

CFTC 2019 Proposed Cross-Border Rules

VISUAL MEMORANDUM

February 20, 2020



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Introduction



Introduction

- **The Proposed Rules:** On December 18, 2019, the CFTC proposed rules that would modify and codify the cross-border application of certain of its Title VII swap rules to both U.S. and non-U.S. registered swap dealers and major swap participants*
- The current cross-border application of the CFTC’s swap rules is primarily defined by the CFTC’s 2013 cross-border guidance (the **2013 Guidance**) and the CFTC’s 2016 rule regarding the cross-border application of margin rules (the **Cross-Border Margin Rule**)
- The Proposed Rules would:
 - Modify the key definitions used in the CFTC’s cross-border framework, including by introducing the “significant risk subsidiary” as a new entity type, eliminating “conduit affiliate” as an entity type, adding new definitions relating to U.S. branches of non-U.S. banks, and modifying the definitions of “U.S. person” and “guarantee” to be clearer, narrower and more consistent with the SEC’s versions
 - Withdraw the **2016 Proposal** relating to the cross-border application of registration thresholds and business conduct standards applicable to swap dealers, which addressed when swaps entered into by foreign branches of consolidated subsidiaries (**FCS**) would be treated like U.S. persons
 - The significant risk subsidiary concept replaces the conduit affiliate concept and is more risk-based than the FCS concept in the 2016 Proposal

* This visual memorandum does **not** address the application of the Proposed Rules to major swap participants

Introduction (cont.)

- The Proposed Rules would:
 - Eliminate the approach taken in CFTC Staff Advisory 13-69 that looked to whether a swap is arranged, negotiated or executed by U.S.-located personnel or agents of a non-U.S. swap dealer (**ANE Transactions**) in determining the application of substantive requirements
 - The Proposed Rules largely supersede CFTC Staff Advisory 13-69 and treat ANE Transactions in the same manner as other transactions between non-U.S. persons
 - Codify the cross-border swaps and positions that would count towards the thresholds for registering as a swap dealer in the 2013 Guidance, with slight modifications
 - Not address mandatory clearing, mandatory trade execution, real-time public reporting and swap data reporting requirements, which would continue to be governed by the 2013 Guidance
 - Modify the cross-border applicability of certain substantive CFTC swap rules, including the availability of substituted compliance
 - Set out a process for the CFTC to make comparability determinations for purposes of substituted compliance
 - Require swap dealers to create and retain records of their compliance with the Proposed Rules
 - The comment period for the Proposed Rule ends **March 9, 2020**

Key Definitions



Overview

- The Proposed Rules would modify and add certain key definitions for purposes of applying the CFTC’s cross-border framework, as summarized in the table below
- Most of the new definitions (with the exception of significant risk subsidiary) would not make significant substantive changes to the CFTC’s approach, but are being added to aid in codifying and clarifying the CFTC’s cross-border framework
- A person may rely on written representations from its counterparty that it satisfies the criteria for one or more of these definitions, unless the person has reason to know that the representation is inaccurate

Definition	Proposed Approach
U.S. Person	Harmonized with SEC definition
Guarantee	Consistent with the Cross-Border Margin Rule and SEC definition, but narrower than 2013 Guidance
Conduit Affiliate	Eliminated
Significant Risk Subsidiary	Newly added entity type based on similar policy concerns as conduit affiliate
Foreign Branch	Generally harmonized with SEC definition
Swap Conducted Through a Foreign Branch	
U.S. Branch	
Swap Conducted Through a U.S. Branch	New definitions
Foreign Counterparty	
Foreign-Based Swap	

U.S. Person

Under the Proposed Rules, a **U.S. Person** would be:

(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;

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

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

- **Comparison to SEC Cross-Border Rules:** The Proposed Rules would simplify and streamline the definition of U.S. Person, making it identical to the SEC’s definition of U.S. Person for purposes of the cross-border application of its requirements for security-based swap dealers (**SEC Cross-Border Rules**)
 - Consistent with the SEC Cross-Border Rules, a U.S. Person would not include 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, their agencies and pension plans
- **Comparison to Cross-Border Margin Rule:** The Proposed Rule’s definition would also be generally consistent with the definition of U.S. Person in the Cross-Border Margin Rule, except that it would **not** include entities that are owned by U.S. Persons that bear unlimited responsibility for the entity’s obligations and liabilities

U.S. Person (cont.)

