

several outstanding questions regarding these comparability determinations. In doing so, the Commission must collaborate with foreign regulators to increase global harmonization.

First, there is uncertainty surrounding the timing and outcome of the MOUs. Critical questions regarding information sharing, cooperation, supervision, and enforcement will remain unanswered until the Commission and our fellow regulators execute these MOUs.

Second, the Commission has issued time-limited no-action relief for the swap data repository reporting requirements. These comparability determinations will be done as separate notices. However, the timing and process for these determinations remain uncertain.

Third, the Commission has failed to provide clarity on the process for addressing the comparability determinations that it declined to undertake at this time. The Notices only state that the Commission may address these requests in a separate notice at a later date given further developments in the law and regulations of other jurisdictions. To promote certainty in the financial markets, the Commission must provide a clear path forward for market participants and foreign regulators.

The following steps would be a better approach: (1) the Commission should extend the Exemptive Order to allow foreign regulators to further implement their regulatory regimes and coordinate with them to implement a harmonized substituted compliance process; (2) the Commission should implement a flexible, outcomes-based approach to the substituted compliance process and apply it similarly to all jurisdictions; and (3) the Commission should work closely with our fellow regulators to expeditiously implement MOUs that resolve regulatory differences and address regulatory oversight issues.

## Conclusion

While I support the narrow comparability determinations that the Commission has made, it was my hope that the Commission would work with foreign regulators to implement a substituted compliance process that would increase the global harmonization effort. I am disappointed that the Commission has failed to implement such a process.

I do believe that in the longer term, the swaps regulations of the major jurisdictions will converge. At this time, however, the Commission's comparability determinations have done little to alleviate the burden of regulatory uncertainty and duplicative

compliance with both U.S. and foreign regulations.

The G-20 process delineated and put in place the swaps market reforms in G-20 member nations. It is then no surprise that the Commission must learn to coordinate with foreign regulators to minimize confusion and disruption in bringing much needed clarity to the swaps market. For all these shortcomings, I respectfully dissent from the Commission's approval of the Notices.

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## COMMODITY FUTURES TRADING COMMISSION

### Comparability Determination for Japan: Certain Transaction-Level Requirements

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Comparability Determination for Certain Requirements under the Japanese Laws and Regulations.

**SUMMARY:** The following is the analysis and determination of the Commodity Futures Trading Commission ("Commission") regarding certain parts of a request by the Bank of Tokyo-Mitsubishi UFJ, Ltd ("BTMU") that the Commission determine that laws and regulations applicable in the Japan provide a sufficient basis for an affirmative finding of comparability with respect to the following regulatory obligations applicable to swap dealers ("SDs") and major swap participants ("MSPs") registered with the Commission: (i) Swap trading relationship documentation and (ii) daily trading records (collectively, the "Business Conduct Requirements").

#### DATES:

*Effective Date:* This determination will become effective immediately upon publication in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Gary Barnett, Director, 202-418-5977, gbarnett@cftc.gov, Frank Fisanich, Chief Counsel, 202-418-5949, ffisanich@cftc.gov, and Jason Shafer, Special Counsel, 202-418-5097, jshafer@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

On July 26, 2013, the Commission published in the **Federal Register** its

"Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations" ("Guidance").<sup>1</sup> In the Guidance, the Commission set forth its interpretation of the manner in which it believes that section 2(i) of the Commodity Exchange Act ("CEA") applies Title VII's swap provisions to activities outside the U.S. and informed the public of some of the policies that it expects to follow, generally speaking, in applying Title VII and certain Commission regulations in contexts covered by section 2(i). Among other matters, the Guidance generally described the policy and procedural framework under which the Commission would consider a substituted compliance program with respect to Commission regulations applicable to entities located outside the U.S. Specifically, the Commission addressed a recognition program where compliance with a comparable regulatory requirement of a foreign jurisdiction would serve as a reasonable substitute for compliance with the attendant requirements of the CEA and the Commission's regulations promulgated thereunder.

In addition to the Guidance, on July 22, 2013, the Commission issued the Exemptive Order Regarding Compliance with Certain Swap Regulations (the "Exemptive Order").<sup>2</sup> Among other things, the Exemptive Order provided time for the Commission to consider substituted compliance with respect to six jurisdictions where non-U.S. SDs are currently organized. In this regard, the Exemptive Order generally provided non-U.S. SDs and MSPs (and foreign branches of U.S. SDs and MSPs) in the six jurisdictions with conditional relief from certain requirements of Commission regulations (those referred to as "Transaction-Level Requirements" in the Guidance) until the earlier of December 21, 2013, or 30 days following the issuance of a substituted compliance determination.<sup>3</sup> However, the Commission provided only transitional relief from the real-time public reporting requirements under part 43 of the Commission's regulations until

<sup>1</sup> 78 FR 45292 (July 26, 2013). The Commission originally published proposed and further proposed guidance on July 12, 2012 and January 7, 2013, respectively. See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012) and Further Proposed Guidance Regarding Compliance with Certain Swap Regulations, 78 FR 909 (Jan. 7, 2013).

<sup>2</sup> 78 FR 43785 (July 22, 2013).

<sup>3</sup> The Transaction-Level Requirements under the Exemptive Order consist of 17 CFR 37.12, 38.11, 23.202, 23.205, 23.400-451, 23.501, 23.502, 23.503, 23.504, 23.505, 23.506, 23.610, and parts 43 and 50 of the Commission's regulations.

September 30, 2013, stating that “it would not be in the public interest to further delay reporting under part 43 . . .”<sup>4</sup> Similarly, the Commission provided transitional relief only until October 10, 2013, from the clearing and swap processing requirements (as described in the Guidance), stating that, “[b]ecause SDs and MSPs have been committed to clearing their [credit default swaps] and interest rate swaps for many years, and indeed have been voluntarily clearing for many years, any further delay of the Commission’s clearing requirement is unwarranted.”<sup>5</sup> The Commission did not make any comparability determination with respect to clearing and swap processing prior to October 10, 2013, or real-time public reporting prior to September 30, 2013.

On September 20, 2013, BTMU submitted a request that the Commission determine that laws and regulations applicable in Japan provide a sufficient basis for an affirmative finding of comparability with respect to certain Transaction-Level Requirements, including the Business Conduct Requirements.<sup>6</sup> (BTMU is referred to herein as the “applicant”). On December 16, 2013, the application was further supplemented with corrections and additional materials. The following is the Commission’s analysis and determination regarding the Business Conduct Requirements, as detailed below.

In addition to the Business Conduct Requirements described below, the applicant also requested a comparability determination with respect to law and regulations applicable in Japan governing trade execution, real-time public reporting, clearing, and swap processing.

