

MEMO# 27820

January 6, 2014

CFTC Issues Cross-Border Substituted Compliance Determinations, Including Comparability Determinations for the European Union

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 1-14
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 2-14
ICI GLOBAL MEMBERS No. 1-14
INTERNATIONAL MEMBERS No. 1-14
INVESTMENT ADVISER MEMBERS No. 1-14
SEC RULES MEMBERS No. 1-14 RE: CFTC ISSUES CROSS-BORDER SUBSTITUTED COMPLIANCE DETERMINATIONS, INCLUDING COMPARABILITY DETERMINATIONS FOR THE EUROPEAN UNION

As we previously informed you, at the end of 2013, the Commodity Futures Trading Commission (“CFTC” or “Commission”) approved a series of comparability determinations that would permit substituted compliance with non-U.S. regulatory regimes in lieu of certain swap requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) and CFTC regulations. [\[1\]](#) This memorandum briefly describes the CFTC’s determinations with respect to the EU. [\[2\]](#) The CFTC made two separate comparability determinations – one for certain transaction-level requirements and a second for certain entity-level requirements.

In the comparability determinations, the CFTC reviews the specific sections of the Commodity Exchange Act (“CEA”) and the CFTC regulations, the CFTC’s regulatory objectives with respect to those requirements, and the relevant provisions of the EU’s comparable laws before providing its comparability determinations.

Transaction-Level Requirements

In response to a joint request by the European Commission (“EC”) and the European Securities and Markets Authority (“ESMA”), the CFTC analyzed certain regulatory obligations applicable to swap dealers (“SDs”) and major swap participants (“MSPs”) registered with the CFTC. These transaction-level requirements (which apply on a

transaction-by-transaction basis) are: (1) swap trading relationship documentation (2) swap portfolio reconciliation and compression; (3) trade confirmation; and (4) daily trading records (collectively “Business Conduct Requirements”). The CFTC declined to consider the request of the EC and ESMA for a comparability determination with respect to regulations governing clearing and swap processing and real-time public reporting because the CFTC was of the view that there currently are no laws or regulation applicable in the EU to compare with the CFTC’s requirements in these areas. In making its Transaction-Level Comparability Determination, the CFTC considered the European Market Infrastructure Regulation (“EMIR”) and the Regulatory Technical Standards as well as the Markets in Financial Instruments Directive (“MiFID”).

For the Business Conduct Requirements (described above), the CFTC generally found that the requirements of EU laws to be comparable to and as comprehensive as the CFTC’s requirements. With respect to swap trading relationship documentation, the CFTC noted that the comparability determination does not apply to the CFTC regulations that require SDs and MSPs to establish policies and procedures, approved in writing by senior management of the SD or MSP, reasonably designed to ensure that they have entered into swap trading relationship documentation with each counterparty prior to or contemporaneously with entering into a swap transaction with such counterparty. The comparability determination also does not extend to the requirement that such documentation include terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and netting of obligations upon termination, transfer of rights and obligations, governing law, dispute resolution, and credit support arrangements as well as notice of the status of the counterparty under the orderly liquidity procedures of Title II of the Dodd-Frank Act and the effect of clearing on swaps executed bilaterally. [3] With regard to the daily trading records, the CFTC noted that the comparability determination does not extend to the requirement that the CFTC and any US prudential regulator of an SD or MSP have direct access to such records.

Entity-Level Requirements

The CFTC also made a comparability determination with respect to certain entity-level requirements applicable to SDs and MSPs (which apply to an SD or MSP firm as a whole), including chief compliance officer, risk management and swap data recordkeeping (collectively, “Internal Business Conduct Requirements”). In making its comparability determination, the CFTC considered EMIR and the RTS, MiFID, and the Capital Requirements Directive (“CRD”). Generally, the CFTC found that the EU laws are comparable to and as comprehensive as the Internal Business Conduct Requirements. The CFTC noted, however, certain areas where EU law was not comparable, including (among other things) reports that were required to be submitted to the CFTC. The CFTC would deem SDs and MSPs to be in compliance nevertheless if they furnished the reports as required to the CFTC. [4]

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endnotes

[1] See ICI Memorandum No. 27807, available at http://www.ici.org/my_ici/memorandum/memo27807. The CFTC issued comparability determinations with respect to certain entity-level requirements for Australia, Canada, the European Union (“EU”), Hong Kong, Japan, and Switzerland. For the EU and Japan, the

CFTC also approved substituted compliance for some transaction-level requirements. See Comparability Determination for Australia: Certain Entity-Level Requirements, 78 FR 78864 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30974.pdf>; Comparability Determination for Hong Kong: Certain Entity-Level Requirements, 78 FR 78852 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30975.pdf>; Comparability Determination for Japan: Certain Entity-Level Requirements, 78 FR 78910 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30976.pdf>; Comparability Determination for Japan: Certain Transaction-Level Requirements, 78 FR 78890 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30977.pdf>; Comparability Determination for Switzerland: Certain Entity-Level Requirements, 78 FR 78899 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30978.pdf>; Comparability Determination for Canada: Certain Entity-Level Requirements, 78 FR 78839 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30979.pdf>.

[2] Comparability Determination for the European Union: Certain Transaction-Level Requirements, 78 FR 78878 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30981.pdf> (“Transaction-Level Comparability Determination”); Comparability Determination for the European Union: Certain Entity-Level Requirements, 78 FR 78923 (Dec. 27, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-27/pdf/2013-30980.pdf> (“Entity-Level Comparability Determination”).

[3] The comparability determination also does not relieve an SD or MSP from the CFTC’s documentation audit and recordkeeping requirements.

[4] For example, although the CFTC has not determined that the requirements of MiFID are comparable to and as comprehensive as regulation 23.606(a)(2), any SD or MSP to which both regulation 23.606 and the MiFID standards are applicable would generally be deemed to be in compliance if the SD or MSP complies with the MiFID standards and produces information to the CFTC staff and the staff of an applicable US prudential regulator. The CFTC also did not find EU law comparable with respect to the requirement that an SD or MSP make certain records open to inspection by any representative of the CFTC, the US Department of Justice or any applicable US prudential regulator. Nevertheless, an SD or MSP would be in compliance with that requirement if it makes records open to inspection.

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