

CFTC Finalizes New Cross-Border Swap Rules, But How Much Has Changed?

July 29, 2020

On July 23, 2020, the Commodity Futures Trading Commission (the “**CFTC**”), in a 3 to 2 vote, finalized rules (the “**Final Rules**”) that superseded certain aspects of the CFTC’s previous policy with respect to the cross-border application of swaps regulations under Commodity Exchange Act (“**CEA**”) Section 2(i), as set forth in the guidance published by the CFTC in July 2013 (the “**2013 Guidance**”).¹

More specifically, the Final Rules, largely consistent with the preceding notice of proposed rulemaking (“**Proposed Rules**”),² classify swap market participants (*e.g.*, U.S. person, guaranteed entity, significant risk subsidiary, foreign branch, U.S. branch), address which cross-border or extraterritorial swaps or swap positions a person would need to consider when determining whether it needs to register with the CFTC as a swap dealer (“**SD**”) or major swap participant (“**MSP**” and, together with SDs, “**Swap Entities**”), categorize certain swaps requirements applicable to Swap Entities for purposes of how they apply to cross-border or extraterritorial swaps transactions, and create a framework for the CFTC to permit Swap Entities to substitute compliance with comparable foreign requirements.

The Final Rules address most, but not all, of the requirements applicable to Swap Entities under Title VII of the Dodd-Frank Act. The unaddressed requirements include: mandatory clearing, mandatory trade execution, real-time public reporting, swap data repository reporting, large trader reporting, margin for uncleared swaps, capital, and financial records and reporting. Several of these requirements (mandatory clearing, mandatory trade execution, real-time public reporting, swap data repository reporting, large trader reporting) remain subject to the 2013 Guidance. The remaining requirements have been addressed by other CFTC rulemakings, including a capital rule that the CFTC finalized the day before it adopted the Final Rules. In part to address these gaps, contemporaneously with adopting the Final Rules, the CFTC adopted a policy statement and issued a staff no-action letter³ to provide relief to non-U.S. SDs from mandatory clearing, mandatory trade execution and real-time reporting for certain transactions with non-U.S. counterparties that are arranged, negotiated or executed on behalf of non-U.S. SDs by U.S.-located personnel or agents (“**ANE Transactions**”). This no-action letter supersedes prior staff guidance published in November 2013 (“**Advisory 13-69**”) ⁴ and related no-action relief.⁵ Outside of this area, however, and depending on what further actions the CFTC takes over the course of the next year (if any), market participants will need to apply different cross-border frameworks to their swap activities corresponding to different CFTC rules.

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

NEW YORK

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

Brian J. Morris
+1 212 225 2795
bmorris@cgsh.com

Wankun (Charles) Wang
+1 212 225 2798
wawang@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 Certain Requirements Applicable to [SDs] and [MSPs], 85 FR 952 (Jan. 8, 2020).

³ CFTC No-Action Letter No. 20-21 (July 23, 2020).

⁴ CFTC Staff Advisory No. 13-69 (Nov. 14, 2013).

⁵ See, *e.g.*, CFTC No-Action Letter No. 17-36 (July 25, 2017).



OVERVIEW OF THE FINAL RULES

Since July 2013, the cross-border application of the CFTC's swaps rules has been governed by the 2013 Guidance, a policy statement that, unlike a formal rule, was not legally binding on the CFTC or market participants. Prior to adoption of the Final Rules, the CFTC had frequently sought to revisit the 2013 Guidance, including in a white paper published by former Chairman J. Christopher Giancarlo in 2018,⁶ and previously in a rule proposal issued in late 2016 under then-Chairman Timothy Massad (the "**2016 Proposal**").⁷ As noted above, the Final Rules supersede most aspects of the 2013 Guidance, but not with respect to mandatory clearing, mandatory trade execution, real-time public reporting, swap data repository reporting, or large trader reporting requirements.

The key elements of the Final Rules are as follows:

Key Definitions. The Final Rules eliminate the concept of a "conduit affiliate" from the 2013 Guidance and replace it with a new class of entity defined as a "significant risk subsidiary" ("**SRS**") The Final Rules also clarify and streamline a number of key definitions from the 2013 Guidance, such as "U.S. person" and "guarantee," mostly to harmonize with later CFTC and Securities and Exchange Commission ("**SEC**") rules. The Final Rules also, for the first time, introduce new definitions relating to U.S. branches of non-U.S. banks. In addition, until December 31, 2027, the Final Rules will permit continued reliance on "U.S. person" and "guarantee" representations pursuant to the 2013 Guidance or the CFTC's uncleared margin requirements ("**Cross-Border Margin Rules**")⁸ that a Swap Entity received prior to the Final Rules' effective date.

Registration Thresholds. The Final Rules largely codify the 2013 Guidance with respect to which cross-border swaps transactions and positions a person would need to consider when determining whether it needs to register as a Swap Entity with the CFTC, subject to conforming changes appropriate to reflect the revised definitions noted above.

ANE Transactions. The CFTC will not apply the swaps-related requirements addressed in the Final Rules to ANE Transactions, so long as neither non-U.S. counterparty is a significant risk subsidiary or a non-U.S. person guaranteed by a U.S. person (a "**Guaranteed Entity**"). As noted above, the CFTC also issued a policy statement and staff no-action relief addressing the treatment of ANE Transactions for purposes of mandatory clearing, mandatory trade execution, and real-time public reporting requirements.

Categorization of Swap Entity Requirements. The Final Rules categorize certain of the entity-level and transaction-level requirements from the 2013 Guidance into Group A, B, or C requirements. Again, here the Final Rules mostly codify the 2013 Guidance, except for: (a) clarifying the treatment of certain ancillary recordkeeping rules; and (b) grouping elective initial margin segregation rules with external business conduct rules.

Application of Swap Entity Requirements. The Final Rules mostly codify the treatment of Swap Entity requirements under the 2013 Guidance, except for: (a) modifying the so-called "emerging market" exception for foreign branches of U.S. Swap Entities so that it applies more flexibly to branches not eligible for substituted compliance but does not apply to swaps with other Swap Entities; (b) expanding the extent to which daily trading

⁶ CFTC Chairman J. Christopher Giancarlo, "Cross Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-US Regulation" (Oct. 1, 2018), available at: https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf. Our Alert Memorandum regarding this white paper can be found at <https://www.clearygotlieb.com/-/media/files/alert-memos-2018/cftc-chairman-proposes-crossborder-swaps-regulation-version.pdf>.

⁷ Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to [SDs] and [MSPs], 81 Fed. Reg. 71946 (Oct. 18, 2016).

⁸ Margin Requirements for Uncleared Swaps for [SDs] and [MSPs]—Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34818 (May 31, 2016).

records, trade confirmation, portfolio reconciliation and compression, and trading relationship documentation rules apply to a Swap Entity that is a Guaranteed Entity, subject to an exception modeled on the modified foreign branch “emerging market” exception; (c) treating SRS Swap Entities like Swap Entities that are Guaranteed Entities; and (d) modifying the treatment of swaps booked to the U.S. branch of a non-U.S. Swap Entity, which are subject to a hybrid between the treatment of U.S. and non-U.S. Swap Entities.

