Regulations (''Exemptive Order''),[9] 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.[10] 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.[11] 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.

[FR Doc. 2013–30975 Filed 12–26–13; 8:45 am]

**BILLING CODE 6351–01–P**

[9] Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 43785 (Jul. 22, 2013).

[10] *http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-29.*

[11] *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b.*

## COMMODITY FUTURES TRADING COMMISSION

### Comparability Determination for Australia: Certain Entity-Level Requirements

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Comparability Determination for Certain Requirements under Australian Regulation.

**SUMMARY:** The following is the analysis and determination of the Commodity Futures Trading Commission (''Commission'') regarding certain parts of a request by the Australian Bankers Association (''ABA'') that the Commission determine that laws and regulations applicable in in the Commonwealth of Australia (''Australia'') 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) Chief compliance officer; (ii) risk management; and (iii) swap data recordkeeping (collectively, the ''Internal 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,* Adam Kezsbom, Special Counsel, 202–418–5372, *akezsbom@cftc.gov,* Israel Goodman, Special Counsel, 202–418–6715, *igoodman@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'' (the ''Guidance'').[1] 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

[1] 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).

''Exemptive Order'').[2] 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 in the six jurisdictions with conditional relief from certain requirements of Commission regulations (those referred to as ''Entity-Level Requirements'' in the Guidance) until the earlier of December 21, 2013, or 30 days following the issuance of a substituted compliance determination.[3]

On April 22, 2013, the ABA (the ''applicant'') submitted a request that the Commission determine that laws and regulations applicable in Australia provide a sufficient basis for an affirmative finding of comparability with respect to certain Entity-Level Requirements, including the Internal Business Conduct Requirements.[4] The applicant provided Commission staff with an updated submission on June 7, 2013. On November 8, 2013, the application was further supplemented with corrections and additional materials. The following is the Commission's analysis and determination regarding the Internal Business Conduct Requirements, as detailed below.[5]

## II. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act[6] (''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.[7]

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.[8] 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 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 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. 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).[9]

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.[10]

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.[11] The Commission's direct access to the books and records required to be maintained

[2] 78 FR 43785 (July 22, 2013).

[3] The Entity-Level Requirements under the Exemptive Order consist of 17 CFR 1.31, 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, 23.606, 23.608, 23.609, and parts 45 and 46 of the Commission's regulations.

[4] For purposes of this notice, the Internal Business Conduct Requirements consist of 17 CFR 3.3, 23.201, 23.203, 23.600, 23.601, 23.602, 23.603, 23.605, and 23.606.

[5] This notice does not address swap data repository reporting (''SDR Reporting''). The Commission may provide a comparability determination with respect to the SDR Reporting requirement in a separate notice.

[6] Public Law 111–203, 124 Stat. 1376 (2010).

[7] 7 U.S.C. 2(i).

[8] 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.)

[9] 78 FR 45342–45.

[10] *See* the Guidance, 78 FR 45342–44.

[11] 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 U.S. 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 an 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.

by an SD or MSP registered with the Commission is a core requirement of the CEA [12] and the Commission's regulations,[13] and is a condition to registration.[14]

## III. Regulation of SDs and MSPs in Australia

On April 22, 2013, the applicant submitted a request that the Commission assess the comparability of laws and regulations applicable in Australia with the CEA and the Commission's regulations promulgated thereunder. The applicant provided Commission staff with an updated submission on June 7, 2013. On November 8, 2013, the application was further supplemented with corrections and additional materials.

As represented to the Commission by the applicant, currently all five Australian registered SDs are Australian authorized deposit-taking institutions (''ADIs'') and holders of an Australian financial services license (''AFSL''). Thus, for the purposes of the Commission's comparability determination, the Commission will consider the laws and regulations applicable to the five SD ADIs with respect to their swap activities. The relevant laws and regulations are administered by two agencies; the Australian Prudential Regulatory Authority (''APRA'') and the Australian Securities and Investments Commission (''ASIC'').[15]

APRA is the prudential regulator of the Australian financial services industry and oversees the banking industry. It has developed a regulatory framework for Australian ADIs under the Banking Act 1959 (the ''Banking Act'') that is based on the banking supervision principles published by the Basel Committee on Banking Supervision. This regulatory framework is set out in a number of different prudential standards that govern the activities of ADIs.

ASIC is Australia's corporate, markets, and financial services regulator. ASIC licenses and monitors financial services businesses to ensure they operate efficiently, honestly, and fairly. ASIC administers, among other things, the following legislation and regulations: the Corporations Act 2001 (the ''Corporations Act''), the Corporations Regulations 2001, and the Australian Securities and Investments Commission Act 2001 (the ''ASIC Act''). Under the Corporations Act, an Australian entity that undertakes specified activities, including dealing or market making in derivatives (including swaps) is required to hold an AFSL. The AFSL regime establishes a number of general licensing obligations that all licensees must comply with. ASIC has also issued regulatory guidance which sets out its expectations of how licensees may comply with their licensing obligations in a range of situations and taking into account the nature, size, and complexity of their financial services business.

## 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.[16] 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.[17]

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.[18]

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).[19] 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 [20] and that the non-U.S. SD or non-U.S. MSP, U.S. bank that is an 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.[21] In addition, portions of a foreign regulatory regime may have similar regulatory objectives, but the means by which these objectives are achieved with respect to swaps market activities may not be clearly defined, or may not

[12] *See* e.g., sections 4s(f)(1)(C), 4s(j)(3) and (4) of the CEA.

[13] *See* e.g., §§ 23.203(b) and 23.606.

[14] *See* supra note 10.

[15] Because the applicant's request and the Commissions determinations herein are based on the comparability of Australian requirements applicable to ADIs and AFSL holders, an SD or MSP that is not an ADI or AFSL holder, or is otherwise not subject to the requirements applicable to ADIs and AFSL holders upon which the Commission bases its determinations, may not be able to rely on the Commission's comparability determinations herein.

[16] 78 FR 45343.

[17] 78 FR 45343.

[18] 78 FR 45343.

[19] 78 FR 45343. The Commission's substituted compliance program would generally be available for SDR Reporting, as outlined in the Guidance, only if the Commission has direct access to all of the data elements that are reported to a foreign trade repository pursuant to the substituted compliance program. Thus, direct access to swap data is a threshold matter to be addressed in a comparability evaluation for SDR Reporting. Moreover, the Commission explains in the Guidance that, due to its technical nature, a comparability evaluation for SDR Reporting ''will generally entail a detailed comparison and technical analysis.'' A more particularized analysis will generally be necessary to determine whether data stored in a foreign trade repository provides for effective Commission use, in furtherance of the regulatory purposes of the Dodd-Frank Act. *See* 78 FR 45345.

[20] 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.

[21] 78 FR 45343.