With respect to trade execution and real-time reporting, the Commission has not made a comparability determination at this time due to the Commission’s view that although a legislative framework for such requirements exists in Japan, detailed regulations with which to compare the requirements of the Commission’s regulations on trade execution and real-time public reporting under such framework are still under consideration in Japan. The Commission may address these requests in a separate notice at a later date, taking into account further developments in the U.S. and Japan.

With respect to clearing and swap processing, this notice does not address § 50.2 (Treatment of swaps subject to a clearing requirement), § 50.4 (Classes of swaps required to be cleared), § 23.506 (Swap processing and clearing), or § 23.610 (Clearing member acceptance for clearing).

The mandatory clearing requirement in Japan, which is consistent with the G20 commitments<sup>7</sup> and objectives, was implemented in November 2012, ahead of other G20 jurisdictions. Japan’s clearing requirement, at its initial stage, is applied to transactions between large domestic financial institutions registered under the Financial Instruments and Exchange Act, No. 25 of 1948 (“FIEA”), who are members of licensed clearing organizations<sup>8</sup>, for (i) certain credit default swaps (i.e., those referencing iTraxx Japan—an investment-grade index CDS from 50 Japanese firms); and (ii) certain interest rate swaps (i.e., three month or six month Japanese yen LIBOR interest rate swaps). According to Japanese authorities, the scope of entities and products subject to the clearing requirement in Japan will be expanded over the next two years in a phased manner.

While the Commission considers that the legal framework in respect of clearing and swap processing in Japan is comparable to the U.S. framework, it also recognizes that there are differences in the scope of entities and products between its clearing requirement under section 2(h)(1)(A) of the CEA and § 50.2 (“the CEA clearing requirement”) and the Japanese FIEA clearing requirement, due to differences in market structures and conditions. Due to such differences, the Commission has not made a comparability determination with respect to §§ 50.2, 50.4, 23.506, or 23.610 at this time. The Commission may address these requests in a separate notice at a later date, taking into account further developments in the U.S. and Japan.

The Commission notes that its Division of Clearing and Risk has granted certain no-action relief from the CEA clearing requirement to qualified

clearing participants of JSCC. Pursuant to such no-action relief, clearing participants of JSCC that are subject to Commission regulation 50.2, as well as parents and affiliates of such participants, may continue clearing yen-denominated interest rate swaps at JSCC instead of at a Commission-registered derivatives clearing organization (“DCO”). Further, JSCC is in the process of registering with the Commission as a DCO. Upon JSCC’s registration, a Japanese SD could comply with both the CEA and FIEA clearing requirements by clearing relevant swaps at JSCC.

## II. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>9</sup> (“Dodd-Frank Act” or “Dodd-Frank”), which, in Title VII, established a new regulatory framework for swaps.

Section 722(d) of the Dodd-Frank Act amended the CEA by adding section 2(i), which provides that the swap provisions of the CEA (including any CEA rules or regulations) apply to cross-border activities when certain conditions are met, namely, when such activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” or when they contravene Commission rules or regulations as are necessary or appropriate to prevent evasion of the swap provisions of the CEA enacted under Title VII of the Dodd-Frank Act.<sup>10</sup>

In the three years since its enactment, the Commission has finalized 68 rules and orders to implement Title VII of the Dodd-Frank Act. The finalized rules include those promulgated under section 4s of the CEA, which address registration of SDs and MSPs and other substantive requirements applicable to SDs and MSPs. With few exceptions, the delayed compliance dates for the Commission’s regulations implementing such section 4s requirements applicable to SDs and MSPs have passed and new SDs and MSPs are now required to be in full compliance with such regulations upon registration with the Commission.<sup>11</sup> Notably, the requirements under Title VII of the Dodd-Frank Act related to SDs and MSPs by their terms apply to all registered SDs and MSPs, irrespective of where they are located, albeit subject to the limitations of CEA section 2(i).

To provide guidance as to the Commission’s views regarding the scope

<sup>4</sup> See id. at 43789.

<sup>5</sup> See id. at 43790.

<sup>6</sup> For purposes of this notice, the Business Conduct Requirements consist of 17 CFR 23.202 and 23.504.

<sup>7</sup> In 2009, leaders of the Group of 20 (“G20”)—whose membership includes Japan, the United States, and 18 other countries—agreed that: (i) OTC derivatives contracts should be reported to trade repositories; (ii) all standardized OTC derivatives contracts should be cleared through central counterparties and traded on exchanges or electronic trading platforms, where appropriate, by the end of 2012; and (iii) non-centrally cleared contracts should be subject to higher capital requirements.

<sup>8</sup> Japan Securities Clearing Corporation (“JSCC”) is currently the only licensed clearing organization under the FIEA in Japan.

<sup>9</sup> Public Law 111–203, 124 Stat. 1376 (2010).

<sup>10</sup> 7 U.S.C. 2(i).

<sup>11</sup> The compliance dates are summarized on the Compliance Dates page of the Commission’s Web site. (<http://www.cftc.gov/LawRegulation/DoddFrankAct/ComplianceDates/index.htm>.)

of the cross-border application of Title VII of the Dodd-Frank Act, the Commission set forth in the Guidance its interpretation of the manner in which it believes that Title VII's swap provisions apply to activities outside the U.S. pursuant to section 2(i) of the CEA. Among other matters, the Guidance generally describes the policy and procedural framework under which the Commission would consider a substituted compliance program with respect to Commission regulations applicable to entities located outside the U.S. Specifically, the Commission established a recognition program where compliance with a comparable regulatory requirement of a foreign jurisdiction would serve as a reasonable substitute for compliance with the attendant requirements of the CEA and the Commission's regulations. With respect to the standards forming the basis for any determination of comparability ("comparability determination" or "comparability finding"), the Commission stated:

In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations, the Commission will take into consideration 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's authority to support and enforce its oversight of the registrant. In this context, comparable does not necessarily mean identical. Rather, the Commission would evaluate whether the home jurisdiction's regulatory requirement is comparable to and as comprehensive as the corresponding U.S. regulatory requirement(s).<sup>12</sup>

Upon a comparability finding, consistent with CEA section 2(i) and comity principles, the Commission's policy generally is that eligible entities may comply with a substituted compliance regime, subject to any conditions the Commission places on its finding, and subject to the Commission's retention of its examination authority and its enforcement authority.<sup>13</sup>

In this regard, the Commission notes that a comparability determination cannot be premised on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction, but rather on whether information relevant to the Commission's oversight of an SD or

