
Joint Meeting of the EFMLG/FLB/FMLC/FMLG

Extraterritoriality of the Dodd-Frank Act

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Extraterritorial Application of the Dodd-Frank Act

- The CFTC draft Guidance was released on June 29, 2012. **It has not yet been finalised; expected in early 2013.**
 - The **general rule** in the draft Guidance is that Title VII applies extraterritorially to the overseas activities of swap dealers with non-US persons. There are 3 key exceptions to the rule:
 - **First**, the external business conduct rules will not be applied to transactions entered into by non-US branches of a US bank or non-US subsidiaries/affiliates with non-US persons.
 - **Second**, if a branch or entity is operating in a non-US jurisdiction that has a “comparable” compliance regime, then the branch/entity would be permitted to comply with that regime instead of Title VII (referred to as “substituted compliance”). Non-US branches/entities are proposed to have a 12 month period to either apply Title VII or apply to operate under the substituted compliance regime.
 - **Third**, there is a “de minimis exception” for emerging markets branches of US banks that in the aggregate constitute less than 5% of the bank’s total notional derivatives. The CFTC provides no definition of “emerging markets”.
 - Summary: The draft Guidance would generally allow US swap dealers to continue to conduct their overseas business in the same overall manner as in which they currently conduct it, albeit with a few more processes to follow and determinations to obtain.
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Substituted Compliance

International Harmonization (§752 DFA)

- Effective and consistent global regulation
- Coordination with foreign regulators
- Information sharing arrangements

Applicability – See Grids in Appendices A-C in CFTC Cross-Border Guidance

- Entity Level Requirements
- Transaction Level Requirements / SDR Reporting
- Non-SD/MSP Participants

Process for Comparability Determination

- Outcomes-based approach / scope of review
- Process / MOU with foreign regulators

Comment Letters

- Criticism
 - Principles-based approach / timing
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Proposed Cross Border Exemptive Order (1 of 3)

The proposed Order adopts the “entity-level requirements” / “transaction-level requirements” approach from the proposed cross-border guidance.

Entity-level requirements

- o Category 1
 - Capital Adequacy
 - Chief Compliance Officer
 - Risk Management
 - Swap Data Recordkeeping
- o Category 2
 - Reporting to an SDR
 - Large Trader Reporting for Physical Commodity Swaps

Transaction-level requirements

- o Category A – Risk Mitigation and Transparency
 - Clearing and Swap Processing
 - Margin (and Segregation) Requirement for Uncleared Swap Transactions
 - Swap Trading Relationship Documentation
 - Portfolio Reconciliation and Compression
 - Real-time Public Reporting
 - Trade Confirmation
 - Daily Trading Records
 - o Category B – Sales Practices
 - External Business Conduct Standards
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Proposed Cross Border Exemptive Order (2 of 3)

Application to Non-US Swap Dealers (SDs) & Non-US Major Swap Participants (MSPs)

○ Entity-Level Requirements

- Category 1 Requirements – delayed until July 2013
- Category 2 Requirements
 - Trades with US persons – no delay; various privacy issues remain unresolved
 - Other trades - delayed until July 2013

○ Transaction-Level Requirements

- Category A Requirements
 - Trades with US persons – no delay
 - Trades with non-US persons guaranteed by US persons – may comply with local rules until July 2013; substituted compliance required thereafter
 - Trades with other non-US persons – N/A, as per proposed interpretive guidance
 - Category B Requirements
 - Trades with US persons – no delay
 - Trades with non-US persons (including those guaranteed by a US person) – Category B requirements do not apply, as per proposed interpretive guidance
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Proposed Cross Border Exemptive Order (3 of 3)

Application to Non-US branches of US Swap Dealers & MSPs

- Entity-Level Requirements – no delay
- Transaction-Level Requirements (Categories A and B)
 - Trades with US persons – no delay
 - Trades with non-US persons – may comply with local rules until July 2013; substituted compliance required thereafter

Application to US Swap Dealers & MSPs

- Entity-Level Requirements
 - Category 1 Requirements – delayed until January 1, 2013
 - Category 2 Requirements – no delay
 - Transaction-Level Requirements – no delay (note, however, that the CFTC separately delayed application of various Transaction-Level requirements)
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Additional Notes

1. The CFTC's proposed cross-border guidance and exemptive order applies to "swaps." The SEC regime applicable to security-based swaps" (SBS) has not yet been finalized and compliance dates have not yet been set.
 2. Timing of Swap Dealer Registration Drives Much of the Analysis
 3. Compliance Dates for Various Transaction-Level Requirements
 - Trading Relationship Documentation – starts to phase in in January 1, 2013
 - Swap Confirmation – implementation schedule to be provided by CFTC based on product and counterparty types
 - Portfolio Reconciliation and Portfolio Compression – 90 days after publication of final rule in the Federal Register (for SDs and MSPs with a US prudential regulator or who are registered with the SEC); 180 days for others
 - External Business Conduct Standards – October 15, 2012, except for the following, for which the compliance date is delayed until January 1, 2013
 - KYC/True Name and Owner
 - Confidential Treatment of Counterparty Information
 - Verification of Counterparty Eligibility
 - Disclosures of Material Information – other than Daily Mark
 - Clearing Disclosures
 - Institutional Suitability – other than diligence to understand risks and rewards in connection with recommendations
 - Acting as an Advisor to Special Entities
 - QIR/ERISA requirements for Special Entities
 - Clearing – expected to start to phase in in February 2013
 4. The CFTC has proposed guidance regarding inter-affiliate swaps – the approach is designed to avoid leakage from the CFTC's mandatory clearing mandate
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