

## What to Know About the New CFTC Cross-Border Swaps Regime

*This Client Alert White Paper serves as a comprehensive guide to the new rule, which largely supersedes prior CFTC guidance that had informed market practice for over seven years.*

### Key Points:

- The new rule became effective on November 13, 2020, but SDs/MSPs are not required to comply with the new rule until September 14, 2021.<sup>1</sup>
- The requirements of the new rule do not apply to swaps executed prior to September 14, 2021.<sup>2</sup>
- Reliance on certain counterparty representations is permitted until December 31, 2027, for representations obtained prior to November 13, 2020.
- Notwithstanding the delayed compliance schedule, certain foreign-based swaps are exempt as of November 13, 2020.<sup>3</sup>

On November 13, 2020, the US Commodity Futures Trading Commission's (CFTC's) final rule on the cross-border application of aspects of the swaps regulatory regime under the Commodity Exchange Act (CEA) (the Cross-Border Rule)<sup>4</sup> became effective.<sup>5</sup>

The Cross-Border Rule addresses (i) the cross-border application of the registration thresholds for swap dealers (SDs) and major swap participants (MSPs) and (ii) the categorization and cross-border application of certain regulatory requirements applicable to those entities and previously addressed in CFTC guidance. The Cross-Border Rule also addresses key definitions, such as the terms "US person" and "guarantee," and replaces the previous "conduit affiliate" category with a new "significant risk subsidiary" concept. Additionally, the Cross-Border Rule formalizes a process and standard of review for the CFTC's grant of comparability determinations regarding a foreign jurisdiction's regulation of SDs/MSPs for substituted compliance purposes.

Overall, the Cross-Border Rule evinces a trend toward simplification and harmonization with the cross-border provisions of the US Securities and Exchange Commission's (SEC's) security-based swap (SBS) regulations (the SBS Cross-Border Rule). With that said, the Cross-Border Rule does not address all of the regulatory requirements covered by prior CFTC guidance, and further separate rulemakings are expected in the future.<sup>6</sup> The Cross-Border Rule makes clear that existing CFTC guidance and staff no-action relief remain effective with respect to regulatory requirements not addressed in the Cross-Border

Rule or not otherwise specifically revoked.<sup>7</sup> In this regard, and as discussed below, contemporaneously with the Cross-Border Rule, CFTC staff revoked a prior advisory and provided relief to non-US SDs with respect to certain regulatory requirements for transactions with non-US counterparties that are “arranged, negotiated, or executed” on their behalf by US personnel (the 2020 ANE No-Action Relief).<sup>8</sup>

This *Client Alert White Paper* provides a detailed summary of the Cross-Border Rule to aid market participants as they gear up for compliance.

## 1. Background

The CFTC adopted the Cross-Border Rule on July 23, 2020, marking the culmination of almost a decade of CFTC rulemaking and guidance on the cross-border application of the CEA swaps regulatory regime established pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). Among other things, the Dodd-Frank Act amended the CEA by adding Section 2(i), which extends the CEA swaps regulatory regime to activities outside the United States that have a “direct and significant” connection with activities in, or effect on, commerce of the United States.<sup>9</sup>

In May 2012, the CFTC and the SEC jointly adopted a release providing, *inter alia*, registration thresholds for SDs and MSPs.<sup>10</sup> The following year, the CFTC adopted interpretive guidance establishing a general, non-binding framework setting out its views on the cross-border application of many aspects of the CEA swaps regulatory regime (the 2013 Guidance).<sup>11</sup> In addition to addressing registration and business conduct requirements for SDs and MSPs, the 2013 Guidance established a process for determining the comparability of foreign regulatory regimes so as to allow substituted compliance in certain circumstances.

In November 2013, the CFTC’s Division of Swap Dealer and Intermediary Oversight (DSIO) issued a staff advisory expressing the view that non-US SDs that regularly use personnel or agents located in the United States to “arrange, negotiate, or execute” a swap with a non-US person would generally be required to comply with certain of the swaps regulatory requirements addressed in the 2013 Guidance (the ANE Staff Advisory).<sup>12</sup> Less than two weeks later, in response to market concerns, CFTC staff granted no-action relief to registered non-US SDs, relieving those entities from compliance obligations with respect to transactions arranged, negotiated, or executed by personnel or agents located in the US.<sup>13</sup> This relief was extended on multiple occasions (collectively, the Original ANE No-Action Relief).<sup>14</sup>

In May 2016, the CFTC adopted a final rule on the cross-border application of the uncleared swap margin requirements for non-prudentially regulated SDs/MSPs (the Cross-Border Margin Rule).<sup>15</sup> Later that year, in October 2016, the CFTC proposed regulations regarding the cross-border application of certain aspects of the CEA swaps regulatory regime, including the cross-border application of the registration thresholds and external business conduct standards for SDs/MSPs (the 2016 Cross-Border Proposal).<sup>16</sup> However, in 2020 the CFTC withdrew the 2016 Cross-Border Proposal and issued a new proposed rule on the cross-border application of the CEA swaps regulatory regime (the 2020 Cross-Border Proposal).<sup>17</sup> The Cross-Border Rule adopts, with some modifications, the 2020 Cross-Border Proposal.

## 2. Key Concepts and Definitions

To determine whether a particular SD/MSP is required to comply with some or all of the requirements of the CEA swaps regulatory regime, each such entity must determine its and its counterparty’s status under the various definitions in the Cross-Border Rule. These include a new “US person” definition, the concepts of a “guarantee” and a “significant risk subsidiary,” and various terms related to branches.

## A. Reliance on Existing Representations

The Cross-Border Rule confirms that market participants generally may reasonably rely on written representations obtained from their counterparty as to their status under the rule's various definitions.<sup>18</sup> This accords with the market practice that has developed under the 2013 Guidance and the Cross-Border Margin Rule, such as the exchange of the ISDA Cross-Border Representation Letter published on August 19, 2013 (with respect to the 2013 Guidance) and the ISDA Regulatory Margin Self-Disclosure Letter published on June 30, 2016 (with respect to the Cross-Border Margin Rule). Specifically, the Cross-Border Rule provides that a person may rely on a written representation that its counterparty does or does not satisfy the criteria for one or more of the categories under the rule, unless such person knows or has reason to know that the representation is not accurate. For purposes of the Cross-Border Rule, a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.<sup>19</sup>

Below is an overview of when market participants may rely on representations made by a counterparty under the 2013 Guidance and the Cross-Border Margin Rule.

Defined Term Under 2013 Guidance / Cross-Border Margin Rule	"US Person"	"Guarantee"	"Conduit Affiliate"
Reliance on prior representations permitted? <sup>1</sup>	✓	✓	✗
<sup>1</sup> Reliance permitted until December 31, 2027, for representations made/obtained prior to the effective date of the Cross-Border Rule of November 13, 2020.			

With respect to the "US person" definition, a person may, until December 31, 2027, continue to classify counterparties as US persons based on representations made pursuant to the "US person" definitions in the 2013 Guidance or the Cross-Border Margin Rule.<sup>20</sup> However, those representations must have been made prior to the effective date of the Cross-Border Rule of November 13, 2020, as discussed further below. Likewise, the Cross-Border Rule permits reliance on representations made pursuant to the "guarantee" definitions in the 2013 Guidance or the Cross-Border Margin Rule until December 31, 2027, so long as the representation was made prior to the effective date of the Cross-Border Rule of November 13, 2020.<sup>21</sup> On the other hand, the CFTC declined requests from commentators to permit reliance on representations made pursuant to the 2013 Guidance definition of a "conduit affiliate" when applying the Cross-Border Rule's new "significant risk subsidiary" definition.<sup>22</sup>

## B. The "US Person" Definition

Whether one or both counterparties to a swap transaction is a "US person" under the Cross-Border Rule (a US Person) is a key determinant of the cross-border application of the CEA swaps regulatory regime. Subject to certain exceptions, a US Person is any of the following:<sup>23</sup>

- A natural person resident in the United States
- 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
- An account (whether discretionary or non-discretionary) of a US Person

- An estate of a decedent who was a resident of the United States at the time of death

This four-pronged definition represents a simplification compared with the approach of the 2013 Guidance, which employed a non-exhaustive eight-pronged list of inclusions in “US person” status.<sup>24</sup> In particular, certain prongs of the 2013 Guidance definition have been consolidated in the Cross-Border Rule, whereas others have been eliminated, as illustrated below.

2013 Guidance	Cross-Border Margin Rule <sup>25</sup>	Cross-Border Rule
(i) Any natural person who is a resident of the United States;	(i) A natural person who is a resident of the United States;	<b>(A)</b> A natural person resident in the United States;
(ii) Any estate of a decedent who was a resident of the United States at the time of death;	(ii) An estate of a decedent who was a resident of the United States at the time of death;	<b>(D)</b> An estate of a decedent who was a resident of the United States at the time of death;
(iii) Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a “legal entity”), in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States;	(iii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prong (iv) or (v) below) (a “legal entity”), in each case that is organized or incorporated under the laws of the United States or that has its principal place of business in the United States, including any branch of such legal entity;	<b>(B)</b> 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;
(iv) Any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension plan is primarily for foreign employees of such entity;	(iv) A pension plan for the employees, officers or principals of a legal entity described in prong (iii) above, unless the pension plan is primarily for foreign employees of such entity;	Subsumed in (B) above. <sup>26</sup>
(v) Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;	(v) A trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;	Subsumed in (B) above. <sup>27</sup>
(vi) Any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-US persons and not offered to US persons;	Not included as separate prong of Cross-Border Margin Rule definition of US Person.	Majority ownership test not included in Cross-Border Rule definition of US Person. Some collective investment vehicles may fall within (B) above. <sup>28</sup>
(vii) Any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity;	(vi) A legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is owned by one or more persons described in prongs (i) through (v) above and for which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity, including any branch of the legal entity;	Concept of unlimited US liability incorporated into Cross-Border Rule definition of “guarantee.” <sup>29</sup>

2013 Guidance	Cross-Border Margin Rule <sup>25</sup>	Cross-Border Rule
(viii) Any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi), or (vii) above.	(vii) An individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prongs (i) through (vi) above.	<b>(C)</b> An account (whether discretionary or non-discretionary) of a US Person; or
2013 Guidance definition of US Person includes, <i>but is not limited to</i> , the above prongs.	Broad catch-all language not included in Cross-Border Margin Rule definition of US Person.	Broad catch-all language not included in Cross-Border Rule definition of US Person.