MSP would be directly available to the Commission and any U.S. prudential regulator of the SD or MSP.<sup>14</sup> The Commission's direct access to the books and records required to be maintained by SD or MSP registered with the Commission is a core requirement of the CEA<sup>15</sup> and the Commission's regulations,<sup>16</sup> and is a condition to registration.<sup>17</sup>

### III. Regulation of SDs and MSPs in Japan

As represented to the Commission by the applicant, swap activities in Japan may be governed by the Banking Act of Japan, No. 59 of 1981 ("Banking Act"), covering banks and bank holding companies, and the FIEA, covering, among others, Financial Instrument Business Operators ("FIBOs") and Registered Financial Institutions ("RFIs"). The Japanese Prime Minister delegated broad authority to implement these laws to the Japanese Financial Services Agency ("JFSA"). Pursuant to this authority, the JFSA has promulgated the Order for Enforcement,<sup>18</sup> Cabinet Office

<sup>14</sup> Under §§ 23.203 and 23.606, all records required by the CEA and the Commission's regulations to be maintained by a registered SD or MSP shall be maintained in accordance with Commission regulation 1.31 and shall be open for inspection by representatives of the Commission, the United States Department of Justice, or any applicable prudential regulator.

In its Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013), the Commission noted that an applicant for registration as a SD or MSP must file a Form 7-R with the National Futures Association and that Form 7-R was being modified at that time to address existing blocking, privacy, or secrecy laws of foreign jurisdictions that applied to the books and records of SDs and MSPs acting in those jurisdictions. *See id.* at 871–72 n. 107. The modifications to Form 7-R were a temporary measure intended to allow SDs and MSPs to apply for registration in a timely manner in recognition of the existence of the blocking, privacy, and secrecy laws. In the Guidance, the Commission clarified that the change to Form 7-R impacts the registration application only and does not modify the Commission's authority under the CEA and its regulations to access records held by registered SDs and MSPs. Commission access to a registrant's books and records is a fundamental regulatory tool necessary to properly monitor and examine each registrant's compliance with the CEA and the regulations adopted pursuant thereto. The Commission has maintained an ongoing dialogue on a bilateral and multilateral basis with foreign regulators and with registrants to address books and records access issues and may consider appropriate measures where requested to do so.

<sup>15</sup> *See e.g.*, sections 4s(f)(1)(C), 4s(j)(3) and (4) of the CEA.

<sup>16</sup> *See e.g.*, §§ 23.203(b) and 23.606.

<sup>17</sup> *See supra* note 13.

<sup>18</sup> Order for Enforcement of the Banking Act and Order for Enforcement of the Financial Instruments and Exchange Act.

Ordinance,<sup>19</sup> Supervisory Guidelines<sup>20</sup> and Inspection Manuals.<sup>21</sup> The Securities and Exchange Surveillance Commission ("SESC") is within the JFSA and has promulgated, among other things, the Inspection Manual for FIBOs.

These requirements supplement the requirements of the Banking Act and FIEA with a more proscriptive direction as to the particular structural features or responsibilities that internal compliance functions must maintain.

In general, banks are subject to the Banking Act, relevant laws and regulations for banks, the Supervisory Guideline for banks, and the Inspection Manual for banks, while FIBOs are subject to the FIEA, relevant laws and regulations for FIBOs, Supervisory Guideline for FIBOs, and Inspection Manual for FIBOs.

Pursuant to Article 29 of the FIEA, any person that engages in trade activities that constitute "Financial Instruments Business"—which, among other things, includes over-the-counter transactions in derivatives ("OTC derivatives") or intermediary, brokerage (excluding brokerage for clearing of securities) or agency services therefor<sup>22</sup>—must register under the FIEA as a FIBO. Banks that conduct specified activities in the course of trade, including OTC derivatives, must register under the FIEA as RFIs pursuant to Article 33–2 of the FIEA. Banks registered as RFIs are required to comply with relevant laws and regulations for FIBOs regarding specified activities. Failure to comply with any relevant laws and regulations, Supervisory Guidelines or Inspection Manuals would subject the applicant to potential sanctions or corrective measures.

The applicant is a licensed bank in Japan that is also registered as an RFI under the supervision of the JFSA. In addition, the applicant is a member of several self-regulatory organizations, including the Japanese Securities

<sup>19</sup> Cabinet Office Ordinance on Financial Instruments Business ("FIB Ordinance") and Cabinet Office Ordinance on Regulation of OTC Derivatives Transaction.

<sup>20</sup> Comprehensive Guideline for Supervision of Major Banks, etc. ("Supervisory Guideline for banks") and Comprehensive Guideline for Supervision of Financial Instruments Business Operators, etc. ("Supervisory Guideline for FIBOs").

<sup>21</sup> Inspection Manual for Deposit Taking Institutions ("Inspection Manual for banks"), consisting of the Checklist for Business Management (Governance), Checklist for Legal Compliance, Checklist for Customer Protection Management, Checklist for Credit Risk Management, Checklist for Market Risk Management, Checklist for Liquidity Risk Management, Checklist for Operational Risk Management, etc.

<sup>22</sup> *See* Article 2(8)(iv) of the FIEA.

<sup>12</sup> 78 FR 45342–45345.

<sup>13</sup> *See* the Guidance, 78 FR 45342–44.

Dealers Association ("JSDA"). The JSDA is a "Financial Instruments Firms Association" authorized under FIEA by the Prime Minister of Japan.<sup>23</sup>

#### IV. Comparable and Comprehensiveness Standard

The Commission's comparability analysis will be based on a comparison of specific foreign requirements against the specific related CEA provisions and Commission regulations as categorized and described in the Guidance. As explained in the Guidance, within the framework of CEA section 2(i) and principles of international comity, the Commission may make a comparability determination on a requirement-by-requirement basis, rather than on the basis of the foreign regime as a whole.<sup>24</sup> In making its comparability determinations, the Commission may include conditions that take into account timing and other issues related to coordinating the implementation of reform efforts across jurisdictions.<sup>25</sup>

In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the corollary requirement(s) under the CEA and Commission regulations, the Commission will take into consideration 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, and
- The home jurisdiction's authority to support and enforce its oversight of the registrant.<sup>26</sup>

In making a comparability determination, the Commission takes an "outcome-based" approach. An "outcome-based" approach means that when evaluating whether a foreign jurisdiction's regulatory requirements are comparable to, and as comprehensive as, the corollary areas of the CEA and Commission regulations, the Commission ultimately focuses on regulatory outcomes (*i.e.*, the home jurisdiction's requirements do not have

to be identical).<sup>27</sup> This approach recognizes that foreign regulatory systems differ and their approaches vary and may differ from how the Commission chose to address an issue, but that the foreign jurisdiction's regulatory requirements nonetheless achieve the regulatory outcome sought to be achieved by a certain provision of the CEA or Commission regulation.