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.[22]

Finally, the Commission will generally 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[23] thnsp; of SDs and MSPs [24] in the relevant jurisdictions.[25] Further, as stated in the Guidance, the Commission expects that an applicant would notify the Commission of any 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.[26]

The Guidance provided a detailed discussion of the Commission's policy regarding the availability of substituted compliance [27] for the Internal Business Conduct Requirements.[28]

## 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 [29] 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.'' [30]

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,[31] provide for notification upon the occurrence of specified events, memorialize understandings related to on-site visits,[32] and include protections related

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[22] 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 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.

[23] ''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 17 CFR Part 23 are limited in scope to the swaps activities of SDs and MSPs.

[24] 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 responsible for determining whether it is subject to 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.

[25] 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.

[26] 78 FR 45345.

[27] *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.

[28] This notice does not address § 23.608 (Restrictions on counterparty clearing relationships). The Commission declines to take up the request for a comparability determination with respect to this regulation due to the Commission's view that there are not laws or regulations applicable in Australia to compare with the prohibitions and requirements of § 23.608. The Commission may provide a comparability determination with respect to this regulation at a later date in consequence of further developments in the law and regulations applicable in Australia.

This notice also does not address capital adequacy because the Commission has not yet finalized rules for SDs and MSPs in this area, nor SDR Reporting. The Commission may provide a comparability determination with respect to these requirements at a later date or in a separate notice.

[29] 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.

[30] 78 FR 45344.

[31] 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'').

[32] The Commission retains its examination authority, both during the application process as well as upon and after registration of an SD or MSP.

Continued

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 Internal Business Conduct Requirements 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 Internal Business Conduct Requirements that the requestor 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 and 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 notice.

As was stated in the Guidance, the Commission recognizes 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. Chief Compliance Officer (§ 3.3)*

*Commission Requirement:* Implementing section 4s(k) of the CEA, Commission regulation 3.3 generally sets forth the following requirements for SDs and MSPs:

- An SD or MSP must designate an individual as Chief Compliance Officer (''CCO'');
- The CCO must have the responsibility and authority to develop the regulatory compliance policies and procedures of the SD or MSP;
- The CCO must report to the board of directors or the senior officer of the SD or MSP;
- Only the board of directors or a senior officer may remove the CCO;
- The CCO and the board of directors must meet at least once per year;
- The CCO must have the background and skills appropriate for the responsibilities of the position;
- The CCO must not be subject to disqualification from registration under sections 8a(2) or (3) of the CEA;
- Each SD and MSP must include a designation of a CCO in its registration application;
- The CCO must administer the regulatory compliance policies of the SD or MSP;
- The CCO must take reasonable steps to ensure compliance with the CEA and Commission regulations, and resolve conflicts of interest;
- The CCO must establish procedures for detecting and remediating non-compliance issues;
- The CCO must annually prepare and sign an ''annual compliance report'' containing: (i) A description of policies and procedures reasonably designed to ensure compliance; (ii) an assessment of the effectiveness of such policies and procedures; (iii) a description of material non-compliance issues and the action taken; (iv) recommendations of improvements in compliance policies; and (v) a certification by the CCO or CEO that, to the best of such officer's knowledge and belief, the annual report is accurate and complete under penalty of law; and
- The annual compliance report must be furnished to the CFTC within 90 days after the end of the fiscal year of the SD or MSP, simultaneously with its annual financial condition report.

*Regulatory Objective:* The Commission believes that compliance by SDs and MSPs with the CEA and the Commission's rules greatly contributes to the protection of customers, orderly and fair markets, and the stability and integrity of the market intermediaries registered with the Commission. The Commission expects SDs and MSPs to strictly comply with the CEA and the Commission's rules and to devote sufficient resources to ensuring such compliance. Thus, through its CCO rule, the Commission seeks to ensure firms have designated a qualified individual as CCO that reports directly to the board of directors or the senior officer of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and procedures reasonably designed to ensure compliance with the CEA and Commission regulations, resolve conflicts of interest, remediate noncompliance issues, and report annually to the Commission and the board or senior officer on compliance of the firm.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as section 4s(k) of the CEA and Commission regulation 3.3.

- APRA prudential standard CPS 520—Fit and Proper (''CPS 520'') requires the appointment of ''responsible persons.'' CPS 520 states that responsible persons must be fit and proper, and that the ultimate responsibility for ensuring that an institution's responsible persons are fit and proper remains with the board of directors.
- ASIC Regulatory Guide 105 Licensing: Organisational competence requires AFSL licensees to appoint ''responsible managers'' who have direct responsibility for significant day-to-day decisions about the financial services provided, and for maintaining organizational competence of the entity. Such responsible managers must have the relevant skill and experience and be of good fame and character.
- ASIC Regulatory Guide 104 Licensing: Meeting the general obligations (''RG 104'') also requires AFSL holders to allocate to a director or senior manager responsibility for overseeing the AFSL holder's compliance measures, and reporting to the governing body (including having ready access to the governing body).
- When ASIC assesses an application for an AFSL, ASIC requires applicants to describe whether their compliance arrangements are generally consistent with ''Australian Standard 3806'' (''AS

*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'').

3806'').[33] AS 3806 provides principles and guidance for designing, developing, implementing, maintaining and improving a flexible, responsive effective and measurable compliance program within an organization. Although this is a non-governmental standard, ASIC refers to AS 3806 in its regulatory guidance for AFSL licensees and asks AFSL holders to refer to the standards when complying with their regulatory obligations.

• AFSL licensees must comply with section 912A of the Corporations Act, which, among other obligations, requires that such entities: Do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly; have adequate arrangements in place for managing conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; comply with any conditions on the license; comply with the financial services laws; take reasonable steps to ensure that representatives comply with the financial services laws; maintain the competence to provide the financial services covered by the license; ensure that representatives are adequately trained and competent to provide those financial services; and if those financial services are provided to retail clients, have a dispute resolution system.

• AFSL licensees are also required under section 912D of the Corporations Act to report to ASIC any significant breach (or likely breach) of its regulatory obligations. ASIC Regulatory Guide 78 Breach reporting by AFS licensees expands on this obligation and requires AFSL holders to have a documented process for, amongst other things, rectifying breaches and ensuring that arrangements are in place to prevent the recurrence of the breach.

• ADIs are also required under APRA prudential standard APS 310 Audit and Related Matters (''APS 310'') to provide APRA a high-level description of its risk management systems covering all major areas of risk and annually, within three months of its annual balance date, provide APRA with a declaration from its CEO endorsed by the board that attests that: they have established systems to monitor and manage those risk including, where appropriate, by setting and requiring adherence to a series of prudent limits, and by adequate and timely reporting processes; the risk management systems are operating effectively and are adequate with regard to the risks they are designed to control; and the descriptions of risk management systems provided to APRA are accurate and current.[34]

*Commission Determination:* The Commission finds that the provisions and requirements under the Australian regimes specified above are generally identical in intent to § 3.3 by seeking to ensure firms have designated a qualified individual as the compliance officer that reports directly to a sufficiently senior function of the firm and that has the independence, responsibility, and authority to develop and administer compliance policies and procedures reasonably designed to ensure compliance with the CEA and Commission regulations, resolve conflicts of interest, remediate noncompliance issues, and report annually on compliance of the firm.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the CCO requirements of the provisions of Australian law and regulations specified above are comparable to and as comprehensive as § 3.3, with the exception of § 3.3(e) concerning preparing and signing an annual compliance report and § 3.3(f) concerning certifying and furnishing an annual compliance report to the Commission.