Recordkeeping. The Final Rules require Swap Entities to create a record of their compliance with the Final Rules and to retain such records.

Compliance Date and Transition Issues. The effective date and compliance date for the Final Rules will be 60 days and 365 days after the date of publication in the Federal Register, respectively. Market participants are permitted to rely on the exceptions to the Group B or C requirements following the effective date of the Final Rules, provided that they comply with the Final Rules’ recordkeeping requirements. Otherwise, swaps entered into prior to the Final Rules’ compliance date will not be subject to the Final Rules.

BACKGROUND

The CFTC's 2013 Guidance interpreted and applied Section 2(i) of the CEA. Section 2(i) provides that the CEA's swaps-related provisions shall not apply to activities outside the United States unless those activities (1) have a direct and significant connection with activities in, or effect on, U.S. commerce or (2) contravene CFTC anti-evasion rules.

Under the 2013 Guidance, the extent to which the CFTC's swaps regulations apply to a swap depended on whether the swap was entered into by a U.S. person, a foreign branch of a U.S. bank ("**foreign branch**"), a guaranteed affiliate of a U.S. person, or a conduit affiliate of a U.S. person.⁹ The 2013 Guidance included definitions for these categories of market participants, addressed how SD and MSP registration requirements applied to swaps entered into by each category, divided most of the remaining swaps regulations into "Entity-Level Requirements" or "Transaction-Level Requirements," and addressed how those requirements applied to swaps entered into by each category. The 2013 Guidance also addressed when the CFTC would permit substituted compliance with comparable foreign regulation and how it would determine comparability.

The CFTC subsequently issued comparability determinations, exemptions, staff no-action letters and staff advisories that have supplemented the 2013 Guidance, including Advisory 13-69 and a series of related no-action letters that address ANE Transactions.¹⁰

In May 2016, the CFTC adopted the Cross Border Margin Rules, which supersede the 2013 Guidance with respect to the cross-border application of margin

requirements for uncleared swaps of Swap Entities that do not have a prudential regulator.¹¹ The Cross-Border Margin Rules include a revised "U.S. person" definition, a revised "guarantee" definition, and a new category for foreign consolidated subsidiaries ("**FCSs**")¹² of U.S. persons. The Cross-Border Margin Rules also expanded the extent to which margin requirements apply extraterritorially to Guaranteed Entities and FCSs and revised the extent to which the CFTC permits substituted compliance with comparable foreign margin rules.

In October 2016, the CFTC published the 2016 Proposal, which proposed to (1) expand the extraterritorial application of SD and MSP registration requirements by treating Foreign Branches, Guaranteed Entities and FCSs like U.S. persons and (2) apply a subset of Swap Entity external business conduct standards to ANE Transactions.

On October 1, 2018, former Chairman J. Christopher Giancarlo 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 "**Giancarlo White Paper**"). The Giancarlo White Paper made proposals in a number of areas of cross-border regulation, including: registration of non-U.S. central counterparties, trading venues and SDs; cross-border application of mandatory clearing and trade execution requirements; and regulation of ANE Transactions.

Finally, on December 18, 2019, the Commission published the Proposed Rules.

⁹ The 2013 Guidance defined a "conduit affiliate" to mean a non-U.S. person that satisfies certain factors, including whether the non-U.S. person: (1) is a majority-owned affiliate of a U.S. person; (2) is controlling, controlled by or under common control with the U.S. person; (3) has financial results that are included in the consolidated financial statements of the U.S. person; and (4) 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. 2013 Guidance, 78 Fed. Reg. at 45359.

¹⁰ See, e.g., CFTC No-Action Letter No. 17-36 (July 25, 2017).

¹¹ Cross-Border Margin Rules, 81 Fed. Reg. 34818 (May 31, 2016).

¹² An FCS is a non-U.S. person in which an ultimate parent entity that is a U.S. person has a controlling financial interest, in accordance with U.S. Generally Accepted Accounting Principles ("**U.S. GAAP**"), 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. GAAP. See 17 C.F.R. § 23.160(a)(1).

KEY DEFINITIONS

(1) Overview

Under the 2013 Guidance, whether and when transactions or counterparties are subject to CFTC swaps regulations depends in part on certain definitions outlined in the 2013 Guidance, including the definitions of U.S. person, guaranteed affiliate and foreign branch. The Final Rules revise many of those definitions, and introduce new ones.

The Final Rules, consistent with the Commission's approach in other contexts, permit a person to rely on a written representation from its counterparty that the counterparty does or does not satisfy the criteria for one or more of the definitions described below, unless such person knows or has reason to know that the representation is not accurate.

Until December 31, 2027, the Final Rules permit reliance on representations with respect to a counterparty's "U.S. person" or "guarantee" status obtained pursuant to the Cross-Border Margin Rules or the 2013 Guidance prior to the effective date of the Final Rules.¹³ However, the CFTC also noted that the best practice is to obtain updated representations as soon as possible, and counterparties onboarded after the Final Rules effective date will need to provide representations that conform to the Final Rules (for purposes of the requirements covered by the Final Rules), the 2013 Guidance (for purposes of the requirements still subject to the 2013 Guidance), and the Cross-Border Margin Rules (at least for Swap Entities that do not have a Prudential Regulator).

(2) U.S. Person

The Final Rules include a simplified U.S. person definition that is consistent with the definition from the SEC's parallel cross-border rules for security-based swaps.¹⁴ Specifically, the Final Rules define a U.S. person as:

- (1) A natural person resident in the United States;
- (2) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;

To harmonize the CFTC's U.S. person definition with the SEC's definition, the Final Rules define the phrase "principal place of business" as used in prong (2) above as "the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person."¹⁵ For externally managed investment vehicles, the principal place of business is the office from which the manager of the vehicle "primarily directs, controls, and coordinates the investment activities of the vehicle." Although this definition is generally consistent with the 2013 Guidance, it eliminates an additional prong of that definition capturing the location of senior personnel of a collective investment vehicle responsible for "the formation and promotion of the collective investment vehicle."¹⁶

- (3) An account (whether discretionary or non-discretionary) of a U.S. person; or

The CFTC clarified that, consistent with the parallel SEC rules, an account's U.S. person status depends on whether any U.S. person owner of the account actually incurs obligations under the swap in question, and neither the status of the fiduciary or other person managing the account, nor the discretionary or non-discretionary nature of the account, nor the status of the person at which the account is held

¹³ See CFTC Rule 23.402(d); Cross-Border Margin Rule, 81 FR at 34827; 2013 Guidance, 78 FR at 45315.

¹⁴ See 17 C.F.R. § 3a71-3(a)(4).

¹⁵ The Final Rules define "control" as "the possession, direct or indirect, of the power to direct or cause the direction of

the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise."¹⁶ 2013 Guidance, 78 FR at 45310.

or maintained, are relevant in determining the account's U.S.-person status.