The Cross-Border Rule also represents a narrowing of approach, in that the CFTC expressly rejected the adoption of inclusionary language in the form of a “catch-all” prong. This reflects the CFTC’s view the enumerated prongs capture those persons with sufficient jurisdictional nexus that they should be categorized as US Persons.<sup>30</sup>

### Harmonization With SEC and Cross-Border Margin Rule Definitions of US Person

The definition of “US person” in the Cross-Border Rule represents a harmonization with the definition in the SBS Cross-Border Rule.<sup>31</sup> The four-pronged definition adopted in the Cross-Border Rule is also consistent with, and captures substantially the same types of entities as, the definition of “US person” in the Cross-Border Margin Rule. Like the Cross-Border Rule, the Cross-Border Margin Rule does not include a majority US-owned collective investment vehicle prong and lacks an inclusionary “catch-all” prong.<sup>32</sup> The Cross-Border Rule also brings the CFTC closer in line with the US prudential regulators’ approach in applying uncleared swap margin requirements to prudentially regulated entities, pursuant to which cross-border application looks to “bright-line” tests of whether relevant entities are organized under the laws of the United States or any state thereof, are a branch or office of any such entity, or are a subsidiary of any such entity.<sup>33</sup>

### Related Terms

The definition of “US person” informs the application of various other definitions in the Cross-Border Rule. Thus, a “non-US person” is any person that is not a US Person (a Non-US Person)<sup>34</sup>; a “US swap entity” is an SD/MSP that is a US Person (a US Swap Entity)<sup>35</sup>; and a “non-US swap entity” is an SD/MSP that is not a US Swap Entity (a Non-US Swap Entity).<sup>36</sup>

### “Principal Place of Business” Test

For the purposes of identifying US Person status under the second prong of the definition above, the Cross-Border Rule defines “principal place of business” to mean the location from which the officers, partners, or managers of the legal entity primarily direct, control, and coordinate the activities of such legal person.<sup>37</sup> As noted by the CFTC in the Cross-Border Rule adopting release, this “principal place of business” element was adopted to discourage entities from moving their jurisdiction of incorporation offshore to avoid complying with the CEA swaps regulatory regime.<sup>38</sup>

For externally managed investment vehicles, the Cross-Border Rule states that this location is the office from which the manager of the vehicle primarily directs, controls, and coordinates the vehicle’s investment activities.<sup>39</sup> In adopting this interpretation, the CFTC drew on US Supreme Court precedent that describes the principal place of business for purposes of diversity jurisdiction as the “place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities.”<sup>40</sup> The CFTC stressed that the focus is on the primary managers responsible for directing, controlling, and coordinating a collective investment vehicle, rather than the named directors or officers of such vehicles.<sup>41</sup> This aligns with the

general approach in the 2013 Guidance, though the Cross-Border Rule does divert from the 2013 Guidance in important ways. For example, when the CFTC adopted both the 2013 Guidance and the Cross-Border Margin Rule, it indicated that the principal place of business of a collective investment vehicle would generally be viewed as the United States if the senior personnel responsible for either (i) the formation and promotion of the collective investment vehicle or (ii) the implementation of the vehicle's investment strategy, in each case, were located in the United States.<sup>42</sup> However, in adopting the Cross-Border Rule, the CFTC indicated its current view that activities related to the formation of a collective investment vehicle — absent an ongoing role in directing, controlling, and coordinating the vehicle — are not as relevant in identifying the principal place of business. The CFTC also indicated that it may consider revising the definition in the Cross-Border Margin Rule accordingly.<sup>43</sup>

Like the four-pronged US Person definition, the Cross-Border Rule's definition of "principal place of business" reflects a harmonization with the analogous language adopted by the SEC in the SBS Cross-Border Rule.<sup>44</sup>

### **Exception for Certain International Organizations**

The US Person definition expressly 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 respective agencies and pension plans. Furthermore, the Cross-Border Rule incorporates catch-all language extending this exclusion to "any other similar international organizations, and their agencies and pension plans" not explicitly listed in the rule.<sup>45</sup> This language is consistent with the SEC's approach in the SBS Cross-Border Rule,<sup>46</sup> and includes institutions with respect to which the CFTC previously granted relief from the CFTC uncleared margin requirements<sup>47</sup> and those treated as "international financial institutions" for purposes of the SD and MSP definitions.<sup>48</sup>

### **C. Narrower "Guarantee" Definition**

The Cross-Border Rule defines 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 has "rights of recourse" against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from such guarantor with respect to its counterparty's swap obligations. In addition, the "guarantee" definition encompasses 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.<sup>49</sup> Although the term "guaranteed entity" is not defined in the rule text, the CFTC used the term "guaranteed entity" in the adopting release to refer to a Non-US Person whose swaps are guaranteed by a US Person (a US Guarantor), but only with respect to the swaps so guaranteed (a Guaranteed Entity).<sup>50</sup>

As noted above, the CFTC interprets the term "guarantee" under the Cross-Border Rule to capture scenarios in which a Non-US Person's counterparty has recourse to a US Person for the performance of the Non-US Person's obligations under a swap by virtue of the US Person's unlimited responsibility for the Non-US Person.<sup>51</sup> This represents a shift in approach from the 2013 Guidance, under which the concept of ultimate responsibility was employed in the definition of "US person" as opposed to the definition of "guarantee."<sup>52</sup>

The term "guarantee" applies regardless of whether the right of recourse is conditioned upon insolvency or failure to meet an obligation under the relevant swap, and regardless of whether the counterparty seeking to enforce the guarantee is required to make a demand for payment or performance.



Furthermore, the terms of the guarantee do not necessarily need to be included in the swap documentation. In contrast to the 2013 Guidance, the Cross-Border Rule's coverage of guarantees does not require that the US Guarantor be an affiliate of the Non-US Person whose obligations are guaranteed.<sup>53</sup> That is, whereas the 2013 Guidance focused on "guaranteed affiliates" of US persons, the Cross-Border Rule's definition of "guarantee" will apply regardless of affiliation so long as the swap counterparty has a conditional or unconditional legally enforceable right to receive payments from, or otherwise collect from, a US Person in connection with a Non-US Person's obligations.

Under the 2013 Guidance, the CFTC interpreted the term "guarantee" to include not only traditional guarantees of payment or performance, but also other formal arrangements that support a non-US person's ability to pay that may be provided by a US person to a non-US person (e.g., keepwells and liquidity puts, certain types of indemnity agreements, master trust agreements, liability or loss transfer or sharing agreements).<sup>54</sup> Consistent with the Cross-Border Margin Rule, the Cross-Border Rule adopts a narrower approach in an attempt to achieve "a more workable framework" to aid in determining whether a Non-US Person counterparty's swap obligations are or are not guaranteed.<sup>55</sup>

#### **D. "Significant Risk Subsidiaries" Replace "Conduit Affiliates"**

The Cross-Border Rule introduces a new category of entity termed a "significant risk subsidiary" (SRS), defined to mean, subject to the exceptions discussed below, any non-US Significant Subsidiary (defined below) of an Ultimate US Parent Entity (defined below) where the Ultimate US Parent Entity has more than US\$50 billion in global consolidated assets, as determined in accordance with generally accepted accounting principles in the United States (US GAAP) at the end of the most recently completed fiscal year (subject to the exceptions below).<sup>56</sup> Relatedly, an "SRS swap entity" is an SRS that is also an SD/MSP (an SRS Swap Entity), whereas an "SRS end-user" is an SRS that is neither an SD/MSP nor a Guaranteed Entity (an SRS End-User).<sup>57</sup>

#### **Significant Subsidiary**

The term "significant subsidiary" is itself defined to capture any subsidiary,<sup>58</sup> including its own subsidiaries, that meets any of the following three quantitative significance tests (a Significant Subsidiary):<sup>59</sup>

- **Equity Capital Significance Test.** The three-year rolling average of the subsidiary's equity capital is at least 5% of the three-year rolling average of the Ultimate US Parent Entity's consolidated equity capital, as determined in accordance with US GAAP as of the end of the most recently completed fiscal year.
- **Revenue Significance Test.** The three-year rolling average of the subsidiary's total revenue is at least 10% of the three-year rolling average of the Ultimate US Parent Entity's total consolidated revenue, as determined in accordance with US GAAP as of the end of the most recently completed fiscal year.
- **Asset Significance Test.** The three-year rolling average of the subsidiary's total assets is at least 10% of the three-year rolling average of the Ultimate US Parent Entity's total consolidated assets, as determined in accordance with US GAAP as of the end of the most recently completed fiscal year.