Under the Proposed Rules, a **U.S. Person** would be:

(1) a **natural person** resident in the United States;

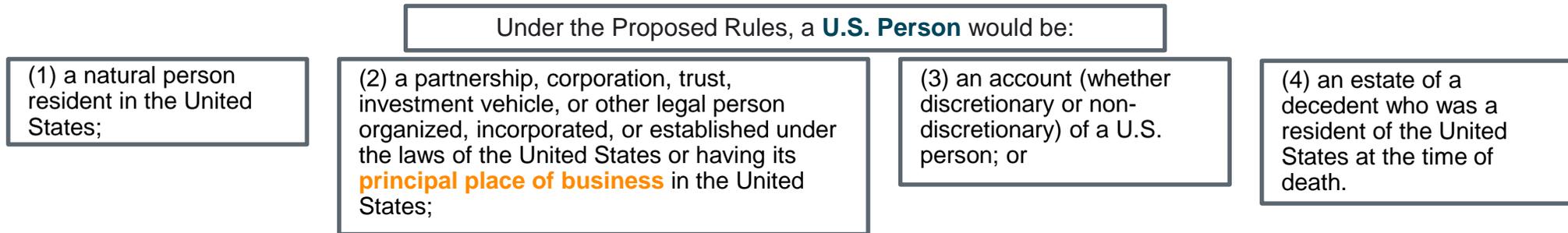
(2) a **partnership, corporation, trust, investment vehicle, or other legal person** organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;

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

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

- **Comparison to 2013 Guidance:** The Proposed Rules would be somewhat narrower than the 2013 Guidance because the proposed U.S. Person definition would:
 - Eliminate the prong of the principal place of business definition for a collective investment vehicle (**CIV**) in which the senior personnel responsible for the formation and promotion of the CIV are located in the United States or a commodity pool, pooled account, investment fund or other CIV with majority U.S. ownership;
 - Eliminate the prong concerning trusts governed by the laws of a U.S. jurisdiction and subject to a U.S. court's primary supervision;
 - Eliminate the prong concerning a CIV majority-owned by one or more U.S. persons; and
 - Not be open-ended or non-exhaustive, and therefore a U.S. Person would be limited to persons expressly enumerated in the definition

U.S. Person (cont.)



- Although not expressly included in the definition of U.S. Person, the CFTC believes that prong 2 would include **pension funds** and **trusts** for employees, officers or principals of a legal entity described in prong 2, consistent with the Cross-Border Margin Rule
- **Principal place of business** would mean the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person
 - With respect to an externally managed investment vehicle or a CIV, its principal place of business would be the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle
 - This definition is consistent with the SEC Cross-Border Rules
- A **branch** of a U.S. Person would be considered a U.S. Person, but certain Foreign Branches, as defined on slide 11, would be treated differently from the U.S. operations
- **Safe Harbor**: Until December 31, 2025, an entity could continue to classify counterparties as U.S. Persons based on representations that were made using the U.S. Person definition made under the Cross-Border Margin Rule

Guarantee

Under the Proposed Rules, a **Guarantee** would be:

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.

- **Rights of recourse:** A party has a right 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 the guarantor with respect to its counterparty's obligations under the swap
- **Guaranteed Entity:** While the Proposed Rule text does not use the term "Guaranteed Entity," the term Guaranteed Entity as used in this memo and the Proposed Rule preamble refers to a non-U.S. Person with swaps that are Guaranteed by a U.S. Person
 - A non-U.S. Person may be a Guaranteed Entity with respect to some, but not other, swaps
- **Look-through:** The definition of Guarantee would look through multiple guarantors. For example, if the obligations of Party A under a swap are guaranteed by a non-U.S. affiliate of Party A, and the non-U.S. affiliate's obligations under the guarantee are further guaranteed by a U.S. parent entity, a U.S. Guarantee would be deemed to exist

Guarantee (cont.)

Under the Proposed Rules, a **Guarantee** would be:

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.

