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Giancarlo Races to the Cross Border Line

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In his final **speech** to the FIA, Chairman Giancarlo last week discussed three cross border swaps proposals that he will schedule for Commission consideration before he steps down on July 15. Giancarlo has been particularly focused during his tenure on advancing a cross border swaps framework based on regulatory deference for jurisdictions that have adopted comparable G-20 swaps reforms—a position he advocated in a **White Paper** in 2018. He is keenly interested to see his cross border vision proposed by the Commission before his departure, and he has signaled that these proposals have the preliminary support of his successor, Heath Tarbert.

Two of the proposals relate to the registration and supervision of CCPs. Consistent with Giancarlo's White Paper recommendations, the CFTC will propose two registration alternatives for non-US CCPs that are subject to "comparable, comprehensive supervision and regulation" in their home countries and do not pose "substantial risk to the US financial system."

The CFTC will also consider a long-awaited rule proposal relating to the registration and regulation of non-US swap dealers and foreign branches of US banks. The proposal will address the registration thresholds for swap dealers, as well as a process for registered swap dealers to obtain comparability determinations from the CFTC relating to certain swap regulations.

Two Non-US DCO Alternatives

The CFTC has traditionally taken the view that a CCP that clears swaps for a single US person must register as a derivatives clearing organization (DCO) with the CFTC. To address the concerns of several non-US CCPs that CFTC registration would be unnecessarily costly and duplicative, the CFTC has individually exempted four non-US CCPs from this registration requirement, subject to conditions. The exemptions are narrowly focused to only permit clearing of proprietary swap positions of US clearing members and their affiliates and do not permit clearing for US customers of a non-US or US clearing member.

Both non-US CCPs and US market participants have urged the CFTC to expand the exemptive relief for non-US CCPs to permit US customer clearing. The pressure for regulatory relief has become more acute as swap clearing requirements have come into effect in more jurisdictions and uncleared swap margin requirements are implemented.

To address these concerns, the CFTC will propose two registration alternatives that would be available to non-US CCPs that (i) are subject to "comparable, comprehensive supervision and regulation" in their home countries and (ii) do not pose "substantial risk to the US financial system." The latter requirement under both proposed alternatives would be defined using two 20 percent tests, both of which would need to be satisfied by a non-US CCP. The first test would require that less than 20 percent of initial margin posted to the CCP be from a "US origin"—described as "initial margin posted by clearing members that are ultimately owned by US domiciled holding companies, regardless of the domicile of the clearing member." The second test would require that the "US origin" business of the non-US CCP be less than 20 percent of the overall US cleared swap markets.

For a non-US CCP that satisfies these 20 percent tests, the CFTC is considering two alternative approaches to ensuring that the CCP is subject to "comparable, comprehensive supervision and regulation" in its home country. The two proposed registration alternatives are:

1. Fully Registered with Alternative Compliance Proposal

Under this proposal, a CCP would have the option to fully register with the CFTC as a DCO, but meet its registration requirements through compliance with its home country requirements. These DCOs could clear for US persons only through registered futures commission merchant (FCMs) members, like other fully registered DCOs. The CFTC would otherwise largely defer to the home country regulator of the DCO, except that it would specifically focus on ensuring that US bankruptcy code protections apply to US customer funds consistent with the CFTC's FCM model. Thus, for a non-US CCP to avail itself of this registration alternative it would need to apply segregation and protection of customer funds requirements that are substantially consistent with US regulatory requirements.

2. Enhanced Exempt DCO Proposal

Under this proposal, the CFTC will consider whether to permit a CCP to clear swaps for US persons who are eligible contract participants (ECPs) through non-US clearing members that are not registered as FCMs, provided that the CCP and the clearing member disclose to the US customer the bankruptcy protections that would be afforded to them under relevant non-US law. This approach is conceptually similar to the CFTC's Part 30 regime for foreign futures clearing, except that it would not be available for retail customers. This alternative proposal is likely to be attractive to non-US CCPs that operate in jurisdictions in which the customer protection regime is not fully comparable to that of the US.

Swap Dealer Cross Border Proposal

This proposal, if adopted, would replace portions of the CFTC's 2013 Title VII cross border guidance and related staff no-action letters and guidance, and would address topics raised in the CFTC's 2016 cross-border proposal. The proposal will address, among other things: the cross-border application of the swap dealer registration thresholds; a formal process through which swap dealers may request comparability determinations from the CFTC; the treatment of foreign consolidated subsidiaries (FCS); and the treatment of swaps between non-US counterparties that are arranged, negotiated or executed by personnel in the US (ANE Transactions).

Finally, the Chairman signaled that the staff is working on additional cross border rulemakings to address the application of the clearing, trade execution and reporting requirements to cross-border swap transactions.

Taken together, these three proposals, if implemented, will represent meaningful progress toward creating a more integrated global swaps market through the use of substituted compliance and deference and would represent a capstone of Giancarlo's tenure as Chairman of the CFTC.