



International Swaps and Derivatives Association, Inc.

## CROSS-BORDER SWAPS REPRESENTATION LETTER

published on August 19, 2013

by the International Swaps and Derivatives Association, Inc.

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On July 26, 2013, the CFTC published an “Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations” providing guidance as to when the CFTC will assert jurisdiction over swap transactions that have a non-U.S. element. This representation letter allows market participants to provide counterparties with status representations needed to determine whether compliance with various CFTC swap regulations is required by the Interpretive Guidance. The representations in this letter are solely for the purposes of making such determinations.

**Capitalized terms used in this letter are defined in Appendix I.**

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### I. U.S. Person Representations.

**Instructions:** Please make one of the two representations provided below by checking the relevant box.

*Not a U.S. Person.*

- We hereby represent that we reasonably believe that we do not fall within any of the U.S. Person Categories and believe in good faith that we would not otherwise be deemed to be a “U.S. person” under the Interpretive Guidance. This representation shall be deemed repeated each time we enter into a Swap Transaction with you unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction.

*U.S. Person.*

- We hereby represent that we reasonably believe that we do fall within one or more of the U.S. Person Categories or would otherwise be deemed to be a “U.S. person” under the Interpretive Guidance. This representation shall be deemed repeated each time we enter

into a Swap Transaction with you unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction.

## II. Additional Representations for Non-U.S. Persons.

**Instructions:** If you checked the first box in Part I (“Not a U.S. Person”), please complete Sections (A) and (B) below by checking one box in each Section.

This information is needed because certain CFTC Swap Regulations apply to transactions with non-U.S. persons if they are “affiliate conduits” or guaranteed by a U.S. person.

### (A) Affiliate Conduit Representations.

*Not an Affiliate Conduit.*

- We hereby represent that we reasonably believe, based upon the relevant guidance in the Interpretive Guidance, including the Affiliate Conduit Factors, that we would not be classified under the Interpretive Guidance as an “affiliate conduit.” This representation shall be deemed repeated each time we enter into a Swap Transaction with you unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction.

*Affiliate Conduit.*

- We hereby represent that we reasonably believe, based upon the relevant guidance in the Interpretive Guidance, including the Affiliate Conduit Factors, that we would be classified under the Interpretive Guidance as an “affiliate conduit.” This representation shall be deemed repeated each time we enter into a Swap Transaction with you unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction.

### (B) Guarantee Representations.

*No U.S. Person Guarantees.*

- We hereby represent to you as of each time we enter into a Swap Transaction with you that, unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction, our obligations to you in connection with the relevant Swap are not, supported by any Guarantee (of which we are aware) other than any Guarantee provided by a person who we reasonably believe does not fall within any of the U.S. Person Categories and who we believe in good faith would not otherwise be deemed a “U.S. person” under the Interpretive Guidance.

U.S. Person Guarantees.

- We hereby represent to you as of each time we enter into a Swap Transaction with you that, unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction, our obligations to you in connection with the relevant Swap are supported by a Guarantee that is provided by a person that we reasonably believe falls within one or more of the U.S. Person Categories or would otherwise be deemed to be a “U.S. person” under the Interpretive Guidance.

**Additional Instructions: If you checked the second box in Section (B) (“U.S. Person Guarantees”), please further indicate in Section (C)(1) below whether such Guarantees are provided by Financial Entities and in Section (C)(2) below whether you are affiliated with a Swap Dealer.**

**(C)(1) Financial Entity Guarantors.**

No Financial Entity Guarantees.

- We further represent to you as of each time we enter into a Swap Transaction with you that, unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction, we reasonably believe that no person who would be deemed to be a “U.S. person” under the Interpretive Guidance who is providing a Guarantee supporting our obligations to you in connection with the relevant Swap is a Financial Entity.

Financial Entity Guarantees.

- We further represent to you as of each time we enter into a Swap Transaction with you that, unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction, we reasonably believe that one or more persons who would be deemed to be a “U.S. person” under the Interpretive Guidance who is providing a Guarantee supporting our obligations to you in connection with the relevant Swap is a Financial Entity.

**(C)(2) Swap Dealer Affiliates.**

No Swap Dealer Affiliates.

- We further represent to you as of each time we enter into a Swap Transaction with you that, unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction, we are not affiliated with a Swap Dealer.

Swap Dealer Affiliates.

- We further represent to you as of each time we enter into a Swap Transaction with you that, unless we have notified you to the contrary in a timely manner in writing prior to entering into such Swap Transaction, we are affiliated with a Swap Dealer and we do not engage in a level of Swap dealing activity that would require registration as a Swap Dealer with the CFTC.

Executed and delivered with effect from the date first written above:

[Name of entity completing letter]<sup>1</sup>

[LEI/CICI: ]

[Alternative Identifier: ]<sup>2</sup>

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

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<sup>1</sup> If this letter is being delivered by an agent on behalf of one or more principals, the agent should insert “as agent for [name of principal][the principals named on the attached sheet].” If the agent is acting on behalf of more than one principal, (i) it may list the names of such principals on a separate sheet and (ii) this letter should be treated as if it were a separate letter with respect to each principal listed on such sheet. Similarly, if this letter is being delivered by a trustee on behalf of one or more trusts or trust funds, the trustee should insert “as trustee for [name of trust or trust fund][the [trusts][trust funds] named on the attached sheet].”

