CROSS-BORDER SWAPS REGULATION VERSION 2.0

A Risk-Based Approach with Deference to

Comparable Non-U.S. Regulation

<u>White Paper</u>

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U.S. Commodity Futures Trading Commission

October 1, 2018

“Whereof what’s past is prologue, what to come
In yours and my discharge.”

SHAKESPEARE,
THE TEMPEST,
ACT II, SCENE 1

EXECUTIVE SUMMARY

This White Paper is written by Commodity Futures Trading Commission (**CFTC**) Chairman J. Christopher Giancarlo. The author has been a constant supporter of the swaps market reforms passed by the U.S. Congress in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (**Dodd-Frank Act** or **Dodd-Frank**) and the commitments made by the G20 leaders in Pittsburgh in 2009. Those are clearing standardized swaps through central counterparties, reporting swaps to trade repositories, and trading standardized swaps on regulated trading platforms. The author supports the CFTC's implementation of the swaps reforms, subject to certain reservations, which he has expressed in previous statements, including in a recent White Paper co-authored with the CFTC Chief Economist Bruce Tuckman earlier this year. Such reservations include long-standing concerns about the CFTC's current approach to applying its swaps rules to cross-border activities.

This paper begins with a broad review of U.S. and global swaps reform efforts that were designed to reform financial regulation and supervision to support economic recovery and make derivatives markets safer and more transparent to regulators. It then sets forth a set of principles to guide the cross-border application of the CFTC's swaps rules. Next, it reviews the CFTC's flawed approach to applying its rules in the cross-border context, an approach premised on the false assumption that nearly every single swap a U.S. person enters into, no matter where and how transacted, has a direct and significant connection with activities in, and effect on, commerce of the United States that requires the imposition of CFTC transaction rules. This approach fails to distinguish between those swaps reforms that are designed to mitigate systemic risk and those reforms that address particular market and trading practices that are suitable for adaptation to local trading conditions. It also fails to recognize the substantial implementation of G20 swaps reforms in non-U.S. jurisdictions in which the majority of global swaps activity takes place.

This paper identifies a number of adverse consequences of the CFTC's cross-border approach, including the following:

- It is expressed in “guidance” rather than formal regulation subject to the Administrative Procedure Act.
- It is over-expansive, unduly complex, and operationally impractical, increasing transaction costs and reducing economic growth and opportunity.
- It relies on a substituted compliance regime that encourages a somewhat arbitrary, rule-by-rule comparison of CFTC and non-U.S. rules under which a transaction or entity may be subject to a patchwork of CFTC and non-U.S. regulations.
- It shows insufficient deference to non-U.S. regulators that have adopted comparable G20 swaps reforms and is inconsistent with the CFTC’s long-standing approach of showing comity to competent non-U.S. regulators in the regulation of futures.

For these reasons, the CFTC’s cross-border approach has driven global market participants away from transacting with entities subject to CFTC swaps regulation and fragmented what were once global markets into a series of separate liquidity pools. Fragmented markets are shallower, more brittle, and less resilient to market shocks, thereby increasing systemic risk rather than diminishing it. Such fragmentation of global swaps markets is neither prescribed by the G20 swaps reforms nor justified as an unavoidable by-product of global reform implementation. In fact, market fragmentation is not only incompatible with global swaps reform efforts, but also detrimental to them.

This White Paper proposes an alternative cross-border framework that is built upon the following principles:

- The CFTC should recognize the distinction between swaps reforms intended to mitigate systemic risk and reforms designed to address particular market and trading practices that may be adapted appropriately to local market conditions.

- The CFTC should pursue multilateralism, not unilateralism, for swaps reforms that are designed to mitigate systemic risk.

- The CFTC should take necessary steps to end the current division of global swaps markets into separate U.S. person and non-U.S. person marketplaces. Markets in regulatory jurisdictions that have adopted comparable G20 swaps reforms should each function as a unified marketplace, under one set of comparable trading rules and under one competent regulator.

- The CFTC shall be a rule maker, not a rule taker, in overseeing U.S. markets.

- The CFTC should act with deference to non-U.S. regulators in jurisdictions that have adopted comparable G20 swaps reforms, seeking stricter comparability for substituted compliance for requirements intended to address systemic risk and more flexible comparability for substituted compliance for requirements intended to address market and trading practices.

- The CFTC should act to encourage adoption of comparable swaps reform regulation in non-U.S. markets that have not adopted G20 swaps reform for any significant swaps trading activity.

Based on the principles set forth in this White Paper, the author intends to direct the CFTC staff to put forth new rule proposals to address a range of cross-border issues in swaps reform – from the registration and regulation of swap dealers and major swap participants to the registration of non-U.S. swaps central counterparties (**CCPs**) and swaps trading venues. These proposals will be presented to the full Commission for thoughtful input and bipartisan consideration and adoption. The resulting rulemakings would replace the cross-border guidance issued by the CFTC in 2013 and the cross-border rules proposed by the CFTC in 2016, as well as address certain positions taken in CFTC staff advisories and no-action letters.

The White Paper recommends improvements to the CFTC's cross-border approach that are supportive of the G20 swaps reforms and aligned to Congressional intent, and that better balance systemic risk mitigation with healthy swaps market activity in support of broad-based economic growth. It develops these recommendations by drawing upon the CFTC's experience over the last five years, the need to act with mutual comity with non-U.S. regulators, and the substantial implementation of G20 swaps reforms in non-U.S. jurisdictions in which the majority of global swaps activity takes place. This is particularly so with respect to measures taken to address systemic risk, such as the adoption of rules requiring swaps central clearing and establishing margin requirements for uncleared swaps.

Among other things, the author recommends the following changes to the CFTC's cross-border approach:

- **Non-U.S. CCPs** – Expand the use of the CFTC's exemptive authority for non-U.S. CCPs that are subject to comparable regulation in their home country and do not pose substantial risk to the U.S. financial system, permitting them to provide clearing services to U.S. customers indirectly through non-U.S. clearing members that are not registered with the CFTC.