A Non-US Person will only be a Significant Subsidiary if it passes at least one of these quantitative significance tests. In comparison to the "foreign consolidated subsidiary" concept proposed in the 2016 Cross-Border Proposal — which was based solely on accounting consolidation — the addition of these quantitative significance conditions reflects a risk-based approach that accounts for the risk that non-US subsidiaries may pose to their US parent entities and the US financial system.<sup>60</sup>

### Ultimate US Parent Entity

It is important to note that, for purposes of the SRS definition, an Ultimate US Parent Entity need not be a non-US entity's ultimate top-level parent entity. Thus, the Cross-Border Rule defines the term "ultimate US parent entity" to mean a US parent entity that is not a subsidiary of any other US parent entity, but such Ultimate US Parent Entity may nonetheless itself have a non-US parent entity. The CFTC expressly declined to adopt an approach limiting the SRS concept to subsidiaries that have a "top tier" US Person parent entity.<sup>61</sup>

### Exclusions From SRS Status

The Cross-Border Rule prohibits the following entities from qualifying as an SRS:

- Non-US subsidiaries that are subject to consolidated supervision and regulation by the Board of Governors of the Federal Reserve System as a subsidiary of a US bank holding company or an intermediate holding company<sup>62</sup>
- Non-US subsidiaries that are subject to capital standards and oversight by the subsidiary's home country supervisor that are consistent with the Basel Committee on Banking Supervision's International Regulatory Framework for Banks and subject to uncleared swap margin requirements in a jurisdiction that the CFTC has found comparable pursuant to a published comparability determination with respect to the uncleared swap margin requirements<sup>63</sup>

The CFTC indicated its view that entities that qualify for these exclusions are subject to a level of regulatory oversight that is sufficiently comparable to the CEA swap regulatory regime with respect to prudential oversight.<sup>64</sup>

### Elimination of Conduit Affiliates

The Cross-Border Rule eliminates the concept of a "conduit affiliate," which was employed in both the 2013 Guidance and the SBS Cross-Border Rule to identify entities that act as vehicles or conduits in effecting swap transactions with third parties on behalf of US person affiliates. Under the 2013 Guidance in particular, the identification of conduit affiliates was a fact-sensitive inquiry undertaken by reference to a non-exhaustive list of relevant factors.<sup>65</sup> The CFTC noted that the concerns posed by such conduit affiliates are intended to be addressed through the new SRS concept.<sup>66</sup> However, the CFTC also noted that the 2013 Guidance concept of "conduit affiliate" may capture entities that are excluded from the definition of SRS (and vice versa).<sup>67</sup>

## E. Foreign Branch Activities

A "foreign branch" is defined under the Cross-Border Rule to be any office of a US bank that meets each of the following criteria (a Foreign Branch):<sup>68</sup>

- (i) Located outside the United States
- (ii) Operates for valid business reasons
- (iii) 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
- (iv) Engaged in the business of banking and subject to substantive regulation in banking or financing in the jurisdiction where it is located



Beyond the territorial requirement embodied in limb (i) above, the requirements in limbs (ii) through (iv) are intended to prevent an entity from setting up operations in a non-US jurisdiction that does not have substantive banking or financial regulation in order to avoid having to comply with the CEA swaps regulatory regime.<sup>69</sup> The Cross-Border Rule's definition of a "foreign branch" is nearly identical to the definition adopted by the SEC in the SBS Cross-Border Rule, except that the SEC definition omits limb (iii) above.<sup>70</sup> Importantly, the CFTC noted that Foreign Branches do not capture affiliates of a US bank that are incorporated as a separate entity.<sup>71</sup> Rather, the term is concerned with Foreign Branches in the sense of a branch of a US bank that is not a separate legal entity from the bank itself.

Relatedly, the Cross-Border Rule defines a "swap conducted through a Foreign Branch" to be a swap entered into by a Foreign Branch if:<sup>72</sup>

- (i) The Foreign Branch or another Foreign Branch is the office through which the US 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 US Person is such Foreign Branch
- (ii) The swap is entered into by such Foreign Branch in its normal course of business
- (iii) The swap is reflected in the local accounts of the Foreign Branch

The inclusion of the "normal course of business" requirement in prong (ii) above is intended to prevent a US bank from routing swaps for booking in a Foreign Branch for purposes of applying the SD and MSP registration thresholds and certain swaps regulatory obligations. In order to satisfy prong (ii) in respect of a swap, the Foreign Branch's entry into such swap must be in the normal course of business for employees located in that branch (or another Foreign Branch of the US bank).<sup>73</sup>

## **F. US Branches and Swaps Conducted Through a US Branch**

The Cross-Border Rule defines "US branch" to mean a branch or agency of a non-US banking organization that satisfies each of the following conditions (a US Branch):<sup>74</sup>

- Is located in the United States
- Maintains accounts independently of the home office and other US Branches, with the profit or loss accrued at each branch determined as a separate item for each US Branch
- Engages in the business of banking and is subject to substantive banking regulation in the state or district where it is located

Consistent with the approach to foreign affiliates of US banks discussed above, the CFTC noted in adopting the Cross-Border Rule that the term "US branch" does not capture a US affiliate of a non-US banking organization that is incorporated as a separate legal entity. Conversely, the CFTC does not recognize US Branches of non-US banking organizations separately from their non-US banking organization for registration purposes.<sup>75</sup>

The Cross-Border Rule defines "swap booked in a US Branch" to mean a swap entered into by a US Branch where the swap is reflected in the local accounts of the US Branch.<sup>76</sup> In the 2020 Cross-Border Proposal, the CFTC had proposed to adopt a broader concept of a "swap conducted through a US branch," which would have captured both (i) swaps reflected in the local accounts of a US branch, as well

as (ii) swaps where the US branch is the office through which the non-US person makes and receives payments and deliveries and the US branch is specified as the office for the non-US person in the relevant swap documentation. The CFTC expressed that the focus on booking in the Cross-Border Rule captures activity of non-US banking organizations taking place in their US Branches that should be treated as taking place in the United States for regulatory purposes. As discussed further below, the location of the personnel involved in arranging, negotiating, and executing the swap is not relevant for application of the Cross-Border Rule.<sup>77</sup>

### **G. Foreign-Based Swaps and Foreign Counterparties**

Building on the branch definitions discussed above, each of the following would constitute a “foreign-based swap” under the Cross-Border Rule (a Foreign-Based Swap):<sup>78</sup>

- A swap by a Non-US Swap Entity, except for a swap booked in a US Branch
- A swap conducted through a Foreign Branch

Similarly, each of the following would qualify as a “foreign counterparty” for purposes of the Cross-Border Rule (a Foreign Counterparty):<sup>79</sup>

- A Non-US Person, except with respect to a swap booked in a US Branch of that Non-US Person
- A Foreign Branch where it enters into a swap in a manner that satisfies the definition of a swap conducted through a Foreign Branch

As discussed further below, exceptions to certain CEA swaps regulatory regime requirements and aspects of the substituted compliance regime apply only to Foreign-Based Swaps or on the basis that the counterparty to a swap qualifies as a Foreign Counterparty.

## **3. SD/MSP Registration Thresholds and *De Minimis* Calculations**

Under the CEA swaps regulatory regime, an entity is required to register (i) as an SD when the entity’s swap dealing activities exceed the *de minimis* threshold of dealing activity or (ii) as an MSP when the entity exceeds the specified swap activity threshold.

### **A. Swap Dealer Registration**

CFTC regulations provide that a person shall not be deemed to be an SD as a result of swap dealing activity unless, during the previous 12 months, the aggregate gross notional amount of swaps connected with those dealing activities exceeds the *de minimis* threshold of US\$8 billion. In applying this threshold, a person must include the aggregate gross notional amount of the swaps connected with the dealing activities of affiliates under common control.<sup>80</sup> The Cross-Border Rule addresses how the *de minimis* threshold applies to cross-border swap dealing activities based on whether the potential SD is a US Person, an SRS, a Guaranteed Entity, or a Non-US Person other than an SRS or a Guaranteed Entity (an Other Non-US Person), as summarized below.