- (4) An estate of a decedent who was a resident of the United States at the time of death.

The Final Rules further harmonize the CFTC's U.S. Person definition with the SEC's definition by excluding certain international financial institutions, such as the World Bank and the International Monetary Fund.¹⁷

The Final Rules also eliminate prongs that had been included in the U.S. person definition under the 2013 Guidance for pension plans for personnel at legal entities organized in the U.S. or with a principal place of business in the U.S. and trusts governed by the laws of a U.S. jurisdiction and subject to a U.S. court's primary supervision. The CFTC stated that each of these prongs is now subsumed by the prong for a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States.

The Final Rule also eliminated the 2013 Guidance's definition's prongs for collective investment vehicles majority-owned by one or more U.S. person(s) and legal entities owned by one or more U.S. person(s) who bear unlimited responsibility for the obligations and liabilities of the legal entity.¹⁸

Finally, the scope of the U.S. person definition from the Final Rules is expressly limited to its terms, rather than a non-exclusive definition as used the 2013 Guidance.

As a practical matter, elimination of the additional prongs from the 2013 Guidance will

likely have a limited impact, only reducing the scope of covered persons at the margins as persons captured by those specialized prongs will often also be captured by more generalized prongs under the Final Rules. However, the revised, simplified definition under the Final Rules makes it far easier for Swap Entities to determine their counterparties' U.S. person statuses based on externally visible factors, for example because they no longer need to determine the U.S. person ownership of collective investment vehicles.

(3) Guarantee

Consistent with the Cross-Border Margin Rule and parallel SEC rules, the Final Rules narrowed the definition of the term "guarantee" to mean an arrangement, pursuant to which one party to a swap has rights of recourse against a guarantor with respect to its counterparty's obligations under the swap. For these purposes, a party to a swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect payments from the guarantor with respect to its counterparty's obligations under the swap. Also, the term "guarantee" encompasses (1) any arrangement pursuant to which the guarantor itself has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from any other guarantor with respect to the counterparty's obligations under the swap and (2) any arrangement pursuant to which a counterparty to a swap has recourse to the guarantor for the performance of the other counterparty's obligations under the swap by virtue of the guarantor's unlimited responsibility for that other counterparty.

¹⁷ Specifically, the definition excludes the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, and their agencies and pension plans. The CFTC also interprets the exclusion to cover the "international financial institutions" that are defined in 22 U.S.C. 262r(c)(2), institutions defined as "multilateral development banks" in

the European Union's regulation on "OTC derivatives, central counterparties and trade repositories," the European Stability Mechanism, and the North American Development Bank.

¹⁸ However, as noted below, the CFTC clarified that legal entities owned by one or more U.S. person(s) who bear unlimited responsibility for the obligations and liabilities of the legal entity will be considered as having a "guarantee" from a U.S. person.

The CFTC also clarified in the Final Rules that a non-U.S. person will be considered a Guaranteed Entity only with respect to its swaps that are guaranteed by a U.S. person. Accordingly, a non-U.S. person could be a Guaranteed Entity with respect to certain swaps with certain counterparties subject to a U.S.-person guarantee, but would not be a Guaranteed Entity with respect to other swaps with other counterparties for which the non-U.S. person's swaps are not guaranteed by a U.S. person.

The definition of "guarantee" under the 2013 Guidance included not only these traditional guarantees of payment or performance of the related swaps, but also other formal arrangements that support the non-U.S. person's ability to pay or perform its swap obligations (*e.g.*, keepwells and liquidity puts, certain types of indemnity agreements, master trust agreements, liability or loss transfer or sharing agreements). In narrowing the guarantee definition, the CFTC noted that concerns arising from limiting the scope of the guarantee definition will be mitigated by the addition of the concept of a "significant risk subsidiary," as described below.

The CFTC noted that having a specific standard is preferable to an open-ended interpretation as in the 2013 Guidance's broader "guarantee" definition, which has presented many challenges, for example making it difficult for Swap Entities to determine whether their non-U.S. counterparty has a guarantee because the definition encompasses arrangements that are purely internal to the counterparty's corporate group.

(4) Significant Risk Subsidiary

As noted above, the Final Rules include a new category of non-U.S. person, an SRS. The definition captures certain "significant subsidiaries." A non-U.S. person is only considered a "significant subsidiary" if it passes at least one of following three tests for significance relative to its ultimate U.S. parent entity:¹⁹

- (1) the three-year rolling average of the subsidiary's equity capital²⁰ is equal to or greater than five percent of the three-year rolling average of its ultimate U.S. parent entity's consolidated equity capital, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year (the "equity capital significance test");
- (2) the three-year rolling average of the subsidiary's revenue is equal to or greater than ten percent of the three-year rolling average of its ultimate U.S. parent entity's consolidated revenue, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year (the "revenue significance test"); or
- (3) the three-year rolling average of the subsidiary's assets is equal to or greater than ten percent of the three-year rolling average of its ultimate U.S. parent entity's consolidated assets, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year (the "asset significance test").

This concept of a "significant subsidiary" borrows from the SEC's definition of "significant subsidiary" in Regulation S-X, as well as the Board of Governors of the Federal Reserve System ("Federal Reserve Board") in its financial statement filing requirements for foreign subsidiaries of U.S. banking organizations. The Final Rules' related definitions of subsidiary, affiliate, and control

¹⁹ The Final Rules define an "ultimate U.S. parent entity" for purposes of the significant subsidiary test as the U.S. parent entity that is not a subsidiary of any other U.S. parent entity. Despite commenters' objections, this definition encompasses U.S. parent entities that may be intermediate

entities in a consolidated corporate family with an ultimate parent entity located outside the United States.
²⁰ Equity capital includes perpetual preferred stock, common stock, capital surplus, retained earnings, accumulated other comprehensive income and other equity capital components and should be calculated in accordance with U.S. GAAP.

are also substantially similar to the definitions found in Regulation S-X.

A significant subsidiary will only be considered an SRS if:

- (1) its ultimate U.S. parent entity has more than \$50 billion in global consolidated assets, as determined in accordance with U.S. GAAP at the end of the most recently completed fiscal year; and
- (2) the non-U.S. person is not subject to either:
 - (a) consolidated supervision and regulation by the Federal Reserve Board as a subsidiary of a U.S. bank holding company or an intermediate holding company;²¹ or
 - (b) both (i) capital standards and oversight by the non-U.S. person's home country regulator that are consistent with the Basel Committee on Banking Supervision's "International Regulatory Framework for Banks" ("**Basel III**")²² and (ii) margin requirements for uncleared swaps in a jurisdiction that the Commission has found comparable pursuant to a published comparability determination with respect to uncleared swap margin requirements.