- **Non-U.S. Trading Venues** – End the current bifurcation of the global swaps markets into separate U.S. person and non-U.S. person marketplaces by exempting non-U.S. trading venues in regulatory jurisdictions that have adopted comparable G20 swaps reforms from having to register with the CFTC as swap execution facilities, thereby permitting such jurisdictions to each function as a unified marketplace, under one set of comparable trading rules and under one competent regulator.

- **Non-U.S. Swap Dealers** – Require registration of non-U.S. swap dealers whose swap dealing activity poses a "direct and significant" risk to the U.S. financial system; take into account situations where the risk to the U.S. financial system is otherwise addressed, such as swap transactions with registered swap dealers that are conducted outside the United States; and show appropriate deference to non-U.S. regulatory regimes that have comparable requirements for entities engaged in swap dealing activity.

- **Clearing and Trade Execution Requirements** – Adopt an approach that permits non-U.S. persons to rely on substituted compliance with respect to the swap clearing and trade execution requirements in Comparable Jurisdictions, and that applies those requirements in Non-Comparable Jurisdictions if they have a "direct and significant" effect on the United States.

- **ANE Transactions** – Take a territorial approach to U.S. swaps trading activity, including trades that are "arranged, negotiated, or executed" within the United States by personnel or agents of such non-U.S. persons. Non-incidental swaps trading activity in the United States should be subject to U.S. swaps trading rules. Such an approach addresses the current fragmentation of U.S. swaps markets, with some activity subject to CFTC rules and some activity not subject to CFTC rules. This approach is consistent with the principle – one unified marketplace, under one set of comparable trading rules and under one competent regulator.

Of note:

1. The author maintains that the CFTC's current cross-border approach goes beyond the Dodd-Frank Act's statutory extension of U.S. swaps reform only to those cross-border activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States…." He calls for replacing CFTC "guidance" and various rule proposals with formal regulation that better adheres to the express language of Title VII in conformance with Congressional intent.

2. The author contends that the CFTC's current cross-border approach, by fragmenting global markets, increases rather than decreases the systemic risk that the Dodd-Frank Act was premised on reducing.

3. The author recommends an approach that is informed by the fundamental difference between swaps reforms that are designed to mitigate systemic risk and swaps reforms that address market structure and trading practices.

4. The author recommends an approach of deference to comparable, non-U.S. swaps reform regulation by adopting a tailored approach to substituted compliance based on whether relevant regulation is intended to address systemic risk or market and trading practices.

5. The author advocates that the next version of cross-border rules should be better calibrated to address systemic risk and foster innovation, competition, and international cooperation, while staying true to the Pittsburgh G20 reforms and being in full accordance with the letter and spirit of Title VII of the Dodd-Frank Act.

Acknowledgment: This work represents the considered views of the author drawn from five years of experience with the CFTC's current approach to the cross-border application of the Dodd-Frank swaps reforms. It is informed by the author's extensive discussions with fellow U.S. market and prudential regulators and non-U.S. regulators that have implemented the G20 swaps reform agenda. It also is informed by concerns raised by members of Congress and the writings and observations of knowledgeable trading professionals, trade associations, and market operators. It has further benefited from the author's extensive discussions with fellow CFTC Commissioners and the work of many experienced CFTC staff, Division Directors, and senior policy advisors, including in the Office of the General Counsel and the Office of International Affairs, particularly Director Eric Pan. The author especially wishes to thank Senior Counsel, Matthew Daigler, for his efforts in designing a logical conceptual framework to transcend the CFTC's current set of *ad hoc* pronouncements, guidance, and proposals concerning cross-border swaps reform.

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I. INTRODUCTION

This White Paper analyzes the Commodity Futures Trading Commission's (**CFTC's**) current approach to applying its swaps rules to cross-border activities. It recommends improvements to the CFTC's cross-border approach that are pro-reform and aligned to Congressional intent and that better balance systemic risk mitigation with healthy swaps market activity in support of broad-based economic growth. These recommendations advocate a territorial, risk-based approach that is meant to be conceptually more straightforward and show deference to non-U.S. regulation when it achieves comparable outcomes to CFTC regulation.

The changes recommended in this White Paper stay true to the goals and objectives of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (**Dodd-Frank Act** or **Dodd-Frank**)[1] in light of the CFTC's implementation experience, global regulatory developments, and the evolving swaps markets. The changes also are consistent with the reforms agreed to by the G20 leaders in Pittsburgh in 2009, where they committed to a sweeping and coordinated set of policy actions that were designed to reform financial regulation and supervision to support economic recovery and make derivatives markets safer and more transparent to regulators.[2]

This White Paper is intended to complement the White Paper the author co-authored with CFTC's Chief Economist Bruce Tuckman, which analyzed the CFTC's current implementation of swaps reform (**April 2018 White Paper**).[3] The April 2018

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010), *available at:* https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

[2] G20 Leaders' Statement, Framework for Strong, Sustainable and Balanced Growth, The Pittsburgh Summit (Sep. 24-25, 2009), *available at:* https://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

[3] CFTC Chairman J. Christopher Giancarlo and CFTC Chief Economist Bruce Tuckman, Swaps Regulation Version 2.0: An Assessment of the Current Implementation of Reform and Proposals for Next Steps (Apr. 26, 2018), *available at:* https://www.cftc.gov/sites/default/files/2018-05/oce_chairman_swapregversion2whitepaper_042618.pdf. *See also* Commissioner J. Christopher Giancarlo, Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return

White Paper addressed several rules adopted or proposed by the CFTC, including those governing swaps clearing, reporting, and trading, as well as swap dealer capital. That earlier work intentionally did not address the cross-border application of those rules, particularly the 2013 cross-border guidance issued by the CFTC (**CFTC Cross-Border Guidance**)[4] or the 2016 cross-border rules proposed by the CFTC (**2016 Proposed Cross-Border Rules**).[5] Together, these CFTC releases, combined with various staff no-action letters and advisories,[6] set forth an expansive view of the cross-border application of the CFTC's swaps rules. This White Paper is intended to address these cross-border issues.