<sup>2</sup> If you would like to include an alternative identifier, please describe the type of identifier provided.

## Appendix I: Definitions

“*Affiliate Conduit Factors*” means the four factors identified in the Interpretive Guidance as relevant to considering whether a non-U.S. person is an “affiliate conduit.”<sup>3</sup> For informational purposes only, the text of the factors (but not the related interpretive material) is reproduced below:

- (i) the non-U.S. person is a majority-owned affiliate of a U.S. person;<sup>4</sup>
- (ii) the non-U.S. person is controlling, controlled by or under common control with the U.S. person;<sup>5</sup>
- (iii) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and
- (iv) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third-party(ies) 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 such swaps with third-party(ies) to its U.S. affiliates.

“*CEA*” means the U.S. Commodity Exchange Act, as amended.

“*CFTC*” means the U.S. Commodity Futures Trading Commission.

“*CFTC Swap Regulations*” means the rules, regulations, orders and interpretations adopted or issued by the CFTC, as in effect from time to time, that apply to Swaps and that are promulgated under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act or that are otherwise designated by the CFTC as being subject to the Interpretive Guidance.<sup>6</sup>

“*Financial Entity*” means a “financial entity,” as defined in Section 2(h)(7)(C) of the Commodity Exchange Act, as amended.

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<sup>3</sup> For the full discussion of how the CFTC interprets the term “affiliate conduit” (or alternately “conduit affiliate”), see the Interpretive Guidance at pp. 45358-59. Note that the discussion indicates that the term “affiliate conduit” is not intended to include affiliates of swap dealers.

<sup>4</sup> The concept of a majority-owned affiliate for these purposes is discussed in fn. 591 of the Interpretive Guidance.

<sup>5</sup> The concept of “control” for these purposes is discussed in fn. 592 of the Interpretive Guidance.

<sup>6</sup> The application of the “U.S. person” concept to swap regulation is discussed at p. 45316 of the Interpretive Guidance and the related concept of “swaps activities” is discussed at p. 45297 & fn. 38.

“**Guarantee**” means an agreement or arrangement under which a person commits to provide a financial backstop or funding against potential losses that may be incurred by another person in connection with a Swap.<sup>7</sup>

“**Interpretive Guidance**” means the *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 Fed. Reg. 45292 (July 26, 2013), as amended or supplemented by the CFTC from time to time.<sup>8</sup>

“**Swap**” means a “swap” as defined in the Section 1a(47) of the CEA and CFTC Regulation 1.3(xxx). The term “Swap” also includes any foreign exchange swaps and foreign exchange forwards that may be exempted from regulation as “swaps” by the Secretary of the Treasury pursuant to authority granted by Section 1a(47)(E) of the Commodity Exchange Act.

“**Swap Dealer**” means a “swap dealer” as defined in Section 1a(49) of the CEA and CFTC Regulation 1.3(ggg) thereunder.

“**Swap Transaction**” means any transaction that results in the creation of new Swap between two or more parties or in a change to the terms of an existing Swap between parties, including execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a Swap.

“**United States**” or “**U.S.**” means the United States, its states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and any other territories or possessions of the United States government, or enclave of the United States government, its agencies or instrumentalities.

“**U.S. Person Categories**” means the enumerated categories of “U.S. persons” that are provided in the Interpretive Guidance.<sup>9</sup> For informational purposes only, the text of the categories (but not the related interpretive materials) is reproduced below:

- (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**

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<sup>7</sup> For a full discussion of how the CFTC interprets the term “guarantee,” see the Interpretive Guidance at p. 45320 & fn. 267 and also at p. 45355.

<sup>8</sup> Available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf>.

<sup>9</sup> Interpretive Guidance at pp. 45316-17.

**entity”**),<sup>10</sup> 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;<sup>11</sup>

- (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),<sup>12</sup> 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;<sup>13</sup>
- (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;<sup>14</sup> and

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<sup>10</sup> See the Interpretive Guidance at p. 45309 regarding the inclusion of legal entities that engage in non-profit activities, U.S. state, county and local governments and their agencies and instrumentalities. The treatment of international financial institutions such as the World Bank is discussed at p. 45353 & fn. 531.

<sup>11</sup> The CFTC indicates that the concept of “principal place of business” as applied to collective investment vehicles requires special consideration due to the nature of such vehicles. In particular, the location of senior personnel responsible for implementing the vehicle’s investment strategy and for forming and/or promoting the vehicle is discussed. For discussion of the relevant considerations, see the Interpretive Guidance at pp. 45309-12.

<sup>12</sup> For purposes of making this determination, the CFTC indicates that collective investment vehicles should “look through” direct investors in certain circumstances. See the Interpretive Guidance at pp. 45313-14 for discussion of when a look-through is required. In addition, the Interpretive Guidance indicates that majority ownership for this purpose is “the beneficial ownership of more than 50 percent of the equity or voting interests.”

<sup>13</sup> See the Interpretive Guidance at p. 45314 regarding exclusion of collective investment vehicles that are publicly offered only to non-U.S. persons and not offered to U.S. persons from the U.S. Person Categories.

<sup>14</sup> Regarding the circumstances in which a majority of the owners of an entity are considered to be U.S. persons with unlimited responsibility for the obligations and liabilities of the legal entity, see the Interpretive Guidance at pp. 45312-13.

- (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).