In doing its comparability analysis the Commission may determine that no comparability determination can be made<sup>28</sup> and that the non-U.S. SD or non-U.S. MSP, U.S. bank that is a SD or MSP with respect to its foreign branches, or non-registrant, to the extent applicable under the Guidance, may be required to comply with the CEA and Commission regulations.

The starting point in the Commission's analysis is a consideration of the regulatory objectives of the foreign jurisdiction's regulation of swaps and swap market participants. As stated in the Guidance, jurisdictions may not have swap specific regulations in some areas, and instead have regulatory or supervisory regimes that achieve comparable and comprehensive regulation to the Dodd-Frank Act requirements, but on a more general, entity-wide, or prudential, basis.<sup>29</sup> 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 swap market activities may not be clearly defined, or may not expressly include specific regulatory elements that the Commission concludes are critical to achieving the regulatory objectives or outcomes required under the CEA and the Commission's regulations. In these circumstances, the Commission will work with the regulators and registrants in these jurisdictions to consider alternative approaches that may result in a determination that substituted compliance applies.<sup>30</sup>

<sup>27</sup> 78 FR 45343.

<sup>28</sup> A finding of comparability may not be possible for a number of reasons, including the fact that the foreign jurisdiction has not yet implemented or finalized particular requirements.

<sup>29</sup> 78 FR 45343.

<sup>30</sup> As explained in the Guidance, such "approaches used will vary depending on the circumstances relevant to each jurisdiction. One example would include coordinating with the foreign regulators in developing appropriate regulatory changes or new regulations, particularly where changes or new regulations already are being considered or proposed by the foreign regulators or legislative bodies. As another example, the Commission may, after consultation with the appropriate regulators and market participants, include in its substituted compliance determination a description of the means by which certain swaps market participants can achieve substituted

Finally, the Commission generally will rely on an applicant's description of the laws and regulations of the foreign jurisdiction in making its comparability determination. The Commission considers an application to be a representation by the applicant that the laws and regulations submitted are in full force and effect, that the description of such laws and regulations is accurate and complete, and that, unless otherwise noted, the scope of such laws and regulations encompasses the swaps activities<sup>31</sup> of SDs and MSPs<sup>32</sup> in the relevant jurisdictions.<sup>33</sup> Further, as stated in the Guidance, the Commission expects that an applicant would notify the Commission of any

compliance within the construct of the foreign regulatory regime. The identification of the means by which substituted compliance is achieved would be designed to address the regulatory objectives and outcomes of the relevant Dodd-Frank Act requirements in a manner that does not conflict with a foreign regulatory regime and reduces the likelihood of inconsistent regulatory obligations. For example, the Commission may specify that [SDs] and MSPs in the jurisdiction undertake certain recordkeeping and documentation for swap activities that otherwise is only addressed by the foreign regulatory regime with respect to financial activities generally. In addition, the substituted compliance determination may include provisions for summary compliance and risk reporting to the Commission to allow the Commission to monitor whether the regulatory outcomes are being achieved. By using these approaches, in the interest of comity, the Commission would seek to achieve its regulatory objectives with respect to the Commission's registrants that are operating in foreign jurisdictions in a manner that works in harmony with the regulatory interests of those jurisdictions." 78 FR 45343-44.

<sup>31</sup> "Swaps activities" is defined in Commission regulation 23.600(a)(7) to mean, "with respect to a registrant, such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives." The Commission's regulations under Part 23 (17 CFR Part 23) are limited in scope to the swaps activities of SDs and MSPs.

<sup>32</sup> No SD or MSP that is not legally required to comply with a law or regulation determined to be comparable may voluntarily comply with such law or regulation in lieu of compliance with the CEA and the relevant Commission regulation. Each SD or MSP that seeks to rely on a comparability determination is solely responsible for determining whether it is legally required to comply with the laws and regulations found comparable. Currently, there are no MSPs organized outside the U.S. and the Commission therefore cautions any non-financial entity organized outside the U.S. and applying for registration as an MSP to carefully consider whether the laws and regulations determined to be comparable herein are applicable to such entity.

<sup>33</sup> The Commission has provided the relevant foreign regulator(s) with opportunities to review and correct the applicant's description of such laws and regulations on which the Commission will base its comparability determination. The Commission relies on the accuracy and completeness of such review and any corrections received in making its comparability determinations. A comparability determination based on an inaccurate description of foreign laws and regulations may not be valid.

<sup>23</sup> Because the applicant's request and the Commission's determinations herein are based on the comparability of Japanese requirements applicable to banks, FIBOs, and RFI, an SD or MSP that is not a bank, FIBO, or RFI, or is otherwise not subject to the requirements applicable to banks, FIBOs, and RFI, upon which the Commission bases its determinations, may not be able to rely on the Commission's comparability determinations herein.

<sup>24</sup> 78 FR 45343.

<sup>25</sup> 78 FR 45343.

<sup>26</sup> 78 FR 45343.

material changes to information submitted in support of a comparability determination (including, but not limited to, changes in the relevant supervisory or regulatory regime) as, depending on the nature of the change, the Commission's comparability determination may no longer be valid.<sup>34</sup>

The Guidance provided a detailed discussion of the Commission's policy regarding the availability of substituted compliance<sup>35</sup> for the Business Conduct Requirements.

## V. Supervisory Arrangement

In the Guidance, the Commission stated that, in connection with a determination that substituted compliance is appropriate, it would expect to enter into an appropriate memorandum of understanding ("MOU") or similar arrangement<sup>36</sup> with the relevant foreign regulator(s). Although existing arrangements would indicate a foreign regulator's ability to cooperate and share information, "going forward, the Commission and relevant foreign supervisor(s) would need to establish supervisory MOUs or other arrangements that provide for information sharing and cooperation in the context of supervising SDs and MSPs."<sup>37</sup>

The Commission is in the process of developing its registration and supervision regime for provisionally-registered SDs and MSPs. This new initiative includes setting forth supervisory arrangements with authorities that have joint jurisdiction over SDs and MSPs that are registered with the Commission and subject to U.S. law. Given the developing nature of the Commission's regime and the fact that the Commission has not negotiated prior supervisory arrangements with certain authorities, the negotiation of supervisory arrangements presents a unique opportunity to develop close working relationships between and among authorities, as well as highlight any potential issues related to cooperation and information sharing.