The CFTC has been a consistent leader among regulators of the world's major derivatives markets in enacting effective regulation and oversight for the U.S. markets. By 2014, it was the first regulatory agency to implement most of the internationally agreed upon swaps market reforms. As a result, the agency now has more than five years of experience with the current CFTC regulatory framework, including its cross-border reach and impact, and is in a position to appreciate its different strengths and deficiencies. Five years provides significant data and experience to evaluate the effects

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to Dodd-Frank (Jan. 29, 2015), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf.

[4] Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 FR 45292 (July 26, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf.

[5] Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 FR 71946 (Oct. 18, 2016), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2016-10-18/pdf/2016-24905.pdf. The CFTC also has adopted final rules governing the cross-border application of the margin requirements for uncleared swaps applicable to swap dealers and major swap participants. *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016) (**Final Cross-Border Margin Rules**), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2016-05-31/pdf/2016-12612.pdf.

[6] Relevant CFTC staff no-action letters and advisories are described below. *See generally* CFTC Staff Letters, *available at:* https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm.

of these reforms and their implementation. Based on a careful analysis of that data and experience, it is possible to recognize successes, address flaws, recalibrate imprecision, and optimize measures in the CFTC's initial implementation of swaps market reform. This is particularly important with respect to the CFTC's approach to regulating cross-border activities.

The author has been a constant supporter of the swaps market reforms passed by the U.S. Congress in Title VII of the Dodd-Frank Act and has stated so publicly on many occasions.[7] Most recently, during a Congressional oversight hearing, he stated:

> I have not wavered in my support for these reforms in my three years on the Commission. Yes, I have criticized the agency's implementation of some of the reforms – almost always where I believed it was impractical, overly burdensome or out of step with Congressional intent. In all cases, however, I advocated alternative approaches I believe better support healthy markets and are more faithful to the law.[8]

Market regulators have a duty to apply legislative policy in ways that enhance trading markets and their underlying vibrancy, diversity, and resilience. That duty includes adopting a forward-looking approach that considers the impact of technological innovation and global regulatory developments and anticipates changing market

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[7] *See, e.g.,* Statement from Commissioner J. Christopher Giancarlo: Reconsidering the CFTC's Swaps Trading Rules for Greater Effectiveness in the Global Economy (Nov. 12, 2014), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement111214 (expressing committed support of the core tenets of Title VII of the Dodd-Frank Act, but opposing the unnecessary and burdensome elements of the CFTC's swaps trading regulatory framework, which is balkanizing global markets); Remarks of CFTC Commissioner J. Christopher Giancarlo before the U.S. Chamber of Commerce: Re-Balancing Reform: Principles for U.S. Financial Market Regulation In Service to the American Economy (Nov. 20, 2014), *available at*: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-2 (expressing unwavering support for the core tenets of Title VII of the Dodd-Frank Act).

[8] Testimony of J. Christopher Giancarlo, Chairman U.S. Commodity Futures Trading Commission before the House Committee on Agriculture (Oct. 11, 2017), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-29.

dynamics.[9] It means replacing regulatory "guidance" with formal rulemaking and following proper administrative procedure. Most importantly, it means regularly reviewing past policy applications to confirm that they remain optimized for the purposes intended.[10] To paraphrase Antonio from Shakespeare's *The Tempest*: What is past is prologue, what is to come is our responsibility.[11]

A. Background on Global Derivatives Markets and Regulatory Reform Efforts

Sustained and broad-based economic growth in the United States and throughout the world requires not just large and efficient capital markets, but also integrated and effective markets for hedging of commercial risk, especially that of key commodity prices, counterparty credit exposure, variable interest rates, and currency exchange rates. These markets, especially large institutional markets for over-the-counter (**OTC**) swaps, influence the price and availability of heating in homes, the energy used in factories, the interest rates borrowers pay on home mortgages, and the returns workers earn on their retirement savings. It has been estimated that the use of commercial derivatives added 1.1% to the size of the U.S. economy between 2003 and 2012.[12]

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[9] *See, e.g.*, Remarks by Nobuchika Mori, Commissioner, Financial Services Agency (Japan) at Thomson Reuters 6th Annual Pan Asian Regulatory Summit, Hong Kong: Rethinking Regulatory Reforms (Oct. 13, 2015), *available at*: https://www.fsa.go.jp/common/conference/danwa/20151013/01.pdf.

[10] *See* Executive Order No. 13772, Presidential Executive Order on Core Principles for Regulating the United States Financial System (Feb. 3, 2017), *available at:* https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states.

[11] William Shakespeare, *The Tempest*, Act II, Scene 1.

[12] The Milken Institute found the following economic benefits to the U.S. economy from derivatives: "[b]anks' use of derivatives, by permitting greater extension of credit to the private sector, increased U.S. quarterly real GDP by about $2.7 billion each quarter from Q1 2003 to Q3 2012; [d]erivatives use by non-financial firms increased U.S. quarterly real GDP by about $1 billion during the same period by improving the firms' ability to undertake capital investments; [c]ombined, derivatives expanded U.S. real GDP by about $3.7 billion each quarter; the total

While often derided in the tabloid press as "risky," derivatives – when used properly – are tools for efficient risk transfer and mitigation. They serve the needs of society to help moderate price, supply, and other commercial risks to free up capital for economic growth, job creation, and prosperity. They allow the risks of variable production costs, such as the price of raw materials, energy, foreign currency, and interest rates, to be transferred from those who cannot afford them to those who can. More than 90% of *Fortune* 500 companies use derivatives to manage commercial or market risk in their worldwide business operations.[13] Cross-border swaps trading enables financial and commercial risk mitigation essential to international trade and investment and global economic prosperity.

