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# Cross-Border Application of the Swaps Provisions of the Dodd-Frank Act

**The Commodity Futures Trading Commission (the "CFTC") has proposed long-awaited interpretive guidance (the "Guidance") concerning the extent to which the new registration and regulatory requirements for swaps under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") apply to transactions and persons outside of the United States. Since the Dodd-Frank Act was introduced, its perceived extraterritoriality has been one of the major talking points and controversies. The Guidance, if adopted, would address certain key concerns raised by market participants since the enactment of the Dodd-Frank Act, particularly in the context of swap dealer and major swap participant ("MSP") registration, including:**

- Whether non-US activities count in determining whether an entity needs to register as a swap dealer or MSP (and what "non-US" means in this context);
- How certain US regulatory requirements, including clearing, trading, reporting and business conduct standards, apply to transactions between non-US dealers and MSPs and various types of US and non-US participants;
- Whether non-US entities may rely on home country regulation;
- Who is a "US person" for purposes of the Dodd-Frank derivatives requirements; and
- How non-US branches of US persons and US branches of non-US persons are treated under US requirements.

If adopted, the Guidance (and the CFTC's position on extraterritoriality issues generally) will likely have a significant impact on the organization and regulation of the global swap markets, and will add another important piece to the regulatory puzzle for global swap market participants. The Guidance may also be taken into account by other US and global regulators in determining the scope of their own rules. The Guidance notably takes a broad view of the CFTC's authority over transactions, persons and activities outside the United States. Although it provides relief on a number of issues, the Guidance nonetheless leaves open certain significant questions, particularly with respect to entities other than swap dealers and MSPs.

The Guidance must also be viewed against the backdrop of ongoing regulatory developments in other jurisdictions. Other major swap market jurisdictions, including in Europe and Asia, are at various stages of implementation of OTC derivatives reforms in light of G20 commitments. Many of these reforms are expected to be broadly similar, but not identical, to the

rules of the CFTC. The broad interpretation of CFTC jurisdiction under the Guidance may have the result that market participants will face conflicting and inconsistent regulations of US and non-US regulators, particularly as it relates to clearing, trading and margin requirements. While acknowledging such issues, the Guidance does not itself provide a means for resolving them.

The Guidance does not address extraterritoriality issues applicable to security-based swap regulation, which is a matter under the jurisdiction of the Securities and Exchange Commission ("SEC"). Although the SEC is expected to issue its own rules or guidance in the area, it has not yet done so, and it is not clear that the two agencies will take the same approach. Inconsistencies may lead to additional compliance complications for market participants who trade both swaps and security-based swaps.

In addition, some market participants have voiced frustration that the CFTC's release took the form of interpretive guidance and not a formal rule. The latter might have provided markets with greater certainty over the regulation of their swaps businesses globally, but would have required a cost-benefit analysis as part of the rule-making process and could potentially be more open to legal challenge.

The Guidance will be open for public comment for 45 days following its publication in the Federal Register. It is not yet clear if the Guidance will be finalized by the time swap dealer and MSP registration requirements come into effect.

## Background: Who Is a US Person?

The Guidance interprets Section 2(i) of the Commodity Exchange Act ("CEA"), which states that provisions of the CEA relating to swaps "shall not apply to activities outside the United States unless those activities (1) have a direct and significant connection with activities in, or effect on, commerce of the United States or (2) contravene such rules or regulations as" the CFTC may adopt to prevent the evasion of the CEA swap provisions. The Guidance thus reflects the CFTC's interpretation of when swap transactions or activities outside the United States nonetheless may have a direct and significant connection with, or effect on, US commerce. As discussed below, under the approach taken by the Guidance, transactions covered by the US requirements include, but are not limited to, those involving US persons, as well as others that may have US connections.

A key aspect of the Guidance, and the analysis of whether US requirements may apply to a particular person, activity or transaction, is its definition of US person, which would include:

- Any natural person who is a US resident;
- Any corporation, partnership or other entity either (A) that is organized or incorporated under the laws of the United States or a state thereof or having its principal place of business in the United States or (B) in which the direct or indirect owners are responsible for the liabilities of such entity and one or more of such owners is a US person;
- Any individual account (discretionary or not) where the beneficial owner is a US person;
- Any commodity pool or collective investment vehicle (regardless of where organized) of which a majority ownership is held, directly or indirectly, by a US person or persons;
- Any commodity pool the operator of which would be required to register as a commodity pool operator under the CEA;
- A pension plan for the employees, officers or principals of a legal entity with its principal place of business in the United States; and
- An estate or trust, the income of which is subject to US income tax regardless of source.

