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August 24, 2023

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union

Dear Mr. Kirkpatrick:

The Institute of International Bankers (“**IIB**”), International Swaps and Derivatives Association (“**ISDA**”) and Securities Industry and Financial Markets Association (“**SIFMA**”, and together with IIB and ISDA, the “**Associations**”)¹ appreciate the opportunity to comment on the above-captioned notice by the Commodity Futures Trading Commission (“**CFTC**” or “**Commission**”) regarding an application submitted by the Associations on behalf of registered nonbank swap dealers² (“**nonbank SDs**”) domiciled in the French Republic (“**France**”) and Federal Republic of Germany (“**Germany**”) and subject to capital and financial reporting requirements of the European Union (“**EU**”) (“**EU nonbank SDs**”) requesting that the CFTC determine that EU nonbank SDs may comply with certain capital and financial reporting requirements under the Commodity Exchange Act (“**CEA**”) and Rules 23.101 and 23.105(d)–(e) thereunder (the “**Commission Capital & Reporting Requirements**”)³ via compliance with corresponding capital and financial reporting requirements in the EU (the “**EU Capital & Reporting Requirements**”), and the proposed order (the “**EU Order**”) providing for the conditional substituted compliance in connection with the application (together, the “**Proposal**”).⁴

¹ See Appendix for more information on the Associations.

² As used herein, a “nonbank” SD refers to an SD that does not have a Prudential Regulator as defined in Section 1a(39) of the CEA.

³ See *Capital Requirements for Swap Dealers and Major Swap Participants*, 85 FR 57462 (Sept. 15, 2020).

⁴ See *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and*

The Associations support the Proposal and agree with the Commission’s overall analysis of and determination of comparability of the Commission’s Capital & Reporting Requirements and the EU Capital & Reporting Requirements. The Proposal reflects a thoughtful, holistic approach to substituted compliance. The Proposal includes requests for comment on several specific questions, which the Associations address below.

I. The EU Capital & Reporting Requirements’ Minimum Capital Levels Reflect Similar Regulatory Concerns & Lead to Comparable Regulatory Outcomes as the Commission’s Capital & Reporting Requirements

The Commission seeks public comment on whether the minimum capital requirements under the EU Capital & Financial Reporting Requirements are comparable in purpose and effect to those under the Commission’s requirements. Specifically, the Commission seeks comment on whether the requirements under the EU Capital & Reporting Requirements that EU nonbank SDs calculate an operational risk exposure as part of the firm’s total risk exposure amount and meet separate liquidity requirements are sufficiently comparable in purpose and effect to the CFTC’s requirement for a nonbank SD to hold regulatory capital equal to or greater than 8 percent of its uncleared swap margin amount.⁵

The Commission notes that “[t]he intent of the minimum capital requirement based on a percentage of the nonbank SD’s uncleared margin was to establish a minimum capital requirement that would help ensure that the nonbank SD meets all of its obligations as a SD to market participants, and to cover potential operational risk, legal risk, and liquidity risk in addition to the risks associated with its trading portfolio.”⁶ The Associations believe the EU Capital & Reporting Requirements’ minimum capital levels are sound, reflect similar regulatory concerns and lead to comparable regulatory outcomes as the Commission Capital & Reporting Requirements.

The EU’s capital framework imposes bank-like capital requirements that, consistent with the Basel Committee on Banking Supervision (“BCBS”) international framework for bank capital requirements, requires an EU nonbank SD to calculate the firm’s total risk exposure amount comprised of risk weighted on-balance sheet and off-balance sheet assets and exposures. The categories of risk charges include those reflecting market risk, credit risk, settlement risk, credit value adjustment (“CVA”) risk of OTC derivatives, and operational risk. EU nonbank SDs are required to hold and maintain regulatory capital in the form of qualifying common equity tier 1 capital, additional tier 1 capital, and tier 2 capital that in aggregate totals or exceeds 8 percent of the total risk exposure amount. In addition, EU nonbank SDs are required to maintain a capital conservation buffer of common equity tier 1 capital equal to 2.5 percent on the

Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union, 88 Fed. Reg. 41774 (June 27, 2023).

⁵ See *Id.* at 41795.

⁶ See *Id.* at 41788.

firm's total risk-weighted assets, separate and independent of the common equity tier 1 capital used to meet the requirement within the 8 percent core capital requirement.