Accordingly, the Commission is negotiating such a supervisory arrangement with each applicable foreign regulator of an SD or MSP. The Commission expects that the arrangement will establish expectations for ongoing cooperation, address direct access to information,<sup>38</sup> provide for notification upon the occurrence of specified events, memorialize understandings related to on-site visits,<sup>39</sup> and include protections related to the use and confidentiality of non-public information shared pursuant to the arrangement.

These arrangements will establish a roadmap for how authorities will consult, cooperate, and share information. As with any such arrangement, however, nothing in these arrangements will supersede domestic laws or resolve potential conflicts of law, such as the application of domestic secrecy or blocking laws to regulated entities.

## VI. Comparability Determination and Analysis

The following section describes the requirements imposed by specific sections of the CEA and the Commission's regulations for the Business Conduct Requirements in the "risk mitigation and transparency" category that are the subject of this comparability determination and the Commission's regulatory objectives with respect to such requirements. Immediately following a description of the requirement(s) and regulatory objective(s) of the specific Business Conduct Requirements that the applicant submitted for a comparability

determination, the Commission provides a description of the foreign jurisdiction's comparable laws, regulations, or rules and whether such laws, regulations, or rules meet the applicable regulatory objective.

The Commission's determinations in this regard and the discussion in this section are intended to inform the public of the Commission's views regarding whether the foreign jurisdiction's laws, regulations, or rules may be comparable to and as comprehensive as those requirements in the Dodd-Frank Act (and Commission regulations promulgated thereunder) and therefore, may form the basis of substituted compliance. In turn, the public (in the foreign jurisdiction, in the United States, and elsewhere) retains its ability to present facts and circumstances that would inform the determinations set forth in this release.

As was stated in the Guidance, the Commission understands the complex and dynamic nature of the global swap market and the need to take an adaptable approach to cross-border issues, particularly as it continues to work closely with foreign regulators to address potential conflicts with respect to each country's respective regulatory regime. In this regard, the Commission may review, modify, or expand the determinations herein in light of comments received and future developments.

### A. Swap Trading Relationship Documentation (§ 23.504)

**Commission Requirement:** Section 4s(i) of the CEA requires each SD and MSP to conform to Commission standards for the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps.<sup>40</sup> Pursuant to this requirement, the Commission adopted § 23.504.

Pursuant to § 23.504(a), SDs and MSPs must have policies and procedures reasonably designed to ensure that the SD or MSP enters into swap trading relationship documentation with each counterparty prior to executing any swap with such counterparty. Such requirement does not apply to cleared swaps.

Pursuant to § 23.504(b), SDs and MSPs must, at a minimum, document terms relating to:

- Payment obligations;
- Netting of payments;
- Events of default or other termination events;
- Netting of obligations upon termination;
- Transfer of rights/obligations;

<sup>40</sup> See 7 U.S.C. § 6s(i).

<sup>34</sup> 78 FR 45345.

<sup>35</sup> See 78 FR 45348–50. The Commission notes that registrants and other market participants are responsible for determining whether substituted compliance is available pursuant to the Guidance based on the comparability determination contained herein (including any conditions or exceptions), and its particular status and circumstances.

<sup>36</sup> An MOU is one type of arrangement between or among regulators. Supervisory arrangements could include, as appropriate, cooperative arrangements that are memorialized and executed as addenda to existing MOUs or, for example, as independent bilateral arrangements, statements of intent, declarations, or letters.

<sup>37</sup> 78 FR 45344.

<sup>38</sup> Section 4s(j)(3) and (4) of the CEA and Commission regulation 23.606 require a registered SD or MSP to make all records required to be maintained in accordance with Commission regulation 1.31 available promptly upon request to, among others, representatives of the Commission. See also 7 U.S.C. § 6s(f); 17 CFR 23.203. In the Guidance, the Commission states that it "reserves this right to access records held by registered [SDs] and MSPs, including those that are non-U.S. persons who may comply with the Dodd-Frank recordkeeping requirement through substituted compliance." 78 FR 45345 n. 472; see also *id.* at 45342 n. 461 (affirming the Commission's authority under the CEA and its regulations to access books and records held by registered SDs and MSPs as "a fundamental regulatory tool necessary to properly monitor and examine each registrant's compliance with the CEA and the regulations adopted pursuant thereto").

<sup>39</sup> The Commission retains its examination authority, both during the application process as well as upon and after registration of an SD or MSP. See 78 FR 45342 (stating Commission policy that "eligible entities may comply with a substituted compliance regime under certain circumstances, subject, however, to the Commission's retention of its examination authority") and 45344 n. 471 (stating that the "Commission may, as it deems appropriate and necessary, conduct an on-site examination of the applicant").

- Governing law;
- Valuation—must be able to value swaps in a predictable and objective manner—complete and independently verifiable methodology for valuation;
- Dispute resolution procedures; and
- Credit support arrangements with initial/variation margin at least as high as set for SD/MSPs or prudential regulator (identifying haircuts and class of eligible assets).

*Regulatory Objective:* Through Commission regulation 23.504, the Commission seeks to reduce the legal, operational, counterparty credit, and market risk that can arise from undocumented swaps or undocumented terms of swaps. Inadequate documentation of swap transactions is more likely to result in collateral and legal disputes, thereby exposing counterparties to significant counterparty credit risk.

In particular, documenting agreements regarding valuation is critical because, as the Commission has noted, the ability to determine definitively the value of a swap at any given time lies at the center of many of the OTC derivatives market reforms contained in the Dodd-Frank Act and is a cornerstone of risk management. With respect to other SDs/MSPs and financial entities, or upon request of any other counterparty, the regulation requires agreement on the process (including alternatives and dispute resolution procedures) for determining the value of each swap for the duration of such swap for purposes of complying with the Commission's margin and risk management requirements, with such valuations based on objective criteria to the extent practicable.

*Comparable Japanese Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as section 4s(i) of the CEA and Commission regulation 23.504.

Article 37-3 of the FIEA and Article 99 of the FIB Ordinance requires RFIs/FIBOs that intend to conclude a swap transaction to deliver to their customer documentation that outlines all relevant terms of the swap transaction. Such documentation must be delivered prior to execution in order to “ensure that the customer can make a decision on whether to conclude the contract with a full understanding on the content...of the contract.” In addition to describing all relevant terms of the transactions, the pre-execution documentation must identify:

- How the obligations arising from the swap transactions will be performed;
- Settlement terms;
- Events on default or termination;
- The name or trade name of the designated dispute resolution organization (if any), or the details of the grievances settlement procedures and dispute resolution measures; and
- The types of and computation method of the amount of customer margins or other guarantee money which a customer is required to deposit regarding the swap transactions, the types of an prices applicable to properties, etc. which may be deposited as customer margins or other guarantee money and matters equivalent thereto, and how customer margins or other guarantee money will be deposited by or returned to the customer.