And yet, global swaps and derivatives markets have not always performed as well as they should. September 2018 marks the ninth anniversary of the Pittsburgh G20 Summit, where G20 leaders committed to a sweeping and coordinated set of policy actions that were designed to reform financial regulation and supervision to support economic recovery and make derivatives markets safer and more transparent to regulators. In 2009, the G20 leaders agreed on a set of reforms for OTC derivatives markets:

1. Standardized OTC derivatives should be traded on regulated platforms, where appropriate;
2. Standardized OTC derivatives should be cleared through central counterparties;
3. OTC derivatives contracts should be reported to trade repositories; and

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increase in U.S. economic activity was 1.1% ($149.5 billion) between 2003 and 2012; [b]y the end of 2012, use of derivatives boosted U.S. employment by 530,400 (0.6%) and industrial production 2.1%." Apanard Prabha et al., Deriving the Economic Impact of Derivatives, Milken Institute, at 1 (Mar. 2014), *available at*: http://assets1b.milkeninstitute.org/assets/Publication/ResearchReport/PDF/Derivatives-Report.pdf.

[13] *See* Anatoli Kuprianov, 2009 ISDA Derivatives Usage Survey, International Swaps and Derivatives Association (ISDA) Research Notes, No. 2, at 1-5 (Spring 2009), *available at*: https://www.isda.org/a/SSiDE/isda-research-notes2.pdf.

4. Non-centrally cleared derivatives contracts should be subject to higher capital requirements.[14]

To achieve these common goals, the G20 leaders pledged to work together to "implement global standards" in financial markets, while rejecting "protectionism."[15]

In the following year, 2010, the U.S. Congress enacted the Dodd-Frank Act.[16] Consistent with the Pittsburgh G20 reforms, Title VII of the Dodd-Frank Act established a comprehensive framework for the regulation of the OTC swaps markets in the United States.[17] Among the world's regulators, the CFTC was the earliest to implement the reforms set forth by the G20 and later endorsed in the Dodd-Frank Act. Since then, other regulators have been engaged in their own implementation efforts.[18] Most notably, in Europe, swaps market reform was first implemented in the form of the European Market Infrastructure Regulation (**EMIR**) in 2012,[19] followed by the Markets in

[14] In Cannes in 2011, the G20 leaders agreed upon a fifth reform to require margin for swaps not subject to central counterparty clearing. *See* Cannes Summit Final Declaration, Building Our Common Future: Renewed Collective Action for the Benefit of All (Nov. 4, 2011), *available at*: https://www.oecd.org/g20/summits/cannes/Cannes%20Declaration%204%20November%202011.pdf.

[15] *See supra* note 2.

[16] *See supra* note 1.

[17] Title VII of the Dodd-Frank Act established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating recordkeeping and real-time reporting regimes; and (4) enhancing the CFTC's rulemaking and enforcement authorities with respect to all registered entities and intermediaries subject to the CFTC's oversight. *See supra* note 1.

[18] *See* FSB, OTC Derivatives Market Reforms: Twelfth Progress Report on Implementation (June 29, 2017) (**Twelfth FSB Progress Report**), *available at:* http://www.fsb.org/wp-content/uploads/P290617-2.pdf.

[19] *See* EMIR: Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=EN.

Financial Instruments Directive (**MiFID II**), much of which first came on-line at the start of 2018.[20]

The regulatory landscape is far different now than it was when the Dodd-Frank Act was enacted. Even in 2013 when the CFTC published the CFTC Cross-Border Guidance, very few non-U.S. jurisdictions had made much progress in implementing the global swaps reforms that were agreed to at the Pittsburgh G20 Summit. Today, however, as a result of cumulative implementation efforts by regulators throughout the world, significant and substantial progress has been made in the world's primary swaps trading jurisdictions to implement the G20 commitments.

The following are some of the significant achievements as of June 2017:[21]

- **Trade Reporting:** Nineteen of 24 Financial Stability Board (**FSB**) jurisdictions have comprehensive trade reporting requirements in force, which gives regulators greater insight into the global trading activities of multinational financial institutions.

- **Central Clearing:** Seventeen of 24 FSB jurisdictions have in force comprehensive standards for determining when standardized OTC derivatives should be centrally cleared, up from 14 at end-June 2016.

- **Margin Requirements for Non-Centrally Cleared Derivatives:** Considerable progress has been made in the implementation of comprehensive margin requirements for non-centrally cleared derivatives; 14 jurisdictions have such requirements in force, up from 3 jurisdictions at end-August 2016.

[20] *See* MiFID II: Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN.

[21] *See* Twelfth FSB Progress Report, *supra* note 18; FSB, Implementation and Effects of the G20 Financial Regulatory Reforms: Third Annual Report (July 3, 2017), *available at:* http://www.fsb.org/wp-content/uploads/P030717-2.pdf.

- **Capital Requirements for Non-Centrally Cleared Derivatives:** Higher capital requirements for exposures to non-centrally cleared derivatives consistent with the bank capital framework adopted by the Basel Committee on Banking Supervision (**BCBS**)[22] are largely in force; 23 jurisdictions have comprehensive requirements in force, up from 20 jurisdictions at end-June 2016.

Of these reforms, swaps central clearing is probably the most far-reaching and consequential. Precise data as far back as 2010 are not available, but the Bank for International Settlements (**BIS**) estimated minimum global clearing rates at that time of about 40% for interest rate swaps and 8% for credit default swaps (**CDS**).[23] By 2017, according to data collected by the CFTC on U.S. reporting entities, about 85% of both new interest rate swaps and new CDS were cleared.[24] The default risk of swaps counterparties that was once spread across Wall Street is now pooled and managed within regulated central counterparties (**CCPs**).[25] Globally, for OTC interest rate derivatives markets, reporting dealers' positions booked against CCPs accounted for

[22] BCBS is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Institutions represented on the BCBS include the Federal Reserve Board (**FRB**), the European Central Bank, Deutsche Bundesbank, Bank of France, Bank of England, Bank of Japan, and Bank of Canada.