The SRS definition replaces the "conduit affiliate" definition from the 2013 Guidance in several respects, and is based on the concept of an FCS from the CFTC Cross-Border Margin Rules. The narrower scope of the SRS definition better reflects a risk-based approach to regulation of FCSs because the definition does not cover subsidiaries that are not significant to their U.S. parents, subsidiaries of groups that are not significant to the U.S. financial systems nor subsidiaries subject to prudential regulation as a subsidiary of a bank holding company or an intermediate holding company. As a result, however, relatively few

entities are likely to qualify as SRSs. On the other hand, despite criticism from commenters that accounting consolidation is not sufficient to satisfy the requirement in CEA Section 2(i) for a "direct" U.S. connection or effect, the CFTC adheres to its view that by virtue of accounting consolidation, a foreign subsidiary's direct relationship with, and the possible negative effect of its swap activities on, its U.S. ultimate parent entity and the U.S. financial system justifies CFTC supervisory interest and authority.

(5) Foreign Branch and Swap Conducted Through a Foreign Branch.

As discussed in further detail below, transactions with, or conducted through, the foreign branch of a U.S. swap dealer are in some cases subject to a more limited scope of CFTC requirements. Under the Final Rules, the term "foreign branch" means an office of a U.S. person that is a bank that: (1) is located outside the United States; (2) operates for valid business reasons; (3) maintains accounts independently of the home office and of the accounts of other foreign branches, with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and (4) is engaged in the business of banking or finance and is subject to substantive regulation in banking or financing in the jurisdiction where it is located.

The Final Rules' definition of foreign branch is consistent with the SEC's definition, other than the requirement for foreign branches to maintain accounts independently of the home office and of the accounts of other foreign branches, with the profit or loss accrued at each branch determined as a separate item for each foreign branch. However, this extra condition seems unlikely to impede the ability of branches to qualify for foreign branch status.

²¹ The CFTC included the exception for subsidiaries of an intermediate holding company in response to commenters' requests.

²² For capital standards and oversight consistent with Basel III, the CFTC stated entities should look to whether the

Bank for International Settlements has determined the jurisdiction is in compliance as of the relevant Basel Committee on Banking Supervision deadline set forth in its most recent progress report.

Additionally, under the Final Rules, the term “swap conducted through a foreign branch” means a swap entered into by a foreign branch where: (1) the foreign branch or another foreign branch is the office through which the U.S. person makes and receives payments and deliveries under the swap pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the U.S. person is such foreign branch; (2) the swap is entered into by such foreign branch in its normal course of business; and (3) the swap is reflected in the local accounts of the foreign branch.

Although this definition eliminates the 2013 Guidance’s requirement that the employees negotiating and agreeing to the terms of the swap be located in a foreign branch of the U.S. bank, the CFTC noted in the preamble that to satisfy the “normal course of business” prong, it would expect swaps that are booked in the foreign branch to be primarily entered into by personnel located a foreign branch. The CFTC described this prong as an “anti-evasion measure,” and noted that it should not prevent personnel of the U.S. bank located in the U.S. from participating in the negotiation or execution of a foreign branch’s swaps. The CFTC said it would assess compliance with this prong by “examining the types of swaps booked in the foreign branch and determining whether any type of swap is primarily entered into by personnel located in the United States,” although notably this formulation seems to diverge from the earlier test for whether the “swaps booked in the foreign branch are primarily entered into by personnel located in the branch (or another foreign branch of the U.S. bank).”

(6) U.S. Branch and Swap Booked in a U.S. Branch.

The CFTC adopted new definitions for the terms, “U.S. branch,” and “swap booked in a U.S. branch,” which are used to identify swap activity that the CFTC believes should be considered to take place in the United States and, thus, remain subject to certain CFTC swaps requirements.

Under the Final Rules, the term “U.S. branch” means a branch or agency of a non-U.S. banking organization where such branch or agency: (1) is located in the United States; (2) maintains accounts independently of the home office and other U.S. branches, with the profit or loss accrued at each branch determined as a separate item for each U.S. branch; and (3) engages in the business of banking and is subject to substantive banking regulation in the state or district where located.

The term “swap booked in a U.S. branch,” in turn, means a swap entered into by a U.S. branch where the swap is reflected in the local accounts of the U.S. branch.

The CFTC eliminated a prong that would have been triggered if a swap’s documentation specified a U.S. branch for purposes of payments and deliveries, even if the swap was not booked to the U.S. branch. The CFTC also clarified that swaps booked in a U.S. branch are those for which the U.S. branch holds the risks and rewards, with the swap being accounted for as an obligation of the branch on the balance sheet of the U.S. branch under applicable accounting standards (or would be accounted for on its balance sheet under applicable accounting standards if the U.S. branch were a separate legal entity) and under regulatory reporting requirements.

(7) Foreign-Based Swap and Foreign Counterparty.

The Final Rules also include definitions of “foreign-based swap” and “foreign counterparty,” which, as more fully described below, are used to determine which swaps the CFTC considers to be foreign swaps of non-U.S. Swap Entities and foreign branches of U.S. Swap Entities for which certain relief from CFTC requirements is available under the Final Rules, and which swaps should be treated as domestic swaps not eligible for such relief.

The term “foreign counterparty” means: (1) a non-U.S. person, except with respect to a swap booked in a U.S. branch of that non-U.S. person; or (2) a foreign branch where it enters into a swap in a manner that satisfies

the definition of a swap conducted through a foreign branch.

The term “foreign-based swap” means: (1) a swap by a non-U.S. Swap Entity, except for a swap booked in a U.S. branch; or (2) a swap conducted through a foreign branch.

The CFTC justified its decision to apply additional rules to swaps between a non-U.S. person and the U.S. branch of a non-U.S. bank on anti-evasion concerns, even though the risks of such swap are borne entirely by non-U.S. persons.

CROSS-BORDER APPLICATION OF REGISTRATION THRESHOLDS

(1) SD Registration Thresholds

Under existing CFTC rules, the definition of “swap dealer” provides that a person shall not be deemed to be an SD as a result of its swap dealing activity involving counterparties unless, during the preceding 12 months, the aggregate gross notional amount of the swap positions connected with those dealing activities, together with the dealing activity of its affiliates under common control, exceeds the *de minimis* thresholds of \$8 billion across all counterparties or \$25 million for swaps with counterparties that are pension plans, municipalities, or other Special Entities.

The Final Rules address how the *de minimis* thresholds apply to the cross-border swap dealing transactions of U.S. and non-U.S. persons, which, as discussed below, depends, in part, on whether the potential registrant is a U.S. person, a Guaranteed Entity, an SRS or a Non-U.S. person other than a Guaranteed Entity or an SRS (“**Other Non-U.S. Person**”).

U.S. Person, Guaranteed Entity or SRS. A U.S. person, Guaranteed Entity or SRS must count all of its swap dealing transactions toward its *de minimis* threshold calculation, including dealing swaps entered into by a foreign branch of such person (although, as noted above, a non-U.S. person is only considered a Guaranteed Entity with respect to its swaps that are guaranteed by U.S. persons).

