

Comparing Cross-Border Swaps Regulation Version 2.0 with the Status Quo

October 22, 2018

On October 1, 2018, Chairman J. Christopher Giancarlo of the Commodity Futures Trading Commission (the “CFTC”) released a white paper entitled “[Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation](#)” (the “White Paper”). Please [click here](#) to read the full alert memorandum regarding the White Paper.

As a supplement to the alert memorandum, the below chart compares the White Paper’s recommendations with the status quo contained in the cross-border guidance published by the CFTC in July 2013 (the “2013 Guidance”)¹ and subsequent CFTC rulemakings, staff advisories, and staff no-action letters. The chart covers the same five areas addressed in the White Paper: (1) registration of non-U.S. central counterparties (“CCPs”); (2) registration of non-U.S. trading venues; (3) registration of non-U.S. swap dealers (“SDs”); (4) cross-border application of mandatory clearing and trade execution requirements; and (5) regulation of swap transactions between non-U.S. counterparties that are arranged, negotiated, or executed by U.S.-located personnel or agents (“ANE Transactions”).

Although the CFTC published a cross-border proposal in October 2016 (the “2016 Proposal”)², such proposal was never adopted and therefore is not covered herein. Further, as noted in the alert memorandum, the White Paper rejects several aspects of the 2016 Proposal, including proposals to expand the extraterritorial application of SD and major swap participant registration requirements.

A glossary of terms used herein can be found at the end of this client alert.

If you have any questions concerning this alert, please reach out to your regular firm contact or the following authors

NEW YORK

Colin D. Lloyd
+1 212 225 2809
clloyd@cgsh.com

Reshama J. Patel
+1 212 225 2012
repatel@cgsh.com

¹ Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013).

² Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 Fed. Reg. 71946 (Oct. 18, 2016).

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| REQUIREMENT | U.S. | | COMPARABLE JURISDICTIONS | | NON-COMPARABLE JURISDICTIONS | |
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| | Status Quo | White Paper | Status Quo | White Paper | Status Quo | White Paper |
| Registration of non-U.S. CCPs | A CCP located in the United States is required to register with the CFTC as a DCO. | A CCP located in the United States should continue to be required to register with the CFTC as a DCO. | <p>A non-U.S. CCP that provides clearing services for U.S. customers must register with the CFTC as a DCO. In 2016, the CFTC relieved certain clearing organizations registered in the EU from certain requirements applicable to DCOs through no-action relief and a comparability determination.</p> <p>The CFTC currently assesses comparability of home country regulation based on consistency with the PFMIs. The CFTC permits a PFMI-compliant non-U.S. CCP to qualify for an exemption from DCO registration when providing access to U.S. persons as long as such a CCP does not permit access to U.S. “customers” and complies with certain reporting and information sharing conditions. In August 2018, the CFTC proposed rules to codify the policies and procedures for a clearing organization located outside of the United States to obtain an exemption from registration as a DCO.</p> | <p>A non-systemically important non-U.S. CCP located in a Comparable Jurisdiction (i.e., one that regulates the CCP in a manner consistent with the PFMIs) would be able to provide clearing services to U.S. customers through a non-U.S. clearing member, without the non-U.S. CCP or the non-U.S. clearing member having to register as a DCO or FCM, respectively.</p> <p>However, a non-U.S. CCP in a Comparable Jurisdiction that the CFTC deems to pose substantial risk to the U.S. financial system should have to register as a DCO with the CFTC, with the CFTC’s regulatory and supervisory focus on the CCP’s U.S.-facing business</p> | A non-U.S. CCP that provides clearing services for U.S. customers must register with the CFTC as a DCO. | <p>Generally, the White Paper recommends that a non-U.S. CCP located in a Non-Comparable Jurisdiction should register with the CFTC as a DCO if it provides clearing services for U.S. persons, either as self-clearing members or as customers.</p> <p>However, the White Paper recommends that the CFTC provide relief from DCO registration to a non-U.S. CCP in a Non-Comparable Jurisdiction if the CCP’s only U.S. members are Foreign Branches that are registered as SDs, provided that certain conditions are met.</p> |
| Registration of Non-U.S. Trading Venues | A multilateral swaps trading venue located in the United States is | A multilateral swaps trading venue located in the United States | A non-U.S. trading venue that allows U.S. persons or persons located in the United States to trade or execute swaps on or | A non-U.S. trading venue in a Comparable Jurisdiction would be exempt from registration as a SEF. Such | A non-U.S. trading venue that allows U.S. persons or persons located in the | A non-U.S. trading venue located in a Non-Comparable Jurisdiction would |