[23] BIS, Statistical release: OTC derivatives statistics at end-December 2017 (May 3, 2018) (**2018 BIS Report**), *available at:* https://www.bis.org/publ/otc_hy1805.pdf.

[24] *See* Remarks of Chairman J. Christopher Giancarlo at the Association of German Banks, Berlin, Germany (May 7, 2018), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo45 (citing 2017 statistics for IRS and CDS).

[25] The successful global implementation of the clearing mandate has, in fact, given the CFTC broad visibility into the large, cleared swaps positions of *non-reporting* entities through their memberships in the major swaps clearinghouses, all of which report to the CFTC. This visibility into cleared positions, together with a significant amount of voluntary reporting, means that the CFTC has extensive insight into counterparty and asset exposures of U.S. bank holding companies and their non-U.S. swap-dealing affiliates.

about 75% of all notional amounts outstanding. In addition, the share of outstanding CDS cleared through CCPs increased to 55% at end-December 2017.[26]

B. Overview of the Global Swaps Market

Unlike derivatives products such as futures that actively trade on futures exchanges in many developing economies, swaps are predominately traded over-the-counter by institutional counterparties in the world's most developed financial centers of New York, London, Tokyo, Sydney, Hong Kong, Singapore, Geneva, and Toronto. Regulatory authorities with oversight of these market centers have been immensely diligent in adopting G20 swaps reforms.[27] Although less progress has been made by jurisdictions outside of the world's major markets, they have relatively little swaps trading activity to oversee.

To help illustrate this, consider the following graphic depiction of global swaps activity, based on the average daily trading activity in interest rate and foreign exchange instruments during April 2016.[28] This activity is divided into regions, as defined by the location of the swap counterparties.

[*see graphic next page*]

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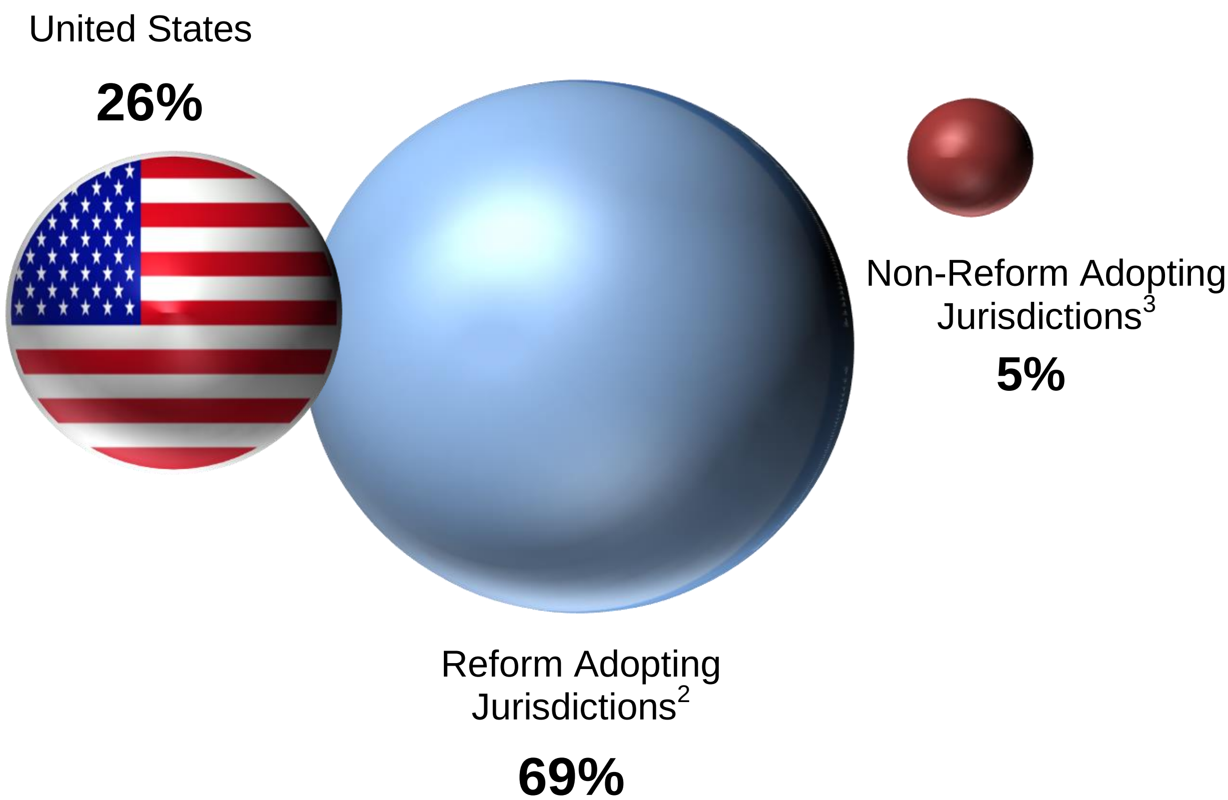
[26] *See* 2018 BIS Report, *supra* note 23, at 2.

[27] *See* Twelfth FSB Progress Report, *supra* note 18.

[28] The graphic depiction, and data upon which it is based, is derived from the BIS, Triennial Central Bank Survey of foreign exchange and OTC derivatives markets in 2016 (updated Dec. 11, 2016) (**2016 BIS Triennial Survey**), available at: https://www.bis.org/publ/rpfx16.htm. *See also* International Swaps and Derivatives Association (**ISDA**), Research Note, Asia-Pacific OTC Derivatives Study (Nov. 2017), *available at:* https://www.isda.org/a/jRTEE/Asia-Pacific-Derivatives-Study-November-2017.pdf.