Notwithstanding that the Commission has not determined that the requirements of Australian law and regulations are comparable to and as comprehensive as §§ 3.3(e) and 3.3(f), any SD or MSP to which both § 3.3 and the Australian law and regulations specified above are applicable would generally be deemed to be in compliance with §§ 3.3(e) and (f) if that SD or MSP complies with the Australian law and regulations specified above, subject to preparing and signing an annual compliance report in accordance with § 3.3(e) and certifying and furnishing the Commission with an annual compliance report in accordance with § 3.3(f). The Commission notes that it generally expects registrants to submit required reports to the Commission in the English language.

*B. Risk Management Duties (§§ 23.600—23.609)*

Section 4s(j) of the CEA requires each SD and MSP to establish internal policies and procedures designed to, among other things, address risk management, monitor compliance with position limits, prevent conflicts of interest, and promote diligent supervision, as well as maintain business continuity and disaster recovery programs.[35] The Commission adopted regulations 23.600, 23.601, 23.602, 23.603, 23.605, and 23.606 to implement the statute.[36] The Commission also adopted regulation 23.609, which requires certain risk management procedures for SDs or MSPs that are clearing members of a derivatives clearing organization (''DCO'').[37] Collectively, these requirements help to establish a robust and comprehensive internal risk management program for SDs and MSPs with respect to their swaps activities,[38] which is critical to effective systemic risk management for the overall swaps market. In making its comparability determination with regard to these risk management duties, the Commission will consider each regulation individually.[39]

[33] AS 3806 is a standard published by ''Standards Australia,'' a non-government standards organization. Australian Standards are not legal documents, but can be referenced in Australian legislation and become mandatory.

[34] Not relevant for the Commission's comparability determination herein, the applicant also referenced APRA draft prudential standard CPS 220 Risk Management (''Draft CPS 220''), which was released by APRA on May 9, 2013. This draft prudential standard, if finalized in a form similar to its draft form, will require each ADI (including SD ADIs) to have a designated compliance function that assists senior management in effectively managing compliance risks. It will also require that the compliance function be adequately staffed by appropriately trained and competent persons who have sufficient authority to perform their role effectively, and have a reporting line independent from business lines. APRA expects to finalize Draft CPS 220 prior to its implementation date of January 1, 2015.

[35] 7 U.S.C. 6s(j).

[36] *See* Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128 (April 3, 2012) (relating to risk management program, monitoring of position limits, business continuity and disaster recovery, conflicts of interest policies and procedures, and general information availability, respectively).

[37] *See* Customer Documentation Rule, 77 FR 21278. Also, SDs must comply with Commission regulation 23.608, which prohibits SDs providing clearing services to customers from entering into agreements that would: (i) Disclose the identity of a customer's original executing counterparty; (ii) limit the number of counterparties a customer may trade with; (iii) impose counterparty-based position limits; (iv) impair a customer's access to execution of a trade on terms that have a reasonable relationship to the best terms available; or (v) prevent compliance with specified time frames for acceptance of trades into clearing.

[38] ''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 17 CFR Part 23 are limited in scope to the swaps activities of SDs and MSPs.

[39] As stated above, this notice does not address § 23.608 (Restrictions on counterparty clearing relationships). The Commission declines to take up

Continued

1. Risk Management Program for SDs and MSPs (§ 23.600)

*Commission Requirement:* Implementing section 4s(j)(2) of the CEA, Commission regulation 23.600 generally requires that:

- Each SD or MSP must establish and enforce a risk management program consisting of a system of written risk management policies and procedures designed to monitor and manage the risks associated with the swap activities of the firm, including without limitation, market, credit, liquidity, foreign currency, legal, operational, and settlement risks, and furnish a copy of such policies and procedures to the CFTC upon application for registration and upon request;
- The SD or MSP must establish a risk management unit independent from the business trading unit;
- The risk management policies and procedures of the SD or MSP must be approved by the firm's governing body;
- Risk tolerance limits and exceptions therefrom must be reviewed and approved quarterly by senior management and annually by the governing body;
- The risk management program must have a system for detecting breaches of risk tolerance limits and alerting supervisors and senior management, as appropriate;
- The risk management program must account for risks posed by affiliates and be integrated at the consolidated entity level;
- The risk management unit must provide senior management and the governing body with quarterly risk exposure reports and upon detection of any material change in the risk exposure of the SD or MSP;
- Risk exposure reports must be furnished to the CFTC within five business days following provision to senior management;
- The risk management program must have a new product policy for assessing the risks of new products prior to engaging in such transactions;
- The risk management program must have policies and procedures providing for trading limits, monitoring of trading, processing of trades, and separation of personnel in the trading unit from personnel in the risk management unit; and
- The risk management program must be reviewed and tested at least annually and upon any material change in the business of the SD or MSP.

*Regulatory Objective:* Through the required system of risk management, the Commission seeks to ensure that firms are adequately managing the risks of their swaps activities to prevent failure of the SD or MSP, which could result in losses to counterparties doing business with the SD or MSP, and systemic risk more generally. To this end, the Commission believes the risk management program of an SD or MSP must contain at least the following critical elements:

- Identification of risk categories;
- Establishment of risk tolerance limits for each category of risk and approval of such limits by senior management and the governing body;
- An independent risk management unit to administer a risk management program; and
- Periodic oversight of risk exposures by senior management and the governing body.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as section 4s(j)(2) of the CEA and Commission regulation 23.600.[40]

- The regulatory framework for ADIs under the Banking Act is based on the banking supervision principles published by the Basel Committee on Banking Supervision.[41] This prudential framework includes requirements (largely set out in detailed and separate prudential standards) regarding capital adequacy, credit risk, market risk, liquidity, credit quality, large exposures, associations with related entities, outsourcing, business continuity management, audit and related arrangements for prudential reporting, governance, and fit and proper management.
- In particular, APS 310 (discussed above) requires an ADI's board and management to ensure that the ADI meets prudential and statutory requirements and has management practices to limit risks to prudent levels. APS 310 mandates that the ADI's risk management practices must be detailed in descriptions of risk management systems that must be regularly reviewed and updated, at least annually, to take account of changing circumstances.
- APRA Prudential standard APS 116 Capital Adequacy: Market Risk (''APS 116'') states that the board, or a board committee, of an ADI must ensure that the ADI has in place adequate systems to identify, measure and manage market risk, including identifying responsibilities, providing adequate separation of duties and avoiding conflicts of interest.
- For certain trading positions, APS 116 states that an ADI must have ''clearly defined policies and procedures for the active management of positions such that: positions are managed on a trading desk; position limits are set and monitored for appropriateness; positions are marked-to-market daily and when marking-to-model the parameters are assessed on a daily basis; and positions are reported to senior management as an integral part of the institution's risk management process.
- If an ADI has received approval to apply an ''internal model'' for market risk, as opposed to the ''standard method'' of calculating capital requirements, APS 116 requires the ADI to have an independent risk control unit that is responsible for the design and implementation of the ADI's market risk management system. The risk control unit must produce and analyze daily reports on the output of the ADI's risk measurement model, including an evaluation of limit utilization. This risk control unit must be independent from business trading and other risk taking units and must report directly to senior management of the ADI.
- If an ADI has received approval to apply an ''internal model'' for market risk, APS 116 states that the board or a board committee and senior management of an ADI must be actively involved in the risk control process. Daily reports must be prepared by the independent risk control unit and must be reviewed by a level of management with sufficient seniority and authority to enforce reductions of positions.
- APS 116 states that an ADI must ensure that an independent review of the risk measurement system and