Counterparty:		US Person	Non-US Person		
			Guaranteed Entity	SRS	Other Non-US Person
Potential SD:		US Person	Guaranteed Entity	SRS	Other Non-US Person
US Person		Include	Include	Include	Include
Non-US Person	Guaranteed Entity	Include	Include	Include	Include
	SRS	Include	Include	Include	Include
	Other Non-US Person <sup>1</sup>	Include <sup>2</sup>	Include <sup>3</sup>	Exclude	Exclude
<p><sup>1</sup> 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.</p> <p><sup>2</sup> Unless the swap is conducted through a Foreign Branch of a registered SD.</p> <p><sup>3</sup> 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 <i>de minimis</i> threshold and is affiliated with a registered SD.</p>					

### US Person, SRS, or Guaranteed Entity

For purposes of determining whether a person is required to register as an SD, (i) a US Person must include all of its swap dealing transactions, without exception, in its *de minimis* calculations and (ii) a Non-US Person that qualifies as an SRS must include all of its swap dealing transactions without exception.<sup>81</sup>

A Non-US Person other than an SRS must include swaps if such Non-US Person's obligations under those swaps are guaranteed by a US Guarantor.<sup>82</sup> That is, a Guaranteed Entity must include all swaps under which its obligations are guaranteed by a US Person. This approach is largely consistent with the treatment of "guaranteed affiliates" under the 2013 Guidance (notwithstanding the differences in defining "guarantee" as between the 2013 Guidance and the Cross-Border Rule).<sup>83</sup>

### Other Non-US Persons

An Other Non-US Person must include swaps with any US Person counterparties, except swaps conducted through a Foreign Branch of a US Person SD.<sup>84</sup> Likewise, an Other Non-US Person must include swaps with a Non-US Person counterparty that is a Guaranteed Entity with respect to those swaps except when the counterparty is registered as a SD, the counterparty's guarantor is a non-financial entity, or the Guaranteed Entity counterparty is itself below the *de minimis* threshold and is affiliated with a registered SD.<sup>85</sup>

Notwithstanding any of the foregoing, an Other Non-US Person does not need to count any swaps that it (i) enters into anonymously on a designated contract market (DCM), a registered swaps execution facility (SEF) or a SEF exempted from registration, or a registered foreign board of trade (FBOT) and (ii) clears through a registered derivatives clearing organization (DCO) or a DCO exempted from registration.<sup>86</sup>

## B. Major Swap Participant Registration

The CEA defines "major swap participant" to include persons that are not SDs but that nevertheless pose a high degree of risk to the US financial system by virtue of the substantial nature of their swap positions.<sup>87</sup> Under CFTC regulations, a person shall not be deemed to be an MSP unless its swap

positions exceed one of several thresholds. The Cross-Border Rule addresses the cross-border application of such thresholds, as summarized below. Note that no market participant has registered with the CFTC as an MSP since the registration category was finalized nearly a decade ago.

Counterparty:		US Person	Non-US Person		
			Guaranteed Entity	SRS	Other Non-US Person
Potential MSP:		US Person	Guaranteed Entity	SRS	Other Non-US Person
US Person		Include	Include	Include	Include
Non-US Person	Guaranteed Entity	Include	Include	Include	Include
	SRS	Include	Include	Include	Include
	Other Non-US Person <sup>1</sup>	Include <sup>2</sup>	Include <sup>3</sup>	Exclude	Exclude
<p><sup>1</sup> 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.</p> <p><sup>2</sup> Unless the swap is conducted through a Foreign Branch of a registered SD.</p> <p><sup>3</sup> Unless the Guaranteed Entity is registered as an SD.</p> <p>Additionally, all swap positions that are subject to recourse should be attributed to the guarantor, whether it is a US Person or a Non-US Person, unless the guarantor, the Guaranteed Entity, and its counterparty are Other Non-US Persons.</p>					

### US Person, SRS or Guaranteed Entity

A US Person or an SRS must count all swap positions entered into by that person.<sup>88</sup> Similarly, a Non-US Person other than an SRS must count all swap positions under which its obligations are guaranteed by a US Guarantor.<sup>89</sup> That is, a Guaranteed Entity must count all of its swap positions where its obligations under the swaps are guaranteed by a US Person.

### Other Non-US Persons

An Other Non-US Person must count swap positions with a counterparty that is a US Person except swaps conducted through a Foreign Branch of a US Person SD.<sup>90</sup> Likewise, an Other Non-US Person must count all swap positions with a Non-US Person counterparty that is a Guaranteed Entity with respect to those swaps except when the counterparty is registered as a SD.<sup>91</sup>

Notwithstanding any of the foregoing, an Other Non-US Person does not need to count any swap positions that are entered into by such Non-US Person 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.<sup>92</sup>

### Attribution Requirement

The CFTC has previously adopted the interpretation that for purposes of applying the MSP definition, in general an entity's swap positions are attributable to a parent, other affiliate, or guarantor to the extent that the counterparty has recourse to the parent, other affiliate, or guarantor in connection with the position.<sup>93</sup> Such attribution is not required in the absence of recourse or if the parent or guarantor is subject to capital regulation by the CFTC, the SEC, or a US prudential regulator

The CFTC addressed the cross-border application of this attribution requirement in the Cross-Border Rule. Consistent with its prior interpretation, the CFTC indicated that attribution is not required if the entity that entered into the swap directly is subject to capital regulation by the CFTC, the SEC or a US prudential regulator, or to Basel-compliant capital standards and oversight by a G20 prudential supervisor.<sup>94</sup> Further, the swap positions of an entity that is required to register as an MSP, or whose MSP registration is pending, are not subject to the attribution requirement.<sup>95</sup>

On the other hand, if a guarantee is present and the entity being guaranteed is not subject to capital regulation as described above, application of the attribution requirement depends on the status of the person to whom there is recourse under the guarantee (i.e., the status of the guarantor), as follows:<sup>96</sup>

- A US Guarantor must attribute to itself any swap position of an entity subject to a guarantee, whether a US Person or a Non-US Person, for which the counterparty to the swap has recourse against that the US Guarantor.<sup>97</sup>
- A Non-US Person must attribute to itself any swap position of an entity for which the counterparty to the swap has recourse against the Non-US Person unless all relevant parties (including the Non-US Person guarantor and both swap counterparties) are Non-US Persons that are not Guaranteed Entities.<sup>98</sup>

#### 4. ANE Transactions

As noted above, in the ANE Staff Advisory, DSIO staff expressed the view that non-US SDs that regularly use personnel or agents located in the United States to “arrange, negotiate, or execute” swaps with a Non-US Person (so-called ANE Transactions) would generally be required to comply with those regulatory requirements categorized as “Transaction-Level Requirements” under the 2013 Guidance (as discussed below). Less than two weeks later, CFTC staff issued no-action relief — which it subsequently extended on multiple occasions — relieving most Non-US Swap Entities from these compliance obligations with respect to ANE Transactions.

In adopting the Cross-Border Rule, the CFTC indicated that it will not treat the use by non-US SDs of personnel or agents located in the United States to arrange, negotiate, or execute transactions with non-US counterparties as a relevant factor in the cross-border application of those regulatory requirements addressed by the rule.<sup>99</sup> The CFTC noted that, although ANE Transactions involve market-facing activity in the United States, such transactions involve two Non-US Persons, and the financial risk of such transactions lies outside the United States. Furthermore, the CFTC observed that Non-US Persons entering into ANE Transactions would generally be subject to regulation and oversight in their home jurisdictions. The CFTC does, however, retain broad antifraud and anti-manipulation enforcement authority with respect to ANE Transactions.<sup>100</sup>

In line with the policy expressed in the Cross-Border Rule, CFTC staff contemporaneously issued the 2020 ANE No-Action Relief, which (i) withdraws the ANE Staff Advisory in its entirety, (ii) withdraws the Original ANE No-Action Relief, and (iii) grants additional no-action relief to non-US SDs for those regulatory requirements treated as Transaction-Level Requirements under the 2013 Guidance but not addressed in the Cross-Border Rule — namely, mandatory clearing, mandatory trade execution, and real-time public reporting. This no-action relief extends through such time as these regulatory requirements are subsequently addressed by formal CFTC action. For these purposes, CFTC action addressing the application of the unaddressed regulatory requirements may include a rulemaking or order addressing such requirements, but does not include action by the CFTC staff.

## 5. Categorizing Applicable Compliance Obligations

In addition to the definitions discussed above, the cross-border application of the CEA swaps regulatory regime depends on the categorization of each regulatory requirement applicable to SDs and MSPs. That is, the cross-border application of a particular regulatory requirement depends not only on the US Person or other status of the counterparties, but also on the category to which the relevant regulatory requirement belongs.

While the CFTC had previously adopted a binary categorization of SD/MSP regulatory requirements in the 2013 Guidance (i.e., so-called Entity-Level vs. Transaction-Level Requirements),<sup>101 102</sup> the Cross-Border Rule employs a three-fold approach to categorization of the enumerated SD/MSP compliance obligations into Group A, Group B, and Group C categories. Notably, the Cross-Border Rule does not address all CEA swaps regulatory requirements, nor even all of the regulatory requirements addressed in the 2013 Guidance, as illustrated in the table below. Indeed, in adopting the Cross-Border Rule, the CFTC indicated that it intends to address in future separate rulemakings the cross-border application of those remaining regulatory requirements.<sup>103</sup>

Requirement	2013 Guidance	Cross-Border Rule
<b>Capital</b> [to be codified at 17 C.F.R. §§ 23.100-23.106]	<b>Entity Level Requirements</b>	Addressed in Capital Rule. <sup>104</sup>
<b>Swap Data Repository (SDR) Reporting</b> [17 C.F.R. Part 45]		To be addressed in separate rulemaking. <sup>105</sup>
<b>Large Trader Reporting</b> [17 C.F.R. Part 20]		To be addressed in separate rulemaking. <sup>106</sup>
<b>Chief Compliance Officer (CCO)</b> [17 C.F.R. § 3.3]		<b>Group A</b> <sup>107</sup>
<b>Risk Management</b> [17 C.F.R. §§ 23.600-23.603, 23.605-23.606, and 23.609]		
<b>Swap Data Recordkeeping</b> [17 C.F.R. §§ 23.201, 23.203, and 45.2(a) (to the extent it duplicates 17 C.F.R. § 23.201)]		
<b>Antitrust</b> [17 C.F.R. § 23.607]	Not addressed in 2013 Guidance.	