II-1-2.1(5)(i) and (ii) of the Inspection Manual for FIBOs requires RFIs/FIBOs to develop internal controls to verify compliance with these documentation requirements, including a system to verify that the written documents were issued before the agreements were concluded. Such internal controls must be approved by the RFI's/FIBO's board of directors. In addition, pursuant to IV(1) of the Checklist for Business Risk Management (Governance) of the Inspection Manual for banks, banks are required to develop an external audit system to review the effectiveness of these internal controls on at least an annual basis. II-1-1.4(1) of the Inspection Manual for FIBOs requires a RFI/FIBO's board of directors to establish an internal audit system to verify the appropriateness and effectiveness of these internal controls by setting up a highly independent internal audit division.

*Commission Determination:* The Japanese standards specified above require OTC derivative contracts entered into between RFIs/FIBOs and their customers to be confirmed in writing, which corresponds to the requirements of Commission regulation 23.504(b)(2).

Pursuant to the FIEA, RFIs and FIBOs are required to document the computation method of the customer margins or other guarantee money that the customer is required to deposit regarding the swap transactions. This corresponds with Commission regulation 23.504(b)(3) and (b)(4)(i), which requires SDs and MSPs to engage in daily valuation with other SDs and MSPs, and financial entities.

Under the Japanese standards, when concluding OTC derivative contracts with each other, counterparties must have agreed detailed procedures and

processes in relation to: (a) identification, recording, and monitoring of disputes relating to the recognition or valuation of the contracts and to the exchange of collateral between counterparties, and (b) the resolution of disputes in a timely manner. These aspects of the Japanese standards correspond to the valuation documentation requirements under Commission regulation 23.504(b)(4), which also require use of market transactions for valuations to the extent practicable, or other objective criteria, and an agreement on detailed processes for valuation dispute resolution for purposes of complying with margin requirements.

Generally identical in intent to § 23.504(b)(2), (3), and (4), the Japanese confirmation and valuation documentation requirements are designed to reduce the legal, operational, counterparty credit, and market risk that can arise from undocumented transactions or terms, reducing the risk of collateral and legal disputes, and exposure of counterparties to significant counterparty credit risk.

Moreover, generally identical in intent to § 23.504(a)(2), (b)(1), (c), and (d), the Japanese standards require that SDs and MSPs establish policies and procedures, including audit procedures, approved in writing by senior management of the SD or MSP, reasonably designed to ensure that they have entered into swap trading relationship documentation in compliance with appropriate standards with each counterparty prior to or contemporaneously with entering into a swap transaction with such counterparty.

Based on the foregoing and the representations of the applicant, the Commission finds the confirmation and valuation documentation requirements of the Japanese standards specified above are comparable to and as comprehensive as the swap trading relationship documentation requirements of Commission regulations 23.504(a)(2), (b)(1), (2), (3), and (4), (c), and (d).

The foregoing comparability determination does not extend to the requirement that such documentation include notice of the status of the counterparty under the orderly liquidation procedures of Title II of the Dodd-Frank Act, and the effect of clearing on swaps executed bilaterally.<sup>41</sup>

<sup>41</sup> See § 23.504(b)(5) and (6).

### B. Daily Trading Records (§ 23.202)

**Commission Requirement:** Section 4s(g)(1) of the CEA and Commission regulation 23.202 generally require that SDs and MSPs retain daily trading records for swaps and related cash and forward transactions, including:

- Documents on which transaction information is originally recorded;
- All information necessary to conduct a comprehensive and accurate trade reconstruction;
- Pre-execution trade information including records of all oral and written communications concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a swap or related cash and forward transactions, whether communicated by phone, fax, instant messaging, chat rooms, email, mobile device, or other digital or electronic media;
- Reliable timing date for the initiation of a trade;
- A record of the time, to the nearest minute using Coordinated Universal Time (UTC), of each quotation provided or received prior to trade execution;
- Execution trade information including the terms of each swap and related cash or forward transaction, terms regarding payment or settlement, initial and variation margin requirements, option premiums, and other cash flows;
- The trade ticket for each swap and related cash or forward transaction;
- The date and time of execution of each swap and related cash or forward transaction to the nearest minute using UTC;
- The identity of the counterparty and the date and title of the agreement to which each swap is subject, including any swap trading relationship documentation and credit support arrangements;
- The product name and identifier, the price at which the swap was executed, and the fees, commissions and other expenses applicable;
- Post-execution trade information including records of confirmation, termination, novation, amendment, assignment, netting, compression, reconciliation, valuation, margining, collateralization, and central clearing;
- The time of confirmation to the nearest minute using UTC;
- Ledgers of payments and interest received, moneys borrowed and loaned, daily swap valuations, and daily calculation of current and potential future exposure for each counterparty;
- Daily calculation of initial and variation margin requirements;
- Daily calculation of the value of collateral, including haircuts;

- Transfers of collateral, including substitutions, and the types of collateral transferred; and

- Credits and debits for each counterparty's account.

Daily trading records must be maintained in a form and manner identifiable and searchable by transaction and counterparty, and records of swaps must be maintained for the duration of the swap plus five years, and voice recordings for one year. Records must be "readily accessible" for the first two years of the five year retention period (consistent with § 1.31).

**Regulatory Objective:** Through § 23.202, the Commission seeks to ensure that an SD's or MSP's records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each swap, which necessarily requires the records to be identifiable by transaction and counterparty. Complete and accurate trade reconstruction is critical for both regulatory oversight and investigations of illegal activity pursuant to the Commission's enforcement authority. The Commission believes that a comprehensive and accurate trade reconstruction requires records of pre-execution, execution, and post-execution trade information.

**Comparable Japanese Law and Regulations:** The applicant has represented to the Commission that the following provisions of law and regulations applicable in Japan are in full force and effect in Japan, and comparable to and as comprehensive as section 4s(g) of the CEA and Commission regulation 23.202.

