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# Navigating the CFTC's Cross-Border Guidance – A Primer for Market Participants

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Compliance with the Final Guidance on the cross-border application of the swaps provisions of the Dodd-Frank Act recently took effect.[1] The Final Guidance, issued in July 2013 by the Commodity Futures Trading Commission ("CFTC" or the "Commission"), applies to persons who conduct cross-border swaps transactions with any jurisdictional nexus to the United States, regardless of whether they are required to register with the CFTC in any capacity.

The Final Guidance interprets the language of Section 2(i) of the Commodity Exchange Act (the "CEA"), which makes the swaps provisions of the Dodd-Frank Act applicable to activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States," or that "contravene such [Commission] rules or regulations … as are necessary or appropriate to prevent evasion of the swaps provisions" of the CEA as enacted by the Dodd-Frank Act."[2] The Final Guidance contains the Commission's statements of the manner in which it intends to interpret when swap-related provisions apply and thus addresses: (1) who qualifies as a U.S. person; (2) how multi-national organizations should calculate the *de minimis* threshold for swap dealer registration; (3) which regulatory requirements will apply to particular entities conducting business transnationally; and (4) the ability to substitute compliance with certain foreign regulatory schemes for CFTC regulation.

Although the Final Guidance is not in the form of a final rule and is subject to future review and amendment, it includes highly specific interpretations and terms and lays out a detailed roadmap for how the Commission intends to exercise its jurisdiction. Notably, On December 4, 2013, the Securities Industry and Financial Markets Association, the International Swaps and Derivatives Association and the Institute of International Bankers (together, the "**Plaintiffs**") filed a joint lawsuit in federal court in the District of Columbia challenging the Final Guidance under

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the Administrative Procedure Act (the "**APA**").[3] The complaint seeks to vacate the Final Guidance and enjoin its application on the basis that the CFTC, in issuing the Final Guidance, violated the APA by portraying the rules as guidance, and failing to conduct a cost benefit analysis as required by the APA. Alternatively, the complaint seeks to partially vacate the Final Guidance with respect to cross-border application on the grounds that it was not adopted in accordance with the CEA. On March 14, 2014, the CFTC filed a motion to dismiss, along with a cross-motion for summary judgment and an opposition to the Plaintiffs' motion for summary judgment. The motions are pending and under consideration in federal court.

This article addresses many of the significant issues presented by the Final Guidance. For ease of reference, Appendix A also provides a number of decision trees and flowcharts following the analysis that detail application of the Final Guidance.[4]

## I. WHO QUALIFIES AS A U.S. PERSON?

For purposes of the Final Guidance, a "U.S. person" is a person whose swap activities could be expected to satisfy the jurisdictional nexus with the United States, either individually or in the aggregate.[5] See Appendix A, Chart I for an illustration of the definition of U.S. person. As discussed more fully below, the CFTC will assert jurisdiction over any swap in which one or both of the counterparties are U.S. persons. In addition, the Final Guidance applies different requirements depending on whether a participant in the swap markets is considered a U.S. or non-U.S. person.

U.S. persons generally include individuals or entities located within the United States as well as individuals or entities outside of the United States whose swap activities nonetheless have a direct and significant connection with the United States. The Commission's interpretation contains eight separate categories or prongs, which include natural persons and legal entities physically located, organized, or with their principal place of business in the United States, as well as accounts of which a U.S. person is a beneficial owner; certain pension plans, trusts, and collective investment vehicles; and unlimited liability legal entities that are directly or indirectly owned by a U.S. person.[6] The interpretation contains the prefatory language "to include, but not be limited to" the enumerated categories, indicating that the Commission will take a facts and circumstances approach to identifying those persons whose activities meet the "direct and significant" jurisdictional nexus, and not limit its determination to a person's legal form and its domicile or location of operation. Accordingly, there may be situations where a person that does not fit into any of the enumerated prongs may nonetheless be treated as a U.S. person.

A party to a swap will be allowed reasonably to rely on the representation of its counterparty as to its status as a U.S. person. The reasonableness of the reliance will depend on the relevant facts and circumstances.

### Resident of the United States—Prongs (i) and (ii)

Leaving its proposed interpretation largely unchanged, the Commission will construe an individual to be a resident of the U.S. if he or she is physically located in the U.S. or one of its territories. The Final Guidance adds that the estate of a person who was a resident of the U.S. at the time of his or her death is also a U.S. person. The Proposed Guidance had instead looked to whether the estate was subject to U.S. income tax, regardless of the source.

### Legal Entities Organized or With Their Principal Place of Business in the U.S.—Prong (iii)

The Commission finalized the first part of the "legal entity" prong largely as proposed, i.e., any legal entity organized or incorporated in the U.S. or having its principal place of business in the U.S. is a U.S. person.[7] The interpretation generally includes those entities that are organized outside of the U.S. but have their "nerve center," that is the "center of direction, control, and coordination of their business activities," in the U.S.[8]

Additional factors are relevant to the determination of principal place of business of a collective investment vehicle, however.[9] The Commission will generally focus on the location of the "high level officers" who direct, control, and coordinate the key functions of the vehicle such as its formation and trading and investment strategies.

### Legal Entities Majority Owned by a U.S. Person—Prong (vii)

The Initial Proposed Guidance would have considered a legal entity of which a U.S. person is a direct or indirect owner and is responsible for the entity's liabilities to be a U.S. person. The Further Proposed

Guidance significantly moderated this approach by proposing as an alternative that only those legal entities for which a U.S. person (a) is a *majority owner* and (b) has *unlimited* responsibility for the entity's liabilities should be considered a U.S. person. The Final Guidance adopts the alternative approach laid out in the Further Proposed Guidance. However, in order to be a U.S. person under the Final Guidance, the majority owner U.S. person(s) need not bear responsibility for all of the entity's liabilities nor do all majority owner U.S. persons need to bear unlimited responsibility.

## Collective Investment Vehicles Majority Owned by a U.S. Person—Prong (vi)

The Commission also significantly changed its initial proposed approach to which collective investment vehicles would be considered U.S. persons. Previously, the Commission advised that a collective investment vehicle would be considered a U.S. person if it was owned *either directly or indirectly* by a U.S. person, irrespective of where it was organized or to whom it was offered. The Further Proposed Guidance added a majority ownership qualification and also provided that a publicly *traded* collective investment vehicle not offered to U.S. persons would not be a U.S. person. Because of the difficulties involved in verifying ownership of publicly *offered* collective investment funds, the Final Guidance expands the exclusion of public funds to incorporate all publicly *offered* funds that are not offered to U.S. persons.

In addition, the Final Guidance removes the "directly or indirectly" qualifier and provides that a collective investment vehicle that is majority-owned by one or more U.S. persons, regardless of where organized, will be considered a U.S. person. The Commission expects the collective investment vehicle not only to determine whether its direct beneficial owners are U.S. persons but also to "look through" the beneficial ownership of any other legal entity invested in the collective investment vehicle that is controlled by or under common control with the collective investment vehicle.

## Commodity Pool Operators—Elimination of Proposed Prong (v)

The Final Guidance does not include as a U.S. person all operators of commodity pools or other collective investment vehicles that would be required to register as a commodity pool operator under the CEA, as had been initially proposed. Instead of focusing on the location, nationality, or registration status of a commodity pool operator as determinative of its status as a U.S. person, the Commission intends to apply the principal place of business and majority ownership standards.

## Trusts as U.S. Persons—Prong (v)

A trust is a U.S. person if it is governed by the laws of a state or other jurisdiction in the United States, and if a U.S. court is able to exercise primary supervision over its administration. The Commission moved away from its proposal, which had linked the determination to whether the trust was subject to U.S. income tax.

## Pension Plans—Prong (iv)

The Proposed Guidance would have considered any pension plan of a legal entity with its principal place of business in the United States to be a U.S. person. The Final Guidance clarifies that such pension plans will not be considered U.S. persons if they are primarily for the benefit of foreign employees.

## Foreign Branches of U.S. Persons

Consistent with the Commission's proposed interpretation, the Final Guidance provides that the activities of a foreign branch are considered the activities of the principal entity, and thus a foreign branch of a U.S. person is a U.S. person. If the foreign branch were to be a swap dealer, the U.S. person would be required to register, and the registration would encompass the foreign branch. While the Commission declined to provide broad relief to foreign branches from treatment as U.S. persons, the Final Guidance permits foreign branches of U.S. bank swap dealers to be treated similarly to non-U.S. persons with respect to certain Dodd-Frank Act requirements, as discussed below.