The US person definition is generally similar to that used for commodity pool investors in CFTC Rule 4.7 (although it uses a majority ownership standard for a collective investment vehicle in lieu of the 10% standard used under Rule 4.7). It differs in certain respects from the standard used under Regulation S under the US Securities Act of 1933, particularly in terms of offshore accounts managed by US persons (which may be treated as non-US under Regulation S).

A non-US branch of a US person would be viewed as part of the US person. Similarly, the US branch of a non-US person would generally be viewed as part of the non-US person and not a separate legal entity. Although there is some ambiguity, the Guidance appears to take the position that a foreign person (including a subsidiary or affiliate) guaranteed by a US person is not itself a US person. This position, if adopted, will give some comfort to US financial groups with international businesses who have been concerned about potential adverse effects on the competitiveness of their overseas subsidiaries. However, some US regulatory requirements may still apply to transactions with such entities, as discussed below. The CFTC has requested comments on this issue as well as on the US person definition more generally.

## Non-US Swap Dealers or Major Swap Participants

A key concern of market participants has been how the swap dealer and MSP registration requirements set forth in the final entity definition rules adopted by the CFTC (the "Final Entity Rules")[1] would apply to non-US persons. Currently, many global institutions conduct significant international swap businesses out of non-US entities (e.g., located in Europe or Asia) and have wondered whether those non-US entities would be required to register with the CFTC or be subject to US requirements (even for trades involving non-US persons or products). The CFTC's approach has sought to address certain of these concerns.

### Swap Dealers

In the US, persons who engage in swap dealing transactions above a certain *de minimis* threshold (initially $8 billion in notional amount in a 12-month period) will be required to register as a swap dealer. In the Guidance, the CFTC takes the view that, in most cases, a non-US entity need only count swap dealing activity with US persons to determine whether it exceeds the *de minimis* threshold and would therefore be required to register. (In the case of a non-US entity whose swaps are guaranteed by a US person, however, all of its swap dealing activity, whether with US or non-US persons, would count toward the *de minimis* threshold.) In addition, the CFTC would exclude swaps between a non-US person and a foreign branch of a registered US swap dealer.[2]

[1] Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 77 Fed. Reg. 30596 (May 23, 2012).

[2] The Guidance also addresses so-called "central booking" arrangements in which swaps are booked in a central legal entity but various subsidiaries, affiliates or branches may be involved in the solicitation and negotiation of the transaction, either on an agency or back-to-back principal basis. In general, if the central booking entity is a US person, it would be required to register as a swap dealer. In addition, if a foreign affiliate, acting as principal, negotiates arranges transactions and faces customers and enters into back-to-back transactions with the US central booking entity, it also may need to register as a swap dealer. The Guidance does not address all of the potential variants of these structures, and the registration analysis will depend on particular facts and circumstances.

The Guidance also limits the aggregation rules for purposes of the *de minimis* test. Under the Final Entity Rules, all swap transactions of an entity's majority-owned affiliated entities must be aggregated for purposes of determining whether that entity can rely on the *de minimis* test. In the case of a non-US entity making this determination, however, only transactions of its non-US affiliates with US persons would be aggregated; transactions of its US affiliates would be excluded.[3]

### MSPs

Under the Final Entity Rules, a non-dealer whose swap trading exposure meets one of the specified thresholds is required to register as an MSP. In the context of a non-US person, however, the Guidance states that only swaps with US persons as counterparties would count toward the relevant thresholds.[4]

In contrast to the swap dealer threshold calculations, a non-US person whose positions are guaranteed by a US person would not need to include those guaranteed positions in determining whether the MSP threshold has been met in respect of the non-US person. Such positions would be attributed to the US person providing the guaranty for purposes of the determination of whether that US entity is an MSP.

## Consequences of Registration for Non-US Swap Dealers and MSPs

Foreign persons that meet or exceed the *de minimis* threshold for swap dealers or the position thresholds for MSPs (as modified by the Guidance) would be required to register with the Commission as a swap dealer or MSP, respectively, regardless of location. Registered entities are subject to a number of regulatory requirements under the CEA and CFTC regulations. In the case of non-US swap dealers and MSPs, the Guidance would provide limited relief from some of those requirements. The Guidance divides the regulatory requirements into two categories: entity-level requirements and transaction-level requirements.