Other Non-U.S. Person. An Other Non-U.S. Person is required to count toward its *de minimis* threshold calculation:

- (1) dealing swaps with a U.S. person, except for swaps conducted through a foreign branch of a registered SD, and
- (2) dealing swaps with a Guaranteed Entity, except when (a) the Guaranteed Entity is registered as an SD, (b) the Guaranteed Entity’s swaps are subject to a guarantee by a U.S. person that is a non-financial entity,²³ or (c) the Guaranteed Entity is itself below the *de minimis* threshold and is affiliated with a registered SD.

Provided however, that an Other Non-U.S. Person is not required to count toward its *de minimis* thresholds any swap cleared through a registered or exempt derivatives clearing organization that the Other Non-U.S. Person anonymously enters into on (A) a designated contract market, (B) a registered or exempted swap execution facility, or (C) a registered foreign board of trade (an “**Anonymous Cleared Swap**”).

Consistent with the 2013 Guidance, the CFTC requires, for the purpose of applying the SD Registration threshold, that a U.S. or non U.S. person must aggregate all swaps connected with its dealing activity with those of persons controlling, controlled by, or under common control to the extent that these affiliates are themselves required to include those swaps in their own *de minimis* threshold calculation, unless the affiliate is a registered SD.

²³ A non-financial entity for the purposes of the Final Rules means a counterparty that is not an SD, MSP, or a financial end-user (as defined in 17 C.F.R. § 23.151). Notably, this

test diverges from the 2013 Guidance, which had instead used the “financial entity” definition from the CEA’s mandatory clearing exception.

The Final Rules generally track the *de minimis* counting conventions currently applicable under the 2013 Guidance. Notably, in response to requests from commenters, the Final Rules preserve the existing exception from counting for an Other Non-U.S. Person for transactions with a guaranteed or conduit affiliate that is not an SD and itself engages in *de minimis* swap dealing activity and which is affiliated with an SD.²⁴ However, the CFTC declined to follow recommendations by commenters to expand the exception for Anonymous Cleared Swaps to apply whether or not the clearing organization and trading venue are registered or exempt from registration with the CFTC, but stated that it may reconsider that position pending other amendments to the registration requirements for, and regulations applicable to, trading facilities.

For a table prepared by the CFTC summarizing the cross-border application of the SD *de minimis* threshold, see Appendix A.

(2) MSP Registration Thresholds

CEA section 1a(33) defines the term “major swap participant” to include persons that are not SDs but that nevertheless pose a high degree of risk to the U.S. financial system by virtue of the “substantial” nature of their swap positions. In accordance with the Dodd-Frank Act and CEA section 1a(33)(B), the Commission adopted rules further defining “major swap participant” and providing that a person would not be deemed an MSP unless its swap positions exceed one of several thresholds. The Commission also adopted interpretive guidance stating that, for purposes of the MSP analysis, an entity’s swap positions would be attributable to a parent, other affiliate or guarantor to the extent that the counterparty has recourse to the parent, other affiliate or guarantor and the parent or guarantor is not subject to capital regulation by the Commission, SEC or a prudential regulator (“attribution requirement”).

²⁴ In addition, CFTC No-Action Letter No. 13-64, which provides relief from counting swaps with a Guaranteed Entity on or before the date such non-U.S. person is required to register with the CFTC as a swap dealer (subject to certain conditions) remains in effect.

The Final Rules identify when a potential MSP’s cross-border swap positions apply toward the MSP thresholds. As discussed below, whether a potential registrant includes a particular swap in its MSP calculation would depend in part on whether the potential registrant is a U.S. person, a Guaranteed Entity, an SRS or an Other Non-U.S. Person.

U.S. Person, Guaranteed Entity or SRS. A U.S. person, Guaranteed Entity or SRS must count all of its swap positions toward its MSP threshold calculation, including swaps entered into by a foreign branch of such person (although, as noted above, a non-U.S. person is only considered a Guaranteed Entity with respect to its swaps that are guaranteed by U.S. persons).

Other Non-U.S. Person. An Other Non-U.S. Person is required to count toward its MSP threshold:

- (1) swap positions with a U.S. person, except for swaps conducted through a foreign branch of a registered SD; and
- (2) swap positions with a Guaranteed Entity, except when the Guaranteed Entity is registered as an SD.²⁵

Provided however, that an Other Non-U.S. Person is not required to count toward its MSP threshold any Anonymous Cleared Swap.

Consistent with the 2013 Guidance, the Final Rules provide that the attribution requirement for the purpose of MSP threshold excludes guarantees of the obligations of entities subject to U.S. capital regulation as well as entities subject to non-U.S. capital standards that are comparable to, and as comprehensive as, the capital regulations and oversight by the Commission, SEC or a U.S. prudential regulator (*i.e.*, Basel compliant capital standards and oversight by a G20 prudential supervisor). Further, swap positions of an entity that is required to register as an MSP, or whose MSP registration is pending, are not subject to the

²⁵ Unlike under the 2013 Guidance, these exceptions do not require the relevant swaps to be cleared or subject to daily variation margin.

attribution requirement. Otherwise, the attribution requirement applies unless the guarantor, guaranteed entity, and counterparty are all non-U.S. persons that are not Guaranteed Entities.

For a table prepared by the CFTC summarizing the cross-border application of the MSP threshold, see Appendix B.

ANE TRANSACTIONS

As noted above, Advisory 13-69 provided that a non-U.S. SD would generally be required to comply with transaction-level requirements for ANE Transactions. The CFTC staff has provided no-action relief from most aspects of Advisory 13-69, which has remained in place pending finalization of further rules or guidance clarifying the scope of CFTC requirements applicable to ANE Transactions.

The CFTC has now decided in the Final Rules to treat ANE Transactions in the same manner as any other transaction between non-U.S. persons, and accordingly has withdrawn Advisory 13-69 and the related no-action relief. In adopting the Final Rules, the CFTC emphasized that persons engaging in any aspect of swap transactions within the U.S. remain subject to the CEA and Commission regulations prohibiting the employment, or attempted employment, of manipulative, fraudulent, or deceptive devices.²⁶ Secondly, the CFTC also expects that in most cases, non-U.S. persons entering into ANE Transactions would be subject to regulation and oversight in their home jurisdictions similar to the Commission's transaction-level requirements.

In adopting the Final Rules, the CFTC stated that, as a matter of policy, it will not apply mandatory clearing, mandatory trade execution, and real-time public reporting requirements to ANE transactions between non-U.S. counterparties pending further rulemaking on this topic, and the staff has issued a new no-action relief to this effect. Additionally, the CFTC noted that it will consider the relevant

comments received in its future rulemaking concerning the cross-border application of these requirements.

The SEC, on the other hand, applies a more expansive approach to regulation of ANE Transactions and its security-based swap rules, requiring a non-U.S. security-based swap dealer to count ANE Transactions towards applicable dealer registration thresholds (subject to an exception for certain transactions involving certain U.S. registrants) and apply external business conduct and reporting requirements to ANE Transactions.