## Guaranteed Affiliates and Affiliate Conduits

Foreign entities with swap obligations guaranteed by a U.S. person are not considered U.S. persons because a guarantee does not necessarily provide unlimited responsibility. Thus, a guaranteed affiliate, i.e., a non-U.S. person that is both an affiliate of a U.S. person and guaranteed by a U.S. person, will also generally not be a U.S. person. However, as discussed below, such non-U.S. affiliates and subsidiaries would be required to count any such swap deal-

ing transactions with U.S. and non-U.S. counterparties toward the *de minimis* registration threshold.

An affiliate conduit, i.e., a non-U.S. affiliate of a U.S. person that functions as a conduit or vehicle for the U.S. person to conduct swaps transactions with third-party counterparties, may be a U.S. person. In making a determination that a non-U.S. person is an affiliate conduit, the Commission will consider whether:

> **(i) the non-U.S. person is a majority-owned affiliate of a U.S. person; (ii) it controls, is controlled by, or is under common control with the U.S. person; (iii) its financial results are included in the U.S. person's consolidated financial statements; and (iv) in the regular course of business, it engages in swaps with non-U.S. third parties for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of the third-party swaps to its U.S. affiliates.**

Affiliates of swap dealers generally are not considered affiliate conduits.

# II. REGISTRATION ISSUES

## General Requirement

A person is required to register as a swap dealer if its swap dealing activities over the preceding 12 months exceed the *de minimis* threshold of swap dealing, which includes the aggregate notional value of swap dealing transactions entered by the person's affiliates under common control. See Appendix A, Chart II for an illustration of how the swap dealer threshold is calculated.

## Application of the Aggregation Principle

The Final Guidance applies the same aggregation principle to a corporate group regardless of whether affiliates within the group are U.S. or non-U.S. persons. Thus, in a departure from the Initial Proposed Guidance, the Final Guidance provides that both U.S. and non-U.S. persons should generally include all relevant swap-dealing activities of all their U.S. and non-U.S. affiliates under common control.[10] However, the swaps of U.S. and non-U.S. affiliates that are registered swap dealers may be excluded. In practice, therefore, both U.S. persons and non-U.S. persons in an affiliated group may engage in swap dealing activity up to the *de minimis* threshold in the aggregate. Once the group's combined swap dealing activities meet the *de minimis* threshold, one or more of the affiliates (whether inside or outside the United States) will generally have to register as a swap dealer. The remaining unregistered affiliates would then not need to count the swap dealer activity, allowing their dealing activity to remain below the threshold.

## Transactions That Must be Counted Within an Affiliated Group

*U.S. persons and their guaranteed non-U.S. affiliates or affiliate conduits* should count all the swap dealing activity of the affiliated entities (i.e., the U.S. persons and their guaranteed and conduit affiliates) with both U.S. and non-U.S. counterparties.

*Non-U.S. persons that are not themselves guaranteed or conduit affiliates* of a U.S. person should count only swap dealing transactions with U.S. persons and guaranteed affiliates of U.S. persons. They need not count swaps with conduit affiliates of U.S. persons. In addition, they need not count transactions with a foreign branch of a U.S. swap dealer that is a bank, a guaranteed affiliate of a U.S. person where the affiliate is a swap dealer, or a guaranteed or conduit affiliate that is not a swap dealer but is affiliated with a swap dealer and that itself engages in swap dealing activity below the threshold. Finally, these persons do not need to count swaps with a guaranteed affiliate where the guaranteed affiliate is, or is guaranteed by, a non-financial entity.

In a modification of the prior guidance, non-U.S. persons not guaranteed by a U.S. person that enter into swaps anonymously on a registered trading platform (where such swaps are cleared) generally do not have to count those swaps toward the *de minimis* threshold. This is because the non-U.S. persons would lack prior information about the counterparty to the swap.

# III. FOREIGN BRANCHES

The Commission received numerous comments on how it should determine whether a swap is "with a foreign branch," and how it should identify a "foreign branch" of a U.S. bank so that it does not

"create unnecessary distinctions between otherwise similar activities."[11]

### Foreign Branches of U.S. Banks

For purposes of the Final Guidance, the Commission will generally consider a foreign office of a U.S. swap dealer to be a foreign branch if it:

> **(i) is subject to Regulation K or the FDIC International Banking Regulation, or otherwise designated as a "foreign branch" by the U.S. bank's primary regulator; (ii) maintains accounts independently of the home office and of the accounts of other foreign branches with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and (iii) is subject to substantive regulation in banking or financing in the jurisdiction where it is located.**

The Commission may consider additional factors as well. An affiliate organized as a separate legal entity is not a foreign branch.

### A Swap "With a Foreign Branch" of a U.S. Bank

A swap will generally be considered to be *with* the foreign branch of a U.S. bank if: (i) the employees involved in its negotiation or execution (other than ministerial functions) are physically located in the foreign branch or in another foreign branch of the U.S. bank; (ii) the foreign branch or another foreign branch is the office through which the U.S. bank makes and receives payments and deliveries under the swap and the swap documentation specifies the foreign branch as the office for the U.S. bank; (iii) the foreign branch enters into the swap in its normal course of business; (iv) the swap is treated as a swap of the foreign branch for tax purposes; and (v) the swap is reflected in the local accounts of the foreign branch.

If material terms of the swap are negotiated or agreed to by employees that are located in the United States, the swap should be considered to be with the U.S. bank, rather than with its foreign branch.

## IV. SUBSTITUTED COMPLIANCE

Where the Commission makes a determination that certain laws and regulations of a foreign jurisdiction are comparable to and as comprehensive as applicable Dodd-Frank Act requirements, it will allow "substituted compliance," i.e., it will deem an entity or transaction in that foreign jurisdiction to be in compliance with certain U.S. requirements if the entity or transaction complies with the corresponding foreign laws and regulations. A Substituted Compliance Determination will apply to the extent provided therein to all entities or transactions in the jurisdiction for which it is made. Depending on the particular circumstances, a determination may be made on a requirement-by-requirement basis or based on the foreign regime as a whole. The Commission will rely on an outcomes-based approach to determine whether foreign requirements achieve the regulatory objectives of the Dodd-Frank Act.

A Substituted Compliance Determination will be subject to the Commission's retention of its examination and enforcement authority.

Eligible entities, either individually or collectively, and foreign regulators may apply for a Substituted Compliance Determination.

Once it has issued a favorable Substituted Compliance Determination, the Commission will enter into a memorandum of understanding ("MOU") or similar arrangement, providing for information sharing and cooperation, with the relevant foreign regulator(s). The Commission will reevaluate its initial determination after four years.

In the absence of a determination, or where the Commission finds that the foreign jurisdiction's regulations are not comparable and comprehensive, entities and transactions will be required to comply with applicable Dodd-Frank Act requirements.

### Substituted Compliance for Regulatory Reporting

The Commission will not permit substituted compliance for swap data repository ("SDR") reporting unless it first has direct and effective access (including electronic access) to data without any legal impediments. Specifically, comparability determinations for SDR reporting would consider whether the Commission is able to effectively obtain access to and utilize data stored in foreign trade repositories. The Commission must be able effectively to access and utilize the data in isolation and when compared to and aggregated with swap data from other jurisdictions, as well as registered SDRs. At the very least, the data elements stored in foreign trade repositories must be adequate to allow comparison and aggregation and all comparable required data

elements that are otherwise required to be reported to a registered SDR must be made available to the Commission.

### Substituted Compliance for Derivatives Clearing Organizations

The Commission may, in its discretion, exempt a derivatives clearing organization ("DCO") from registration where, at a minimum, the DCO is subject to comparable and comprehensive supervision by another regulator.[12] The Final Guidance states that the Commission must first have entered into an appropriate MOU or similar arrangement with the relevant foreign supervisor in the clearing organization's home country, and the clearing organization must have been found to be in compliance with the Principles for Financial Market Infrastructures ("PFMIs").[13] Because the exemptive authority is discretionary, the Commission is not compelled to exempt any clearing organization from the DCO registration requirements, even upon a finding that a facility is "subject to comparable, comprehensive supervision and regulation" by another regulator.