- **Comparison to 2013 Guidance:** This definition of Guarantee is narrower than the definition in the 2013 Guidance, which also includes less traditional guarantees, such as keepwells and liquidity puts, certain indemnity agreements, master trust agreements and liability or loss transfer or sharing agreements
- **Comparison to Cross-Border Margin Rule:** This definition of Guarantee is consistent with the definition used in the Cross-Border Margin Rule
- **Comparison with SEC Cross-Border Rules:** This definition of Guarantee is consistent with the definition used in the SEC Cross-Border Rules

Significant Risk Subsidiary

- **New classification.** The Proposed Rules would replace the concept of a “conduit affiliate” from the 2013 Guidance with a new entity type—a significant risk subsidiary (**SRS**)
- An SRS is a non-U.S. significant subsidiary of an ultimate U.S. parent entity where the 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, but **excluding** non-U.S. subsidiaries that are subject to:
 - consolidated supervision and regulation by the Federal Reserve Board as a subsidiary of a U.S. bank holding company; or
 - both (i) capital standards and oversight by the non-U.S. person’s home country regulator that are consistent with Basel III **and** (ii) margin requirements for uncleared swaps in a jurisdiction for which the CFTC has issued a comparability determination with respect to uncleared swap margin requirements
- For purposes of the SRS definition, US. Parent entity means any U.S.-based entity in a consolidated group that has one or more subsidiaries in which the entity has a controlling interest, as determined in accordance with U.S. GAAP
- For purposes of the SRS definition, significant subsidiary is a subsidiary that exceeds one or more of the following metrics based on a three year rolling average:

Equity capital \geq 5% of the three year rolling average of its ultimate U.S. parent’s consolidated equity capital	Total revenue \geq 10% of the three year rolling average of its ultimate U.S. parent’s total consolidated revenue	Total assets \geq 10% of the three year rolling average of its ultimate U.S. parent’s total consolidated assets
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Foreign Branches

Foreign Branch:

An office of a U.S. bank that:

1. is located outside of the United States;
2. operates for valid business reasons;
3. maintains accounts independently of the home office and 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 and is subject to substantive regulation in banking or financing in the jurisdiction where it is located.

Swap Conducted Through a Foreign Branch:

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.

- **Foreign Branch:** The definition would not capture an affiliate of a U.S. bank that is organized as a separate legal entity
- **Swap Conducted Through a Foreign Branch:**
 - The first prong focuses on the location where the payments or deliveries under the swap must be made, consistent with the standard ISDA Master Agreement
 - **Normal course of business** means that it must be in the normal course for employees located in the branch (or another Foreign Branch of the U.S. bank) to enter into the type of swap in question
 - The CFTC believes that personnel in the U.S. may participate in the negotiation or execution of the swap, but the swap must be booked by the Foreign Branch
- **Comparison with 2013 Guidance:** The definition of Foreign Branch would be generally consistent with the definition in the 2013 Guidance
- **Comparison with SEC Cross-Border Rules:** The definition of Foreign Branch would also be generally consistent with the SEC's definition, with the exception of the independent accounts requirement, which is not part of the SEC's definition

U.S. Branches

U.S. Branch:

A branch or agency of a non-U.S. bank that:

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 regulation in banking or financing in the jurisdiction where it is located.

Swap Conducted Through a U.S. Branch:

A swap entered into by a U.S. branch where:

1. the U.S. branch is the office through which the non-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 non-U.S. person is such U.S. branch; or
2. the swap is reflected in the local accounts of the U.S. branch.

- **New Definitions:** U.S. Branch and Swaps Conducted Through a U.S. Branch are newly defined terms that would be used to identify swap activity that the CFTC believes should be viewed as taking place in the United States
- Unlike the counterpart definition for Swap Conducted Through a Foreign Branch, there is no ordinary course of business requirement for the definition of a Swap Conducted Through a U.S. Branch
 - Thus, even an atypical swap carried out by a non-U.S. entity through a U.S. Branch would be a Swap Conducted Through a U.S. Branch

Foreign Counterparty and Foreign-Based Swap

Foreign counterparty:

1. A non-U.S. person, except with respect to a swap conducted through 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.