the request for a comparability determination with respect to this regulation due to the Commission's view that there are not laws or regulations applicable in Australia to compare with the prohibitions and requirements of § 23.608. The Commission may provide a comparability determination with respect to this regulation at a later date in consequence of further developments in the law and regulations applicable in Australia.

[40] Not relevant for the Commission's comparability determination herein, the applicant also referenced Draft CPS 220. Draft CPS 220 seeks to introduce additional requirements in respect of the risk management framework for ADIs. APRA expects to finalize CPS 220 prior to its implementation date of January 1, 2015. Under Draft CPS 220, an APRA-regulated institution must have policies and procedures that provide the board with a comprehensive institution-wide view of its material risks. Draft CPS 220 also requires the risk management function of an ADI be ''operationally independent'' and must be headed by a designated Chief Risk Officer (''CRO''). The CRO must be involved in, and have the authority to provide effective challenge to, activities and decisions that may materially affect the institution's risk profile.

[41] The Corporations Act requires AFSL holders to comply with risk management requirements, however, this requirement does not apply where an entity is regulated by APRA. *See* section 912A(1)(h).

overall risk management process is carried out initially (i.e., at the time when model approval is sought) and then regularly as part of the ADI's internal audit process.

*Commission Determination:* The Commission finds that the provisions of Australian law and regulations specified above are generally identical in intent to § 23.600 by requiring a system of risk management that seeks to ensure that firms are adequately managing the risks of their swaps activities to prevent failure of the SD or MSP, which could result in losses to counterparties doing business with the SD or MSP, and systemic risk more generally. Specifically, the Commission finds that the Australian provisions specified above comprehensively require SDs and MSPs to establish risk management programs containing the following critical elements:

- Identification of risk categories;
- Establishment of risk tolerance limits for each category of risk and approval of such limits by senior management and the governing body;
- An independent risk management unit to administer a risk management program; and
- Periodic oversight of risk exposures by senior management and the governing body.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the risk management program requirements of the provisions of Australian law and regulations specified above, are comparable to and as comprehensive as § 23.600, with the exception of § 23.600(c)(2) concerning the requirement that each SD and MSP produce a quarterly risk exposure report and provide such report to its senior management, governing body, and the Commission.

Notwithstanding that the Commission has not determined that the requirements of Australian law and regulations are comparable to and as comprehensive as § 23.600(c)(2), any SD or MSP to which both § 23.600 and the Australian law and regulations specified above are applicable would generally be deemed to be in compliance with § 23.600(c)(2) if that SD or MSP complies with the Australian law and regulations specified above, subject to compliance with the requirement that it produce quarterly risk exposure reports and provide such reports to its senior management, governing body, and the Commission in accordance with § 23.600(c)(2). The Commission notes that it generally expects reports furnished to the Commission by registrants to be in the English language.

2. Monitoring of Position Limits (§ 23.601)

*Commission Requirement:* Implementing section 4s(j)(1) of the CEA, Commission regulation 23.601 requires each SD or MSP to establish and enforce written policies and procedures that are reasonably designed to monitor for, and prevent violations of, applicable position limits established by the Commission, a designated contract market (''DCM''), or a swap execution facility (''SEF'').[42] The policies and procedures must include an early warning system and provide for escalation of violations to senior management (including the firm's governing body).

*Regulatory Objective:* Generally, position limits are implemented to ensure market integrity, fairness, orderliness, and accurate pricing in the commodity markets. Commission regulation 23.601 thus seeks to ensure that SDs and MSPs have established the necessary policies and procedures to monitor the trading of the firm to prevent violations of applicable position limits established by the Commission, a DCM, or a SEF. As part of its Risk Management Program, § 23.601 is intended to ensure that established position limits are not breached by the SD or MSP.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as section 4s(j)(1) of the CEA and Commission regulation 23.601.

- Section 912A(1)(ca) of the Corporations Act, which requires AFSL holders to take reasonable steps to ensure its representatives comply with the financial services laws, which would include regulatory position limits.
- APS 310 (discussed above) requires an ADI's board and management to ensure that the ADI meets prudential and statutory requirements and has management practices to limit risks to prudent levels.

In addition to the foregoing, the applicant also submitted various guidelines and required best practices concerning the setting of internal risk tolerance limits and monitoring for compliance with such internal limits. Although the Commission recognizes these as prudent risk management practices, the Commission does not believe that these provisions are comparable to § 23.601 because § 23.601 requires monitoring for compliance with external position limits set by the Commission, a DCM, or a SEF.

*Commission Determination:* The Commission finds that the Australian provisions specified above are generally identical in intent to § 23.601 by requiring SDs and MSPs to establish necessary policies and procedures to monitor the trading of the firm to prevent violations of applicable position limits established by applicable laws and regulations, including those of the Commission, a DCM, or a SEF. Specifically, the Commission finds that the provisions of Australian law and regulations specified above, while not specific to the issue of position limit compliance, nevertheless comprehensively require SDs and MSPs to monitor for regulatory compliance generally, which includes monitoring for compliance with position limits set pursuant to applicable law and the responsibility of senior management (including the board of directors) for such compliance.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the compliance monitoring requirements of Australian law and regulations, as specified above, are comparable to and as comprehensive as § 23.601. For the avoidance of doubt, the Commission notes that this determination may not be relied on to relieve an SD or MSP from its obligation to strictly comply with any applicable position limit established by the Commission, a DCM, or a SEF.

3. Diligent Supervision (§ 23.602)

*Commission Requirement:* Commission regulation 23.602 implements section 4s(h)(1)(B) of the CEA and requires each SD and MSP to establish a system to diligently supervise all activities relating to its business performed by its partners, members, officers, employees, and agents. The system must be reasonably designed to achieve compliance with the CEA and CFTC regulations. Commission regulation 23.602 requires that the supervisory system must specifically designate qualified persons with authority to carry out the supervisory responsibilities of the SD or MSP for all activities relating to its business as an SD or MSP.