### Substituted Compliance Determinations to Date

In December 2013, the Commission made a number of substituted compliance determinations, each of which was effective on December 21, 2013. The comparability determinations were issued for swap dealers and major swap participants in Australia, Hong Kong, Japan, Switzerland, Canada, and the European Union, (together, the "**Initial Comparable Jurisdictions**"). Subject to certain limitations, the CFTC's comparability determinations permit substituted compliance for certain Entity-Level Requirements[14] by swap dealers in all six of the Initial Comparable Jurisdictions, and for Transaction-Level Requirements[15] by swap dealers in the European Union and Japan. The CFTC did not make a comparability determination for counterparty clearing relationships[16] or compliance and risk reports. It is anticipated that the CFTC will continue to embrace substituted compliance, an approach that could address some of the concerns about the scope of the Final Guidance.

Entity-Level and Transaction-Level Requirements are discussed in detail in Section V., below.[17]

## V. REGULATORY REQUIREMENTS

### Entity-Level Requirements

Finalized largely as proposed, the Entity-Level Requirements include capital adequacy, chief compliance officer, risk management, swap data recordkeeping, SDR Reporting, and Large Trader Reporting. The first four requirements fall into the "First Category" of Entity-Level Requirements and are intended to address risks to the swap dealer as a whole.[18] The latter two requirements fall into the "Second Category," and relate more closely to market transparency and market surveillance. See Appendix A, Charts III-A and III-B for an illustration of the Entity-Level requirements and how they apply.

U.S. swap dealers are expected to comply fully with both categories of Entity-Level Requirements. Substituted compliance may be permitted for non-U.S. swap dealers under certain circumstances, as discussed below.

### Substituted Compliance for Entity-Level Requirements

With respect to First Category Entity-Level Requirements, substituted compliance generally will be available for a non-U.S. swap dealer (including one that is an affiliate of a U.S. person) regardless of whether the counterparty is a U.S. person or a non-U.S. person.

However, substituted compliance for Second Category Entity-Level Requirements will generally be available only where the counterparty is a non-U.S. person.[19] Specifically, substituted compliance for SDR Reporting may be available for non-U.S. swap dealers (including those that are affiliates of a U.S. person), only where the swap counterparty is a non-U.S. person that is not a guaranteed or conduit affiliate, and where the Commission has direct access to the relevant swap data. Substituted compliance will be permitted for requirements for recordkeeping related to complaints and marketing and sales materials only where the swap counterparty is a non-U.S. person.

### Transaction-Level Requirements

The Final Guidance also largely incorporates the Transaction-Level Requirements as proposed. These include: (i) Category A: clearing and swap processing; margining and segregation for uncleared swaps; trade execution; swap trading relationship documen-

tation; portfolio reconciliation and compression; real-time public reporting; trade confirmation; and daily trading records; and (ii) Category B: external business conduct standards. See Appendix A, Charts III-A and III-C for an illustration of the Transaction-Level requirements and how they apply.

## Category A Requirements

Category A requirements do not apply to transactions between a non-U.S. swap dealer (including an affiliate of a U.S. person) and a non-U.S. person that is not a guaranteed or conduit affiliate. However, Category A requirements apply to transactions between all other counterparties, with substituted compliance available in some instances.

The availability of substituted compliance depends in part on the type of counterparty to the swap transaction, and is available for transactions between the following: (i) two foreign branches of U.S. bank swap dealers; (ii) a foreign branch of a U.S. bank swap dealer and a non-U.S. person, whether or not that person is a guaranteed or conduit affiliate of a U.S. person; (iii) a foreign branch of a U.S. bank swap dealer and a non-U.S. swap dealer (including an affiliate of a U.S. person); and (iv) a non-U.S. swap dealer (including an affiliate of a U.S. person) and a non-U.S. person that is a guaranteed affiliate or affiliate conduit of a U.S. person.[20]

Even though substituted compliance will not be permitted for swaps between a non-U.S. swap dealer and a U.S. person (other than a foreign branch), the swap dealer will be deemed to be in compliance if it complies with home jurisdiction requirements that are essentially identical to the applicable Dodd-Frank Act requirements. A finding that requirements are essentially identical may be made through Commission action and, in some cases, staff no-action relief.

Anonymous executions on registered trading platforms that are cleared will generally be considered to have met all Category A requirements.

## Category B Transaction-Level Requirements (External Business Conduct)

Whether the external business conduct requirements apply to swaps will depend on the counterparties to the swap. Specifically, where one counterparty is a U.S. swap dealer or another U.S. person, the external business conduct requirements will apply. However, although foreign branches of U.S. bank swap dealers are considered U.S. persons, transactions between non-U.S. swap dealers (including an affiliate of a U.S. person) and a foreign branch of a U.S. bank swap dealer are not subject to such requirements.

Non-U.S. swap dealers need not comply with the external business conduct requirements when engaging in swap transactions with non-U.S. persons, even if guaranteed by a U.S. person.

Substituted compliance is not available for the external business conduct requirements irrespective of the counterparties to the transaction.

Anonymous transactions on a registered trading platform are not subject to the external business conduct requirements.

## Applicability to Activity in the United States — Non-U.S. Swap Dealers

In a footnote to the Final Guidance, the Commission emphasized its strong supervisory interest in regulating swap dealing activities that take place in the United States, regardless of the status of the counterparty. Accordingly, under the Final Guidance, swaps between U.S. branches of non-U.S. swap dealers are subject to Transaction-Level Requirements without the availability of substituted compliance.[21]

In November 2013, CFTC staff issued both an advisory[22] and time-limited no-action relief in connection with the advisory,[23] which stated the staff's view that Transaction-Level Requirements apply to transactions of non-U.S. swap dealers that are arranged, negotiated, or executed by personnel or agents of the non-U.S. swap dealer that are located within the United States, regardless of whether the counterparty is a non-U.S. person. The Division of Swap Dealer and Intermediary Oversight ("DSIO") noted its belief that "pursuant to the Dodd-Frank [Act], the Commission has a strong supervisory interest in swap dealing activities that occur within the United States, regardless of the status of the counterparties." The no-action relief, which was extended on January 3, 2014,[24] provides that the DSIO, the Division of Clearing and Risk, and the Division of Market Oversight, will not recommend enforcement action against a non-U.S. swap dealer for failure to comply with any applicable Transaction-Level Requirement (other than certain multilateral portfolio compression and swap trading relationship requirements). The relief is in effect until September 15, 2014. In the meantime, the CFTC has requested comment on all aspects of the staff advisory.[25]

## VI. APPLICATION TO NON-REGISTRANTS

Requirements related to clearing, trade execution, real-time public reporting, Large Trader Reporting, SDR Reporting, and swap data recordkeeping also apply to market participants that are not registered swap dealers ("Non-Registrant Requirements"). See Appendix A, Chart IV for an illustration of the Non-Registrant Requirements and how they apply. A non-U.S. clearing member that holds positions that trigger routine Large Trader Reporting obligations must report all reportable positions to the Commission, including those between two non-registrant, non-U.S. persons. Therefore, regardless of whether either non-registrant is otherwise required to comply with the Non-Registrant Requirements, Large Trader Reporting will always apply. In addition, such entities may be subject to certain recordkeeping requirements.

In a cross-border swap between two non-registrants where at least one of the counterparties is a U.S. person (including a U.S. affiliate of a non-U.S. person), both parties to the swap generally would be expected to comply with the other Non-Registrant Requirements as well, and substituted compliance would not be available.

However, where both non-registrants are non-U.S. persons that are guaranteed affiliates of a U.S. person, both parties to the swap generally would be expected to comply with all Non-Registrant Requirements, but substituted compliance would be available. Where either or both of the parties are a conduit affiliate rather than a guaranteed affiliate, the counterparties only need to comply with the conditions of the Inter-Affiliate Exemption from clearing, as discussed below, and with certain Part 43 reporting requirements.