***Entity-Level Requirements***: The entity-level requirements apply to a swap dealer or MSP as a whole and encompass requirements as to capital, chief compliance officer, risk management, swap data recordkeeping and reporting and large trader reporting.[5] As a general matter, the entity-level requirements apply to all registered swap dealers and MSPs across all of their swap transactions, without distinction as to the counterparty or the location of the swap or selling activity. Under the Guidance, the entity-level requirements would apply to registered non-US swap dealers and MSPs at an entity level. However, such entities may be able to rely on substituted compliance with home country requirements, as discussed below.

***Transaction-Level Requirements***: The transaction-level requirements encompass mandatory clearing and swap processing, margin for uncleared swaps, trade execution requirements, relationship documentation, portfolio reconciliation and compression, real-time public reporting, trade confirmation, daily trading records and external business conduct

[3] The Guidance does not specifically address the calculation by the US affiliates in this scenario. The CFTC also requested comment on whether the transactions of any non-US affiliates that are registered swap dealers should also be excluded from this calculation.

[4] As a general matter, the MSP determination also considers swaps guaranteed by a party, unless the guaranteed entity is itself subject to US capital regulation.

[5] 7 USC. 2(a)(13), 6r, and 6s.

standards.[6] For non-US swap dealers and MSPs, these requirements will apply to all transactions with US persons.[7] The requirements (with the exception of the external business conduct requirements) will also apply to transactions with certain non-US persons, such as those that are guaranteed by a US person or are acting as a "conduit" for a US person. In the case of transactions with non-US persons guaranteed by or acting as a conduit for a US person, however, substituted compliance with comparable home country rules may be permitted, as described below. For transactions between a non-US swap dealer or MSP and other non-US persons without a US connection, the transaction-level requirements would not apply at all.

The application of the transaction-level requirements to transactions with non-US persons guaranteed by or acting as a conduit for a US person is likely to be controversial. For such transactions, it is likely that foreign regulatory requirements would apply. In the CFTC's view, the US interest in such transactions arises at least in part from risk of non-performance by the non-US counterparty. If the non-US person defaults on its obligations under the swaps, then the US guarantor will be held responsible (or would bear the cost) to settle those obligations. Similarly, in the case of a non-US person acting as a "conduit" for a US person, the CFTC is concerned that the risks of the transactions flow back to the US person. Notably, however, the non-US swap dealer or MSP will not be required to comply with the external business conduct standards when dealing with a non-US counterparty, even if that party is guaranteed by a US person.

## Substituted Compliance

The CFTC acknowledges in the Guidance that applying the entity-level requirements and transaction-level requirements to non-US entities in this way may result in overlapping and potentially conflicting regulation. As a result, the CFTC proposes to permit non-US swap dealers and MSPs to satisfy those requirements through "substituted compliance" with their home jurisdiction's regulations, as long as the home jurisdiction's regulations are "comparable" and "comprehensive" with relevant Dodd-Frank Act requirements as determined by the CFTC.

Under the Guidance, non-US swap dealers and MSPs will be permitted to rely on substituted compliance for all of the entity-level regulations, so long as those regulations are determined to be comparable to those under the CEA. Non-US swap dealers and MSPs will also be able to rely on substituted compliance for the transaction-level requirements, but only when dealing with a non-US person guaranteed by a US person or a non-US affiliate of a US firm acting as a "conduit" for a US firm. Substituted compliance with transaction-level requirements will also be permitted with respect to swaps between a foreign branch of a US swap dealer and a non-US person. Substituted compliance will not be available for transactions with US persons.

The Guidance provides limited detail on the process for obtaining a determination that home country requirements are comparable and comprehensive for purposes of substituted compliance. The CFTC has a long history of making comparability determinations in the context of futures regulation through the Rule 30.10 exemptions that have been granted to futures exchanges and self-regulatory organizations in numerous jurisdictions. One might expect that a similar approach would be used for determinations in the substituted compliance context. The CFTC did note, however, that a prior

[6] 7 USC. 2(a)(13), 6r, and 6s.

[7] US-based swap dealers and MSPs will have to comply with these requirements for all of their transactions, whether with US or non-US persons.

Rule 30.10 exemption would not in itself be sufficient for a determination that the swap regulatory framework is sufficiently comparable to permit substituted compliance. The Guidance contemplates that requests for comparability determinations could be made by foreign regulators or industry groups. The Guidance does not contain any specific timeframe or procedure for requesting a determination.

