulatory authority or authorities in that jurisdiction addressing oversight and supervision of applicable security-based swap dealers subject to the substituted compliance determination. Through such MOU or other arrangement, the SEC and the foreign financial regulatory authority or authorities would express their commitment to cooperate with each other to fulfill their respective regulatory mandates.

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<sup>24</sup> See id. at 45344-45.

<sup>25</sup> All materials related to the supervisory arrangements are available at [www.cftc.gov](http://www.cftc.gov).

<sup>26</sup> Under the proposed framework, requestors may seek confidential treatment of their applications for substituted compliance determinations.

Once the SEC has made a substituted compliance determination with respect to a particular foreign jurisdiction, it would apply to every foreign security-based swap dealer in the specified class or classes registered and regulated in that jurisdiction, subject to the conditions specified in the applicable order. Finally, the proposed framework for security-based swap dealers would permit the SEC, on its own initiative, to modify the terms of, or withdraw, a substituted compliance determination for a particular foreign jurisdiction, after appropriate notice and opportunity for comment. Such a need could arise, for example, due to changes in the foreign regulatory regime or a failure of a foreign regulator to exercise its supervisory or enforcement authority in an effective manner. The SEC also would have the ability to periodically review previously-issued substituted compliance determinations and decide whether they should each continue to apply.

*Question A.4: Please provide copies of, or weblinks to, any documentation or forms that have been developed for sharing with jurisdictions or entities as part of the comparability or equivalence assessment.*

### **CFTC**

See attached CFTC staff summary charts provided to regulators of potential applicants for purposes of producing a side-by-side comparison.

### **SEC**

At this time, the SEC has not adopted any particular documentation or forms for sharing with jurisdictions or entities as part of the process for making a substituted compliance determination. However, a copy of the SEC Cross-Border Proposal, which should provide the FSB and its member jurisdictions with additional detail and granularity on the overall process and analysis to be used by the SEC in making substituted compliance determinations under the proposed framework is available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf>. A copy of the SEC Cross-Border Adopting Release, which contains the final Rule 0-13 that sets forth the general procedures for submission of requests for substituted compliance determinations, is available at: <http://www.sec.gov/rules/final/2014/34-72472.pdf>.

*Question A.5: Please provide a list of jurisdictions that you have already determined to be comparable or equivalent, if any (and for what regulatory purposes), and please note any jurisdictions for which a determination is pending.*

### **CFTC**

The CFTC has approved eight broad comparability determinations that permit substituted compliance with non-U.S. regulatory regimes for certain swaps provisions of the CEA and the CFTC's regulations.

Working with authorities in Australia, Canada, the EU, Hong Kong, Japan, and Switzerland, the CFTC issued comparability determinations for a broad range of Entity-Level Requirements. In

two jurisdictions, the EU and Japan, the CFTC also approved substituted compliance for a number of key Transaction-Level Requirements.<sup>27</sup>

For the EU, the CFTC issued comparability determinations for Transaction-Level Requirements under CFTC regulations 23.501 (swap confirmation), 23.502 (portfolio reconciliation), 23.503 (portfolio compression), and certain provisions of 23.202 (daily trading records) and 23.504 (swap trading relationship documentation). For Japan, the CFTC issued comparability determinations for Transaction-Level Requirements under certain provisions of CFTC regulations 23.202 (daily trading records) and 23.504 (swap trading relationship documentation).

In addition to the completed determinations, CFTC staff has been approached by a number of additional foreign jurisdictions regarding the process for submitting applications for comparability determinations.

## **SEC**

With the exception of Rule 0-13, which sets forth the general procedures for submission of requests for substituted compliance determinations, the substituted compliance framework set forth in the SEC Cross-Border Proposal has not yet been adopted by the SEC, which continues to review public input and discuss next steps. As a result, the process for receiving substituted compliance applications is not in effect, and no determinations have been made or are pending.