*Regulatory Objective:* The Commission's diligent supervision rule seeks to ensure that SDs and MSPs

[42] The setting of position limits by the Commission, a DCM, or a SEF is subject to requirements under the CEA and Commission regulations other than § 23.601. The setting of position limits and compliance with such limits is not subject to the Commission's substituted compliance regime.

strictly comply with the CEA and the Commission's rules. To this end, through § 23.602, the Commission seeks to ensure that each SD and MSP not only establishes the necessary policies and procedures that would lead to compliance with the CEA and Commission regulations, but also establishes an effective system of internal oversight and enforcement of such policies and procedures to ensure that such policies and procedures are diligently followed.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as section 4s(h)(1)(B) of the CEA and Commission regulation 23.602.

- CPS 520 (discussed above) sets forth the fitness requirements for all APRA regulated institutions. These standards apply to all directors and senior managers of an ADI as well as other ''responsible persons.'' The applicable key requirements of this prudential standard are: an ADI must have a Fit and Proper policy that meets certain standards; the fitness and propriety of a responsible person must generally be assessed prior to initial appointment and then re-assessed annually; and an ADI must take steps to ensure that a person is not appointed to, or does not continue to hold, a responsible person position for which they are not qualified.
- Section 912A(1)(ca) of the Corporations Act requires that an AFSL licensee take reasonable steps to ensure that its representatives comply with the financial services laws.
- RG 104 (discussed above) sets forth guidance for an AFSL licensee with respect to supervision. These regulatory guidelines require that an AFSL licensee have measures for monitoring and supervising their representatives to determine whether they are complying with the financial services laws. They also require that an AFSL licensee take measures to ensure that their representatives who provide financial services have, and maintain the necessary knowledge and skills, to competently provide those services.

*Commission Determination:* The Commission finds that the provisions of Australian law and regulations specified above are generally identical in intent to § 23.602 because such standards seek to ensure that SDs and MSPs strictly comply with applicable law, which would include the CEA and the Commission's regulations. Through the provisions specified above, Australian law and regulations seek to ensure that each SD and MSP not only establishes the necessary policies and procedures that would lead to compliance with applicable law, which would include the CEA and Commission regulations, but also establishes an effective system of internal oversight and enforcement of such policies and procedures to ensure that such policies and procedures are diligently followed.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the internal supervision requirements of the provisions of Australian law and regulations, as specified above, are comparable to and as comprehensive as § 23.602.

4. Business Continuity and Disaster Recovery (§ 23.603)

*Commission Requirement:* To ensure the proper functioning of the swaps markets and the prevention of systemic risk more generally, Commission regulation 23.603 requires each SD and MSP, as part of its risk management program, to establish a business continuity and disaster recovery plan that includes procedures for, and the maintenance of, back-up facilities, systems, infrastructure, personnel, and other resources to achieve the timely recovery of data and documentation and to resume operations generally within the next business day after the disruption.

*Regulatory Objective:* Commission regulation 23.603 is intended to ensure that any market disruption affecting SDs and MSPs, whether caused by natural disaster or otherwise, is minimized in length and severity. To that end, this requirement seeks to ensure that entities adequately plan for disruptions and devote sufficient resources capable of carrying out an appropriate plan within one business day, if necessary.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as Commission regulation 23.603.

APRA prudential standard CPS 232 Business Continuity Management (''CPS 232'') requires each ADI to implement a whole-of-business approach to business continuity management. Specifically, CPS 232 states that:

- A regulated institution must identify, assess, and manage potential business continuity risks to ensure that it is able to meet its financial and service obligations to its depositors, policyholders and other creditors;
- The board of a regulated institution must consider business continuity risks and controls as part of its overall risk management systems and approve a Business Continuity Management Policy;
- A regulated institution must develop and maintain a Business Continuity Plan that documents procedures and information which enable the regulated institution to manage business disruptions;
- A regulated institution must review the Business Continuity Plan annually and periodically arrange for its review by the internal audit function or an external expert; and
- A regulated institution must notify APRA in the event of certain disruptions.

*Commission Determination:* The Commission finds that the provisions of Australian law and regulations specified above are generally identical in intent to § 23.603 because such standards seek to ensure that any market disruption affecting SDs and MSPs, whether caused by natural disaster or otherwise, is minimized in length and severity. To that end, the Commission finds that the provisions of Australian law and regulations specified above seek to ensure that entities adequately plan for disruptions and devote sufficient resources capable of carrying out an appropriate plan in a timely manner.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the business continuity and disaster recovery requirements of the provisions of Australian law and regulations, as specified above, are comparable to and as comprehensive as § 23.603.

5. Conflicts of Interest (§ 23.605)

*Commission Requirement:* Section 4s(j)(5) of the CEA and Commission regulation 23.605(c) generally require each SD or MSP to establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any commodity or swap are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision.

In addition, section 4s(j)(5) of the CEA and Commission regulation 23.605(d)(1) generally prohibits an SD or MSP from directly or indirectly interfering with or attempting to influence the decision of any clearing unit of any affiliated clearing member of a DCO to provide

clearing services and activities to a particular customer, including:

- Whether to offer clearing services to a particular customer;
- Whether to accept a particular customer for clearing derivatives;
- Whether to submit a customer's transaction to a particular DCO;
- Whether to set or adjust risk tolerance levels for a particular customer; or
- Whether to set a customer's fees based on criteria other than those generally available and applicable to other customers.

Commission regulation 23.605(d)(2) generally requires each SD or MSP to create and maintain an appropriate informational partition between business trading units of the SD or MSP and clearing units of any affiliated clearing member of a DCO to reasonably ensure compliance with the Act and the prohibitions set forth in § 23.605(d)(1) outlined above.

The Commission observes that § 23.605(d) works in tandem with Commission regulation 1.71, which requires FCMs that are clearing members of a DCO and affiliated with an SD or MSP to create and maintain an appropriate informational partition between business trading units of the SD or MSP and clearing units of the FCM to reasonably ensure compliance with the Act and the prohibitions set forth in § 1.71(d)(1), which are the same as the prohibitions set forth in § 23.605(d)(1) outlined above.

Finally, § 23.605(e) requires that each SD or MSP have policies and procedures that mandate the disclosure to counterparties of material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a swap execution facility or DCM or to clear a derivative through a DCO.

*Regulatory Objective:* Commission regulation 23.605(c) seeks to ensure that research provided to the general public by an SD or MSP is unbiased and free from the influence of the interests of an SD or MSP arising from the SD's or MSP's trading business.

In addition, the § 23.605(d) (working in tandem with § 1.71) seeks to ensure open access to the clearing of swaps by requiring that access to and the provision of clearing services provided by an affiliate of an SD or MSP are not influenced by the interests of an SD's or MSP's trading business.

Finally, § 23.605(e) seeks to ensure equal access to trading venues and clearinghouses, as well as orderly and fair markets, by requiring that each SD and MSP disclose to counterparties any material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a SEF or DCM, or to clear a derivative through a DCO.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as Commission regulation 23.605(c).