Foreign-based swap:

1. A swap by a non-U.S. swap dealer, except for a swap conducted through a U.S. branch; or
2. A swap conducted through a foreign branch.

- **New Definitions:** Foreign Counterparty and Foreign-Based Swap are newly defined terms that would be used to identify swap activity that may be eligible for relief from certain CFTC requirements, as discussed in more detail in Sections 3 and 4 of this memorandum
- The definition of Foreign Counterparty does **not** include a non-U.S. Person conducting a swap through its U.S. Branch, despite a non-U.S. Person bearing ultimate risk for the swap

Registration Thresholds



Registration Thresholds

- An entity is not required to register as a swap dealer unless its swaps connected with its swap dealing activity over the preceding 12 months exceed an aggregate gross notional amount of (1) \$8 billion of swaps with any counterparty or (2) \$25 million of swaps with certain special entities, as defined under CFTC rules (the **De Minimis Threshold**)
- Under the Proposed Rules, a counting entity that is a **U.S. Person, Guaranteed Entity** or **SRS** would count all swaps with all types of counterparties, including swaps entered into by a foreign branch of such persons
- **Not Counted:** A counting entity that is a non-U.S. Person other than a Guaranteed Entity or SRS (an **Other Non-U.S. Person**) would **not** be required to count swaps toward its De Minimis Threshold with:
 - An SRS or another Other Non-U.S. Person
 - A U.S. Person that is conducted through a Foreign Branch of a registered swap dealer
 - A Guaranteed Entity that is a registered swap dealer
 - A Guaranteed Entity with a guarantor that is a non-financial entity
- **Anonymous Cleared Exception:** An Other Non-U.S. Person would also not be required to count swaps toward its De Minimis Threshold that are:
 - Entered into by such Other Non-U.S. Person on a designated contract market (**DCO**), a registered or exempt swap execution facility, or a registered foreign board of trade;
 - Cleared through a registered or exempt DCO; and
 - For which the Other Non-U.S. Person does not know the identity of its counterparty prior to execution.
- The scope of swaps that would be counted towards the De Minimis Threshold is generally consistent with the 2013 Guidance, with two differences highlighted on the next slide

Registration Thresholds

- The below chart provided by the CFTC in the Proposed Rules release summarizes the application of the counting requirements, with our annotations highlighting key differences from the 2013 Guidance

Swaps Counted Towards the De Minimis Threshold under the Proposed Rules

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

¹ Would 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, or unless the guarantor is a non-financial entity.

Some SRS that are not “conduit affiliates” under the 2013 Guidance may be required to count more swaps towards their De Minimis Threshold under the Proposed Rules because they would be required to count swaps with other SRS and Other Non-U.S. Persons

The Proposed Rules would require an Other Non-U.S. Person to count swaps with a Guaranteed Entity that is not a swap dealer but is affiliated with a swap dealer, in contrast to the 2013 Guidance, which excluded such swaps if the counterparty engaged in de minimis swap dealing activity

Application of Substantive Requirements



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Application of Substantive Requirements

- The 2013 Guidance assigned most substantive requirements into four categories: first category entity-level requirements (**Entity 1**); second category entity-level requirements (**Entity 2**); category A transaction-level requirements (**Transaction A**); and category B transaction-level requirements (**Transaction B**)
 - The Entity 1 and Entity 2 requirements apply to the firm as a whole, regardless of the U.S. Person or non-U.S. Person status of the counterparty, while the Transaction A and Transaction B requirements apply to an individual swap or trade relationship
- The Proposed Rules would reorganize these substantive requirements into three groups: **Group A**, **Group B** and **Group C**
- The Proposed Rules would not place all of the requirements addressed in the 2013 Guidance and Cross-Border Margin Rule into these groups, and the CFTC notes that certain requirements would be addressed separately
- The chart on the following slide shows in **blue** how the Proposed Rules would group the requirements, with the corresponding category in the 2013 Guidance in parentheses
- Below the grouped requirements are those requirements, shown in **orange**, that would not be assigned a group in the Proposed Rules and would therefore remain governed by the 2013 Guidance or the Cross-Border Margin Rule