### **B. Requirements on Market Participants Related to: reporting to TRs; clearing transactions through CCPs; capital, margin and/or other risk mitigation requirements; and executing transactions on exchanges or electronic platforms**

*Question B.1: What legal capacity, if any, do authorities in your jurisdiction have to defer to another jurisdiction's regulatory framework and/or authorities? Which authorities can exercise this capacity? Please also indicate if/when 'partial' or 'conditional' deference decisions can be made.*

## **CFTC**

See response to Question A.1 with regard to Entity-Level Requirements, which include reporting to SDRs and capital adequacy, and Transaction-Level Requirements, which include required clearing and swap processing, margin and segregation for uncleared swaps, swap trading relationship documentation, portfolio reconciliation and compression, confirmation, daily trading records, and trade execution, as well as real-time public reporting.

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<sup>27</sup> All comparability determinations issued by the CFTC are available at: <http://www.cftc.gov/LawRegulation/DoddFrankAct/CDSCP/index.htm>

## SEC

In addition to setting forth a framework for substituted compliance with respect to certain requirements applicable to registered security-based swap dealers, the SEC Cross-Border Proposal also would permit substituted compliance with respect to: (i) requirements relating to regulatory reporting and public dissemination of security-based swap data; (ii) requirements relating to mandatory clearing for security-based swaps; and (iii) requirements relating to mandatory trade execution of security-based swaps. Details regarding the proposed substituted compliance for each of these three categories are provided below.

### ***Regulatory Reporting and Public Dissemination***

The SEC Cross-Border Proposal sets forth a framework that, if adopted, would allow parties subject to the reporting and public dissemination requirements for security-based swaps in sections 13(m) and 13A of the Exchange Act<sup>28</sup> to satisfy those obligations through compliance with a comparable reporting and public dissemination system of a foreign jurisdiction, provided that certain conditions are met. Specifically, the SEC must issue an order determining that the applicable foreign jurisdiction's requirements for the regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements.<sup>29</sup> In addition to requiring the existence of an applicable and effective substituted compliance determination by the SEC, the proposed framework would only permit substituted compliance with respect to U.S. regulatory reporting and public dissemination requirements in cases where, with respect to at least one of the direct counterparties to the security-based swap, (i) such counterparty is either a foreign person or a foreign branch of a U.S. person; and (ii) the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.<sup>30</sup>

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<sup>28</sup> Section 13A(a)(1) of the Exchange Act provides that all security-based swaps that are not accepted for clearing shall be subject to regulatory reporting. See 15 U.S.C. 78m-1(a)(1). Section 13(m)(1)(G) of the Exchange Act provides that each security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap repository (*i.e.*, a TR), and section 13(m)(1)(C) of the Exchange Act generally provides that transaction, volume, and pricing data of all security-based swaps shall be publicly disseminated. See 15 U.S.C. 78m(m)(1)(G) and (C). In November 2010, the SEC proposed Regulation SBSR to implement the provisions of sections 13(m) and 13A of the Exchange Act. See Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) (available at: <http://www.sec.gov/rules/proposed/2010/34-63346fr.pdf>).

<sup>29</sup> In its cross-border proposal, the SEC explained that it considered, but ultimately determined not to propose, treating regulatory reporting and public dissemination separately for purposes of allowing substituted compliance, noting that such an approach could, among other things, “introduce unnecessary operational complexity for cross-border market participants and might yield few if any efficiency gains.” See SEC Cross-Border Proposal, 78 FR at 31096.

<sup>30</sup> Accordingly, a security-based swap between two U.S. persons would not be eligible for substituted compliance with respect to regulatory reporting and public dissemination under the proposed rule (unless one or both of the U.S. persons were acting through a foreign branch), even if the security-based swap were solicited, negotiated, and executed outside the United States.