- Section 912A(1)(aa) of the Corporations Act requires AFSL licensees to have adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by a licensee or a representative of the licensee in the provision of financial services.
- ASIC Regulatory Guide 181 Licensing: Managing conflicts of interest and ASIC Regulatory Guide 79 Research report providers: Improving the quality of investment research (specific to research reports provided in Australia), set out ASIC's expectations regarding how financial service licensees are to manage conflicts of interest that arise in relation to the financial services that they provide. The conflicts management obligation requires that all conflicts of interest be adequately managed, recognizing that many conflicts of interest can be managed by a combination of internal controls and disclosures. Where conflicts cannot be adequately managed through internal controls and/or disclosure, the ASIC guidelines require that an AFSL holder must avoid the conflict or refrain from providing the affected financial service.
- Section 941A of the Corporations Act requires AFSL licensees to provide a Financial Services Guide to retail clients if they provide a financial service to the client.
- Section 942B(2)(f) of the Corporations Act states that the Financial Services Guide must provide disclosures about relationships that may influence the provision of the financial service.[43]

The applicant has represented to the Commission that ASIC and APRA, in the process of their oversight and enforcement of the foregoing Australian law and regulations for ADIs and ASFL licensees, would require any SD or MSP subject to such law and regulations to resolve or mitigate conflicts of interests in the provision of clearing services by a clearing member of a DCO that is an affiliate of the SD or MSP, or the decision of a counterparty to execute a derivative on a SEF or DCM, or clear a derivative through a DCO, through appropriate information firewalls and disclosures.

*Commission Determination:* The Commission finds that the provisions of Australian law and regulations specified above with respect to conflicts of interest that may arise in producing or distributing research are generally identical in intent to § 23.605(c) because such standards seek to ensure that research provided to the general public by an SD is unbiased and free from the influence of the interests of an SD arising from the SD's trading business.

With respect to conflicts of interest that may arise in the provision of clearing services by an affiliate of an SD or MSP, the Commission further finds that although the general conflicts of interest prevention requirements under the Australian law and regulations specified above do not require with specificity that access to and the provision of clearing services provided by an affiliate of an SD or MSP not be improperly influenced by the interests of an SD's or MSP's trading business, such general requirements would require prevention and remediation of such improper influence when recognized or discovered. Thus such standards would ensure open access to clearing.

Finally, although not as specific as the requirements of § 23.605(e) (Undue influence on counterparties), the Commission finds that the general disclosure requirements of the Australian law and regulations specified above would ensure equal access to trading venues and clearinghouses by requiring that each SD and MSP disclose to counterparties any material incentives or conflicts of interest regarding the decision of a counterparty to execute a derivative on a SEF or DCM, or to clear a derivative through a DCO.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the provisions of Australian law and regulations specified above in relation to conflicts of interest are comparable to and as comprehensive as § 23.605.

6. Availability of Information for Disclosure and Inspection (§ 23.606)

*Commission Requirement:* Commission regulation 23.606 implements sections 4s(j)(3) and (4) of the CEA, and requires each SD and MSP to disclose to the Commission, and an

[43] In addition to the foregoing, the applicant referenced Draft CPS 220. This draft prudential standard, if finalized in a form similar to its draft form, will require each ADI (including SD ADIs) to have policies and procedures for identifying, monitoring, and managing potential and actual conflicts of interest.

SD's or MSP's U.S. prudential regulator (if any) comprehensive information about its swap activities, and to establish and maintain reliable internal data capture, processing, storage, and other operational systems sufficient to capture, process, record, store, and produce all information necessary to satisfy its duties under the CEA and Commission regulations. Such systems must be designed to provide such information to the Commission and an SD's or MSP's U.S. prudential regulator within the time frames set forth in the CEA and Commission regulations and upon request.

*Regulatory Objective:* Commission regulation 23.606 seeks to ensure that each SD and MSP captures and maintains comprehensive information about their swap activities, and is able to retrieve and disclose such information to the Commission and its U.S. prudential regulator, if any, as necessary for compliance with the CEA and the Commission's regulations and for purposes of Commission oversight, as well as oversight by the SD's or MSP's U.S. prudential regulator, if any.

The Commission observes that it would be impossible to meet the regulatory objective of § 23.606 unless the required information is available to the Commission and any U.S. prudential regulator under the foreign legal regime. Thus, a comparability determination with respect to the information access provisions of § 23.606 would be premised on whether the relevant information would be available to the Commission and any U.S. prudential regulator of the SD or MSP, not on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as Commission regulation 23.606.

Section 912C of the Corporations Act and sections 29–33 of the ASIC Act enable ASIC to gather information from AFSL licensees, including:

- A statement containing specified information about the financial services provided by the AFSL holder or its representatives, or the financial services business carried on by the licensee;
- Inspection of books without charge;
- Issuance of a notice to a body corporate to produce books about the affairs of the body corporate;
- Issuance of a notice to a person who carries out a financial services business to produce books relating to, among other things, a dealing in financial products, or the character or financial position of the business;
- Issuance of a notice to produce books relating to the supply of financial services; and
- Issuance of a notice to produce documents in the person's possession that relate to the affairs of the body corporate.

In addition, Section 988A of the Corporations Act requires AFSL license holders to keep financial records that correctly record and explain the transactions and financial position of the financial services business carried out by the licensee.

Part 2.3 of the ASIC Derivative Transaction Rules (Reporting) 2013 places certain requirements on reporting entities (which includes the five SD ADIs as reporting entities from October 1, 2013). Specifically, Rule 2.3.1 requires reporting entities to keep records in relation to OTC derivatives transactions (including swaps) that enable the reporting entity to demonstrate it has complied with the Derivative Transaction Rules, and must keep the records for a period of at least five years from the date the record is made or amended. Reporting entities must also keep a record of all information that it is required to be reported under such rules.

Rule 2.3.2 further requires a reporting entity to, on request by ASIC, provide ASIC within a reasonable time with records or other information relating to compliance with or determining whether there has been compliance with the Rules.

*Commission Determination:* The Commission finds that the Australian law and regulations specified above are generally identical in intent to § 23.606 because such standards seek to ensure that each SD and MSP captures and stores comprehensive information about their swap activities, and are able to retrieve and disclose such information as necessary for compliance with applicable law and for purposes of regulatory oversight.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the Australian law and regulations with respect to the availability of information for inspection and disclosure, as specified above, are comparable to, and as comprehensive as, § 23.606, with the exception of § 23.606(a)(2) concerning the requirement that an SD or MSP make information required by § 23.606(a)(1) available promptly upon request to Commission staff and the staff of an applicable U.S. prudential regulator. The applicant has not submitted any provision of law or regulations applicable in Australia upon which the Commission could make a finding that SDs and MSPs would be required to retrieve and disclose comprehensive information about their swap activities to the Commission or any U.S. prudential regulator as necessary for compliance with the CEA and Commission regulations, and for purposes of Commission oversight and the oversight of any U.S. prudential regulator.