Comparability will need to be assessed on a requirement-by-requirement basis, rather than on the basis of the foreign regulatory system as a whole. As a result, an entity may be able to rely on substituted compliance for some requirements but not others. Where there is no requirement that is comparable, the non-US entity will need to comply with the applicable US entity-level or transaction-level requirement. Since many other jurisdictions are still in the process of developing their regulatory framework for derivatives, it may be difficult to obtain a comparability determination until those rules are finalized. There may also be situations in which multiple foreign regulatory systems may need to be considered, such as the not infrequent situation where a non-US entity organized in one non-US jurisdiction acts through a branch located in another non-US jurisdiction.

The "comparable and comprehensive" wording reflects similar concepts for clearing houses in the European Market Infrastructure Regulation (EMIR),[8] for exchanges and investment firms in the draft Markets in Financial Instruments Regulation (MiFIR)[9] and for various entities involved in the operation of hedge funds in the Alternative Investment Fund Management Directive (AIFMD).[10] Under these proposals, non-European regulated institutions will be given access to European markets if their home financial regulation and fiscal regime are deemed to be equivalent by the European Securities and Markets Authority.

The powers bestowed on both US and European regulators to make equivalence or comparability determinations will hopefully be used to harmonize applicable cross-border regulatory requirements. However, these powers also raise the unwelcome specter of tit-for-tat responses, retaliation or political intervention by regulators on important questions of cross-border commerce.

## Cross-Border Application of the CEA's Swap Provisions to Transactions Involving Other Market Participants

Although the Guidance principally focuses on cross-border issues involving swap dealers and MSPs, extraterritoriality issues arise for a range of other market participants and transactions that may become subject to US requirements. For these transactions, the Guidance takes a broad view of the scope of the CFTC's authority, interpreting Section 2(i) so that the clearing, trade-execution, and public and swap data repository ("SDR") reporting and the record-keeping requirements of

[8] Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories, 2010/0250 (COD), 15 June 2012.

[9] Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories - Council of the European Union Presidency compromise, 20 June 2012.

[10] Alternative Investment Fund Managers Directive (2011/61/EU).

the Dodd-Frank Act will apply to any swap where at least one of the parties is a US person (irrespective of the location or subject of the transaction or the activities of the parties in connection with the swap).

Moreover, the Guidance would not permit substituted compliance for the clearing, trade-execution and real-time public reporting requirements, or with the large trader reporting requirements otherwise applicable to non-US persons. However, the CFTC would allow substituted compliance with respect to SDR reporting and recordkeeping requirements for transactions subject to them, provided that the Commission has direct access to the swap data for these transactions that is stored at the foreign trade repository.

This aspect of the Guidance does little to resolve many of the concerns raised by market participants about the potential extraterritorial application of the Dodd-Frank derivatives amendments. As the CFTC acknowledges in the Guidance, it is possible, and perhaps even likely, that a transaction between a non-US person and a US person could be subject to multiple regulatory requirements, which may be inconsistent or conflicting. This could, for example, include the requirement to clear the trade in multiple jurisdictions.

For example, it would be impossible for a European counterparty to satisfy a European requirement to clear contracts on a European clearing house under EMIR and for a US counterparty to clear contracts on a separate US clearing house under the CEA in respect of the same transaction without introducing interoperability between clearing houses, a structure which can result in significant risk and cost for the market as a whole. In the case of transactions between US and European entities, this problem may be mitigated by the fact that some European clearing houses are also regulated as clearing organizations in the US. It would further help if the main US clearing houses, which are all currently treated as UK recognized overseas clearing houses or have applications pending, are similarly treated as equivalent under EMIR by ESMA. Similar problems may arise in other jurisdictions, however, without a means for substituted compliance or mutual recognition for the clearing requirement. Even where dual regulation of clearing houses is possible, the clearing houses and regulators will also have to deal with different review periods, restrictions on business development and inconsistent regulation at the clearing house level resulting from multiple regulators. EMIR provides that counterparties will be deemed to fulfill the EMIR clearing, reporting and risk management obligations where at least one of them is established in a third country in respect of which an equivalence declaration has been made.[11] Other complexities arise from different means of accessing clearing houses, including intermediary requirements.

With respect to these issues, the Guidance notes that the CFTC will continue to work to address such matters through cooperation with other regulators and potentially memoranda of understanding or similar arrangements. In the absence of more definitive guidance on these points, however, market participants trading with a US counterparty should be prepared to comply with the applicable US requirements as well as any applicable non-US requirements.