EU nonbank SDs are also subject to a leverage ratio floor, which requires each firm to maintain tier 1 capital (aggregate common equity tier 1 capital and additional tier 1 capital) of at least 3 percent of total on-balance sheet and off-balance sheet exposure without regard to risk weighting. This requirement is intended to prevent excessive leverage and complements the risk-based minimum capital requirements.

EU capital requirements also include liquidity requirements that are designed to ensure that an SD has sufficient liquidity to fund their operations over various time horizons, including making timely payments to customers and counterparties. There are three types of requirements: (1) hold sufficiently liquid assets to meet expected obligations under stress for 30 days; (2) a stable funding requirement under which firms must hold diverse stable instruments sufficient to meet long-term obligations under normal and stressed conditions; and (3) maintain robust strategies, policies, processes, and systems for identification of liquidity risk over appropriate time horizons, including intra-day.

In addition, EU member states may require EU nonbank SDs to satisfy a firm-specific minimum requirement for own funds and eligible liabilities (“**MREL**”) if they meet certain requirements. The MREL requirement is separate from the minimum capital requirements imposed on EU nonbank SDs described above and is designed to ensure that firms, including the EU nonbank SDs subject to the requirement, maintain, at all times, sufficient eligible instruments to facilitate the implementation of the preferred resolution strategy. The MREL is expressed as two ratios that have to be met in parallel: (i) a percentage of the entity's total risk exposure amount, and (ii) a percentage of the entity's total leverage ratio exposure measure.

Further, EU capital requirements impose an additional supplemental standard of total loss absorbing capacity (“**TLAC**”) for global systemically important institution (“**G-SII**”) entities identified as resolution entities globally and require such entities to maintain a risk-based capital and eligible liabilities ratio of 18 percent of the entity's total risk exposure amount and a non-risk-based capital and eligible liabilities ratio of 6.75 percent of the firm's total leverage ratio exposure measure. In addition, “material subsidiaries” of non-EU G-SIIs, including subsidiaries of U.S. global systemically important banks, that are not resolution entities are required to maintain MREL equal to 90 percent of the foregoing as applied to their parent entity at all times.

Considering all of the above, although the EU capital framework does not have a direct analogue to the 8 percent uncleared swap margin requirement, it has various other measures that achieve the same regulatory objective of ensuring that an SD maintains an amount of capital that is sufficient to cover the full range of risks an EU nonbank SD may face.

A. Similar Analysis Applies to Pending Substituted Compliance Applications for Japan, Mexico and the UK

The Associations believe a similar analysis leads to the same answer in reference to the currently pending capital substituted applications for Japan, Mexico and the United Kingdom (“UK”). As we noted in our responses to the Commission’s proposed orders and requests for comment in regard to the capital frameworks for Japan and Mexico, although those two regimes are not identical to the Commission’s and do not include an 8% of swap margin requirement, we support the finding that taken as a whole, they both ensure the same regulatory objective of ensuring nonbank SDs maintain sufficient capital to cover the full range of risks⁷.

Further, as noted in our submitted application on the UK capital regime, in calculating its risk weighted assets for purposes of the framework’s risk-based ratios, a UK nonbank SD must incorporate risk exposure amounts composed of market, credit, settlement, CVA, and operational risk. Because they cover the full range of a firm’s exposures, not just those related to swaps, these exposure amounts will generally yield capital requirements that substantially exceed 8 percent of the SD’s uncleared swap margin amount. In addition, the UK framework mandates a leverage ratio floor that, similar to the uncleared swap margin requirement, is based principally on volume and counterparties without regard to risk-weighting. UK SDs are also subject to comprehensive liquidity requirements that are designed to ensure that a SD has sufficient liquid assets to meet its ongoing obligations. As a result, although the UK capital framework does not have a direct analogue to the 8 percent uncleared swap margin requirement, it has various other measures that achieve the same regulatory objectives.⁸

II. Technical Comments on Notice Filing Conditions: Current Language Might Require Regulatory Filing Prior to Discovery of Triggering Event

In its proposed order, the Commission requires an EU nonbank SD to comply with certain specified EU laws and regulations, as well as enumerated conditions, to be able to rely on substituted compliance. Below, the Associations provide technical comments on two of those conditions, numbers 21 and 22, addressing practical challenges of the current wording, which could require notification prior to the discovery of the relevant failure. Condition 15 of the proposed Mexico order already contains our suggested language, “when it knows” to address that practical challenge.⁹ The

⁷ See IIB, ISDA and SIFMA letter in response to the Commission’s proposal regarding Japan dated Oct. 7, 2022, and ISDA and SIFMA letter in response to the Commission’s proposal regarding Mexico dated Feb. 13, 2023.