Global Swaps Activity[1]



[1] Based on average daily trading activity in interest rate and exchange instruments during April 2016 as measured by the 2016 BIS Triennial Survey.

[2] "Reform Adopting Jurisdictions" are non-U.S. jurisdictions that have implemented most of the G20 reforms such that the CFTC can conduct a comparability determination.

[3] "Non-Reform Adopting Jurisdictions" are non-U.S. jurisdictions that generally have not implemented the G20 reforms.

As illustrated above, approximately 26% of the global swaps activity, as measured by the 2016 BIS Triennial Survey,[29] is represented by trades where at least one counterparty is in the United States. Furthermore, approximately another 69% of global swaps activity represents trades where at least one counterparty is in a jurisdiction that has implemented most of the G20 reforms such that the CFTC can conduct a comparability determination (**Reform Adopting Jurisdictions**).[30] These jurisdictions include Singapore, Japan, Hong Kong, the European Union (**EU**) (including the United Kingdom (**UK**)), Australia, Canada, and Switzerland. By contrast, only approximately 5% of global swaps activity involves a counterparty that is located in a jurisdiction where implementation of the G20 reforms remains generally incomplete (**Non-Reform Adopting Jurisdictions**).[31] Furthermore, the swaps trading activity in jurisdictions with the major financial centers – New York, London, Tokyo, Hong Kong, Singapore, Sydney, Geneva, and Toronto – accounts for approximately 85% of global swaps activity, based on the data contained in the 2016 BIS Triennial Survey.[32] Another method of analyzing global swaps activity is to examine where these transactions are cleared. Analysis done by CFTC staff indicates that an even smaller percentage of cleared global derivatives activity occurs in Non-Reform Adopting Jurisdictions.[33]

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[29] The data used to create this graphic includes FX spot transactions as well as other types of FX products and other interest rate instruments that may not fall within the definition of swap under the Dodd-Frank Act. *See* 2016 BIS Triennial Survey, *supra* note 28.

[30] For example, according to the 2016 BIS Triennial Survey, trading continues to be concentrated in the largest financial centers. For example, in April 2016, sales desks in five countries – the United Kingdom, the United States, Singapore, Hong Kong, and Japan – intermediated 77% of all foreign exchange trading. Asian financial centers, namely Tokyo, Hong Kong, and Singapore, increased their combined share of intermediation to 15%.

[31] As noted above, these numbers are based on the 2016 BIS Triennial Survey. Because of the need to account for "double-counting" (*i.e.*, transaction reporting by two reporting entities to a transaction), the reporting numbers need to be adjusted to provide a meaningful measure of overall market size.

[32] *See* 2016 BIS Triennial Survey, *supra* note 28.

[33] This estimate is based on internal CFTC data on cleared positions and an independent analysis of global cleared position data published by BIS. *See* BIS, OTC derivatives

C. Cross-Border Swaps Regulation 2.0

As discussed in the April 2018 White Paper, the current CFTC framework can be called "Swaps Reform Version 1.0," using the analogy of a first version of a software application.[34] While it contains the basic functionality of the Pittsburgh G20 swaps reforms, it has some significant bugs and flaws. These flaws must be addressed to better balance systemic risk resiliency with vibrant and durable financial markets essential for sustainable economic growth and broad-based prosperity. The goal is to pursue improvements to the CFTC's Swaps Reform Version 1.0, while staying true to the Pittsburgh G20 reforms and remaining in full accordance with the letter and spirit of Title VII of the Dodd-Frank Act. The new framework should be engineered to better enhance market durability, increase trading liquidity, and stimulate broad-based economic growth and revival.

With respect to the application of the CFTC's swaps rules to cross-border activities, we can refer to these improvements as "Cross-Border Swaps Regulation Version 2.0." The goal is to develop the next version of cross-border rules to be better calibrated to address systemic risk while fostering efficiency, innovation, and international cooperation in the global swaps markets.

As an initial matter, the CFTC should adopt final cross-border rules as a matter of good order and proper regulatory practice. It is inappropriate to continue to rely on interpretive policy statements or guidance that is not subject to the Administrative Procedure Act (**APA**),[35] as is currently the case.[36] Formal rules provide greater clarity

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outstanding (updated May 3, 2018) (**BIS 2018 Outstanding Derivatives Report**), *available at*: https://www.bis.org/statistics/derstats.htm?m=6%7C32%7C71.

[34] *See* Keynote Address of CFTC Commissioner J. Christopher Giancarlo Before SEFCON VII: Making Market Reform Work for America (Jan. 18, 2017) (**Giancarlo SEFCON Address**), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-19.

[35] 5 U.S.C. § 553(b).

[36] *See, e.g.,* Statement of Dissent by Commissioner Scott D. O'Malia, Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations and Related Exemptive Order (July 12, 2013), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement071213b (disagreeing

and certainty regarding market activities, especially for smaller market participants that may only have limited resources to retain outside counsel to advise them on CFTC interpretive guidance. Formal rules also benefit from the robust notice-and-comment process and cost-benefit consideration requirements mandated by the APA.

While the 2016 Proposed Cross-Border Rules represent a positive step to move away from relying on interpretative statements or guidance, they do not cure the flaws with the current CFTC cross-border approach. The 2016 Proposed Cross-Border Rules are limited in scope and perpetuate (and at times exacerbate) many of the problems with the CFTC's current approach to the cross-border application of the swaps rules.[37] Accordingly, the CFTC should propose new rules that more comprehensively govern the cross-border application of the swaps provision of Title VII of the Dodd-Frank Act and that benefit from the vigorous public scrutiny inherent in a formal notice-and-comment rulemaking process.