## ***Mandatory Clearing***

In recognition of the potential for duplicative or conflicting clearing requirements that could arise in circumstances where counterparties to a security-based swap subject to the mandatory clearing requirement in section 3C of the Exchange Act<sup>31</sup> may seek to clear the transaction at a clearing agency that is neither registered with the SEC nor exempt from registration, the SEC Cross-Border Proposal indicated that the SEC is proposing to use its authority to exempt persons from the clearing mandate in section 3C of the Exchange Act if a relevant transaction is submitted to a foreign clearing agency that is the subject of a substituted compliance determination by the SEC. Unlike the substituted compliance framework proposed in other contexts in the SEC Cross-Border Proposal, this approach would not involve the adoption of a specific rule. Rather, the SEC expects that it would use its existing authority, under section 36 of the Exchange Act,<sup>32</sup> to exempt certain specified transactions from the clearing mandate contained in Title VII of the Dodd-Frank Act.

Nevertheless, the SEC indicated in its cross-border proposal that substituted compliance with respect to the mandatory clearing requirement would still largely follow the same process and considerations applicable to the substituted compliance framework proposed in other areas. This process, as well as the factors the SEC expects to consider in making a substituted compliance determination, is described in greater detail below. Moreover, the SEC has proposed limiting substituted compliance in relation to mandatory clearing only to transactions submitted for clearing to foreign clearing agencies that have no U.S. person members or activities in the United States.

## ***Mandatory Trade Execution***

The SEC Cross-Border Proposal contains a proposed rule that, if adopted, would allow parties subject to the mandatory trade execution requirement in section 3C(h) of the Exchange Act<sup>33</sup> to satisfy that requirement by executing the relevant transaction, or having such transaction executed on their behalf, on a security-based swap market (or class of markets) that is neither registered under the Exchange Act nor exempt from registration under the Exchange Act,

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<sup>31</sup> Section 3C(a)(1) of the Exchange Act provides that it “shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under [the Exchange] Act or a clearing agency that is exempt from registration under [the Exchange] Act if the security-based swap is required to be cleared.” See 15 U.S.C. 78c-3(a)(1). Section 3C of the Exchange Act further requires the SEC to review each security-based swap (or any group, category, type, or class of security-based swaps) to make a determination that such security-based swap (or group, category, type, or class of security-based swap) should be required to be cleared. See 15 U.S.C. 78c-3(b).

<sup>32</sup> Section 36 of the Exchange Act provides that, subject to certain exceptions, the SEC “by rule, regulation, or order may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.” See 15 U.S.C. 78mm.

<sup>33</sup> Section 3C(h)(1) of the Exchange Act requires, with respect to transactions involving security-based swaps subject to the clearing requirement in section 3C(a)(1) of the Exchange Act, that counterparties execute such transactions on an exchange or a security-based swap execution facility that is registered under section 3D of the Exchange Act or exempt from registration under section 3D(e) of the Exchange Act. See 15 U.S.C. 78c-3(h)(1).

provided that certain conditions are met. Specifically, the applicable security-based swap market must be covered by, or must be in a class of markets that is covered by, a substituted compliance determination issued by the SEC. Moreover, the proposed framework would only permit substituted compliance with respect to the mandatory trade execution requirement in cases where, with respect to at least one of the direct counterparties to the security-based swap, (i) such counterparty is either a foreign person or a foreign branch of a U.S. person; and (ii) the security-based swap transaction is not solicited, negotiated, or executed by a person within the United States on behalf of such counterparty.<sup>34</sup>

*Question B.2: Please provide a brief description of the standards that need to be met in coming to a decision as to whether to exercise any such deference, and the criteria/inputs used in assessing whether these standards have been met (e.g. whether “similar outcomes” is the standard used; whether an analysis of enforcement regimes or authority is included as part of the assessment; whether reference is made to implementation of international standards; etc.).*

## **CFTC**

See response to Question A.2.