Application of Substantive Requirements

Group A	Group B	Group C
<p>CCO Requirement (Entity 1)</p> <p>Risk Management (Entity 1)</p> <p>Recordkeeping, except rules relating to customer complaints and sales and marketing materials (Entity 1)</p> <p>Recordkeeping requirements relating to customer complaints and sales and marketing materials (Entity 2)</p> <p>Antitrust Considerations (no category)</p>	<p>Swap Trading Relationship Documentation (Transaction A)</p> <p>Portfolio Reconciliation and Compression (Transaction A)</p> <p>Trade Confirmation (Transaction A)</p> <p>Daily Trading Records (Transaction A)</p>	<p>External Business Conduct Standards (Transaction B)</p>
<p>Requirements with No Group Proposed / Governed by 2013 Guidance</p>		<p>Subject to Separate Cross-Border Margin Rule</p>
<p>Capital Adequacy (Entity 1)</p> <p>Large Trader Reporting (Entity 2)</p> <p>Swap Data Reporting (Entity 2)</p>	<p>Clearing and Swap Processing (Transaction A)</p> <p>Trade Execution (Transaction A)</p> <p>Real-time Public Reporting (Transaction A)</p>	<p>Margin for Uncleared Swaps (Transaction A)</p>

Group A Requirements

- The Group A requirements include the CFTC's antitrust rule and certain requirements that are Entity 1 and Entity 2 requirements under the 2013 Guidance that would continue to apply to all swap dealers
- Under the 2013 Guidance:
 - a non-U.S. swap dealer would be eligible for substituted compliance with respect to Entity 1 requirements; and
 - a non-U.S. swap dealer may be eligible for substituted compliance for transactions with non-U.S. counterparties with respect to Entity 2 requirements, other than large trader reporting
- Under the Proposed Rules, a non-U.S. swap dealer would be eligible for substituted compliance with respect to Group A requirements where the non-U.S. swap dealer is subject to comparable regulation in its home jurisdiction
- Under the Proposed Rules, swap data reporting and large trader reporting would **not** be Group A requirements, and therefore would remain governed by the 2013 Guidance
- Swap data recordkeeping requirements related to customer complaints and sales and marketing materials would be eligible for substituted compliance in all cases, including with respect to U.S. counterparties

Group B Requirements

- The Group B requirements consist of certain Transaction A requirements under the 2013 Guidance that relate to risk mitigation and recordkeeping
- The following slide includes an annotated version of Group B applicability chart provided by the CFTC in the Proposed Rule release that highlights certain differences as compared to the current applicability of Transaction A requirements
- There would be three exceptions from the applicability of certain Group B requirements:
 - **Anonymous Cleared Exception:** Group B requirements, other than pre-execution daily trading records, would not apply to any Foreign-Based Swaps that satisfy the Anonymous Cleared Exception, as defined on slide 18
 - **Non-U.S. Swap Dealer Exception:** Group B requirements would not apply to swaps between counterparties that are both Other Non-U.S. Persons
 - **Foreign Branch Group B Exception:** Group B requirements would not apply to a transaction between a swap dealer that is a Foreign Branch and an Other Non-U.S. Person, as long as:
 - The requirement is not eligible for substituted compliance; and
 - This exception is used for no more than 5% of the aggregate gross notional amount of all its swaps in a calendar quarter
 - The Foreign Branch Group B Exception would replace the exclusion in the 2013 Guidance for swaps between a Foreign Branch and Other Non-U.S. Person in a foreign jurisdiction other than Australia, Canada, the European Union, Hong Kong, Japan and Switzerland, subject to a similar 5% limitation (the **Emerging Markets Exclusion**)
 - The Proposed Rule would permit a non-U.S. swap dealer not transacting through a U.S. Branch, or a swap dealer transacting through a Foreign Branch, to apply for substituted compliance with respect to Group B requirements for swaps with foreign counterparties

Group B Requirements

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

¹ Under the Proposed Rules, the Exchange-Traded Exception would be available from certain group B and C requirements for certain anonymous, exchange-traded, and cleared foreign-based swaps between the listed parties.

² Under the Proposed Rules the Foreign Branch Group B Exception would be available from the group B requirements for a foreign branch's foreign-based swaps with a foreign counterparty that is an Other Non-U.S. Person.