[11] EMIR, Article 13.

## Compliance Phase-In

At the same time it issued the proposed Guidance, the CFTC proposed a separate exemption that would provide a delayed timetable for compliance with the Guidance and certain other swap dealer and MSP regulatory requirements.[12] According to the CFTC, the compliance delay is intended to allow time for the Commission, foreign regulators and market participants to continue to consult and coordinate on the regulation of cross-border swaps activity, as well as the appropriate implementation of substituted compliance.

The exemption would become effective on the compliance date for registration of swap dealers and MSPs (which is expected to be 60 days following the publication of the final product definitions in the Federal Register) and expire: (i) for non-US swap dealers, non-US MSPs, foreign branches of US swap dealers, and foreign branches of US MSPs, 12 months following the publication of the proposal; and (ii) for US swap dealers and US MSPs, January 1, 2013.

During the exemption period, non-US swap dealers and MSPs would be permitted to delay compliance with the entity-level requirements, other than the requirement to report transactions to an SDR and the large trader reporting requirements.[13] Non-US swap dealers and MSPs would have to comply with the transaction-level requirements when dealing with US persons, but would only have to comply with applicable foreign regulations in dealing with non-US persons (without need for a substituted compliance determination). The relief is intended to provide the market and the CFTC time to make determinations about substituted compliance, and the CFTC stated that it may consider extending the relief until substituted compliance is available. This is also consistent with certain transitional provisions in EMIR, which allow non-US clearing houses operating under national regimes, such as the UK's recognized overseas clearing house regime, to continue operating for a limited period until an equivalence determination is made.

In order to rely on the compliance delay exemption, non-US swap dealers and MSPs would be required to: (i) file an application to register as either a swap dealer or a MSP with the National Futures Association (NFA) by the time otherwise required under the applicable rules; and (ii) within 60 days of applying for registration, submit to the NFA a compliance plan addressing how it plans to comply, in good faith, with all applicable requirements under the CEA. Specifically, the entity would need to explain whether it intends to comply with the applicable entity-level requirement or transaction-level requirement or rely on substituted compliance and, if the latter, provide a description of the relevant home country requirement. The exemption does not provide any delay in the requirement to register as a swap dealer or MSP.

The exemption also permits US swap dealers and MSPs to delay compliance with the entity-level requirements (other than the recordkeeping, SDR reporting and large trader reporting requirements) until January 1, 2013. In addition, a foreign branch of a US swap dealer or MSP may delay compliance with the transaction-level requirements for transactions with non-US persons (and instead comply only with the applicable foreign requirement during the exemption period).

[12] Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 Fed. Reg. 41110 (July 12, 2012) (proposed order).

[13] Non-US swap dealers and MSPs that are not affiliates or subsidiaries of a US swap dealer may, however, delay compliance with the swap reporting and large trader reporting for swaps with non-US persons.

## Conclusion

The Guidance and phased compliance period proposals provide helpful certainty for certain extraterritorial issues, particularly questions about whether a non-US entity with limited US-facing activity needs to register as a swap dealer or MSP. Depending on how it is implemented, the possibility of relying on substituted compliance may also relieve many burdens of duplicative or inconsistent regulations for non-US swap dealers and MSPs, at least for their transactions with non-US persons.

The Guidance leaves many issues of extraterritorial application of the CEA unaddressed, however, particularly in the context of clearing, exchange trading and similar requirements where a non-US entity deals with a US person. The positions of non-US regulators, and their reactions to the Guidance, will also need to be considered. Continuing dialogues between US and non-US regulators on the implementation of their respective new frameworks for derivatives may address some of these lingering issues. Other problems may require market solutions (some of which are being considered, as in the clearing area). In the interim, however, market participants in cross-border business will continue to face the possibility of inconsistent or conflicting rules in multiple jurisdictions.

The following tables summarize the application under the Guidance of particular Dodd-Frank requirements, as well as the expected corresponding treatment under EMIR.

- Entity-Level Requirements

| US | EU (UNDER VARIOUS PIECES OF LEGISLATION DEPENDING ON TYPE OF INSTITUTION) |
|---|---|
| Capital adequacy | Capital adequacy (CRD[14]/AIFMD) |
| Chief compliance officer | Governance (MiFID/EMIR/AIFMD) |
| Risk Management | Risk Management (EMIR) |
| Swap data recordkeeping | Recordkeeping (MiFID[15]/EMIR/AIFMD) |
| Swap data reporting (SDR reporting) | Reporting (to trade repository) (EMIR) |
| Large trader reporting | Notification requirement for non-financial counterparties exceeding clearing threshold (EMIR); position reporting by trading venues (MiFID II[16]) |

[14] Capital Requirements Directive (2006/49/EC).