Specifically, this White Paper recommends that the staff of the CFTC put forth new rule proposals to address a range of cross-border issues in swaps reform – from the registration and regulation of swap dealers and major swap participants (**MSPs**) to the registration of non-U.S. trading venues and clearing organizations.[38] These proposals should be presented to the full Commission for thoughtful input and bipartisan consideration and adoption. The resulting rulemakings would replace the CFTC Cross-Border Guidance and the 2016 Proposed Cross-Border Rules, as well as address certain positions taken in CFTC staff advisories and no-action letters. These new

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with the CFTC's decision to issue its position on the cross-border application of its swaps regulations in the form of interpretive guidance instead of promulgating a legislative rule under the APA).

[37] *See, e.g.,* Statement of Commissioner J. Christopher Giancarlo on the Proposed Rule on Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants (Oct. 11, 2016), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement101116.

[38] *See* Giancarlo SEFCON Address, *supra* note 34 ("I intend to do everything I can to encourage the CFTC to replace its cross-border Interpretative Guidance with a formal rulemaking that recognizes outcomes-based substituted compliance for competent non-U.S. regulatory regimes").

rulemakings would draw upon the CFTC's experience over the last five years, the need to act with mutual comity with non-U.S. regulatory authorities, and the substantial implementation of G20 swaps reforms in non-U.S. jurisdictions in which the majority of global swaps activity takes place, particularly with respect to measures taken to address systemic risk, such as rules requiring central clearing, margin requirements for uncleared swaps, and dealer capital.

These rulemakings would be further informed by the distinction discussed above between Reform Adopting Jurisdictions, where the bulk of global swaps activity takes place, and Non-Reform Adopting Jurisdictions, where only a very small amount of swaps activity takes place. The primary goal would be to clarify and simplify the CFTC's cross-border approach for Reform Adopting Jurisdictions, which have generally adopted the G20 reforms and where the vast majority of swaps trading takes place. Formulating an approach to the remaining Non-Reform Adopting Jurisdictions, which have not yet adopted the G20 reforms, but where only a small percentage of swaps trading takes place, raises more difficult issues and will need to be carefully considered by CFTC staff as it prepares proposed rulemakings. The goal is to adopt rulemakings that address systemic risk to the U.S. financial system in a way that is better tailored to the market as it exists now, not as it existed in 2010 or even in 2013.

The new rule proposals also would be informed by the increased swaps trading data the CFTC receives concerning U.S.-related trading activity and the potential for build-up of risk in U.S.-related entities. In this regard, in order to facilitate its ability to share information with other regulators, the CFTC recently adopted amendments to its regulations relating to access to swap data held by swap data repositories (**SDRs**).[39] The amendments make changes to the CFTC's regulations governing the grant of

[39] Amendments to the Swap Data Access Provisions of Part 49 and Certain Other Matters, 83 FR 27410 (June 12, 2018), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2018-06-12/pdf/2018-12377.pdf. This rulemaking was prompted by the U.S. Congress's repeal of the indemnification requirement in Section 21(d)(2) of the CEA, 7 U.S.C. § 24a(d)(2), by the Fixing America's Surface Transportation Act of 2015 (**FAST Act**). FAST Act, Public Law 114–94, 129 Stat. 1312 (Dec. 4, 2015), *available at:* https://www.gpo.gov/fdsys/pkg/PLAW-114publ94/pdf/PLAW-114publ94.pdf.

access to swap data to certain foreign and domestic authorities by SDRs. It is a common experience of foreign and domestic regulators that conducting oversight of global derivatives markets can be difficult as a result of the current fragmented financial regulatory structure.[40] The amendments to the swaps reporting rules adopted by the CFTC should enable authorities to enhance their oversight of derivatives markets across product and asset classes by incorporating the trading and position data they receive from regulated entities into the data sets obtained directly from SDRs. This will enable significant progress toward cross-border data sharing and enhance transparency in the global swaps market.

Some will ask why it is necessary to revisit the CFTC Cross-Border Guidance and related staff interpretive positions. What is the problem to be solved? Here are some of the most significant problems with the CFTC's current approach to applying its rules to cross-border activities:

- It is expressed in "guidance" rather than formal regulation subject to the APA.
- It is over-expansive, unduly complex, and operationally impractical, increasing transaction costs and reducing economic growth and opportunity.[41]
- It is premised on the incorrect assumption that nearly every single swap a U.S. person[42] enters into, no matter where and how transacted, has a direct

[40] *See* Opening Statement of Chairman J. Christopher Giancarlo before the Open Commission Meeting (June 4, 2018), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement060418.

[41] *See* Giancarlo SEFCON Address*, supra* note *34*.

[42] The definition of "U.S. person" in the CFTC Cross-Border Guidance is extraordinarily expansive and was later carved back by the CFTC when it adopted final rules governing the cross-border application of its margin rules. *See* Final Cross-Border Margin Rules, 81 FR at 34821-24. This White Paper recommends that the staff use the narrower, more territorial definition of "U.S. person" in the Final Cross-Border Margin Rules rather than the more expansive definition in the CFTC Cross-Border Guidance. *See* Appendix A.

and significant connection with activities in, and effect on, commerce of the United States that requires the imposition of CFTC transaction rules.[43]

- It relies on a substituted compliance regime that encourages a somewhat arbitrary, rule-by-rule comparison of CFTC and non-U.S. rules under which a transaction or entity may be subject to a patchwork of CFTC and non-U.S. regulation.

- It shows insufficient deference to non-U.S. regulators that have adopted comparable swaps reforms for their jurisdictions and is inconsistent with the CFTC's traditional approach of comity with competent non-U.S. regulators in futures regulation.

- It fails to distinguish between those swaps reforms that are designed to mitigate systemic risk and those reforms that address particular market and trading practices that are suitable for adaptation to local trading conditions.

- It has driven global market participants away from transacting with entities subject to CFTC swaps regulation and caused fragmentation of what were once global markets into a series of separate liquidity pools that are less resilient to market shocks, thereby increasing systemic risk rather than diminishing it.[44]

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[43] *See* Statement of Commissioner J. Christopher Giancarlo Regarding Final Response to District Court Remand Order in *Securities Industry and Financial Markets Association, et al. v. United States Commodity Futures Trading Commission* (Aug. 4, 2016), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement080316.