Where a swap is between two non-registrants where neither is a guaranteed or conduit affiliate or only one is such an affiliate, the counterparties need not comply with the Non-Registrant Requirements, except for the outward facing swap condition of the Inter-Affiliate Exemption. The Inter-Affiliate Exemption permits affiliates that satisfy certain conditions not to clear their swaps. One of these conditions is that all "outward facing swaps," i.e., swaps between either of the affiliate counterparties to the inter-affiliate swap and any unaffiliated counterparty, regardless of where the counterparty is located, must be cleared. Thus, even if a non-U.S. person uses the Inter-Affiliate Exemption, the exemption's outward facing swaps conditions must be met.[26]

A swap between one of the counterparties to an inter-affiliate swap and an unaffiliated nonfinancial end user will not need to be cleared, notwithstanding the outward facing swap condition.[27] The Final Guidance provides that a foreign end user counterparty to an outward facing swap (i.e., an unaffiliated non-U.S. person that is not otherwise subject to the CEA) may elect not to clear a swap if: (i) neither it nor the non-U.S. affiliate counterparty is in a jurisdiction in which substituted compliance is allowed and where a similar exception from clearing exists; (ii) the foreign end user is not a financial entity; and (iii) it enters into the swap to hedge or mitigate its commercial risk. If the parties are located in a substituted compliance jurisdiction, the foreign end user will be required to follow the rules of its home jurisdiction.

## VIII. COMPLIANCE DATES

Although the Final Guidance became effective immediately upon publication, the Exemptive Order provided for a more extended compliance period.

Compliance with the final "U.S. person" interpretation and the requirements relating to the *de minimis* registration threshold calculations was expected beginning on October 10, 2013. Until then, a non-U.S. person was permitted to exclude from its swap dealer calculations swaps with non-U.S. persons and swaps with a foreign branch of a U.S. swap dealer.

Additionally, until October 10, 2013, regarding aggregation of affiliate positions for purposes of the swap dealer *de minimis* calculations:

(i) A non-U.S. person that was engaged in swap dealing activities with U.S. persons as of December 21, 2012 could exclude the aggregate gross notional amount of swaps connected with the swap dealing activity of its U.S. affiliates under common control;

(ii) A non-U.S. person that was engaged in swap dealing activities with U.S. persons as of December 21, 2012 and is an affiliate under common control with a person that is registered as a swap dealer could also exclude the aggregate gross notional amount of swaps connected with the swap dealing activity of any non-U.S. affiliate under common control that was either (i) engaged in swap dealing activities with U.S. persons as of December 21, 2012 or (ii) registered as a swap dealer.

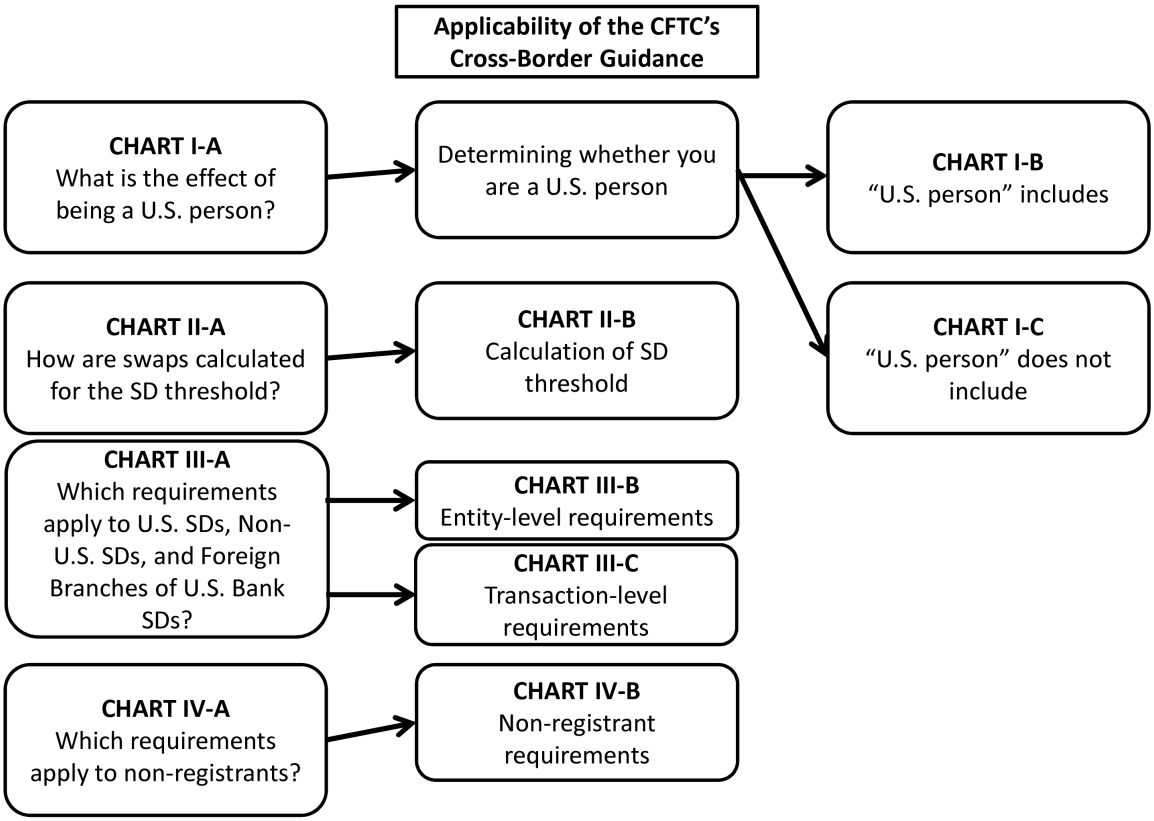
(iii) A non-U.S. person could exclude the aggregate gross notional amount of swaps connected with the swap dealing activity of its non-U.S. affiliates

under common control with other non-U.S. persons as counterparties.

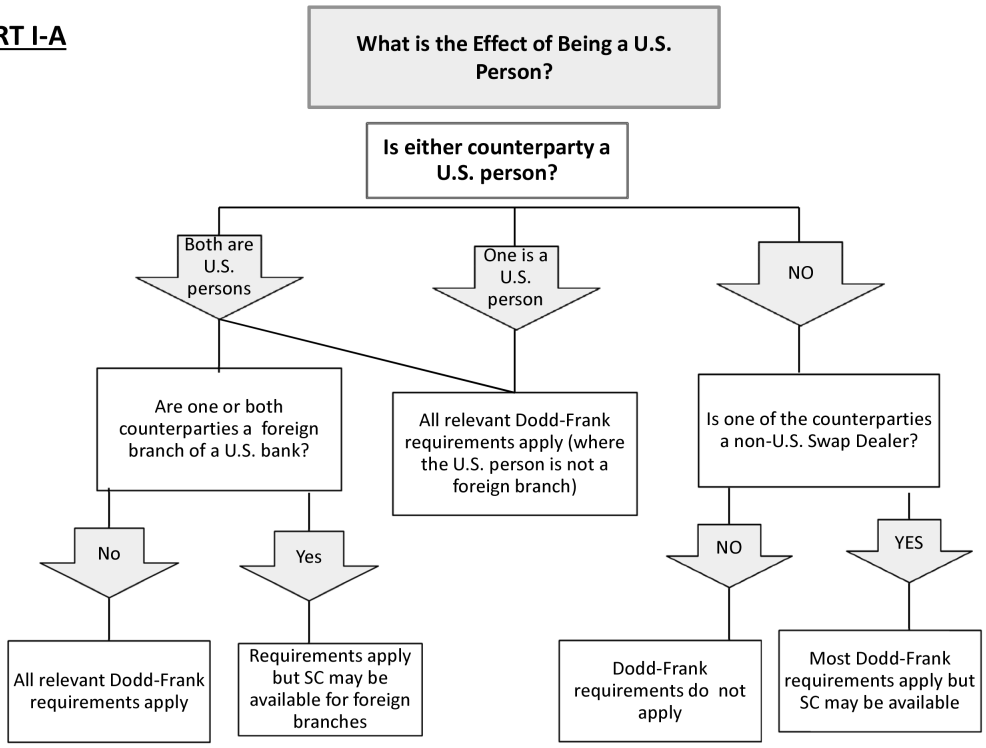
Accordingly, a non-U.S. person that was previously exempt from registration as a swap dealer but must now register as a swap dealer because of changes to how the Commission will interpret the swap dealer *de minimis* calculation or aggregation requirements is not required to register as a swap dealer until two months after the end of the month in which that person exceeds the *de minimis* threshold under the Final Guidance.