⁸ See IIB, ISDA and SIFMA Substituted Compliance Application for UK Swap Dealers from CEA Sections 4s(e)–(f) and Rules 23.101 and 23.105(d)–(e), (p)(2).

⁹ See *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores*, 87 Fed. Reg. 76374 (Dec. 13, 2022). Similar comments were made by the International Bankers Association of Japan in its letter commenting on the proposed Japan Order dated Oct. 6, 2022 (p.7).

Associations have included a reference to condition 15 in the Mexico proposal in the below chart.

No.	Condition
Mexico condition 15	The Mexican nonbank SD files a notice with the Commission and NFA within 24 hours of when it knows that its regulatory capital is below 120 percent of the minimum capital requirement under the Mexican Capital Rules. The Notice must be prepared in the English language. [emphasis added]
21	The EU nonbank SD files a notice with the Commission and NFA within 24 hours of when the firm knew or should have known that its regulatory capital fell below 120 percent of its minimum capital requirement comprised of the firm's core capital requirements and any applicable capital buffer requirements. For purposes of the calculation, the 20 percent excess capital must be in the form of common equity tier 1 capital. The notice filed with Commission and NFA must be prepared in the English language.
22	The EU nonbank SD files a notice with the Commission and NFA within 24 hours if it fails <u>of when it knows it has failed</u> to make or keep current the financial books and records. The notice must be prepared in the English language.

The Associations also recommend tailoring the requirements in condition 25 below to actual material changes to the EU rules as they apply to EU nonbank SDs.

No.	Condition
25	The EU nonbank SD or an entity acting on its behalf notifies the Commission of any material changes to the information submitted in the application for capital comparability determination, including, but not limited to, material changes to the EU Capital Rules or EU Financial Reporting Rules imposed on EU nonbank SDs, the ECB or relevant EU Member State authority's supervisory authority or supervisory regime over EU nonbank SDs, and proposed or final material changes to the EU Capital Rules or EU Financial Reporting Rules as they apply to EU nonbank SDs;

III. Compliance Date: At Least 6 Months from Issuance of Comparability Order

The Commission also seeks public comment on the compliance dates for the reporting conditions that the EU Order imposes on EU nonbank SDs. The Associations respectfully request the Commission set the compliance date at least six months following the issuance of the final comparability determination order. We believe a six-month period is necessary to adequately prepare for compliance with the reporting conditions.

* * *

The Associations appreciate the opportunity to comment on the Proposal and the Commission's consideration of our views. We look forward to continuing dialogue with the Commission regarding substituted compliance. If you have questions or would like additional information, please contact the undersigned.

Very truly yours,



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IIB



Steven Kennedy
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Kyle L Brandon
Managing Director, Head of Derivatives Policy
SIFMA

cc: The Honorable Rostin Behnam, Chairman
The Honorable Kristin N. Johnson, Commissioner
The Honorable Christy Goldsmith Romero, Commissioner
The Honorable Summer K. Mersinger, Commissioner
The Honorable Caroline D. Pham, Commissioner
Ms. Amanda Olear, Director, Market Participants Division
Mr. Thomas Smith, Deputy Director
Mr. Rafael Martinez, Associate Director
Ms. Liliya Bozhanova, Special Counsel

Appendix

The **Institute of International Bankers** represents internationally headquartered financial institutions from over thirty-five countries around the world doing business in the United States. 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 enhance the depth and liquidity of U.S. financial markets and contribute greatly to the U.S. economy through direct employment of U.S. citizens, as well as through other operating and capital expenditures.

Since 1985, **ISDA** has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 79 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: www.isda.org. Follow us on [Twitter](#), [LinkedIn](#), [Facebook](#) and [YouTube](#).

SIFMA 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>.