Article 156–64(1) and (2) of the FIEA, II–2–1 2.(1)(iv) of the FIBO Inspection Manual, and II.1.1(3)(iii) of the Checklist for Customer Protection Management, requires a RFI/FIBO to retain records for swaps and related cash and forward transactions, including:

- Documents prior to the conclusion of a contract that outline the terms of a swap transaction;
- 24-hour audio recordings of trading by dealers;
- Order tickets for each swap and related cash or forward transactions;
- The date and time the order was accepted and the date and time the order was filled, both of which must be recorded by time of day, of each swap and related cash or forward transaction;
- Product name (items to be listed in the books and documents may be entered using codes, brevity codes or any other symbols that have been standardized by the relevant RFI/FIBO);

- Price at which the swap was executed, and the fees, commissions and other expenses applicable;

- Documents upon conclusion of a contract that contain an outline of swap transactions, the name of the customer, as well as trading daily books and customer account ledgers that contain transaction histories;

- Ledgers of the customer fees, margin transaction payment interest, margin transactions receipt interest, security borrowing fee or security lending fee;

- Guarantee money on deposit, customer margin, trade margin or other matters regarding collateral property (the distinction between cash or security, etc. deposited as margin, date of receipt or date of return, issue name, volume or amount of money); and
- Debit or credit of money and balances of all accounts.

Pursuant to the OTC Derivative Ordinance, FIEA Enforcement Order, FIB Ordinance, and the Supervisory Guideline for FIBOs, records of swaps of RFIs/FIBOs must be in writing and maintained for a period from 5 to 10 years, depending on the specific record at issue. III–16(iv) of the Checklist for Market Risk Management of the Inspection Manual for banks assesses whether voice recordings are maintained for all traders on a 24-hour basis, recorded tapes are stored for a prescribed period of time, and retained "under the control of an organization segregated from the market and back-office divisions."

III–2–(1)(viii) in Exhibit 1 of the Checklist for Operational Risk Management of the Inspection Manual for banks and II–2–1.2(1) of the Inspection Manual for FIBOs assesses whether documentary evidence such as transaction data are stored for a period specified by the internal rules and operational procedures, etc., but at least one year.

In addition, III–3–10–2(3) (iv) of Supervisory Guideline for banks specifically requires banks to have the personnel and systems to respond in a timely and appropriate manner to inspections and supervision provided by overseas regulatory authorities. In view of maintaining direct dialog and smooth communications with the relevant overseas regulatory authorities, this provision ensures the establishment of a reporting system which enables timely and appropriate reporting.

Similarly, IV–5–2(i) of Supervisory Guideline for FIBOs would ensure the availability of information to a regulator promptly upon request. Under this provision, the JFSA assesses whether a designated parent company of a FIBO



ensures group-wide compliance with the relevant laws, regulations and rules of each country in which it does business by establishing an appropriate control environment for legal compliance in accordance with the size of its overseas bases and the characteristics of its business operations.

The JFSA has informed the Commission that, in the process of its oversight and enforcement of the foregoing Japanese standards for FIBOs and RFIs, any SD or MSP would be subject to such standards and required to record pre-execution trade information, communicated by not only telephone but also other forms of communication comparable to those listed in § 23.202(a)(1) and (b)(1).

**Commission Determination:** The Commission finds that compliance with Japanese standards would enable the relevant competent authority to conduct a comprehensive and accurate trade reconstruction for each swap, which the Commission finds generally meets the regulatory objective of § 23.202.

In addition, the Commission finds that the Japanese standards specified above would ensure Commission access to the required books and records of SDs and MSPs by requiring personnel and systems necessary to respond in a timely and appropriate manner to inspections and supervision provided by overseas regulatory authorities.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the daily trading records requirements of Japan's standards are comparable to and as comprehensive as § 23.202.

Issued in Washington, DC on December 20, 2013, by the Commission.

**Melissa D. Jurgens,**  
*Secretary of the Commission.*

## **Appendices to Comparability Determination for Japan: Certain Transaction-Level Requirements**

### **Appendix 1—Commission Voting Summary**

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative. Commissioner O'Malia voted in the negative.

### **Appendix 2—Statement of Chairman Gary Gensler and Commissioners Chilton and Wetjen**

We support the Commission's approval of broad comparability determinations that will be used for substituted compliance purposes. For each of the six jurisdictions that has registered swap dealers, we carefully reviewed each regulatory provision of the foreign jurisdictions submitted to us and compared the provision's intended outcome

to the Commission's own regulatory objectives. The resulting comparability determinations for entity-level requirements permit non-U.S. swap dealers to comply with regulations in their home jurisdiction as a substitute for compliance with the relevant Commission regulations.

These determinations reflect the Commission's commitment to coordinating our efforts to bring transparency to the swaps market and reduce its risks to the public. The comparability findings for the entity-level requirements are a testament to the comparability of these regulatory systems as we work together in building a strong international regulatory framework.

In addition, we are pleased that the Commission was able to find comparability with respect to swap-specific transaction-level requirements in the European Union and Japan.

The Commission attained this benchmark by working cooperatively with authorities in Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland to reach mutual agreement. The Commission looks forward to continuing to collaborate with both foreign authorities and market participants to build on this progress in the months and years ahead.

### **Appendix 3—Dissenting Statement of Commissioner Scott D. O'Malia**

I respectfully dissent from the Commodity Futures Trading Commission's ("Commission") approval of the Notices of Comparability Determinations for Certain Requirements under the laws of Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland (collectively, "Notices"). While I support the narrow comparability determinations that the Commission has made, moving forward, the Commission must collaborate with foreign regulators to harmonize our respective regimes consistent with the G-20 reforms.

However, I cannot support the Notices because they: (1) Are based on the legally unsound cross-border guidance ("Guidance");<sup>1</sup> (2) are the result of a flawed substituted compliance process; and (3) fail to provide a clear path moving forward. If the Commission's objective for substituted compliance is to develop a narrow rule-by-rule approach that leaves unanswered major regulatory gaps between our regulatory framework and foreign jurisdictions, then I believe that the Commission has successfully achieved its goal today.

#### *Determinations Based on Legally Unsound Guidance*

As I previously stated in my dissent, the Guidance fails to articulate a valid statutory foundation for its overbroad scope and inconsistently applies the statute to different activities.<sup>2</sup> Section 2(i) of the Commodity Exchange Act ("CEA") states that the Commission

does not have jurisdiction over foreign activities unless "those activities have a direct and significant connection with activities in, or effect on, commerce of the United States . . ."<sup>3</sup> However, the Commission never properly articulated how and when this limiting standard on the Commission's extraterritorial reach is met, which would trigger the application of Title VII of the Dodd-Frank Act<sup>4</sup> and any Commission regulations promulgated thereunder to swap activities that are outside of the United States. Given this statutorily unsound interpretation of the Commission's extraterritorial authority, the Commission often applies CEA section 2(i) inconsistently and arbitrarily to foreign activities.

Accordingly, because the Commission is relying on the legally deficient Guidance to make its substituted compliance determinations, and for the reasons discussed below, I cannot support the Notices. The Commission should have collaborated with foreign regulators to agree on and implement a workable regime of substituted compliance, and then should have made determinations pursuant to that regime.