Guaranteed affiliates and affiliate conduits were also expected to comply with Transaction-Level Requirements relating to swaps with non-U.S. persons and foreign branches of U.S. swap dealers beginning October 10, 2013.

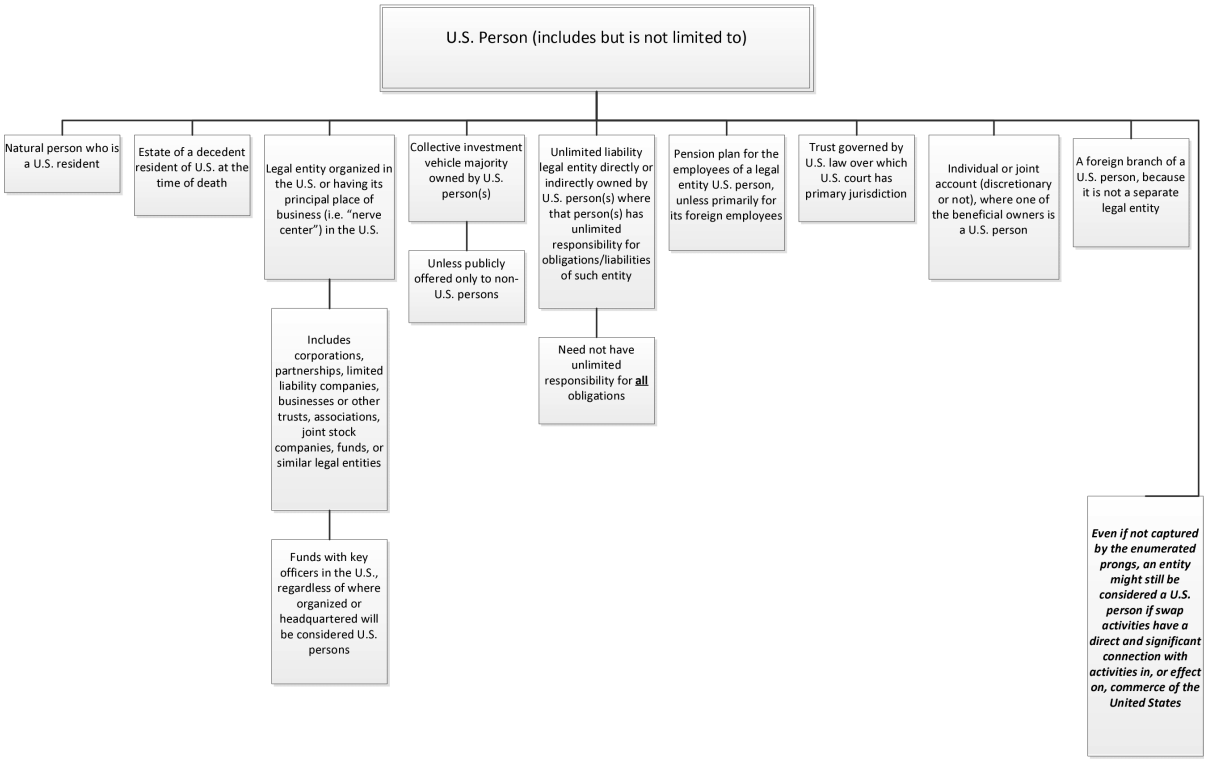
## APPENDIX A



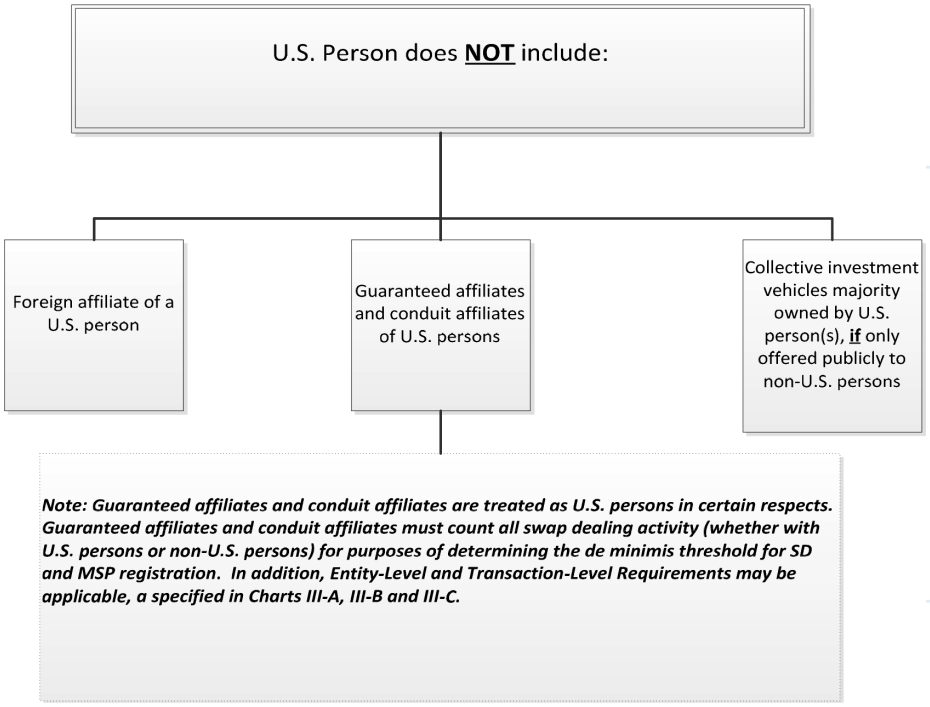
## CHART I-A



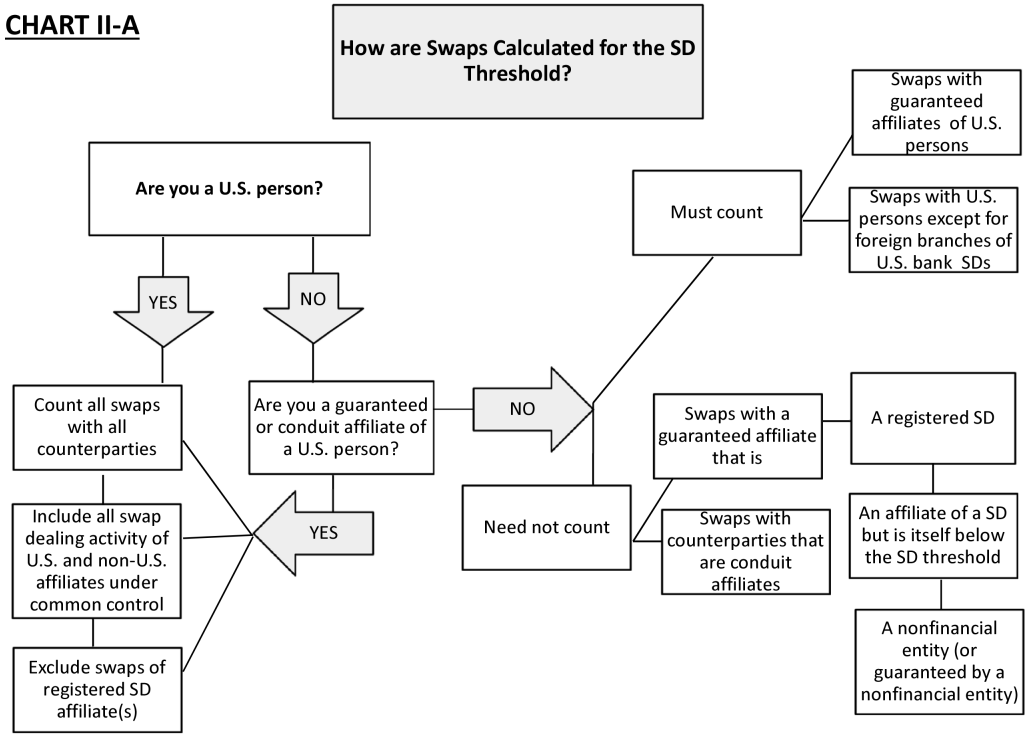

## CHART I-B



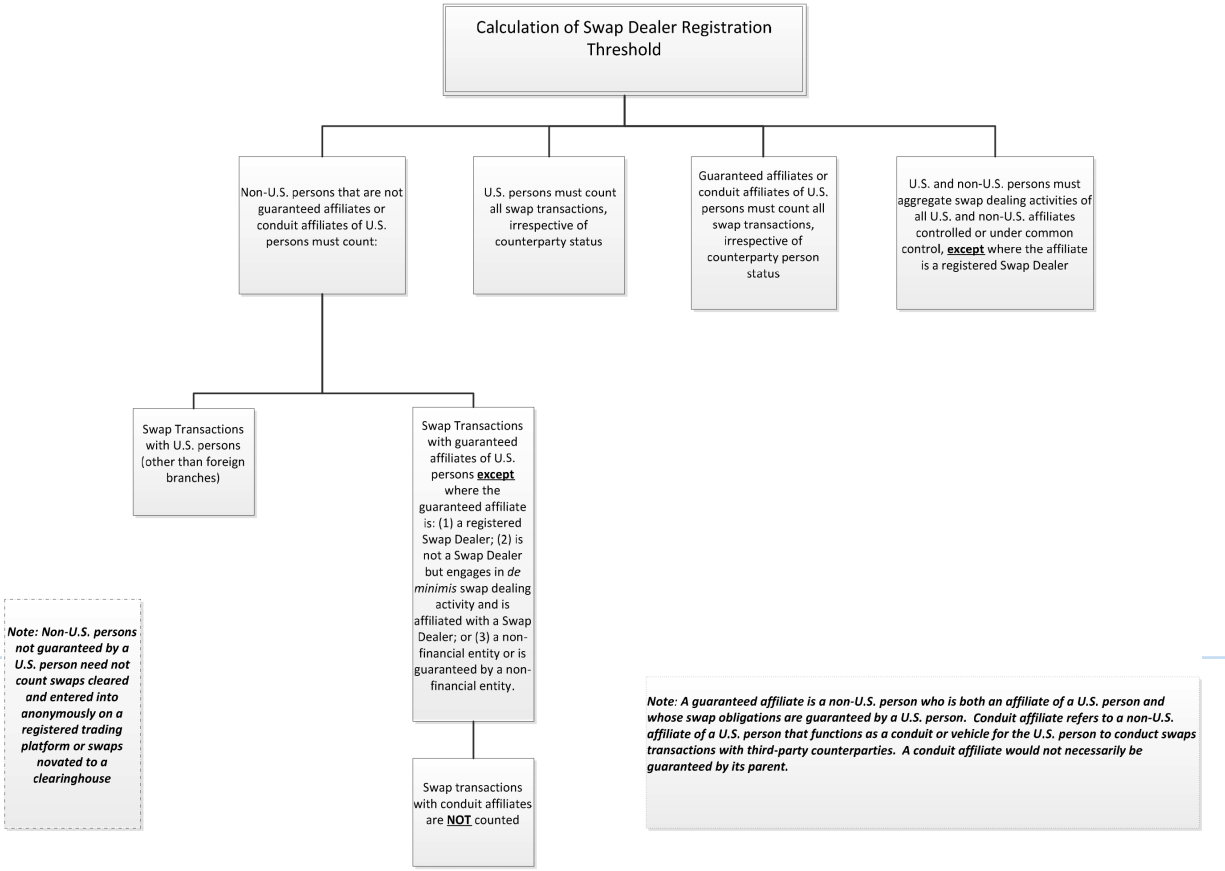
## CHART I-C



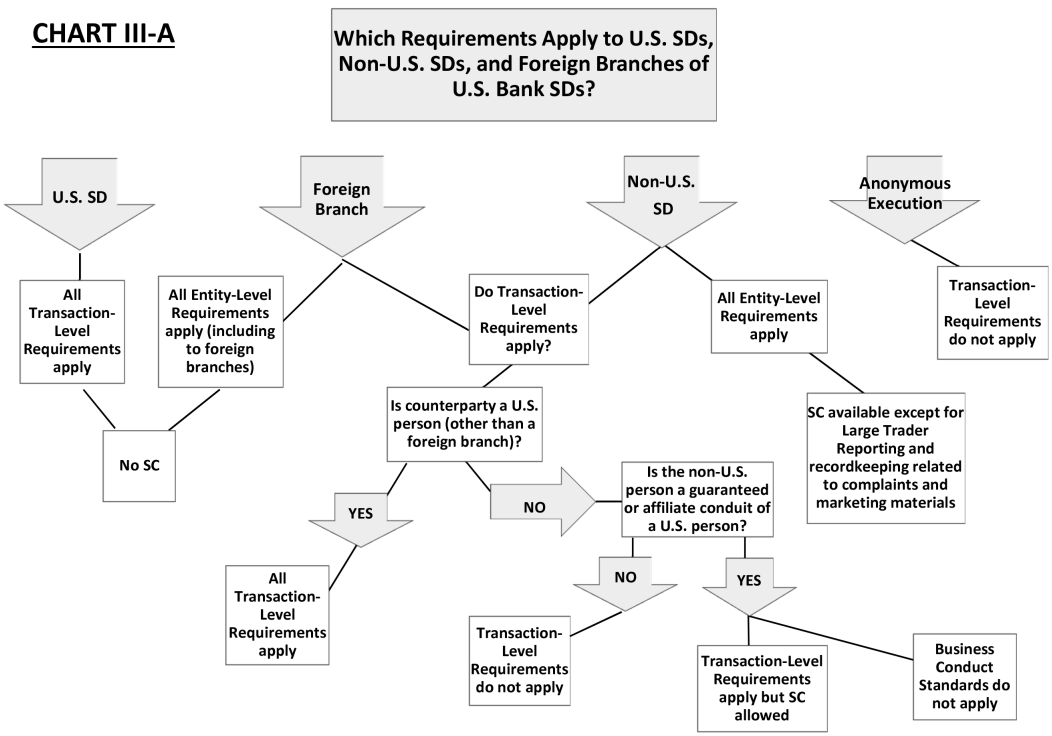

## CHART II-A



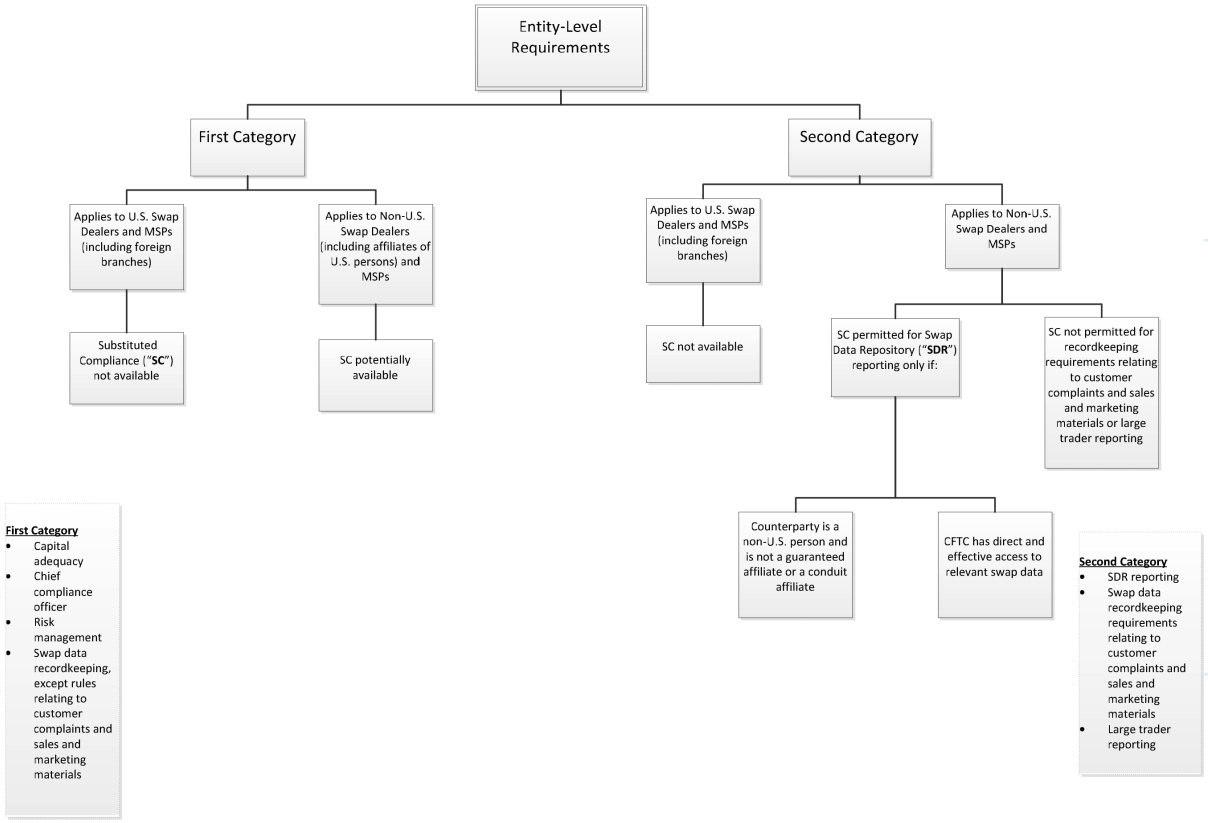
## CHART II-B



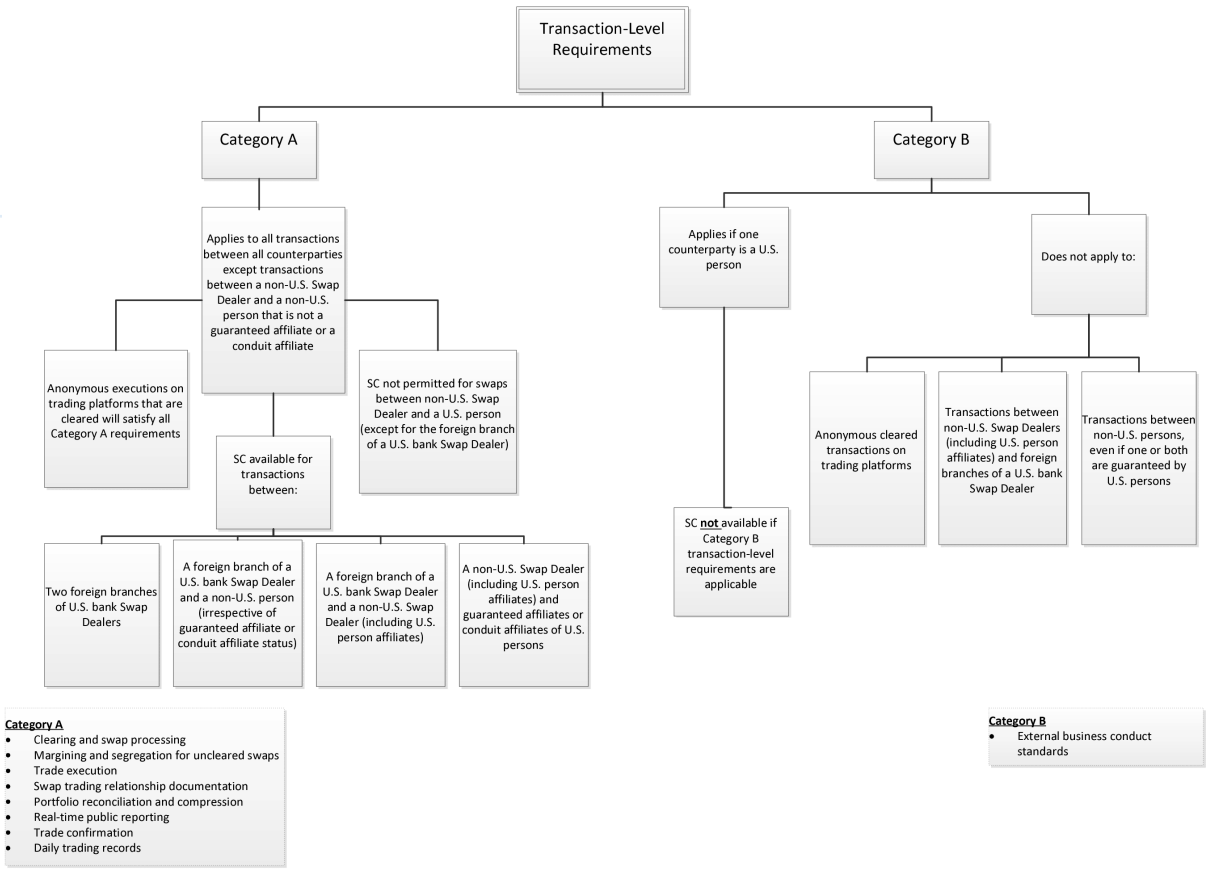

## CHART III-A



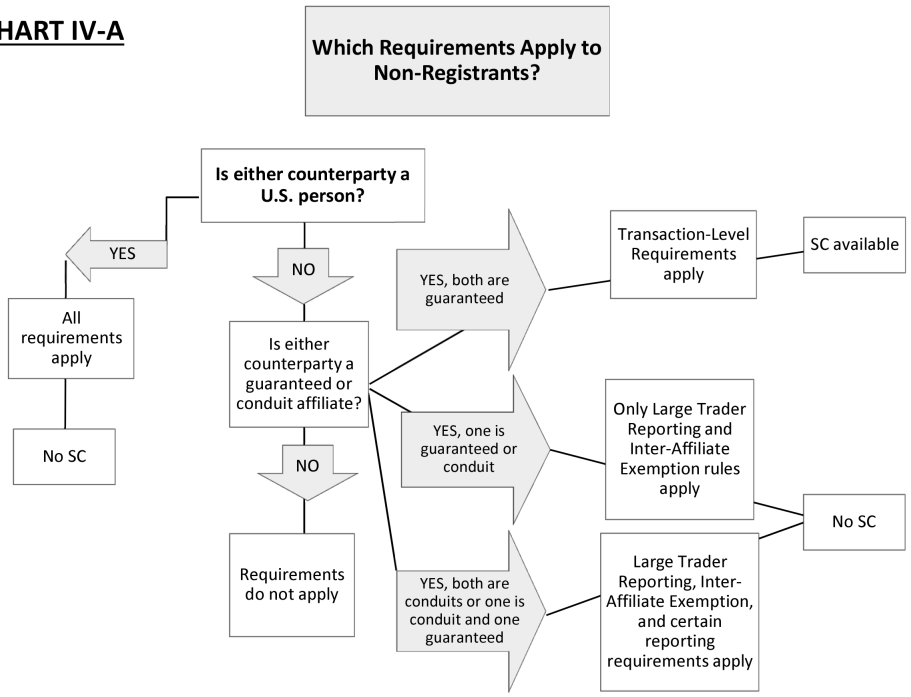
## CHART III-B



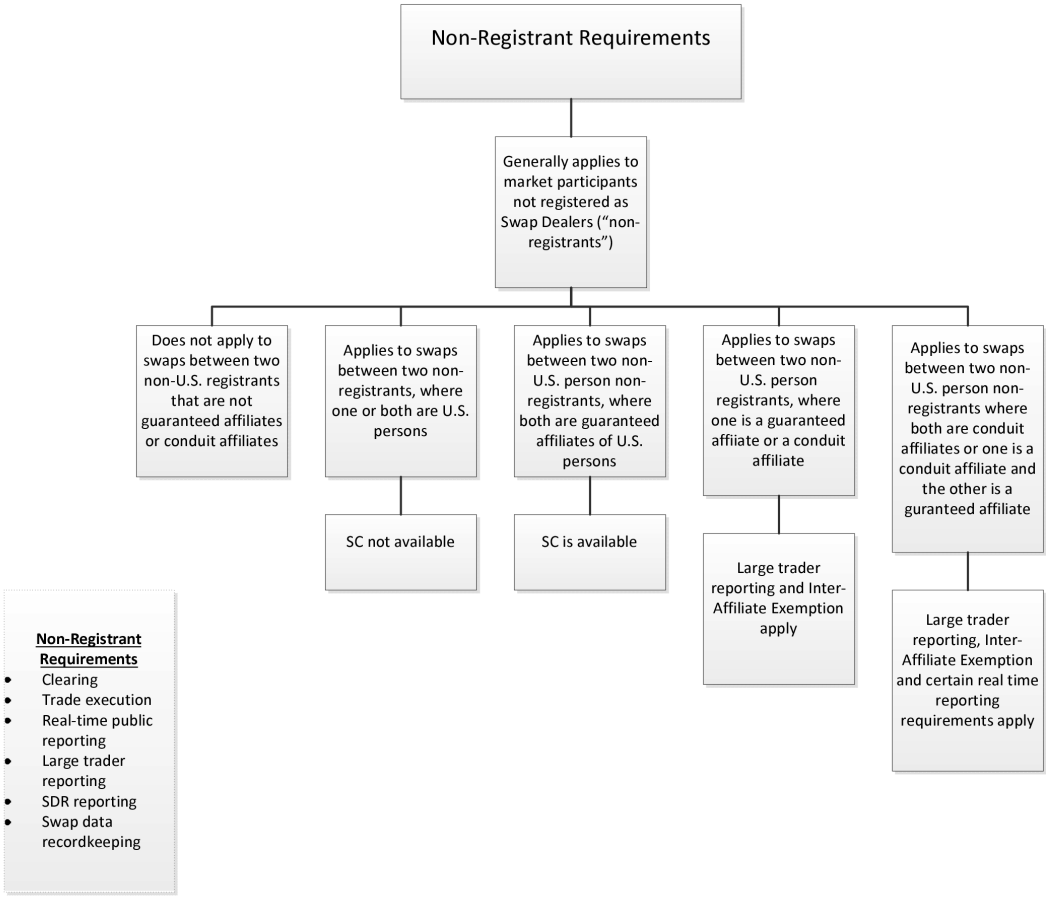

## CHART III-C



## CHART IV-A




## CHART IV-B



**NOTES**

1. Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, RIN 3038-AD85, 78 Fed. Reg. 45,292 (July 26, 2013) ("Final Guidance"). The Final Guidance became effective on July 26, 2013, the date of publication in the Federal Register. However, in a companion release, the CFTC also issued an exemptive order delaying compliance with several of the requirements in the Final Guidance ("Exemptive Order"). Exemptive Order Regarding Compliance with Certain Swap Regulations, RIN3038-AE05, 78 Fed. Reg. 43,785 (July 22, 2013); *see also* Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 858 (Jan. 7, 2013) ("January Order").
2. Commodity Exchange Act Section 2(i).
3. *See* Complaint, Securities Industry and Financial Markets Association et. al. v. the United States Commodity Futures Trading Commission, No. 13 CV 1916 (D.D.C. Dec. 4, 2013). Plaintiffs' motion for summary judgment is available at: http://www.sifma.org/uploadedfiles/correspondence/legal_filings/2013/motionforsummaryjudgment-as-filed-stamped.pdf?n=32492
4. This article focuses on swap dealers and unregistered market participants and does not address the effect of the Final Guidance on major swap participants ("MSPs").
