



March 26, 2025

Commission Regulations 23.23, 23.106, and 23.160

Thomas Smith
Acting Director, Market Participants Division
Brian Young
Director, Division of Enforcement
Commodity Futures Trading Commission
Three Lafayette Centre 1155 21st Street, NW
Washington, DC 20581

Re: Request for Guidance Concerning Substituted Compliance

Dear Messrs. Smith and Young:

The Institute of International Bankers (“IIB”), the International Swaps and Derivatives Association (“ISDA”) and the Securities Industry and Financial Markets Association (“SIFMA” and, together with IIB and ISDA, the “Associations”)¹ are writing to request that staff of the Market Participants Division (“MPD”) and Division of Enforcement (“DOE”) of the Commodity Futures Trading Commission (“Commission”) provide guidance clarifying the circumstances under which (i) MPD would make a referral to DOE concerning a potential enforcement matter against a non-U.S. swap dealer or major swap participant (either, a “swap entity”) or foreign branch of a U.S. swap entity for violation of a Commission requirement for which the swap entity is relying on substituted compliance with comparable standards in a foreign jurisdiction (“foreign comparable standards”) under Regulation 23.23, 23.106, or 23.160 (together, the “Substituted Compliance Rules”) and (ii) DOE would recommend that the Commission commence enforcement action against a swap entity for such a violation.

In general, the Substituted Compliance Rules permit a non-U.S. swap entity or foreign branch of a U.S. swap entity subject to foreign comparable standards to satisfy certain of the Commission’s swap entity requirements by substituting compliance with those foreign comparable standards, subject to such further conditions and limitations as the Commission may impose in its comparability determination for the relevant foreign jurisdiction.² However, if such a swap entity “failed to comply with a foreign jurisdiction’s relevant standards, or the terms of an applicable comparability determination, the Commission could initiate an action for a violation

¹ Information regarding the Associations is set forth in Appendix A.

² See Regulations 23.23(f), 23.106(a)(4)(ii), 23.160(b)(1)(ii), 23.160(b)(2)(i), 23.160(b)(2)(iii), and 23.160(b)(2)(iv).

of the Commission's corresponding requirements.”³ Consistent with this, the Commission has retained its examination and enforcement authority with respect to swap entities relying on substituted compliance.⁴

The Commission's retention of such authority has raised questions regarding how the Commission will take substituted compliance into account when exercising that authority. In particular, IIB and SIFMA previously requested that the Commission state that it and the National Futures Association (“NFA”) would not independently examine for or otherwise assess whether a non-U.S. swap entity is complying with foreign comparable standards, but would instead look to the relevant foreign regulatory authority to conduct such examinations or assessments, given that the Commission and NFA lack the subject-matter expertise to interpret and apply foreign laws.⁵

In response to this request, the Commission clarified that its and NFA's examinations of non-U.S. swap entities “occur with appropriate notice and consultation with the relevant foreign authority in the foreign jurisdiction that has primary oversight of” the non-U.S. SD.⁶ The Commission further noted the “general focus” of its and NFA's examinations of non-U.S. swap entities is on assessing compliance with requirements not covered by substituted compliance.⁷

Also, notably, as part of its review of foreign requirements when making a comparability determination, the Commission takes into account the ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the foreign comparable standards.⁸ Consistent with this fact, the Commission has stated that it “generally relies upon the relevant foreign regulator's oversight of a non-U.S. swap entity in relation to the application of a foreign jurisdiction's standards where a non-U.S. swap entity complies with such standards pursuant to a comparability determination issued by the Commission.”⁹

Although these clarifications have been helpful, prior Commission enforcement matters have prompted questions and concerns about how the Commission will take substituted

³ 85 Fed. Reg. 56924, 56979 (Sept. 14, 2020) (“2020 Cross-Border Release”).

⁴ *See id.*

⁵ *See id.*

⁶ *Id.*

⁷ *Id.*

⁸ *See* Regulations 23.23(g)(4)(iii), 23.106(a)(3)(iii), and 23.160(c)(3)(iii).