Notwithstanding that the Commission has not determined that the requirements of Australian law and regulations are comparable to and as comprehensive as § 23.606(a)(2), any SD or MSP to which both § 23.606 and the Australian law and regulations specified above are applicable would generally be deemed to be in compliance with § 23.606(a)(2) if that SD or MSP complies with the Australian law and regulations specified above, subject to compliance with the requirement that it produce information to Commission staff and the staff of an applicable U.S. prudential regulator in accordance with § 23.606(a)(2).

7. Clearing Member Risk Management (§ 23.609)

*Commission Requirement:* Commission regulation 23.609 generally requires each SD or MSP that is a clearing member of a DCO to:

- Establish risk-based limits based on position size, order size, margin requirements, or similar factors;
- Screen orders for compliance with the risk-based limits;
- Monitor for adherence to the risk-based limits intra-day and overnight;
- Conduct stress tests under extreme but plausible conditions of all positions at least once per week;
- Evaluate its ability to meet initial margin requirements at least once per week;
- Evaluate its ability to meet variation margin requirements in cash at least once per week;
- Evaluate its ability to liquidate positions it clears in an orderly manner, and estimate the cost of liquidation; and
- Test all lines of credit at least once per year.

*Regulatory Objective:* Through Commission regulation 23.609, the Commission seeks to ensure the financial integrity of the markets and the clearing system, to avoid systemic risk, and to protect customer funds. Effective risk management by SDs and MSPs that are clearing members is essential to achieving these objectives. A failure of risk management can cause

a clearing member to become insolvent and default to a DCO. Such default can disrupt the markets and the clearing system and harm customers.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as Commission regulation 23.609.

- The regulatory framework for ADIs under the Banking Act is based on the banking supervision principles published by the Basel Committee on Banking Supervision.[44] This prudential framework includes requirements (largely set out in detailed and separate prudential standards) regarding capital adequacy, credit risk, market risk, liquidity, credit quality, large exposures, associations with related entities, outsourcing, business continuity management, audit and related arrangements for prudential reporting, governance, and fit and proper management.
- In particular, APS 310 (discussed above) requires an ADI's board and management to ensure that the ADI meets prudential and statutory requirements and has management practices to limit risks to prudent levels. APS 310 mandates that the ADI's risk management practices must be detailed in descriptions of risk management systems that must be regularly reviewed and updated, at least annually, to take account of changing circumstances.
- APRA Prudential standard APS 116 Capital Adequacy: Market Risk (''APS 116'') states that the board, or a board committee, of an ADI must ensure that the ADI has in place adequate systems to identify, measure and manage market risk, including identifying responsibilities, providing adequate separation of duties and avoiding conflicts of interest.
- For certain trading positions, APS 116 states that an ADI must have ''clearly defined policies and procedures for the active management of positions such that: Positions are managed on a trading desk; position limits are set and monitored for appropriateness; positions are marked-to-market daily and when marking-to-model the parameters are assessed on a daily basis; and positions are reported to senior management as an integral part of the institution's risk management process.
- If an ADI has received approval to apply an ''internal model'' for market risk, as opposed to the ''standard method'' of calculating capital requirements, APS 116 requires the ADI to have an independent risk control unit that is responsible for the design and implementation of the ADI's market risk management system. The risk control unit must produce and analyze daily reports on the output of the ADI's risk measurement model, including an evaluation of limit utilization. This risk control unit must be independent from business trading and other risk taking units and must report directly to senior management of the ADI.
- If an ADI has received approval to apply an ''internal model'' for market risk, APS 116 states that the board or a board committee and senior management of an ADI must be actively involved in the risk control process. Daily reports must be prepared by the independent risk control unit and must be reviewed by a level of management with sufficient seniority and authority to enforce reductions of positions.
- APS 116 states that an ADI must ensure that an independent review of the risk measurement system and overall risk management process is carried out initially (i.e., at the time when model approval is sought) and then regularly as part of the ADI's internal audit process.

Further, on June 4, 2013, APRA issued a letter to all ADIs, including the Australian SDs outlining the framework for the application of risk management requirements to the Australian banks' membership of CCPs. Such a framework should include, at a minimum: application of appropriate systems and controls to monitor, on a continuing basis, the risk that membership of and conduct of business through a CCP or multiple CCPs may create and to manage such risk. This would include application of limits on potential risk exposures. These clearly articulated conditions together with APRA's prudential standards are designed to achieve a comparable regulatory outcome as Commission regulation 23.609.

Specifically, APRA has represented to the Commission that, in the process of its oversight and enforcement of the foregoing Australian law, regulations, and prudential standards, any SD or MSP subject to such standards that is a clearing member of a DCO would be expected to have established risk-based limits and a compliance and assessment framework for these limits consistent with the Commission's requirements for a clearing member and set out in the SD's or MSP's risk management policy framework. APRA would expect banks in Australia to adhere to their risk limit policies and any targeted review would examine the banks' risk management policy framework that captures these regulatory obligations.

*Commission Determination:* The Commission finds that the Australian law and regulations specified above are generally identical in intent to § 23.609 because such standards seek to ensure the financial integrity of the markets and the clearing system, to avoid systemic risk, and to protect customer funds.

The Commission notes that the Australian law and regulations specified above are not as specific as § 23.609 with respect to ensuring that SDs and MSPs that are clearing members of a DCO establish detailed procedures and limits for clearing member risk management purposes. Nevertheless, the Commission finds that the general requirements under the Australian law and regulations specified above, implemented in the context of clearing member risk management and pursuant to the representations of ASIC and APRA, meet the Commission's regulatory objective specified above.

Based on the foregoing and the representations above, the Commission hereby determines that the clearing member risk management requirements of the Australian law and regulations specified above are comparable to and as comprehensive as § 23.609.

*C. Swap Data Recordkeeping (§§ 23.201 and 23.203)*

*Commission Requirement:* Sections 4s(f)(1)(B) and 4s(g)(1) of the CEA, and Commission regulation 23.201 generally require SDs and MSPs to retain records of each transaction, each position held, general business records (including records related to complaints and sales and marketing materials), records related to governance, financial records, records of data reported to SDRs, and records of real-time reporting data along with a record of the date and time the SD or MSP made such reports. Transaction records must be kept in a form and manner identifiable and searchable by transaction and counterparty.

Commission regulation 23.203, requires SDs and MSPs to maintain records of a swap transaction until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of five years after such date. Records must be ''readily accessible'' for the first 2 years of the 5 year retention period (consistent with § 1.31).

[44] The Corporations Act requires AFSL holders to comply with risk management requirements, however, this requirement does not apply where an entity is regulated by APRA. *See* section 912A(1)(h).

The Commission notes that the comparability determination below with respect to §§ 23.201 and 23.203 encompasses both swap data recordkeeping generally and swap data recordkeeping relating to complaints and marketing and sales materials in accordance with § 23.201(b)(3) and (4).[45]

*Regulatory Objective:* Through the Commission's regulations requiring SDs and MSPs to keep comprehensive records of their swap transactions and related data, the Commission seeks to ensure the effectiveness of the internal controls of SDs and MSPs, and transparency in the swaps market for regulators and market participants.