CATEGORIZATION AND APPLICATION OF REQUIREMENTS

(1) Background

The 2013 Guidance applied a bifurcated approach to the classification of certain regulatory requirements applicable to Swap Entities, based on whether the requirement applies to the firm as a whole ("**Entity-Level Requirement**") or to the individual swap or trading relationship ("**Transaction-Level Requirement**"), with two subcategories of requirements for both Transaction-Level Requirements ("Category A" and "Category B") and Entity-Level Requirements ("Category 1" and "Category 2").

Under the Final Rules, the CFTC has adopted a similar approach to categorization of certain swap dealer requirements which are newly designated as Group A, B and C requirements.

The Commission noted in the preamble that it intends to separately address the cross-border application of the Title VII requirements addressed in the 2013 Guidance that are not categorized as Group A, B or C requirements in the Final Rules (*e.g.*, capital adequacy, clearing and swap processing, mandatory trade execution, swap data repository reporting, large trader reporting, and real-time public reporting).²⁷

²⁶ See CEA Section 6(c)(1); CFTC Regulation 180.1.

²⁷ The CFTC adopted capital adequacy and related financial reporting requirements for Swap Entities at its open meeting

on July 22, 2020, which make non-U.S. Swap Entities potentially eligible for substituted compliance.

(2) Group A Requirements

The Group A requirements consist of: (1) chief compliance officer (CFTC Rule 3.3); (2) risk management (including requirements of internal policies and procedures to address risk management (CFTC Rules 23.600 and 23.609), monitor compliance with position limits (CFTC Rule 23.601), prevent conflicts of interest (CFTC Rule 23.605), promote diligent supervision (CFTC Rule 23.602), maintain business continuity and disaster recovery programs (CFTC Rule 23.603) and maintain information availability (CFTC Rule 23.606)); (3) swap data recordkeeping (CFTC Rules 23.201 and 23.203, as well as CFTC Rule 45.2(a), to the extent it duplicates CFTC Rule 23.201); and (4) antitrust considerations (CFTC Rule 23.607). Group A requirements apply on an entity-wide basis for all swaps, regardless of the U.S. or non-U.S. status of the counterparty.

Consistent with the general approach to Entity-Level Requirements under CFTC rules, the Final Rules permit a non-U.S. Swap Entity to avail itself of substituted compliance with respect to the Group A requirements where the non-U.S. Swap Entity is subject to comparable regulation in its home jurisdiction. U.S. Swap Entities remain ineligible for substituted compliance with respect to Group A requirements.

Group A requirements track certain of the current Category 1 and 2 Entity-Level Requirements, with the addition of antitrust considerations (which was not categorized under the 2013 guidance) and the removal of capital and reporting requirements (which as noted above are being treated separately). The CFTC also clarified that to the extent a Swap Entity receives substituted compliance for a Group A requirement pertaining to regulatory records that incorporates the CFTC's general recordkeeping requirements under CFTC Rule 1.31, substituted compliance with the requirements of CFTC Rule 1.31 would also be permitted for such records, and similarly any

²⁸ The CFTC expects that Swap Entities will address any significant risk that may arise as a result of the utilization of one or more of the enumerated exceptions under the Final Rules in connection with their risk management programs, as required pursuant to CFTC Rule 23.600. The CFTC

previously issued comparability determination that allows substituted compliance for CFTC Rule 23.201 also allows for substituted compliance with CFTC Rule 45.2(a) to the extent it duplicates CFTC Rule 23.201. Firms wishing to avail themselves of substituted compliance for the antitrust considerations requirements in CFTC Rule 23.607 will need to apply for substituted compliance.

(3) Group B Requirements

The Group B requirements consist of: (1) swap trading relationship documentation (CFTC Rule 23.504); (2) portfolio reconciliation and compression (CFTC Rules 23.502 and 23.503); (3) trade confirmation (CFTC Rule 23.501); and (4) daily trading records (CFTC Rule 23.202).

Group B requirements track a subset of the current Category A Transaction-Level Requirements related to risk mitigation and recordkeeping, which can be effectively applied on a transaction-by-transaction basis.

The Final Rules provide for the following exceptions²⁸ and availability of substituted compliance with respect to Group B requirements:

(a) *Exchange-Traded Exception*

Group B requirements (other than pre-execution recordkeeping requirements under the daily trading records) do not apply to a non-U.S. Swap Entity (other than a U.S. branch) or foreign branch of a U.S. Swap Entity with respect to an Anonymous Cleared Swap.

(b) *Foreign Branches of U.S. Swap Entities*

Limited Foreign Branch Group B Exception.

Group B requirements do not apply to a foreign branch of a U.S. Swap Entity with respect to a swap with a foreign counterparty (*i.e.*, not a swap booked in the counterparty's U.S. branch) that is (1) an Other Non-U.S. Person that is not a Swap Entity or (2) an SRS

clarified in the preamble to the Final Rules that this expectation is not meant to imply an additional risk management program requirement, but rather to remind swap entities of their obligations to maintain a risk management program under current CFTC Rule 23.600.

that is neither a Swap Entity nor a Guaranteed Entity (an “**SRS End User**”), subject to the following conditions:

- (1) the exception will not be available with respect to any Group B requirement for which substituted compliance is available for the relevant swap;²⁹ and
- (2) in any calendar quarter, the aggregate gross notional amount of swaps conducted by a Swap Entity in reliance on the exception may not exceed five percent of the overall aggregate gross notional amount entered into by the Swap Entity in that calendar quarter.³⁰

The exception from Group B requirements for foreign branches of a U.S. Swap Entity is designed to replace the emerging markets exception from the 2013 Guidance, but adopts a more flexible approach. The 2013 Guidance identified particular jurisdictions as ineligible for relief, whereas the Final Rules look to specific CFTC requirements and availability of substituted compliance to determine eligibility with respect to those specific requirements.

The 2013 Guidance’s emerging markets exception remains relevant with respect to mandatory clearing, mandatory trade execution, and real-time public reporting requirements.

Substituted Compliance. A U.S. Swap Entity transacting through a foreign branch may avail itself of substituted compliance with respect to the Group B requirements for swaps with foreign counterparties, including swaps conducted through a foreign branch of a U.S. Swap Entity counterparty.

(c) SRS or Guaranteed Swap Entities

Limited Swap Entity SRS/Guaranteed Entity Exception. Group B requirements do not apply to a

non-U.S. Swap Entity that is an SRS or a Guaranteed Entity (collectively, an “**SRS or Guaranteed Swap Entity**”) with respect to a foreign-based swap (*i.e.*, a swap not booked in a U.S. branch) with (1) an Other Non-U.S. Person that is not a Swap Entity or (2) an SRS End User, subject to the following conditions:

- (1) the exception would not be available with respect to any Group B requirement for which substituted compliance is available for the relevant swap; and
- (2) in any calendar quarter, the aggregate gross notional amount of swaps conducted by the SRS or Guaranteed Swap Entity in reliance on the exception, aggregated with the gross notional amount of swaps conducted by all affiliated SRS or Guaranteed Swap Entities in reliance on the exception, may not exceed five percent of the aggregate gross notional amount of all swaps entered into by the SRS or Guaranteed Swap Entity and all affiliated Swap Entities in that calendar quarter.³¹

Substituted Compliance. As a non-U.S. Swap Entity, an SRS or a Guaranteed Entity may avail itself of substituted compliance with respect to the Group B requirements for swaps with foreign counterparties, including swaps conducted through a foreign branch of a U.S. Swap Entity counterparty.