Requirement	2013 Guidance	Cross-Border Rule
<b>Required Clearing and Swap Processing</b> [17 C.F.R. §§ 23.506, 23.610 and 39.12 and 17 C.F.R. Part 50]	<b>Transaction Level Requirements</b>	To be addressed in separate rulemaking. <sup>108</sup>
<b>Uncleared Swap Margin</b> [17 C.F.R. §§ 23.150-23.161]		Addressed in Cross-Border Margin Rule. <sup>109</sup>
<b>Real-Time Public Reporting</b> [17 C.F.R. Part 43]		To be addressed in separate rulemakings. <sup>110</sup>
<b>Mandatory Trade Execution</b> [17 C.F.R. §§ 37.10, 38.12]		To be addressed in separate rulemaking. <sup>111</sup>
<b>Swap Trading Relationship Documentation</b> [17 C.F.R. § 23.504]		<b>Group B</b> <sup>112</sup>
<b>Portfolio Reconciliation and Compression</b> [17 C.F.R. §§ 23.502, 23.503]		
<b>Trade Confirmation</b> [17 C.F.R. § 23.501]		
<b>Daily Trading Records</b> [17 C.F.R. § 23.202]		
<b>External Business Conduct Standards</b> [17 C.F.R. §§ 23.400-23.451]		<b>Group C</b> <sup>113</sup>
<b>Elective (Non-Regulatory) Initial Margin Segregation for Uncleared Swaps</b> [17 C.F.R. §§ 23.700-23.704]	Not addressed in 2013 Guidance.	

The Cross-Border Rule starts from the default position that SDs and MSPs — whether US Persons or Non-US Persons — are subject to the CEA swaps regulatory regime as CFTC registrants.<sup>114</sup> That is, if an entity is required to register as an SD or MSP, it is subject to regulation by the CFTC. The Cross-Border Rule then operates to modify this default position consistent with principles of international comity and the conditioning of the CFTC’s cross-border jurisdiction on activities having a “direct and significant” connection with activities in, or effect on, commerce in the United States. Accordingly, by reference to the definitions and categorization of the regulatory requirements outlined above, the Cross-Border Rule provides certain entities with exceptions from some requirements and makes substituted compliance with foreign regulations available in some circumstances (as discussed below). Any such substituted compliance is subject to any conditions in the relevant comparability determination.

If substituted compliance applies in respect of any particular SD/MSP regulatory requirement, by complying with the comparable regulations of a foreign jurisdiction, an SD/MSP is deemed to be in compliance with the CEA swaps regulatory regime requirements to which it is subject as a CFTC registrant. Accordingly, failure to comply with the foreign jurisdiction’s regulatory requirements will constitute a violation of the CEA swaps regulatory regime and could result in CFTC enforcement action. That is, regardless of substituted compliance, all SD/MSPs remain subject to the CFTC’s examination and enforcement authority.<sup>115</sup>

## A. Group A Requirements

As set out in the table above, the Group A requirements consist of requirements relating to (i) chief compliance officers (17 C.F.R. § 3.3); (ii) risk management (17 C.F.R. §§ 23.600-23.603, 23.605, 23.606, and 23.609); (iii) swap data recordkeeping (17 C.F.R. §§ 23.201, 23.203, and 45.2(a) to the extent it

duplicates 17 C.F.R. § 23.201); and (iv) antitrust considerations (17 C.F.R. § 23.607) (together, the Group A Requirements).

The CFTC noted that the Group A Requirements would be impractical to apply only to specific transactions or counterparties, and are most effective when applied at an enterprise level.<sup>116</sup> In this regard, the Group A Requirements cover some, but not all, of the Entity-Level Requirements of the 2013 Guidance. The CFTC indicated its view that it has strong supervisory interests in ensuring that SDs/MSPs are subject to the Group A Requirements or comparably rigorous standards.<sup>117</sup>

Below is a summary of the cross-border application of the Group A Requirements under the Cross-Border Rule.

SD/MSP	Group A Requirements	Substituted Compliance Available?
US Person	Apply	No
Non-US Person	Apply	Yes

The Cross-Border Rule permits a Non-US Swap Entity to satisfy any Group A Requirement by complying with the applicable standards of a foreign jurisdiction with respect to which the CFTC has issued a comparability determination.<sup>118</sup>

## B. Group B Requirements

The Group B requirements consist of requirements relating to (i) swap trading relationship documentation (17 C.F.R. § 23.504); (ii) portfolio reconciliation and compression (17 C.F.R. §§ 23.502, 23.503); (iii) trade confirmation (17 C.F.R. § 23.501); and (iv) daily trading records (17 C.F.R. § 23.202) (together, the Group B Requirements).

The Group B Requirements primarily relate to risk mitigation and the maintenance of good recordkeeping and business practices. The CFTC indicated that, in its view, the Group B Requirements can practically be applied at the individual transaction or trading relationship level so as to distinguish between domestic and foreign transactions and counterparties.<sup>119</sup> In this regard, the Group B Requirements cover a subset of the regulatory requirements treated as Transaction-Level Requirements under the 2013 Guidance.<sup>120</sup>

Below is a summary of the cross-border application of the Group B Requirements under the Cross-Border Rule.

Counterparty: SD/MSP:		US Person		Non-US Person			
		Non-Foreign Branch	Foreign Branch	US Branch	Guaranteed Entity	Swap Entity SRS	Other Non-US Person or SRS End-User
US Person	Non-Foreign Branch	Apply	Apply	Apply	Apply	Apply	Apply
	Foreign Branch	Apply <sup>1</sup>	Apply <sup>1</sup> (SC)	Apply <sup>1</sup>	Apply <sup>1</sup> (SC)	Apply <sup>1</sup> (SC)	Apply <sup>1,2</sup> (SC)
Non-US Person	US Branch	Apply	Apply	Apply	Apply	Apply (SC)	Apply (SC)
	Guaranteed Entity or SRS	Apply <sup>1</sup>	Apply <sup>1</sup> (SC)	Apply <sup>1</sup>	Apply <sup>1</sup> (SC)	Apply <sup>1</sup> (SC)	Apply <sup>1,3</sup> (SC)
	Other Non-US Person	Apply <sup>1</sup>	Apply <sup>1</sup> (SC)	Apply <sup>1</sup>	Apply <sup>1</sup> (SC)	Apply <sup>1</sup> (SC)	Do Not Apply <sup>4</sup>

<sup>1</sup> The Exchange-Traded Swap Group B Exception is available for certain anonymous, exchange-traded, and cleared Foreign-Based Swaps between the two parties.

<sup>2</sup> The Limited Foreign Branch Group B Exception is available for a Foreign Branch's Foreign-Based Swaps with a Foreign Counterparty that is an SRS End-User or an Other Non-US Person that is not an SD/MSP, subject to certain conditions discussed above.

<sup>3</sup> The Limited Swap Entity SRS/Guaranteed Entity Group B Exception is available for the Foreign-Based Swaps of each SRS Swap Entity or Guaranteed Swap Entity with a Foreign Counterparty that is an SRS End-User or an Other Non-US Person that is not an SD/MSP, subject to certain conditions.

<sup>4</sup> The Non-US Person Swap Entity Group B Exception is available for a Non-US Swap Entity that is neither an SRS nor a Guaranteed Entity with respect to its Foreign-Based Swaps with a Foreign Counterparty (other than a Foreign Branch) that is neither (i) an SRS that is an SD/MSP nor (ii) a Guaranteed Entity.

*(SC) denotes the availability of substituted compliance*

### Exceptions to Group B Requirements

The Cross-Border Rule provides a number of exceptions to the Group B Requirements, as described below.

- Exchange-Traded Swap Group B Exception.** The Cross-Border Rule provides that each Non-US Swap Entity and Foreign Branch of a US Swap Entity is excepted from the Group B Requirements (subject to the caveat below) with respect to any Foreign-Based Swap that is (i) entered into anonymously on a DCM, a registered SEF, a SEF exempted from registration with the CFTC, or a registered FBOT, and (ii) cleared through a registered DCO or a clearing organization exempted from registration with the CFTC (the Exchange-Traded Swap Group B Exception).<sup>121</sup> The caveat is that the Group B Requirements in respect of daily trading records obligations continue to apply notwithstanding the exception. The CFTC declined to extend this exception to US Swap Entities.<sup>122</sup>
- Limited Foreign Branch Group B Exception.** Under the Cross-Border Rule, a Foreign Branch of a US Swap Entity is excepted from the Group B Requirements with respect to any Foreign-Based Swap with a Foreign Counterparty (other than a Foreign Branch) that is neither an SD/MSP nor a Guaranteed Entity (the Limited Foreign Branch Group B Exception).<sup>123</sup> This exception is designed to allow a Foreign Branch of a US Swap Entity to continue to access swap markets for which substituted compliance may not be available under in limited circumstances in recognition of the fact that activities through foreign branches in these markets, though not necessarily significant in volume,

may nevertheless be an integral element of a US Swap Entity's global business, and may be necessary to preserve liquidity in emerging markets.<sup>124</sup>

The availability of this exception is subject to the following limitations:

- The Limited Foreign Branch Group B Exception is not available with respect to any Group B Requirement if the requirement, as applicable to the relevant swap(s), is eligible for substituted compliance pursuant to a comparability determination issued by the CFTC prior to execution of the relevant swap(s).<sup>125</sup>
- The Limited Foreign Branch Group B Exception is not available if, in any calendar quarter, the aggregate gross notional amount of swaps conducted by the SD/MSP in reliance on this exception exceeds 5% of the aggregate gross notional amount of all of its swaps.<sup>126</sup>
- **Non-US Swap Entity Group B Exception.** The Cross-Border Rule provides that each Non-US Swap Entity that an Other Non-US Person is excepted from the Group B Requirements with respect to any Foreign-Based Swap with a Foreign Counterparty (other than a Foreign Branch) that is neither (i) an SRS that is an SD/MSP nor (ii) a Guaranteed Entity — that is, with a Foreign Counterparty (other than a Foreign Branch) that is an SRS End-User or an Other Non-US Person (the Non-US Person Swap Entity Group B Exception).<sup>127</sup>
- **Limited Swap Entity SRS/Guaranteed Entity Group B Exception.** Under the Cross-Border Rule, each Non-US Swap Entity that is an SRS or a Guaranteed Entity, is excepted from the Group B Requirements with respect to any Foreign-Based Swap with a Foreign Counterparty (other than a Foreign Branch) that is neither an SD/MSP nor a Guaranteed Entity — that is, with a Foreign Counterparty that is an SRS End-User or an Other Non-US Person that is not an SD/MSP (the Limited Swap Entity SRS/Guaranteed Entity Group B Exception).<sup>128</sup>

Analogously to the Limited Foreign Branch Group B Exception, this exception is subject to the following limitations:

- The Limited Swap Entity SRS/Guaranteed Entity Group B Exception is not available with respect to any Group B Requirement for which substituted compliance is available for the relevant swap.<sup>129</sup>
- The Limited Swap Entity SRS/Guaranteed Entity Group B Exception is not available if, in any calendar quarter, the aggregate gross notional amount of swaps conducted by the SD/MSP in reliance on this exception exceeds five percent of the aggregate gross notional amount of all of its swaps.<sup>130</sup>

### Substituted Compliance

The Cross-Border Rule provides for substituted compliance in certain circumstances in respect of the Group B Requirements, as described below.

- **Foreign-Based Swaps.** The Cross-Border Rule permits a Non-US Swap Entity or Foreign Branch of a US Swap Entity to satisfy any applicable Group B Requirement for a Foreign-Based Swap with a Foreign Counterparty by complying with the applicable standards of a foreign jurisdiction with respect to which the CFTC has issued a comparability determination.<sup>131</sup>

- **Swaps Booked in a US Branch.** The Cross-Border Rule also permits a Non-US Swap Entity to satisfy any applicable Group B Requirement for any swap booked in a US Branch with a Foreign Counterparty that is neither a Foreign Branch nor a Guaranteed Entity by complying with the applicable standards of a foreign jurisdiction with respect to which the CFTC has issued a comparability determination.<sup>132</sup>

### C. Group C Requirements

The Group C requirements consist of the external business conduct requirements (17 C.F.R. §§ 23.400-23.451) and the elective initial margin segregation requirement (17 C.F.R. §§ 23.700-23.704). The Group C Requirements thus primarily encompass CFTC regulations focused on customer protection.

Set forth below is a summary of the cross-border application of the Group C Requirements under the Cross-Border Rule.

Counterparty: SD/MSP:		US Person		Non-US Person			
		Non-Foreign Branch	Foreign Branch	US Branch	Guaranteed Entity	SRS	Other Non-US Person or SRS End-User
US Person	Non-Foreign Branch	Apply	Apply	Apply	Apply	Apply	Apply
	Foreign Branch	Apply <sup>1</sup>	Do Not Apply <sup>2</sup>	Apply <sup>1</sup>	Do Not Apply <sup>2</sup>	Do Not Apply <sup>2</sup>	Do Not Apply <sup>2</sup>
Non-US Person	US Branch	Apply	Apply	Apply	Apply	Do Not Apply <sup>3</sup>	Do Not Apply <sup>3</sup>
	Guaranteed Entity or SRS	Apply <sup>1</sup>	Do Not Apply <sup>2</sup>	Apply <sup>1</sup>	Do Not Apply <sup>2</sup>	Do Not Apply <sup>2</sup>	Do Not Apply <sup>2</sup>
	Other Non-US Person	Apply <sup>1</sup>	Do Not Apply <sup>2</sup>	Apply <sup>1</sup>	Do Not Apply <sup>2</sup>	Do Not Apply <sup>2</sup>	Do Not Apply <sup>2</sup>
<p><sup>1</sup> The Exchange-Traded Swap Group C Exception is available for certain anonymous, exchange-traded, and cleared Foreign-Based Swaps between the two parties.</p> <p><sup>2</sup> The Foreign Swap Group C Exception is available to each Non-US Swap Entity and Foreign Branch of a US Swap Entity for its Foreign-Based Swaps with a Foreign Counterparty.</p> <p><sup>3</sup> The US Branch Group C Exception is available to a Non-US Swap Entity with respect to any swap booked in a US Branch with a Foreign Counterparty that is neither a Foreign Branch nor a person whose performance under the swap is guaranteed by a US Guarantor.</p>							

### Exceptions to Group C Requirements

The Cross-Border Rule provides a number of exceptions to the Group C Requirements, as described below.

- **Exchange-Traded Swap Group C Exception.** The Cross-Border Rule provides that each Non-US Swap Entity and Foreign Branch of a US Swap Entity is excepted from the Group C Requirements with respect to any Foreign-Based Swap, which is (i) entered into anonymously on a DCM, a registered SEF, a SEF exempted from registration with the CFTC, or a registered FBOT, and (ii) cleared through a registered DCO or a clearing organization exempted from registration with the

CFTC (the Exchange-Traded Swap Group C Exception).<sup>133</sup> The CFTC declined to extend this exception to US Swap Entities.<sup>134</sup>

- **Foreign Swap Group C Exception.** The Cross-Border Rule provides that each Non-US Swap Entity and Foreign Branch of a US Swap Entity is excepted from the Group C Requirements with respect to Foreign-Based Swaps with a Foreign Counterparty (the Foreign Swap Group C Exception).<sup>135</sup>
- **US Branch Group C Exception.** The Cross-Border Rule provides that a Non-US Swap Entity is excepted from the Group C Requirements with respect to any swap booked in a US Branch with a Foreign Counterparty that is neither a Foreign Branch nor a Guaranteed Entity (the US Branch Group C Exception).<sup>136</sup>

## 6. Substituted Compliance Process

While the provisions of the Cross-Border Rule discussed above make substituted compliance available in certain circumstances, substituted compliance only applies with respect to a foreign jurisdiction for which (and solely to the extent of which) the CFTC has issued a comparability determination for the relevant CEA swaps regulatory regime. Building on the substituted compliance regime established under the 2013 Guidance and the Cross-Border Margin Rule, the Cross-Border Rule establishes a more formalized regime pursuant to which it will consider granting comparability determinations.

### A. Eligibility and Submission Requirements

The CFTC may issue comparability determinations on its own initiative.<sup>137</sup> Additionally, a request for a comparability determination with respect to some or all of the Group A and Group B Requirements may be submitted, individually or collectively, by either:<sup>138</sup>

- An SD/MSP that is eligible for substituted compliance under the Cross-Border Rule
- A trade association or other similar group on behalf of its SD/MSP members
- A foreign regulatory authority with direct supervisory authority over SDs/MSPs subject to Group A and/or Group B Requirements and that is responsible for administering the relevant foreign jurisdiction's swap standards

Requests for comparability determinations must meet certain minimum submission requirements, including supplying the following information:<sup>139</sup>

- A description of the objectives of the relevant foreign jurisdiction's standards and the products and entities subject to such standards
- A description of how the relevant foreign jurisdiction's standards address, at a minimum, the elements or goals of the CFTC's corresponding requirements or group of requirements
- A description of the differences between the relevant foreign jurisdiction's standards and the CFTC's corresponding requirements, and an explanation regarding how such differing approaches achieve comparable outcomes
- A description of the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's standards



- Copies of the foreign jurisdiction's relevant standards (including an English translation of any foreign-language document)
- Such other information and documentation as the CFTC deems appropriate

## **B. Standard of Review**

The CFTC may issue a comparability determination under the Cross-Border Rule to the extent that it determines that some or all of the relevant foreign jurisdiction's standards are "comparable" to the CFTC's corresponding requirements or would result in comparable outcomes as those requirements.<sup>140</sup> The Cross-Border Rule does not specifically define the term "comparable," but rather adopts a "flexible, outcome-based approach" pursuant to which the CFTC may consider any factor it deems appropriate in assessing comparability.<sup>141</sup> With that said, the Cross-Border Rule does specify certain factors that the CFTC may take into account, including:<sup>142</sup>

- The scope and objectives of the relevant foreign jurisdiction's standards
- Whether the relevant foreign jurisdiction's standards achieve comparable outcomes to the CFTC's corresponding requirements
- The ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's standards
- Whether the relevant regulatory authority or authorities have entered into a memorandum of understanding or other arrangement with the CFTC addressing information sharing, oversight, examination, and supervision of SDs/MSPs relying on such comparability determination

In adopting the Cross-Border Rule, the CFTC stressed that reciprocity is one of many non-determinative factors it may consider when assessing comparability, but that the absence of a reciprocal comparability determination or similar finding on the part of a foreign jurisdiction would not preclude a comparability determination being granted by the CFTC.<sup>143</sup>

## **C. Discretion and Conditions**

The issuance of a comparability determination is discretionary, and the CFTC may subject a comparability determination to appropriate terms and conditions.<sup>144</sup> Furthermore, the CFTC reserves itself the right to further condition, modify, suspend, terminate, or otherwise restrict any comparability determination that it grants.<sup>145</sup>

## **D. Continuation of Prior Comparability Determinations**

Importantly, the Cross-Border Rule does not affirmatively alter the effectiveness of comparability determinations granted by the CFTC under the 2013 Guidance.<sup>146</sup> The CFTC has previously issued comparability determinations with respect to aspects of the regulatory requirements of Australia, Canada, the European Union, Hong Kong, Japan, and Switzerland.<sup>147</sup> However, the CFTC indicated that it may reevaluate these prior comparability determinations in the context of the Cross-Border Rule.<sup>148</sup>

## **7. Recordkeeping**

SDs/MSPs must create and retain records of their compliance with the Cross-Border Rule.<sup>149</sup> The CFTC stressed that these records are a "fundamental element" of each SD's/MSP's compliance program and regulatory oversight by the CFTC.<sup>150</sup>

## 8. Key Takeaways and Action Items

The requirements of the Cross-Border Rule do not apply to swaps executed prior to September 14, 2021, and reliance on certain counterparty representations obtained prior to November 13, 2020, is permitted until December 31, 2027, for representations.