## **SEC**

As a general rule, the SEC Cross-Border Proposal contemplates that all substituted compliance determinations made by the SEC, regardless of the particular subject area involved, would be based on a “comparability” standard and that the SEC would endeavor to take a holistic approach in making these determinations, ultimately focusing on regulatory outcomes as a whole with respect to the requirements within the same category rather than a rule-by-rule comparison. Additional information regarding the specific determinations and findings the SEC must make in respect of each of the categories discussed in this response to (*i.e.*, regulatory reporting and public dissemination, mandatory clearing, and trade execution) is provided separately below.

### ***Regulatory Reporting and Public Dissemination***

As proposed, a substituted compliance order with respect to the reporting and public dissemination requirements for security-based swaps in sections 13(m) and 13A of the Exchange Act would require the SEC to make a finding that a foreign jurisdiction’s requirements for the regulatory reporting and public dissemination of security-based swaps are comparable to otherwise applicable requirements. In making such a determination, the proposed rule would require the SEC to take into account such factors as it determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised,

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<sup>34</sup> As was the case with the proposed substituted compliance framework related to regulatory reporting and public dissemination (described above), a security-based swap between two U.S. persons would not be eligible for substituted compliance with respect to mandatory trade execution under the proposed rule (unless one or both of the U.S. persons were acting through a foreign branch), even if the security-based swap were solicited, negotiated, and executed outside the United States.

by the foreign financial regulatory authority or authorities to support oversight of its regulatory reporting and public dissemination system for security-based swaps.

In addition, the proposed rule states that the SEC shall not make such a substituted compliance determination unless it finds that: (i) the data elements that are required to be reported pursuant to the rules of the foreign jurisdiction are comparable to those required to be reported pursuant to Rule 901 of Regulation SBSR; (ii) the rules of the foreign jurisdiction require the security-based swap to be reported and publicly disseminated in a manner and a timeframe comparable to those required by Regulation SBSR; (iii) the SEC has direct electronic access to the security-based swap data held by a trade repository or foreign regulatory authority to which security-based swaps are reported pursuant to the rules of that foreign jurisdiction; and (iv) any trade repository or foreign regulatory authority in the foreign jurisdiction that receives and maintains required transaction reports of security-based swaps pursuant to the laws of that foreign jurisdiction is subject to requirements regarding data collection and maintenance; systems capacity, resiliency, and security; and recordkeeping that are comparable to the requirements imposed on security-based swap data repositories under specific SEC rules.

### ***Mandatory Clearing***

In the SEC Cross-Border Proposal, the SEC indicated that in determining whether to issue an order making a substituted compliance determination with respect to a particular foreign clearing agency, it would expect to look at the scope and objectives of the applicable foreign jurisdiction's regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities to support the oversight of such clearing agency.

### ***Mandatory Trade Execution***

As proposed, a substituted compliance order with respect to the section 3C(h) of the Exchange Act would require the SEC to make a finding that a security-based swap market (or class of markets) is subject to comparable, comprehensive supervision and regulation by the relevant foreign financial regulatory authority or authorities in such foreign jurisdiction. In making such a substituted compliance determination, the proposed rule would require the SEC to take into account such factors as it determines are appropriate, such as the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the relevant foreign financial regulatory authority or authorities in the foreign jurisdiction to support the oversight of the security-based swap market (or class of markets).

*Question B.3: Please provide a brief description of the process by which a decision to defer to another jurisdiction is taken, including any action that needs to be initiated to begin the process (e.g. an application from a jurisdiction or an entity), the general time frame for coming to a decision, any processes in place for reviewing a decision, and whether any other agreements or conditions need to be met in order for an affirmative decision to be taken (e.g. confidentiality agreements, supervisory cooperation, or reciprocal arrangements).*

## **CFTC**

See response to Question A.3.