(d) U.S. Branches of Non-U.S. Swap Entities.

Substituted Compliance. With respect to the Group B requirements, the Final Rules allow a non-U.S. Swap Entity to avail itself of substituted compliance with respect to the Group B requirements for swaps booked in a U.S. branch with a counterparty that is an SRS or Other Non-U.S. Person.

In response to requests from commenters, the CFTC expanded the availability of substituted compliance for Group B requirements under the Proposed Rules to any swap booked in a U.S. branch of a non-U.S. Swap Entity with a foreign

²⁹ The CFTC did not, however, address applicability of the exception in circumstances where substituted compliance is available for some, but not all, Group B requirements.

³⁰ The CFTC clarified in the Final Rules that the five percent cap applies on a swap-by-swap basis. Specifically, only swaps entered into in reliance on the exception count towards the five percent cap, but not swaps that are eligible

for the exception but with respect to which a foreign branch of a U.S. Swap Entity complies with all of the group B requirements (directly or through substituted compliance).

³¹ As with Foreign Branches as noted in footnote 30, the five percent cap in this context similarly applies on a swap-by-swap basis.

counterparty that is neither a foreign branch nor a Guaranteed Entity, agreeing that such transaction has a limited nexus to U.S. commerce.

(e) Other Non-U.S. Persons.

Other Non-U.S. Person Swap Entity Group B Exception. Group B requirements do not apply to an Other Non-U.S. Person Swap Entity with respect to a foreign-based swap (*i.e.*, a swap not booked in a U.S. branch) with a counterparty that is an Other Non-U.S. Person or an SRS End User.

The CFTC adopted the SRS End User concept at the request of commenters, agreeing that SRS End Users do not pose as significant a risk to the United States as a Swap Entity or Guaranteed Entity, and subjecting such entities to Group B requirements would introduce unnecessary operational costs and risk of losing access to swap liquidity for hedging and other non-dealing purposes.

Substituted Compliance. As a non-U.S. Swap Entity, an Other Non-U.S. Person Swap Entity may avail itself of substituted compliance with respect to the Group B requirements for swaps with foreign counterparties, including swaps conducted through a foreign branch of a U.S. Swap Entity counterparty.

For a table prepared by the CFTC summarizing the cross-border application of the Group B requirements in consideration of related exceptions and substituted compliance, see Appendix C.

(4) Group C Requirements

The Group C requirements consist of the external business conduct requirements (CFTC Rules 23.400-23.451) and the elective initial margin segregation requirement (CFTC Rules 23.700-704).

Group C requirements track the current Category B Transaction-Level requirements, with the addition of elective initial margin segregation, and generally apply in a manner consistent with the 2013

Guidance. Group C requirements are not eligible for substituted compliance.

The Final Rules provide for the following exceptions³² to Group C requirements:

(a) Exchange-Traded Exception

Group C requirements do not apply to a non-U.S. Swap Entity (other than a U.S. branch) or foreign branch of a U.S. Swap Entity with respect to an Anonymous Cleared Swap.

(b) Foreign Branches of U.S. Swap Entities

Group C requirements do not apply to a foreign branch of a U.S. Swap Entity with respect to its swaps with other foreign branches and non-U.S. persons (other than swaps booked in a U.S. branch).

(c) SRS or Guaranteed Swap Entities

Group C requirements do not apply to an SRS or Guaranteed Swap Entity with respect to its foreign-based swaps (*i.e.*, swaps not booked in a U.S. branch) with foreign branches and non-U.S. persons (other than swaps booked in a U.S. branch).

(d) U.S. Branches of Non-U.S. Swap Entities

Group C requirements do not apply to a non-U.S. Swap Entity with respect to any swap booked in a U.S. branch with an SRS or Other Non-U.S. Person, other than a swap booked in a U.S. branch.

In response to requests from commenters, the CFTC included in the Final Rules the above exception, agreeing that although such swaps are part of the U.S. swap market, foreign regulators have a stronger interest in such swaps with respect to the Group C requirements, which relate to counterparty protection rather than risk mitigation.

(e) Other Non-U.S. Persons

Group C requirements do not apply to an Other Non-U.S. Person Swap Entity with respect to its foreign-based swaps (*i.e.*, swaps not booked in a U.S. branch) with foreign branches and non-U.S. persons (other than swaps booked in a U.S. branch).

³² See footnote 29 above.

For a table prepared by the CFTC summarizing the cross-border application of the Group C requirements in consideration of related exceptions, see Appendix D.

COMPARABILITY DETERMINATIONS

The CFTC is implementing a comparability determination process, as described below, to permit a non-U.S. Swap Entity or foreign branch of a U.S. Swap Entity to comply with comparable foreign swap standards in lieu of the CFTC's requirements in certain cases.

The CFTC made clear that the Final Rules are not intended to affect the effectiveness of any existing CFTC comparability determinations, although it will consider applications to amend existing comparability determinations in due course. Further, as noted above, the CFTC views any previously issued comparability determination that allows for substituted compliance for CFTC Rule 23.201 to also allow for substituted compliance with CFTC Rule 45.2(a) to the extent it duplicates CFTC Rule 23.201. This clarification responds to concerns expressed by commenters that since CFTC Rule 45.2(a) is not included in Group A requirements, a Swap Entity relying on substituted compliance with respect to CFTC Rule 23.201 may have to nonetheless follow the identical requirements in CFTC Rule 45.2(a).

(1) Standard of Review

Under the Final Rules, in assessing comparability, the CFTC will follow a flexible outcomes-based standard of review and may consider any factor it deems appropriate, such as (1) the scope and objectives of the relevant foreign jurisdiction's regulatory standards, (2) whether a foreign jurisdiction's regulatory standards achieve comparable regulatory outcomes to the CFTC's corresponding requirements, (3) the ability of the relevant regulatory authority to supervise and enforce compliance and (4) whether the relevant foreign jurisdiction's regulatory authorities have entered into a memorandum of understanding or similar cooperative arrangement with the CFTC regarding the oversight of Swap Entities.

The 2013 Guidance similarly applies an outcomes-based approach, but also looks to whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the CEA. Notably, the Final Rules do not expressly incorporate certain factors addressing comprehensiveness of foreign regulations from the 2013 Guidance, including comprehensiveness of the foreign requirement(s), and the comprehensiveness of the foreign regulator's supervisory compliance program. Additionally, the CFTC stated that the standard of review in the Final Rules is broader than the 2013 Guidance by explicitly allowing the CFTC to consider a foreign jurisdiction's regulatory standards (as opposed to regulatory requirements) comparable to the CEA and CFTC regulations, and that it would consider whether a foreign regulatory authority has issued a reciprocal comparability determination with respect to the CFTC's corresponding regulatory requirements.

