

## CFTC Adopts Final Cross Border Swaps Guidance

Today the U.S. Commodity Futures Trading Commission (the “CFTC”) adopted final guidance regarding the cross border application of the new derivatives requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”), as well as an interim final exemptive order that phases in the relevant requirements. This adoption was welcome news for market participants, who were facing substantial uncertainty since the CFTC’s existing temporary cross border guidance was scheduled to expire today.

The final text of the guidance and the exemptive order is not yet available. However, below are some highlights of the guidance and the exemptive order for funds and investment advisers, based on the discussion at the CFTC meeting and the materials released so far:

- Parties can continue to rely on the existing temporary cross border guidance (the CFTC order effective December 21, 2012) until 75 days after the final guidance is published in the Federal Register.
- Under the temporary cross border guidance, a collective investment vehicle is only a “US person” if it is organized in the United States. Under the final guidance, a collective investment vehicle will also be a “US person” if (i) a majority of its interests are owned by US persons (unless interests in the fund are publicly offered, but are not offered in the United States); or (ii) the fund’s principal place of business is in the United States. The test for determining the location of a fund’s principal place of business will depend principally on the location of the fund’s investment managers, fund sponsors and promoters, and the sales and trading desk used by the fund. As a result of this expanded definition, many transactions between offshore funds advised by US investment advisers and non-US swap dealers will become subject to the Dodd-Frank requirements.
- US swap dealers will be required to comply with the Dodd-Frank transaction-level requirements (such as clearing, margin, swap execution facility trading, real-time reporting and external business conduct standards) with respect to transactions with all counterparties.
- Non-US branches of US swap dealers will also be required to comply with these requirements, but with respect to transactions with non-US persons, can generally satisfy the requirements through “substituted compliance” (compliance with the comparable requirements of another jurisdiction) if the transaction has a “bona fide” connection to the non-US branch. The CFTC will determine whether a particular category of requirements of another jurisdiction are comparable to the Dodd-Frank requirements, using an “outcomes-based approach.” The CFTC issued a no-action letter yesterday indicating that certain risk mitigation requirements of the European Market Infrastructure Regulation (EMIR) (confirmation, portfolio compression, portfolio risk valuation, and portfolio compression requirements) are “substantially identical” to the Dodd-Frank requirements.
- Non-US swap dealers will be required to comply with the transaction-level requirements with respect to transactions with US persons and with non-US affiliates guaranteed by a US person, but will be able to satisfy the requirements with respect to transactions with non-US affiliates guaranteed by a US person through “substituted compliance.”
- The Dodd-Frank requirements are generally becoming effective earlier than the corresponding requirements in other jurisdictions. Therefore, in order to provide time for comparable requirements in other jurisdictions to become effective, a non-US swap dealer or non-US branch of a US swap

dealer located in Australia, Canada, the European Union, Hong Kong, Japan or Switzerland only needs to comply with the requirements in effect in its jurisdiction for any requirement for which “substituted compliance” is possible until the earlier of (i) December 21, 2013, or (ii) 30 days following the issuance of a substituted compliance determination for the relevant requirement.

Please contact the Ropes & Gray attorney who usually advises you with any questions.