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| | required to register as a SEF or DCM. | would continue to be required to register as a SEF or DCM. | <p>pursuant to the rules of the platform, either directly or indirectly through an intermediary, must register as a SEF or DCM.</p> <p>The CFTC has noted that it would consider alternative compliance arrangements for trading venues registered in Comparable Jurisdictions.</p> <p>Late in 2017, the CFTC granted an order of exemption to certain MTFs and OTFs authorized within the EU and listed in an appendix to the order from the SEF registration requirement.</p> | a venue would be allowed to have U.S. participants, although such U.S. participants would still need to be eligible contract participants. | United States to trade or execute swaps on or pursuant to the rules of the platform, either directly or indirectly through an intermediary, must register as a SEF or DCM. | continue to be required to register as a SEF or DCM if U.S. persons have access, either directly or indirectly through a non-U.S. intermediary, to the trading venue, subject to a materiality threshold. |
| Registration of Non-U.S. SDs | A U.S. person must count all dealing swaps toward the <i>de minimis</i> threshold. | A U.S. person would continue to count all dealing swaps toward the <i>de minimis</i> threshold. | <p>A “guaranteed entity” and “conduit affiliate” (each term as used in the 2013 Guidance) of a U.S. person must count all dealing swaps toward the <i>de minimis</i> threshold.</p> <p>A non-U.S. person that is not a guaranteed or conduit affiliate must count all dealing activity with a U.S. person and a guaranteed entity toward the <i>de minimis</i> threshold except those swaps with (1) a Foreign Branch of a registered SD; (2) a guaranteed affiliate that is registered as an SD or operating under the <i>de minimis</i> threshold and affiliated with a registered SD; and (3) a guaranteed</p> | <p>A Guaranteed Entity would continue counting all dealing swaps toward the <i>de minimis</i> threshold.</p> <p>An FCS or Other Non-U.S. Person would only be required to count dealing swaps with a U.S. person or a Guaranteed Entity toward the <i>de minimis</i> threshold, except those swaps with: (1) a Foreign Branch of a registered SD; (2) a Guaranteed Entity that is registered as, or affiliated with, a registered SD; and (3) a Guaranteed Entity whose U.S. guarantor is a non-financial entity.</p> | Same as status quo for Comparable Jurisdictions. | <p>A Guaranteed Entity would continue to count all dealing swaps toward the <i>de minimis</i> threshold.</p> <p>An Other Non-U.S. Person would count dealing swaps with a U.S. person and a Guaranteed Entity toward the <i>de minimis</i> threshold, except those swaps with: (1) a Foreign Branch of a registered SD; (2) a Guaranteed Entity that is registered as, or affiliated with, a registered SD; and (3) a Guaranteed Entity whose U.S. guarantor is a non-financial entity.</p> |