(2) Eligibility Requirements

Under the Final Rules, a comparability determination may be initiated by the CFTC on its own or requested by (1) Swap Entities eligible for substituted compliance, (2) trade associations whose members are such Swap Entities, or (3) foreign regulatory authorities that have direct supervisory authority over such Swap Entities and are responsible for administering the relevant swap standards in the foreign jurisdiction.

(3) Submission Requirements

Under the Final Rules, any person requesting a comparability determination is required to furnish certain information to the CFTC that provides a comprehensive understanding of the foreign jurisdiction's relevant swap standards and an explanation as to how such standards may achieve comparable outcomes to the CFTC attendant regulatory requirements.

(4) Supervision of Substituted Compliance

In the preamble to the Final Rules, the CFTC noted that although it does not commit to not independently

examine or assess whether a Swap Entity is complying with foreign standards, 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.

RECORDKEEPING

Under the Final Rules, a Swap Entity is required to create a sufficiently detailed record of its compliance with the Final Rules, and retain those records in accordance with CFTC Rule 23.203.

COMPLIANCE DATES AND TRANSITION ISSUES

The CFTC clarified in adopting the Final Rule that (1) any no-action relief or guidance not specifically revoked remains in effect; and (2) the Final Rules only apply to swaps entered into on or after the Final Rules' compliance date, which is the date 365 days following the Final Rules' publication in the Federal Register.

The effective date of the Final Rules will be the date that is 60 days following the Final Rules' publication in the Federal Register. Provided that market participants comply with recordkeeping requirements in the Final Rules, they can take advantage of the exceptions to the Group B and Group C requirements described above as soon as the Final Rules become effective, while not having to comply with the remaining requirements until the compliance date.

...

CLEARY GOTTLIB

APPENDIX A

Cross-Border Application of the SD De Minimis Threshold

Counterparty→ Potential SD↓		U.S. Person	Non-U.S. Person		
			Guaranteed Entity	SRS	Other Non-U.S. Person
U.S. Person		Include	Include	Include	Include
Non-U.S. Person	Guaranteed Entity	Include	Include	Include	Include
	SRS	Include	Include	Include	Include
	Other Non-U.S. Person ¹	Include ²	Include ³	Exclude	Exclude

¹ Does not include swaps entered into anonymously on a DCM, a registered SEF or a SEF exempted from registration, or a registered FBOT and cleared through a registered DCO or a DCO exempted from registration.

² Unless the swap is conducted through a foreign branch of a registered SD.

³ Unless the Guaranteed Entity is registered as an SD, unless the guarantor is a non-financial entity, or unless the Guaranteed Entity is itself below the *de minimis* threshold and is affiliated with a registered SD.

APPENDIX B

Cross-Border Application of the MSP Threshold

Counterparty→ Potential MSP↓		U.S. Person	Non-U.S. Person		
			Guaranteed Entity	SRS	Other Non-U.S. Person
U.S. Person		Include	Include	Include	Include
Non-U.S. Person	Guaranteed Entity	Include	Include	Include	Include
	SRS	Include	Include	Include	Include
	Other Non-U.S. Person ¹	Include ²	Include ³	Exclude	Exclude

¹ Does not include swaps positions entered into anonymously on a DCM, a registered SEF or a SEF exempted from registration, or a registered FBOT and cleared through a registered DCO or a DCO exempted from registration.

² Unless the swap is conducted through a foreign branch of a registered SD.

³ Unless the Guaranteed Entity is registered as an SD.

Additionally, all swap positions that are subject to recourse should be attributed to the guarantor, whether it is a U.S. person or a non-U.S. person, unless the guarantor, the Guaranteed Entity, and its counterparty are Other Non-U.S. Persons.

APPENDIX C

Cross-Border Application of the Group B Requirements in Consideration of Related Exceptions and Substituted Compliance

Counterparty→ Swap Entity↓		U.S. Person		Non-U.S. Person			
		Non-Foreign Branch	Foreign Branch	U.S. Branch	Guaranteed Entity or SRS	Swap Entity SRS	Other Non-U.S. Person or SRS End User
U.S. Swap Entity	Non-Foreign Branch	Yes	Yes	Yes	Yes	Yes	Yes
	Foreign Branch	Yes ¹	Yes ¹ <i>Sub. Comp. Available</i>	Yes ¹	Yes ¹ <i>Sub. Comp. Available</i>	Yes ¹ <i>Sub. Comp. Available</i>	Yes ^{1,2} <i>Sub. Comp. Available</i>
Non-U.S. Swap Entity	U.S. Branch	Yes	Yes	Yes	Yes	Yes <i>Sub. Comp. Available</i>	Yes <i>Sub. Comp. Available</i>
	Guaranteed Entity or SRS	Yes ¹	Yes ¹ <i>Sub. Comp. Available</i>	Yes ¹	Yes ¹ <i>Sub. Comp. Available</i>	Yes ¹ <i>Sub. Comp. Available</i>	Yes ^{1,3} <i>Sub. Comp. Available</i>
	Other Non-U.S. Persons	Yes ¹	Yes ¹ <i>Sub. Comp. Available</i>	Yes ¹	Yes ¹ <i>Sub. Comp. Available</i>	Yes ¹ <i>Sub. Comp. Available</i>	No

¹ The Exchange-Traded Exception is available from certain group B and C requirements for certain anonymous, exchange-traded, and cleared foreign-based swaps between the listed parties.

² The Limited Foreign Branch Group B Exception is available from the group B requirements for a foreign branch's foreign-based swaps with a foreign counterparty that is an SRS End User or an Other Non-U.S. Person that is not a Swap Entity, subject to certain conditions.

³ The Limited Swap Entity SRS/Guaranteed Entity Group B Exception is available from the group B requirements for the foreign-based swaps of each Swap Entity that is an SRS or Guaranteed Entity with a foreign counterparty that is an SRS End User or an Other Non-U.S. Person that is not a Swap Entity, subject to certain conditions.

APPENDIX D

Cross-Border Application of the Group C Requirements in Consideration of Related Exceptions

Counterparty→ Swap Entity↓		U.S. Person		Non-U.S. Person			
		Non-Foreign Branch	Foreign Branch	U.S. Branch	Guaranteed Entity	SRS	Other Non-U.S. Persons
U.S. Swap Entity	Non-Foreign Branch	Yes	Yes	Yes	Yes	Yes	Yes
	Foreign Branch	Yes ¹	No	Yes ¹	No	No	No
Non-U.S. Swap Entity	U.S. Branch	Yes	Yes	Yes	Yes	No	No
	Guaranteed Entity or SRS	Yes ¹	No	Yes ¹	No	No	No
	Other Non-U.S. Persons	Yes ¹	No	Yes ¹	No	No	No

¹The Exchange-Traded Exception is available from certain group B and C requirements for certain anonymous, exchange-traded, and cleared foreign-based swaps between the listed parties.