⁹ 2020 Cross-Border Release, 85 Fed. Reg. at 56979.

compliance into account in the enforcement context.¹⁰ We accordingly request that MPD and DOE provide further guidance concerning how they will apply the Substituted Compliance Rules when they consider a potential enforcement matter against a swap entity for violation of a Commission requirement for which the swap entity is relying on substituted compliance.¹¹

Specifically, we request that MPD confirm that, in considering whether to make a referral to DOE for such a potential enforcement matter: (i) absent a final determination by the relevant foreign regulatory authority that the swap entity is not in compliance with the foreign comparable standard, MPD will not make the referral; (ii) if the foreign regulatory authority confirms that it has reached a final determination that the swap entity is not in compliance with the foreign comparable standard, then MPD will seek to determine whether the foreign regulatory authority intends to take any enforcement, supervisory or other appropriate remedial action; and (iii) if the foreign regulatory authority confirms that it is satisfied that appropriate remedial action has been or will be taken by the swap entity, whether due to the foreign regulatory authority's actions or otherwise, then MPD will not, absent exigent or extraordinary circumstances,¹² refer the matter to DOE for potential enforcement action.¹³

¹⁰ See, e.g., Statement of Commissioner Caroline D. Pham on Order Regarding Australia and New Zealand Banking Group Ltd. (Apr. 2, 2024), *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement040224>.

¹¹ For this purpose, given that non-U.S. swap entities are subject to overlapping supervision requirements under Regulations 23.602 and 166.3, the former of which specifically addresses the non-U.S. swap entity's activities relating to its business as a swap entity, we request that this guidance likewise apply to enforcement referrals concerning Regulation 166.3 to the extent the underlying circumstances relate to the non-U.S. swap entity's business as a swap entity and the non-U.S. swap entity is relying on substituted compliance with respect to Regulation 23.602.

¹² For purposes of this request, exigent or extraordinary circumstances would include the loss of U.S. customer or counterparty funds that may be recovered by a Commission enforcement action or imminent or ongoing harm to orderly trading on a U.S. trading or execution facility or U.S. financial stability.

¹³ As a corollary, we also request confirmation that MPD will not (i) refer a matter to DOE where a foreign regulator has reached a final determination as to non-compliance but where the foreign regulator and the swap entity remain in discussions as to remedial action or (ii) independently review the appropriateness or adequacy of any remedial action agreed by a foreign regulatory authority and swap entity with respect to any foreign comparable standard.

Likewise, we request that DOE confirm, in considering whether to recommend that the Commission commence enforcement action against a swap entity concerning violation of a requirement for which the swap entity is relying on substituted compliance: (i) absent a final determination by the foreign regulatory authority that the swap entity is not in compliance with the foreign comparable standard, DOE will not make the recommendation; (ii) if the foreign regulatory authority confirms that it has reached a final determination that the swap entity is not in compliance with the foreign comparable standard, then DOE will seek to determine whether the foreign regulatory authority intends to take any enforcement, supervisory or other appropriate remedial action; and (iii) if the foreign regulatory authority confirms that it is satisfied that appropriate remedial action has been or will be taken by the swap entity, whether due to the foreign regulatory authority's actions or otherwise, then DOE will not, absent exigent or extraordinary circumstances, recommend that the Commission commence enforcement action.¹⁴

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¹⁴ As a corollary, we also request confirmation that DOE will not (i) recommend that the Commission commence an enforcement action where a foreign regulator has reached a final determination as to non-compliance but where the foreign regulator and the swap entity remain in discussions as to remedial action or (ii) independently review the appropriateness or adequacy of any remedial action agreed by a foreign regulatory authority and swap entity with respect to any foreign comparable standard.

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Thank you for your consideration of this request. Please do not hesitate to contact Stephanie Webster (swebster@iib.org) or any of the undersigned with any questions you may have. Pursuant to Commission Regulation 140.99(c)(3)(ii), the Associations hereby undertake that, if at any time prior to the issuance of a no-action letter, any material representation made in this letter ceases to be true and complete, they will promptly inform Commission staff in writing of all materially changed facts and circumstances.

Respectfully submitted,



Stephanie Webster
General Counsel
Institute of International Bankers



Kyle Brandon
Managing Director, Head of Derivatives Policy
SIFMA



Christopher Young
Head of U.S. Public Policy
ISDA

Appendix A: Information Regarding the Associations

The Institute of International Bankers represents the U.S. operations of internationally headquartered financial institutions from more than 35 countries around the world. The membership consists principally of international banks that operate branches, agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States. The IIB works to ensure a level playing field for these institutions, which are an important source of credit for U.S. borrowers and comprise the majority of U.S. primary dealers. These institutions also enhance the depth and liquidity of U.S. financial markets and contribute significantly to the U.S. economy through direct employment of U.S. citizens, as well as through other operating and capital expenditures. For more information, visit iib.org.

Since 1985, the International Swaps and Derivatives Association has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 76 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: <https://www.isda.org/>. Follow us on Twitter, LinkedIn, Facebook and YouTube.

The Securities Industry and Financial Markets Association is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.