As the September 14, 2021, compliance date approaches, market participants should be prepared to evaluate and make representations with respect to their status under the Cross-Border Rule where necessary in opening new trades and trading relationships. Of note, existing standard representations and documents do not address SRS status.

On January 15, 2021, ISDA published the new ISDA US Self-Disclosure Letter,<sup>151</sup> portions of which supersede the existing ISDA Cross-Border Swaps Representation Letter and the US aspects of the ISDA Regulatory Margin Self-Disclosure Letter. Notably, the new ISDA US Self-Disclosure Letter addresses, in one document, disclosures relating to the Cross-Border Rule, the 2013 Guidance (where still applicable), the Cross-Border Margin Rule, the US prudential regulators' margin rules, and the SEC's margin rules.

Separately, investment vehicles and end-users that previously qualified as "US persons" under the 2013 Guidance and/or the Cross-Border Margin Rule should carefully consider their status under the Cross-Border Rule, particularly given the fact that, under the Cross-Border Rule, a US Person does not include a prong capturing a commodity pool, pooled account, investment fund, or other collective investment vehicle that is majority-owned by one or more US Persons. Any such change in status could materially impact trading relationships and potentially alleviate certain regulatory obligations (including margin requirements).

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[US-EU Margin Rules Reference Guide](#)

[CFTC Publishes Long-Awaited Comparability Determination for EU Margin Rules](#)

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## Endnotes

- <sup>1</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(h)(3)(iii)).
- <sup>2</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(h)(2)).
- <sup>3</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(h)(3)(ii)).
- <sup>4</sup> Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56924 (Sep. 14, 2020) (to be codified at 17 C.F.R. pt. 23), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-09-14/pdf/2020-16489.pdf> (the Cross-Border Rule). Minor technical corrections were subsequently adopted. See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants; Correction. 85 Fed. Reg. 69498 (Nov. 3, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-11-03/pdf/2020-23167.pdf>.
- <sup>5</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(h)(3)(i)).
- <sup>6</sup> In particular, the Cross-Border Rule does not address 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.
- <sup>7</sup> Cross-Border Rule, 85 Fed. Reg. at 56980-56981.
- <sup>8</sup> CFTC No-Action Letter 20-21 (July 23, 2020), *available at* <https://www.cftc.gov/csl/20-21/download> (the 2020 ANE No-Action Relief).
- <sup>9</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) § 722(d) (codified at 7 USC. § 2(i)).
- <sup>10</sup> Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 77 Fed. Reg. 30595 (May 23, 2012), *available at* <https://www.govinfo.gov/content/pkg/FR-2012-05-23/pdf/2012-10562.pdf> (the Entities Rule).
- <sup>11</sup> Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45291 (July 26, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-07-26/pdf/2013-17958.pdf> (the 2013 Guidance).
- <sup>12</sup> Applicability of Transaction-Level Requirements to Activity in the United States, CFTC Staff Advisory No. 13-69 (Nov. 14, 2013), *available at* <https://www.cftc.gov/csl/13-69/download>.
- <sup>13</sup> No-Action Relief: Certain Transaction-Level Requirements for Non-US Swap Dealers, CFTC Staff Letter No. 13-71 (Nov. 26, 2013), *available at* <https://www.cftc.gov/csl/13-71/download>.
- <sup>14</sup> CFTC staff extended this relief on multiple occasions, mostly recently in 2017. See Extension of No-Action Relief: Transaction-Level Requirements for Non-US Swap Dealers, CFTC Staff Letter No. 17-36 (July 25, 2017), *available at* <https://www.cftc.gov/csl/17-36/download>.
- <sup>15</sup> Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants-Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34817 (May 31, 2016) (the Cross-Border Margin Rule), *available at* <https://www.govinfo.gov/content/pkg/FR-2016-05-31/pdf/2016-12612.pdf>. For further discussion, please refer to Latham's *Client Alert* regarding the CFTC Cross-Border Margin Rules in proposed form. CFTC Proposes Cross-Border Application of Margin Requirements for Uncleared Swaps, *Client Alert* No. 1865 (Aug. 13, 2015), *available at* <https://www.lw.com/thoughtLeadership/lw-CFTC-Cross-Border-Application-UnclearedSwaps>.
- <sup>16</sup> 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), *available at* <https://www.govinfo.gov/content/pkg/FR-2016-10-18/pdf/2016-24905.pdf>.

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- <sup>17</sup> Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 952 (Jan. 08, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-01-08/pdf/2019-28075.pdf>.
- <sup>18</sup> Cross-Border Rule, 85 Fed. Reg. at 56932.
- <sup>19</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)).
- <sup>20</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(23)(iv)).
- <sup>21</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(9)).
- <sup>22</sup> Cross-Border Rule, 85 Fed. Reg. at 56947.
- <sup>23</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(23)(i)).
- <sup>24</sup> 2013 Guidance, 78 Fed. Reg. at 45316.
- <sup>25</sup> 17 C.F.R. § 23.160(a)(10).
- <sup>26</sup> Cross-Border Rule, 85 Fed. Reg. at 56934. The CFTC stated in the Cross-Border Rule that, in its view, the language in paragraph (B) of the Cross-Border Rule definition of a “US person” would include pension plans for the employees, officers, or principals of a legal entity described in that paragraph. The CFTC noted that it received no comments regarding its statements in proposing the Cross-Border Rule that “the second prong of the definition would subsume the pension fund and trust prongs of the “US person” definition in the Cross-Border Margin Rule.”
- <sup>27</sup> Cross-Border Rule, 85 Fed. Reg. at 56934. The CFTC stated in the Cross-Border Rule that, in its view, the language in paragraph (B) of the Cross-Border Rule definition of a “US person” also “subsumes the trust prong of the “US person” definition in the Cross-Border Margin Rule”. The CFTC noted that it received no comments regarding its statements in proposing the Cross-Border Rule that “the second prong of the definition would subsume the pension fund and trust prongs of the “US person” definition in the Cross-Border Margin Rule.”
- <sup>28</sup> Cross-Border Rule, 85 Fed. Reg. at 56935-56936.
- <sup>29</sup> Cross-Border Rule, 85 Fed. Reg. at 56934-56935.
- <sup>30</sup> Cross-Border Rule, 85 Fed. Reg. at 56936.
- <sup>31</sup> 17 C.F.R. § 240.3a71-3(a)(4)(i).
- <sup>32</sup> 17 C.F.R. § 23.160(a)(10).
- <sup>33</sup> Margin and Capital Requirements for Covered Swap Entities, 80 Fed. Reg. 74839 at 74883 (Nov. 30, 2015), available at <https://www.govinfo.gov/content/pkg/FR-2015-11-30/pdf/2015-28671.pdf>.
- <sup>34</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(10)).
- <sup>35</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(24)).
- <sup>36</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(11)).
- <sup>37</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(23)(ii)).
- <sup>38</sup> Cross-Border Rule, 85 Fed. Reg. at 56936.
- <sup>39</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(23)(ii)).
- <sup>40</sup> *Hertz Corp. v. Friend*, 559 US 77, 80 (2010).
- <sup>41</sup> Cross-Border Rule, 85 Fed. Reg. at 56936-56937.
- <sup>42</sup> 2013 Guidance, 78 Fed. Reg. at 45310; Cross-Border Margin Rule, 81 Fed. Reg. at 34823.
- <sup>43</sup> Cross-Border Rule, 85 Fed. Reg. at 56937.
- <sup>44</sup> 17 C.F.R. § 240.3a71-3(a)(4)(ii).
- <sup>45</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(23)(iii)).
- <sup>46</sup> 17 C.F.R. § 240.3a71-3(a)(4)(iii).
- <sup>47</sup> No-Action Position with Respect to Uncleared Swaps with the European Stability Mechanism, CFTC Staff Letter No. 17-34 (July 24, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/17-34.pdf>.
- <sup>48</sup> Relief for Certain Non-US Persons from Including Swaps with International Financial Institutions in Determining Swap Dealer and Major Swap Participant Status, CFTC Staff Letter No. 18-13 (May 16, 2018), <https://www.cftc.gov/csl/18-13/download>.
- <sup>49</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(9)).
- <sup>50</sup> Cross-Border Rule, 85 Fed. Reg. at 56941.
- <sup>51</sup> Cross-Border Rule, 85 Fed. Reg. at 56940.
- <sup>52</sup> 2013 Guidance, 78 Fed. Reg. at 45317.
- <sup>53</sup> Cross-Border Rule, 85 Fed. Reg. at 56940.
- <sup>54</sup> 2013 Guidance, 78 Fed. Reg. at 45320, n. 267.
- <sup>55</sup> Cross-Border Rule, 85 Fed. Reg. at 56941.