5. The Commission makes clear that its interpretation of U.S. person for purposes of the Final Guidance is not intended to apply to other contexts under the CEA, and is limited to swaps activities under Title VII of the Dodd-Frank Act.
6. The final interpretation of "U.S. person" includes:
   (i) any natural person who is a resident of the United States;
   (ii) any estate of a decedent who was a resident of the United States at the time of death;
   (iii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a "legal entity"), in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States;
   (iv) any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension plan is primarily for foreign employees of such entity;
   (v) any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;
   (vi) any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;
   (vii) any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and
   (viii) any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi), or (vii).
7. Nonprofit entities, as well as U.S. state, county and local governments and their agencies and instrumentalities will also be considered U.S. persons.
8. Final Guidance, *supra* note 2 at 45,309 (discussing *Hertz Corp. v. Friend*, 559 U.S. 77 (2010)).
9. A collective investment vehicle is an entity or group of related entities created for the purpose of pooling and trading or investing assets of one or more investors. Because collective investment vehicles are created to achieve the investment objectives of their investors, rather than those of a separate operating business, the Commission has determined that additional interpretive factors exist. Affected parties may consider seeking staff guidance as to their U.S. person status.
10. Under the Proposed Guidance, a non-U.S. person would only have needed to include the aggregate notional value of swap dealing transactions entered into by its non-U.S. affiliates under common control. It would not have been required to include the swap dealing transactions entered into by its U.S. affiliates.
11. Final Guidance, *supra* note 2 at 45,329. Many of these comments were in response to the Commission's January Order.