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| | | | <p>affiliate whose U.S. guarantor is a non-financial entity.</p> <p>The 2013 Guidance also provides an exception for swaps executed anonymously on a registered SEF, DCM, or FBOT and cleared by a registered or exempt DCO.</p> | <p>There would continue to be an exception for swaps executed anonymously on a registered SEF, DCM, or FBOT and cleared by a registered or exempt DCO.</p> | | <p>There would continue to be an exception for swaps executed anonymously on a registered SEF, DCM, or FBOT and cleared by a registered or exempt DCO.</p> <p>The proposed treatment of FCSs is left open for discussion.</p> |
| Cross-Border Application of Mandatory Clearing and Trade Execution Requirements | <p>A Rule 50.4 Swap that a U.S. person engages in is subject to the CEA's mandatory clearing requirement and, if made "available to trade" by a SEF or DCM, the trade execution requirement as well, regardless of the extent of its counterparty's U.S. nexus, unless another exception or exemption applies.</p> | <p>A Rule 50.4 Swap that a U.S. person engages in would continue to be subject to the CEA's mandatory clearing requirement and, if made "available to trade" by a SEF or DCM, the trade execution requirement as well, regardless of the extent of its counterparty's U.S. nexus, unless another exception or exemption applies.</p> | <p>A Rule 50.4 Swap that a non-U.S. person engages in is subject to the CEA's mandatory clearing requirement and, if made "available to trade" by a SEF or DCM, the trade execution requirement as well, unless another exception or exemption applies.</p> <p>The CFTC may make a substituted compliance determination for swaps between: (1) a non-U.S. person that is registered as an SD and a Foreign Branch or a guaranteed or conduit affiliate; (2) a Foreign Branch that is registered as an SD and a non-U.S. person; and (3) a guaranteed or conduit affiliate and another guaranteed or conduit affiliate.</p> <p>The CEA's mandatory clearing and trade execution requirements do not apply at all for swaps between a non-U.S.</p> | <p>A Guaranteed Entity, FCS, and Other Non-U.S. Person could rely on substituted compliance with respect to the CEA's mandatory clearing and trade execution requirements. A non-U.S. person should look to local rules in determining whether a particular swap needs to be cleared or executed on a trading venue.</p> | <p>Same as status quo for Comparable Jurisdictions.</p> | <p>A Rule 50.4 Swap that a Foreign Branch engages in would be subject to the CEA's clearing requirement, regardless of the extent of its counterparty's U.S. nexus, unless another exception or exemption applies.</p> <p>A Rule 50.4 Swap that a Guaranteed Entity engages in would be subject to the CEA's clearing requirement, regardless of the extent of its counterparty's U.S. nexus, unless another exception or exemption applies or the swap is with an Other Non-U.S. Person and is subject to WGMR Margin Requirements.</p> <p>A Rule 50.4 Swap that an Other Non-U.S. Person engages in would be subject to the CEA's</p> |

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| | | | <p>person registered as an SD and a guaranteed or conduit affiliate.</p> <p>Notably, the CFTC has not yet found any foreign jurisdictions to be comparable for the purposes of the swap clearing requirement.</p> <p>For a swap between a Foreign Branch and a non-U.S. person that is not a guaranteed or conduit affiliate that is executed in a jurisdiction other than Australia, Canada, the EU, Hong Kong, Japan and Switzerland, counterparties may comply with Transaction-Level Requirements applicable in the jurisdiction in which the Foreign Branch is located, provided that, in the aggregate, such swaps fall below 5 percent of the aggregate notional value of swaps entered into by the U.S. bank as a whole.</p> | | | <p>clearing requirement if such Rule 50.4 Swap is with: (1) a U.S. person; and (2) a Guaranteed Entity, unless such swap is subject to WGMR Margin Requirements.</p> <p>There would be a materiality threshold for swaps between (1) a Foreign Branch, Guaranteed Entity or Other Non-U.S. Person and (2) an Other Non-U.S. Person.</p> <p>The treatment of an FCS and the applicability and scope of the CEA's trade execution requirement in a Non-Comparable Jurisdiction are both left open for discussion.</p> |
| ANE Transactions | N/A | N/A | <p>A staff advisory provided that a non-U.S. SD (whether an affiliate or not of a U.S. person) that "regularly" uses personnel or agents located in the United States to arrange, negotiate, or execute a swap with a non-U.S. person would be required to comply with Transaction-Level Requirements, without substituted compliance.</p> | <p>All swaps "executed" in the United States would be subject to the CEA's mandatory clearing and trade execution requirements.</p> <p>ANE Transactions would not count toward the <i>de minimis</i> threshold for a non-U.S. dealer located in a Comparable Jurisdiction.</p> | Same as status quo for Comparable Jurisdictions. | <p>All swaps "executed" in the United States would be subject to CEA's mandatory clearing and trade execution requirements.</p> <p>Although the White Paper does not address the matter, one might infer that a non-U.S. dealer in a Non-Comparable</p> |