The Commission's regulations require SDs and MSPs to keep swap data in a level of detail sufficient to enable regulatory authorities to understand an SD's or MSP's swaps business and to assess its swaps exposure.

By requiring comprehensive records of swap data, the Commission seeks to ensure that SDs and MSPs employ effective risk management, and strictly comply with Commission regulations. Further, such records facilitate effective regulatory oversight.

The Commission observes that it would be impossible to meet the regulatory objective of §§ 23.201 and 23.203 unless the required information is available to the Commission and any U.S. prudential regulator under the foreign legal regime. Thus, a comparability determination with respect to the information access provisions of § 23.203 would be premised on whether the relevant information would be available to the Commission and any U.S. prudential regulator of the SD or MSP, not on whether an SD or MSP must disclose comprehensive information to its regulator in its home jurisdiction.

*Comparable Australian Law and Regulations:* The applicant has represented to the Commission that the following provisions of law and regulations applicable in Australia are in full force and effect in Australia, and comparable to and as comprehensive as sections 4s(f)(1)(B) and 4s(g)(1) of the CEA and §§ 23.201 and 23.203.

- Section 286 of the Corporations Act requires firms to keep financial records that correctly record and explain its transactions, financial position and performance for 7 years after the transactions are completed.
- Section 988A of the Corporations Act requires AFSL licensees to keep financial records that correctly record and explain the transactions and financial position of the licensee's financial services business.
- Section 988E of the Corporations Act specifies a list of categories of information to be shown in the records of an AFSL licensee, including records of all money received or paid by the licensee; acquisitions and disposals of financial products, the charges and credits arising from them, and the names of the person acquiring or disposing of each of those products; all income from commissions, interest and other sources and all payments of interest, commissions and other expenses; and records pertaining to the securities or managed investment products that are the property of the licensee or held by the licensee for other persons.
- Corporations regulation 7.8.11 further specifies categories of information to be shown in records, including all financial products dealt with by the AFSL licensee under instructions from another person; and records pertaining to property held by the licensee for another person.
- Corporations regulation 7.8.12 further specifies categories of information to be shown in records, including separate particulars of every transaction by the AFSL licensee, the date of such transactions, and copies of acknowledgments of the receipt of financial products or documents of title to financial products.

Part 2.3 of the ASIC Derivative Transaction Rules (Reporting) 2013 places certain requirements on reporting entities (which includes the five SD ADIs as reporting entities from October, 1 2013). Specifically, Rule 2.3.1 requires reporting entities to keep records in relation to OTC derivatives transactions (including swaps) that enable the reporting entity to demonstrate it has complied with the Derivative Transaction Rules, and must keep the records for a period of at least five years from the date the record is made or amended. Reporting entities must also keep a record of all information that it is required to be reported under such rules.

Rule 2.3.2 further requires a reporting entity to, on request by ASIC, provide ASIC within a reasonable time with records or other information relating to compliance with or determining whether there has been compliance with the Rules.

*Commission Determination:* The Commission finds that the provisions of Australian law and regulations specified above are generally identical in intent to §§ 23.201 and 23.203 because such provisions seek to ensure the effectiveness of the internal controls of SDs and MSPs, and transparency in the swaps market for regulators and market participants.

In addition, the Commission finds that the provisions of Australian law and regulations specified above require SDs and MSPs to keep swap data in a level of detail sufficient to enable regulatory authorities to understand an SD's or MSP's swaps business and to assess its swaps exposure.

Finally, the Commission finds that the provisions of Australian law and regulations specified above, by requiring comprehensive records of swap data, seek to ensure that SDs and MSPs employ effective risk management, seek to ensure that SDs and MSPs strictly comply with applicable regulatory requirements (including the CEA and Commission regulations), and that such records facilitate effective regulatory oversight.

Based on the foregoing and the representations of the applicant, the Commission hereby determines that the requirements of Australian law and regulation with respect to swap data recordkeeping, as specified above, are comparable to, and as comprehensive as, §§ 23.201 and 23.203, with the exception of § 23.203(b)(2) concerning the requirement that an SD or MSP make records required by § 23.201 open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable U.S. prudential regulator. The applicant has not submitted any provision of Australian law or regulation upon which the Commission could make a finding that SDs and MSPs would be required to make records required by § 23.201 open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable U.S. prudential regulator.

Notwithstanding that the Commission has not determined that the requirements of Australian law and regulations are comparable to and as comprehensive as § 23.203(b)(2), any SD or MSP to which both § 23.203 and the Australian law and regulations specified above are applicable would generally be deemed to be in compliance with § 23.203(b)(2) if that SD or MSP complies with the Australian law and regulations specified above, subject to compliance with the requirement that it make records required by § 23.201 open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable U.S. prudential regulator in accordance with § 23.203(b)(2).

[45] *See* the Guidance for a discussion of the availability of substituted compliance with respect to swap data recordkeeping, 78 FR 45332–33.

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

**Melissa D. Jurgens,**

*Secretary of the Commission.*

## Appendices to Comparability Determination for Australia: Certain Entity-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'');[1] (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.[2] 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 * * *''[3] 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[4] 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.[5] The ODRG specifically agreed that a flexible, outcomes-based approach, based on a broad category-by-category basis, should form the basis of comparability determinations.[6]

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.[7] 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.[8] 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''),[9] the

[1] Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (Jul. 26, 2013).

[2] *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b.*

[3] CEA section 2(i); 7 U.S.C. 2(i).

[4] Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[5] *http://www.cftc.gov/PressRoom/PressReleases/pr6678–13.*

[6] *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.''

[7] 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).

[8] Yen-denominated interest rate swaps are subject to the mandatory clearing requirement in both the U.S. and Japan.

[9] Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 43785 (Jul. 22, 2013).

Regulations (''Exemptive Order''),[9] 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.[10] 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.[11] 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.

[FR Doc. 2013–30974 Filed 12–26–13; 8:45 am]

**BILLING CODE 6351–01–P**

[9] Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 43785 (Jul. 22, 2013).

[10] *http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-29.*

[11] *http://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b.*

## COMMODITY FUTURES TRADING COMMISSION

## Comparability Determination for the European Union: Certain Transaction-Level Requirements

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Comparability Determination for Certain Requirements under the European Market Infrastructure Regulation.

**SUMMARY:** The following is the analysis and determination of the Commodity Futures Trading Commission (''Commission'') regarding certain parts of a joint request by the European Commission (''EC'') and the European Securities and Markets Authority (''ESMA'') that the Commission determine that laws and regulations applicable in the European Union (''EU'') 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; (ii) swap portfolio reconciliation and compression; (iii) trade confirmation; and (iv) 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 Ellie Jester, Special Counsel, 202–418–5874, *ajester@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'').[1] 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

[1] 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).