## **SEC**

With respect to each of the four substituted compliance categories outlined in the SEC Cross-Border Proposal, including the three discussed in this response (*i.e.*, regulatory reporting and public dissemination, mandatory clearing, and trade execution), the process would follow the procedures set forth in Rule 0-13. As noted above in the response to Question A.3, these procedures include the requirement that all applications for substituted compliance determinations must, among other things, be in writing in the form of a letter and include any supporting documents necessary to make the application complete. Applications may be submitted to the SEC either electronically or in paper format, and all filings and supporting documentation filed pursuant to this proposed rule must be in or translated into the English language. The final rule further provides that applications may be submitted by a party that potentially would comply with requirements under the Exchange Act pursuant to a substituted compliance order, or by the relevant foreign financial regulatory authority or authorities. Under Rule 0-13, if an application is incomplete, the SEC may request that the application be withdrawn unless the applicant can justify, based on all the facts and circumstances, why supporting materials have not been submitted and undertakes to submit promptly the omitted materials. Pursuant to Rule 0-13, after the filing of an application for a substituted compliance determination is complete, SEC staff will review the application and make a recommendation to the SEC. The SEC will then consider the recommendation and the Office of the Secretary will issue an appropriate response and notify the applicant. The rule also provides that the SEC will publish in the Federal Register a notice that the application has been submitted which invites public comment on the application. The SEC may also, in its sole discretion, schedule a hearing on the matter addressed by the application.<sup>35</sup>

Moreover, both proposed Rule 3Ch-2 (addressing substituted compliance for mandatory trade execution) and re-proposed Rule 908(c) of Regulation SBSR (addressing substituted compliance for regulatory reporting and public dissemination) provide that, as a pre-condition to making a substituted compliance determination, that the SEC must have entered into a supervisory and enforcement MOU or other arrangement with the appropriate financial regulatory authority or authorities in that jurisdiction addressing oversight and supervision of the applicable security-based swap market under the substituted compliance determination.

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<sup>35</sup> Under the proposed framework, requestors may seek confidential treatment of their applications for substituted compliance determinations.



Finally, the SEC Cross-Border Proposal contemplates that all of the proposed substituted compliance frameworks discussed therein, including the three described in this response), would permit the SEC, on its own initiative, to modify the terms of, or withdraw, an existing substituted compliance determination, after appropriate notice and opportunity for comment. As discussed in the response to Question A.3, such a need could arise, for example, due to changes in the foreign regulatory regime or a failure of a foreign regulator to exercise its supervisory or enforcement authority in an effective manner. The SEC also would have the ability to periodically review previously-issued substituted compliance determinations and decide whether the substituted compliance determination should continue to apply.

*Question B.4: Please provide copies of, or weblinks to, any documentation or forms that have been developed for sharing with jurisdictions or entities as part of the comparability or equivalence assessment.*

### **CFTC**

See response to Question A.4.

### **SEC**

At this time, the SEC has not adopted any particular documentation or forms for sharing with jurisdictions or entities as part of the process for making a substituted compliance determination. However, a copy of the SEC Cross-Border Proposal, which should provide the FSB and its member jurisdictions with additional detail and granularity on the overall process and analysis to be used by the SEC in making substituted compliance determinations under the proposed framework is available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf>. A copy of the SEC Cross-Border Adopting Release, which contains the final Rule 0-13 that sets forth the general procedures for submission of requests for substituted compliance determinations, is available at: <http://www.sec.gov/rules/final/2014/34-72472.pdf>.

*Question B.5: Please provide a list of jurisdictions that you have already determined to be comparable or equivalent, if any (and for what regulatory purposes), and please note any jurisdictions for which a determination is pending.*

### **CFTC**

See response to Question A.5.

### **SEC**

With the exception of Rule 0-13, which sets forth the general procedures for submission of requests for substituted compliance determinations, the substituted compliance framework set forth in the SEC Cross-Border Proposal has not yet been adopted by the SEC, which continues to review public input and discuss next steps. As a result, the process for receiving substituted compliance applications is not in effect, and no determinations have been made or are pending.