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| | | | <p>In July 2017, the CFTC extended time-limited no-action relief for the applicability of certain Transaction-Level Requirements for a non-U.S. SD when entering into a swap with a non-U.S. person that is not a guaranteed or conduit affiliate of a U.S. person using personnel or agents located in the United States to arrange, negotiate, or execute such swap.</p> | <p>If a third-party intermediary located in the United States arranges or negotiates a swap between non-U.S. counterparties, that intermediary would register as a SEF, not an introducing broker.</p> <p>If a U.S.-based agent/employee of a non-U.S. SD located in the United States arranges or negotiates a swap with a non-U.S. person, such a swap would be subject to the CEA's mandatory clearing and trade execution requirements. However, if the non-U.S. SD is subject to regulation in a Comparable Jurisdiction, the White Paper notes that there may be a basis to defer to the non-U.S. jurisdiction.</p> | | <p>Jurisdiction would count ANE Transactions toward the <i>de minimis</i> threshold.</p> <p>If a third-party intermediary located in the United States arranges or negotiates a swap between non-U.S. counterparties, that intermediary would register as a SEF, not an introducing broker.</p> <p>If a U.S.-based agent/employee of a non-U.S. SD located in the United States arranges or negotiates a swap with a non-U.S. person, such a swap would be subject to the CEA's mandatory clearing and trade execution requirements.</p> |

GLOSSARY

| <u>Term/Abbreviation</u> | <u>Definition</u> |
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| CEA | means the Commodity Exchange Act of 1936, as amended. |
| Comparable Jurisdiction | means a non-U.S. jurisdiction that has adopted reforms comparable to the CFTC's regime. |
| DCM | means a designated contract market. |
| DCO | means a derivatives clearing organization. |
| E.U. | means the European Union. |
| FBOT | means a foreign board of trade. |
| FCM | means a futures commission merchant. |
| FCS | means, as used in the White Paper, a foreign consolidated subsidiary, which is a non-U.S. person in which an ultimate parent entity that is a U.S. person ("U.S. ultimate parent entity") has a controlling financial interest, in accordance with U.S. Generally Accepted Accounting Principles, such that the U.S. ultimate parent entity includes the non-U.S. person's operating results, financial position, and statement of cash flows in the U.S. ultimate parent entity's consolidated financial statements, in accordance with U.S. Generally Accepted Accounting Principles. |
| Foreign Branch | means a foreign branch of a U.S. bank. |
| Guaranteed Entity | means a non-U.S. person whose swaps are guaranteed by a U.S. person. |
| Qualifying MTF | means a qualifying MTF overseen by competent authorities designated by European Union Member States. |
| MTF | means a multilateral trading facility. |
| Non-Comparable Jurisdiction | means a non-U.S. jurisdiction that has not adopted reforms comparable to the CFTC's regime. |
| OTF | means an organised trading facility. |
| Other Non-U.S. Person | means a non-U.S. dealer that is neither a Guaranteed Entity nor an FCS. |
| PFMIs | means the Principles for Financial Market Infrastructures. |
| Rule 50.4 Swap | means a swap that is subject to the CEA's mandatory clearing requirement. |
| SEF | means a swap execution facility. |
| Transaction-Level Requirements | means the transaction-level requirements identified in the 2013 Guidance. |
| WGMR Margin Requirements | means the uncleared swap initial and variation margin requirements that are consistent with the standards established by the Basel Committee on Banking Supervision – International Organization of Securities Commissions Working Group on Margining Requirements. |