12. Under Section 5b(h) of the CEA, the Commission has discretionary authority to exempt DCOs, conditionally or unconditionally, from applicable DCO registration requirements.
13. The PFMIs are international standards for payment, clearing and settlement systems, including central counterparties and trade re-

positories, issued jointly by the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions.

14. Swap dealers located in the Initial Comparable Jurisdictions may substitute compliance for the following Entity-level Requirements: Chief Compliance Officer (except for certification of the annual report); swap data recordkeeping and reporting; risk management program; monitoring of position limits; diligent supervision; conflicts of interest policies and procedures; availability of information for disclosure and inspection; and clearing member risk management.
15. Swap dealers in the EU may substitute compliance for the following Transaction-level Requirements: certain daily trading records; trade confirmations; portfolio reconciliation and compression; and swap trading relationship documentation with respect to confirmation and valuation. Swap dealers in Japan may substitute compliance for daily trading records and all swap trading relationship documentation, except documentation regarding disclosures and certain representations.
16. The CFTC addressed this by issuing no-action relief for non-U.S. swap dealers in Australia, Canada, the EU, Japan and Switzerland on December 20, 2013. The relief expires on March 2, 2014, April 2, 2014 or December 1, 2014, depending on the reporting requirement.
17. Canada: Certain Entity-Level Requirements, 78 Fed. Reg. 78,839 (Dec. 27, 2013); Hong Kong: Certain Entity-Level Requirements, 78 Fed. Reg. 78,852 (Dec. 27, 2013); Australia: Certain Entity-Level Requirements, 78 Fed. Reg. 78,864 (Dec. 27, 2013); Switzerland: Certain Entity-Level Requirements, 78 Fed. Reg. 78,899 (Dec. 27, 2013); Japan: Certain Transaction-Level Requirements, 78 Fed. Reg. 78,890 (Dec. 27, 2013); Japan: Certain Entity-Level Requirements, 78 Fed. Reg. 78,910 (Dec. 27, 2013); European Union: Certain Transaction-Level Requirements, 78 Fed. Reg. 78,878 (Dec. 27, 2013); European Union: Certain Entity-Level Requirements, 78 Fed. Reg. 78,923 (Dec. 27, 2013).