The Proposed Rules would expand the Emerging Markets Exclusion from Transaction A requirements that would be classified as Group B requirements by making it available in any jurisdiction for which a substituted compliance determination has not been made

The Proposed Rules would codify Footnote 513 of the 2013 Guidance for Transaction A requirements that would be classified as Group B requirements, which would provide clarity with respect to Footnote 513

The Proposed Rules would expand application of the Transaction A requirements that would be classified as Group B requirements to a swap between a Non-U.S. swap dealer that is a Guaranteed Entity or SRS and an Other Non-U.S. Person

The Proposed Rules would not apply transaction-level requirements to ANE Transactions

Group C Requirements

- The Group C requirements are the CFTC's external business conduct standards, which are classified as Transaction B requirements under the 2013 Guidance
- The following slide includes an annotated version of Group C applicability chart provided by the CFTC in the Proposed Rule release that highlights certain differences as compared to the current applicability of Transaction B requirements
- There would be two exceptions from the applicability of certain Group C requirements:
 - **Anonymous Cleared Exception:** Like the Group B requirements, Group C requirements would not apply to any Foreign-Based Swaps that satisfy the Anonymous Cleared Exception, as described on slide 18
 - **Foreign Swap Group C Exception:** Group C requirements would not apply to swaps of non-U.S. dealers and Foreign Branches of U.S. swap dealers with non-U.S. counterparties that are not U.S. branches
- Group C requirements are not eligible for substituted compliance

Group C Requirements

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

¹ Under the Proposed Rules the Exchange-Traded Exception would be available from certain group B and C requirements for certain anonymous, exchange-traded, and cleared foreign-based swaps between the listed parties.

Transaction B requirements, which would be classified as Group C requirements, would apply slightly more broadly under the Proposed Rules to transactions between:

- A Foreign Branch of a U.S. swap dealer and a U.S. Branch of a non-U.S. Person; and
- A Non-U.S. swap dealer and a counterparty that is a U.S. Branch of a non-U.S. Person, even if not conducted through a U.S. Branch of the Non-U.S. swap dealer

The Proposed Rules would codify Footnote 513 of the 2013 Guidance for Transaction B requirements that would be classified as Group C requirements, which would provide clarity with respect to Footnote 513

The Proposed Rules would not apply transaction-level requirements to ANE Transactions

Comparability Determinations and Recordkeeping



Comparability Determinations

- **Codified process:** The Proposed Rules would codify a process by which the CFTC would make comparability determinations regarding foreign jurisdiction's regulation of swap dealers and activities
 - The CFTC would be able to issue a comparability determination on its own initiative or a determination may be requested by (1) a swap dealer that is eligible for substituted compliance, (2) a trade association on behalf of such entities or (3) a foreign regulatory authority that has direct supervisory authority over swap dealers subject to Group A and Group B requirements and that is responsible for administering the relevant foreign jurisdiction's swap standards
- **Flexible Outcomes-Based Approach:** The CFTC states in the Proposed Rule preamble that it is adopting a flexible outcomes-based approach that emphasizes comparable regulatory outcomes over identical regulatory approaches
- **Standard of review:** The CFTC may issue a comparability determination to the extent it determines that some or all of the relevant foreign jurisdiction's standards are comparable, based on an assessment of:
 - the scope and objectives of the standards;
 - whether the standards achieve comparable outcomes to the corresponding CFTC requirements;
 - the ability of the relevant regulatory authority to supervise and enforce compliance with the standards; and
 - whether the relevant regulatory authority has entered into an arrangement with the CFTC addressing information sharing, oversight, examination, and supervisions of swap dealers relying on such comparability determination
- **Existing Determinations:** All existing comparability determinations would remain effective

Recordkeeping Requirements

- The Proposed Rules would require swap dealers to **create and retain records of their compliance** with the Proposed Rules
- Records must be retained and made available for inspection in accordance with the CFTC's existing recordkeeping rules for swap dealers (**17 C.F.R. 23.203**)
- The CFTC advises that the records should be sufficiently detailed to allow compliance officers and regulators to assess compliance with the Proposed Rules

Davis Polk Contacts

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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