#### *Flawed Substituted Compliance Process*

Substituted compliance should not be a case of picking a set of foreign rules identical to our rules, determining them to be "comparable," but then making no determination regarding rules that require extensive gap analysis to assess to what extent each jurisdiction is, or is not, comparable based on overall outcomes of the regulatory regimes. While I support the narrow comparability determinations that the Commission has made, I am concerned that in a rush to provide some relief, the Commission has made substituted compliance determinations that only afford narrow relief and fail to address major regulatory gaps between our domestic regulatory framework and foreign jurisdictions. I will address a few examples below.

First, earlier this year, the OTC Derivatives Regulators Group ("ODRG") agreed to a number of substantive understandings to improve the cross-border implementation of over-the-counter derivatives reforms.<sup>5</sup> The ODRG specifically agreed that a flexible, outcomes-based approach, based on a broad category-by-category basis, should

<sup>3</sup> CEA section 2(i); 7 U.S.C. 2(i).

<sup>4</sup> Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>5</sup> <http://www.cftc.gov/PressRoom/PressReleases/pr6678-13>.

<sup>1</sup> Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (Jul. 26, 2013).

<sup>2</sup> <http://www.cftc.gov/PressRoom/SpeechesTestimony/omalstatement071213b>.



form the basis of comparability determinations.<sup>6</sup>

However, instead of following this approach, the Commission has made its comparability determinations on a rule-by-rule basis. For example, in Japan's Comparability Determination for Transaction-Level Requirements, the Commission has made a positive comparability determination for some of the detailed requirements under the swap trading relationship documentation provisions, but not for other requirements.<sup>7</sup> This detailed approach clearly contravenes the ODRG's understanding.

Second, in several areas, the Commission has declined to consider a request for a comparability determination, and has also failed to provide an analysis regarding the extent to which the other jurisdiction is, or is not, comparable. For example, the Commission has declined to address or provide any clarity regarding the European Union's regulatory data reporting determination, even though the European Union's reporting regime is set to begin on February 12, 2014. Although the Commission has provided some limited relief with respect to regulatory data reporting, the lack of clarity creates unnecessary uncertainty, especially when the European Union's reporting regime is set to begin in less than two months.

Similarly, Japan receives no consideration for its mandatory clearing requirement, even though the Commission considers Japan's legal framework to be comparable to the U.S. framework. While the Commission has declined to provide even a partial comparability determination, at least in this instance the Commission has provided a reason: the differences in the scope of entities and products subject to the clearing requirement.<sup>8</sup> Such treatment creates uncertainty and is contrary to increased global harmonization efforts.

Third, in the Commission's rush to meet the artificial deadline of December 21, 2013, as established in the Exemptive Order Regarding Compliance with Certain Swap Regulations

("Exemptive Order"),<sup>9</sup> the Commission failed to complete an important piece of the cross-border regime, namely, supervisory memoranda of understanding ("MOUs") between the Commission and fellow regulators.

I have previously stated that these MOUs, if done right, can be a key part of the global harmonization effort because they provide mutually agreed-upon solutions for differences in regulatory regimes.<sup>10</sup> Accordingly, I stated that the Commission should be able to review MOUs alongside the respective comparability determinations and vote on them at the same time. Without these MOUs, our fellow regulators are left wondering whether and how any differences, such as direct access to books and records, will be resolved.

Finally, as I have consistently maintained, the substituted compliance process should allow other regulatory bodies to engage with the full Commission.<sup>11</sup> While I am pleased that the Notices are being voted on by the Commission, the full Commission only gained access to the comment letters from foreign regulators on the Commission's comparability determination draft proposals a few days ago. This is hardly a transparent process.

#### *Unclear Path Forward*

Looking forward to next steps, the Commission must provide answers to several outstanding questions regarding these comparability determinations. In doing so, the Commission must collaborate with foreign regulators to increase global harmonization.

First, there is uncertainty surrounding the timing and outcome of the MOUs. Critical questions regarding information sharing, cooperation, supervision, and enforcement will remain unanswered until the Commission and our fellow regulators execute these MOUs.

Second, the Commission has issued time-limited no-action relief for the swap data repository reporting requirements. These comparability determinations will be done as separate notices. However, the timing and process for these determinations remain uncertain.

Third, the Commission has failed to provide clarity on the process for addressing the comparability determinations that it declined to

undertake at this time. The Notices only state that the Commission may address these requests in a separate notice at a later date given further developments in the law and regulations of other jurisdictions. To promote certainty in the financial markets, the Commission must provide a clear path forward for market participants and foreign regulators.

The following steps would be a better approach: (1) The Commission should extend the Exemptive Order to allow foreign regulators to further implement their regulatory regimes and coordinate with them to implement a harmonized substituted compliance process; (2) the Commission should implement a flexible, outcomes-based approach to the substituted compliance process and apply it similarly to all jurisdictions; and (3) the Commission should work closely with our fellow regulators to expeditiously implement MOUs that resolve regulatory differences and address regulatory oversight issues.

#### *Conclusion*

While I support the narrow comparability determinations that the Commission has made, it was my hope that the Commission would work with foreign regulators to implement a substituted compliance process that would increase the global harmonization effort. I am disappointed that the Commission has failed to implement such a process.

I do believe that in the longer term, the swaps regulations of the major jurisdictions will converge. At this time, however, the Commission's comparability determinations have done little to alleviate the burden of regulatory uncertainty and duplicative compliance with both U.S. and foreign regulations.

The G-20 process delineated and put in place the swaps market reforms in G-20 member nations. It is then no surprise that the Commission must learn to coordinate with foreign regulators to minimize confusion and disruption in bringing much needed clarity to the swaps market. For all these shortcomings, I respectfully dissent from the Commission's approval of the Notices.

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<sup>6</sup> <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/odrgreport.pdf>. The ODRG agreed to six understandings. Understanding number 2 states that "[a] flexible, outcomes-based approach should form the basis of final assessments regarding equivalence or substituted compliance."

<sup>7</sup> The Commission made a positive comparability determination for Commission regulations 23.504(a)(2), (b)(1), (b)(2), (b)(3), (b)(4), (c), and (d), but not for Commission regulations 23.504(b)(5) and (b)(6).

<sup>8</sup> Yen-denominated interest rate swaps are subject to the mandatory clearing requirement in both the U.S. and Japan.

<sup>9</sup> Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 43785 (Jul. 22, 2013).

<sup>10</sup> <http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-29>.

<sup>11</sup> <http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b>.