18. Under the Final Guidance, swap data recordkeeping relating to complaints and marketing and sales materials has been moved from the First to the Second Category of Entity-Level Requirements.
19. Substituted compliance will not be allowed for Large Trader Reporting.
20. Where a swap between a foreign branch of a U.S. swap dealer and a non-U.S. person (that is not a guaranteed or conduit affiliate) occurs in a foreign jurisdiction outside of Australia, Canada, the EU, Hong Kong, Japan, or Switzerland, the parties to the transaction may comply with transaction-level requirements applicable to entities domiciled or doing business where the foreign branch operates if: 1) the aggregate notional value of the swaps of all foreign branches in such countries does not exceed 5% of the aggregate notional value of all the swaps of the U.S. swap dealer; and 2) the U.S. person maintains records with supporting information to identify and address any significant risk that may arise from applying local transaction-level requirements.
21. Final Guidance, *supra* note 2 at 45,350, n.513.
22. Division of Swap Dealer and Intermediary Oversight Advisory, Applicability of Transaction-Level Requirements to Activity in the United States, CFTC Staff Advisory No. 13-69 (Nov. 14, 2013).
23. No-Action Relief: Certain Transaction-Level Requirements for Non-U.S. Swap Dealers, CFTC Letter No. 3-71 (Nov. 26, 2013).
24. Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers, CFTC Letter No. 14-01 (Jan. 3, 2014).
25. Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents on the Non-U.S. Swap Dealers Located in the United States, 79 Fed. Reg. 1,347 (Jan. 8, 2014).
26. *See* CFTC Regulation 50.52(b)(4)(i).
27. The outward facing swaps condition will not apply if the unaffiliated counterparty elects to use the end user exception from clearing under Section 2(h)(7) of the CEA.