[15] Markets in Financial Instruments Directive (2004/39/EC).

[16] Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), Council of the European Union Presidency compromise, 20 June 2012.

| TYPE OF ENTITY | US REQUIREMENTS | EU REQUIREMENTS |
|---|---|---|
| US-based swap dealer/MSP | Apply | Equivalence determination where doing business in EU. EMIR reporting and risk management obligations apply where US entity enters into transaction with EU entity, where transaction has direct, substantial and foreseeable effect in EU or where appropriate for anti-evasion, subject to equivalence determination. |
| European branches/agencies of US-based swap dealer | Apply | Apply |
| Swaps negotiated/solicited by a European affiliate but booked in US swap dealer | Apply | Only marketing and transaction arranging rules apply, unless transaction has direct, substantial and foreseeable effect in EU or where appropriate for anti-evasion[17] (subject to equivalence determination). |
| European swap dealer affiliated with and guaranteed by US person | Apply, but substituted compliance permitted | Only marketing and transaction arranging rules apply. |
| European swap dealer affiliated with US person but not guaranteed by US person | Apply, but substituted compliance permitted | Apply |
| European swap dealer (unaffiliated with US person and not guaranteed by US person) | Apply, but substituted compliance permitted | Apply |

- Transaction-Level Requirements

| US | EU |
|---|---|
| Clearing | Clearing |
| Margin | Margin |
| Trade execution | Venue-trading obligation |
| Trading relationship documentation | Portfolio reconciliation (uncleared swaps) |
| Portfolio reconciliation/compression | Reporting to trade repository (EMIR) |
| Real-time public reporting | Pre- and post-trade transparency (MiFIR) |
| Trade confirmation | Trade confirmation (uncleared swaps) |
| Daily trading records | Record-keeping (MiFID, EMIR) |
| External business conduct | Business conduct (MiFID, EMIR) |

[17] ESMA is consulting with third country supervisors and will consult on a regulatory technical standard clarifying the scope of this provision at a later date.

| | TRANSACTION BETWEEN: | | |
|---|---|---|---|
| | US PERSON | EUROPEAN PERSON GUARANTEED BY US PERSON | EUROPEAN PERSON NOT GUARANTEED BY US PERSON |
| US swap dealer | US: Apply<br>EU: Do not apply (except where transaction has direct, substantial and foreseeable effect in EU or where appropriate for anti-evasion (subject in either case to equivalence determination)) | US: Apply<br>EU: Apply (subject to equivalence determination) | US: Apply<br>EU: Apply (subject to equivalence determination) |
| Swaps negotiated/solicited by a European affiliate but booked in US swap dealer | US: Apply<br>EU: Do not apply (except where transaction has direct, substantial and foreseeable effect in EU or where appropriate for anti-evasion (subject in either case to equivalence determination)) | US: Apply (other than external business conduct)<br>EU: Apply (subject to equivalence determination) | US: Apply (other than external business conduct)<br>EU: Apply (subject to equivalence determination) |
| European branches/agencies of US-based swap dealer | US: Apply<br>EU: Apply (subject to equivalence determination) | US: Apply (other than external business conduct), but substituted compliance permitted<br>EU: Apply | US: Apply (other than external business conduct), but substituted compliance permitted<br>EU: Apply |
| European affiliate of US person<br>- affiliate is the legal counterparty but all swaps guaranteed by US person | US: Apply<br>EU: Apply (subject to equivalence determination) | US: Apply (other than external business conduct), but substituted compliance permitted<br>EU: Apply | US: Do not apply<br>EU: Apply |
| European affiliate of US person<br>- swaps NOT booked in US (i.e., affiliate is the legal counterparty) and swaps NOT guaranteed by US person | US: Apply<br>EU: Apply (subject to equivalence determination) | US: Apply (other than external business conduct), but substituted compliance permitted<br>EU: Apply | US: Do not apply<br>EU: Apply |
| European swap dealer<br>- swaps neither booked in US nor guaranteed by a US person | US: Apply<br>EU: Apply (subject to equivalence determination) | US: Apply (other than external business conduct), but substituted compliance permitted<br>EU: Apply | US: Do not apply<br>EU: Apply |

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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