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- <sup>56</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(13)).
- <sup>57</sup> Cross-Border Rule, 85 Fed. Reg. at 56946.
- <sup>58</sup> The term “subsidiary” is defined to mean an affiliate of a person controlled by such person directly, or indirectly through one or more intermediaries. The term “control” (and related terms) means 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. Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(15)).
- <sup>59</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(14)).
- <sup>60</sup> Cross-Border Rule, 85 Fed. Reg. at 56943.
- <sup>61</sup> Cross-Border Rule, 85 Fed. Reg. at 56944.
- <sup>62</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(13)(i)).
- <sup>63</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(13)(ii)). See Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 63376 (Sept. 15, 2016), available at <https://www.govinfo.gov/content/pkg/FR-2016-09-15/pdf/2016-22045.pdf>; Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 82 Fed. Reg. 48394 (Oct. 18, 2017), available at <https://www.govinfo.gov/content/pkg/FR-2017-10-18/pdf/2017-22616.pdf>; Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. 12908 (Apr. 3, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-04-03/pdf/2019-06319.pdf>.
- <sup>64</sup> Cross-Border Rule, 85 Fed. Reg. at 56945.
- <sup>65</sup> 2013 Guidance, 78 Fed. Reg. at 45358.
- <sup>66</sup> Cross-Border Rule, 85 Fed. Reg. at 56942.
- <sup>67</sup> Cross-Border Rule, 85 Fed. Reg. at 56947.
- <sup>68</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(3)).
- <sup>69</sup> Cross-Border Rule, 85 Fed. Reg. at 56948.
- <sup>70</sup> 17 C.F.R. § 240.3a71-3(a)(2).
- <sup>71</sup> Cross-Border Rule, 85 Fed. Reg. at 56948.
- <sup>72</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(17)).
- <sup>73</sup> Cross-Border Rule, 85 Fed. Reg. at 56948.
- <sup>74</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(21)).
- <sup>75</sup> Cross-Border Rule, 85 Fed. Reg. at 56950.
- <sup>76</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(16)).
- <sup>77</sup> Cross-Border Rule, 85 Fed. Reg. at 56949.
- <sup>78</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(4)).
- <sup>79</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(5)).
- <sup>80</sup> 17 C.F.R. § 1.3.
- <sup>81</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(b)(1)).
- <sup>82</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(b)(2)(ii)).
- <sup>83</sup> 2013 Guidance, 78 Fed. Reg. at 45319.
- <sup>84</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(b)(2)(i)).
- <sup>85</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(b)(2)(iii)).
- <sup>86</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(d)).
- <sup>87</sup> 7 USC. § 1a(33).
- <sup>88</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(c)(1)).
- <sup>89</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(c)(2)(ii)).
- <sup>90</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(c)(2)(i)).
- <sup>91</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(c)(2)(iii)).
- <sup>92</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(d)).
- <sup>93</sup> Entities Rule, 77 Fed. Reg. at 30689.
- <sup>94</sup> Cross-Border Rule, 85 Fed. Reg. at 56959.
- <sup>95</sup> Cross-Border Rule, 85 Fed. Reg. at 56959.
- <sup>96</sup> Cross-Border Rule, 85 Fed. Reg. at 56959.
- <sup>97</sup> Cross-Border Rule, 85 Fed. Reg. at 56959.

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- <sup>98</sup> Cross-Border Rule, 85 Fed. Reg. at 56959-56960.
- <sup>99</sup> Cross-Border Rule, 85 Fed. Reg. at 56963.
- <sup>100</sup> Cross-Border Rule, 85 Fed. Reg. at 56961.
- <sup>101</sup> The 2013 Guidance further categorized the Entity-Level Requirements, such that (1) capital adequacy; (2) chief compliance officer; (3) risk management; (4) swap data recordkeeping constituted “First Category Entity-Level Requirements” whereas (1) swap data repository reporting and (2) large trader reporting constituted “Second Category Entity-Level Requirements”. See 2013 Guidance, 78 Fed. Reg. at 45331.
- <sup>102</sup> The 2013 Guidance further categorized the Transaction-Level Requirements, such that (1) required clearing and swap processing; (2) margin (and segregation) for uncleared swaps; (3) mandatory trade execution; (4) swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; and (8) daily trading records constituted “Category A Transaction-Level Requirements whereas the external business conduct standards constituted a “Category B Transaction-Level Requirement”. See 2013 Guidance, 78 Fed. Reg. at 45333.
- <sup>103</sup> Cross-Border Rule, 85 Fed. Reg. at 56963-56964, n. 354.
- <sup>104</sup> Cross-Border Rule, 85 Fed. Reg. at 56963-56964, n. 354. In September 2020, the CFTC adopted capital requirements for SDs and MSPs which provides that non-US domiciled CFTC-regulated SDs and MSPs may petition the CFTC for a program of substituted compliance. See Capital Requirements of Swap Dealers and Major Swap Participants, 85 Fed. Reg. 57462 (Sept. 15, 2020), available at <https://www.cftc.gov/sites/default/files/2020/09/2020-16492a.pdf> (the Capital Rule).
- <sup>105</sup> Cross-Border Rule, 85 Fed. Reg. at 56963-56964, n. 354.
- <sup>106</sup> Cross-Border Rule, 85 Fed. Reg. at 56963-56964, n. 354.
- <sup>107</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(6)).
- <sup>108</sup> Cross-Border Rule, 85 Fed. Reg. at 56963-56964, n. 354.
- <sup>109</sup> See 17 C.F.R. § 23.160.
- <sup>110</sup> Cross-Border Rule, 85 Fed. Reg. at 56963-56964, n. 354.
- <sup>111</sup> Cross-Border Rule, 85 Fed. Reg. at 56963-56964, n. 354.
- <sup>112</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(7)).
- <sup>113</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(a)(8)).
- <sup>114</sup> Cross-Border Rule, 85 Fed. Reg. at 56963.
- <sup>115</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(5)).
- <sup>116</sup> Cross-Border Rule, 85 Fed. Reg. at 56964.
- <sup>117</sup> Cross-Border Rule, 85 Fed. Reg. at 56964-56965.
- <sup>118</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(f)(1)).
- <sup>119</sup> Cross-Border Rule, 85 Fed. Reg. at 56966.
- <sup>120</sup> In particular, with the Category A Transaction-Level Requirements. See Cross-Border Rule, 85 Fed. Reg. at 56990, n. 561.
- <sup>121</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(1)(i)).
- <sup>122</sup> Cross-Border Rule, 85 Fed. Reg. at 56970.
- <sup>123</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(4)).
- <sup>124</sup> Cross-Border Rule, 85 Fed. Reg. at 56973.
- <sup>125</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(4)(i)).
- <sup>126</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(4)(ii)).
- <sup>127</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(3)).
- <sup>128</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(5)).
- <sup>129</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(5)(i)).
- <sup>130</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(5)(ii)).
- <sup>131</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(f)(2)).
- <sup>132</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(f)(3)).
- <sup>133</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(1)(i)).
- <sup>134</sup> Cross-Border Rule, 85 Fed. Reg. at 56970.
- <sup>135</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(1)(ii)).
- <sup>136</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(e)(2)).
- <sup>137</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(1)).
- <sup>138</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(2)).



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- <sup>139</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(3)).
- <sup>140</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(4)).
- <sup>141</sup> Cross-Border Rule, 85 Fed. Reg. at 56978.
- <sup>142</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(6)).
- <sup>143</sup> Cross-Border Rule, 85 Fed. Reg. at 56979.
- <sup>144</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(6)).
- <sup>145</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(g)(7)).
- <sup>146</sup> Cross-Border Rule, 85 Fed. Reg. at 56977.
- <sup>147</sup> Comparability Determination for Australia: Certain Entity-Level Requirements, 78 Fed. Reg. 78864 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30974.pdf>; Comparability Determination for Canada: Certain Entity-Level Requirements, 78 Fed. Reg. 78839 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30979.pdf>; Comparability Determination for the European Union: Certain Entity-Level Requirements, 78 Fed. Reg. 78923 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30980.pdf>; Comparability Determination for Hong Kong: Certain Entity-Level Requirements, 78 Fed. Reg. 78852 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30975.pdf>; Comparability Determination for Japan: Certain Entity-Level Requirements, 78 Fed. Reg. 78910 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30976.pdf>; Comparability Determination for Switzerland: Certain Entity-Level Requirements, 78 Fed. Reg. 78899 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30978.pdf>; Comparability Determination for the European Union: Certain Transaction-Level Requirements, 78 Fed. Reg. 78878 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30981.pdf>; Comparability Determination for Japan: Certain Transaction-Level Requirements, 78 Fed. Reg. 78890 (Dec. 27, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-12-27/pdf/2013-30977.pdf>.
- <sup>148</sup> Cross-Border Rule, 85 Fed. Reg. at 56977.
- <sup>149</sup> Cross-Border Rule (to be codified at 17 C.F.R. § 23.23(h)(1)).
- <sup>150</sup> Cross-Border Rule, 85 Fed. Reg. at 56980.
- <sup>151</sup> ISDA US Self-Disclosure Letter (Jan. 15, 2021), *available at* <https://www.isda.org/book/isda-us-self-disclosure-letter/>.