[44] *See, e.g.,* Testimony of Commissioner J. Christopher Giancarlo before the U.S. House Committee on Agriculture, Subcommittee on Commodity Exchanges, Energy, and Credit (Apr. 14, 2015) (**Giancarlo 2015 U.S. House Testimony**), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-5 (arguing that the combined effect of the CFTC's cross-border approach is to dictate that non-U.S. market operators and participants must abide by the CFTC's peculiar, one-size-fits-all swaps transaction-level rules for trades involving U.S. persons or supported by U.S.-based personnel).

The CFTC arguably instigated a rift in cross-border swaps cooperation with non-U.S. jurisdictions, particularly Europe, with the CFTC Cross-Border Guidance by imposing CFTC transaction rules on swaps traded by U.S. persons, even in jurisdictions committed to implementing the G20 swaps reforms. That approach appeared to alienate many non-U.S. regulatory counterparts and squander important American leadership and influence in the global swaps reform efforts. While the CFTC's over-expansive assertion of jurisdiction may have been understandable in 2013 when other G20 jurisdictions had not yet implemented swaps reforms, the world is much different today than it was then. The CFTC's 2013 approach is increasingly out of step with the world's major swaps trading regimes that have now adopted swaps reforms for which the CFTC can make comparability determinations.

D. Conclusion

Given the global nature of the swaps market, where cross-border transactions are the norm rather than the exception, it is imperative that the CFTC get the cross-border application of its swaps rules right. Failure to do so risks the continuing fragmentation of global swaps markets, further diminishing their resilience in the event of global market shocks. Such fragmentation of global swaps markets is neither prescribed by the G20 swaps reforms nor justified as an unavoidable by-product of reform implementation. In fact, market fragmentation is not only incompatible with global swap reform effort, but also detrimental to it. Failure to pare back the overreach of CFTC swaps regulation has invited, and will continue to invite, lack of cooperation and overreach from non-U.S. regulators – many of these have been responsible and effective in adopting swaps reform regulation

The following sections of this White Paper set forth principles that should guide the cross-border application of the CFTC swaps rules. Thereafter follows concrete recommendations to address key aspects of the application of the CFTC's current approach.[45] These recommendations are informed by comments received on the 2016

[45] The recommendations made in this White Paper do not address the regulation of MSPs (in part because there are no MSPs currently registered with the CFTC) or certain other aspects of

Proposed Cross-Border Rules and related rules.[46] They also are consistent, in important respects, with recommendations recently made by the U.S. Department of the Treasury in its 2017 report on capital markets (**Treasury Report on Capital Markets**).[47]

The recommendations set forth below are intended to foster conversation and dialogue both at the Commission and within the broader international derivatives trading community. Given the complexity of the issues, market participants and other interested parties will benefit from being able to consider and respond to concrete recommendations. The primary goal of the White Paper is to recommend ways to clarify and simplify the CFTC's cross-border approach for Reform Adopting Jurisdictions that are comparable to the CFTC's regime (**Comparable Jurisdictions**). Formulating an approach to those jurisdictions that are not comparable to the CFTC's regime (**Non-Comparable Jurisdictions**) raises more difficult issues. These issues will need to be carefully considered by CFTC staff in preparing proposed rulemakings. In this regard, this White Paper notes that only a small percentage of swaps trading takes place in Non-Reform Adopting Jurisdictions and, therefore, appropriate weighing should be

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the CFTC's cross-border approach (*e.g.*, inter-affiliate swaps). They also do not address margin requirements for uncleared swaps because the CFTC recently adopted final rules regarding the cross-border application of its margin requirements for uncleared swaps. *See* Final Cross-Border Margin Rules; and Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2016-01-06/pdf/2015-32320.pdf. The CFTC is closely monitoring developments in the implementation of the margin rules as the rules are gradually phased-in to determine if changes are necessary or appropriate.

[46] Comment letters on the CFTC's proposed cross-border guidance and rules, and related orders, are *available at:* https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1233; https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234; https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1315; https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1386; https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1452; and https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1752.

[47] *See* U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities: Capital Markets (Oct. 2017), *available at:* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-MarketsINAL-FINAL.pdf.

made of the more limited systemic risk posed to the United States from those jurisdictions.[48]

Finally, whatever approach the CFTC has taken in the past or that is recommended or suggested in this White Paper, the goal is ultimately to get the CFTC's cross-border rules right going forward, as that is all that is within our control, for the past is but prologue.[49]

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[48] At the same time, however, the CFTC staff must be cognizant of the possibility of evasion when adopting rules applicable in Non-Comparable Jurisdictions. *See infra* note 51.

[49] All of the recommendations contained in this White Paper can be accomplished through CFTC rulemaking and do not require Congressional action.

II. PRINCIPLES TO GUIDE THE CROSS-BORDER APPLICATION OF THE CFTC'S SWAPS RULES

The recommendations set forth in this White Paper are guided by a series of principles built upon two key foundations:

First, the non-U.S. reach of the CFTC's swaps regulation is limited by Section 2(i) of the Commodity Exchange Act (**CEA**).[50] This provision provides, in relevant part, that the CFTC's swaps authority "shall not apply" to activities outside the United States unless those activities "have a direct and significant connection with activities in, or effect on, commerce of the United States….[51] Section 2(i) of the CEA (**Section 2(i)**) imposes a significant limitation on the CFTC's extraterritorial authority.[52] It certainly was not intended by the U.S. Congress to justify broad extraterritorial application of CFTC rules. Such an extraterritorial approach does not represent good regulatory policy, as it leads to costly overlapping and duplicative regulation. It is simply not sustainable and may signal to non-U.S. regulators that the CFTC does not respect their rightful sovereignty over entities established and operating in their jurisdictions.[53]

Second, the nature of global swaps markets is different from other financial markets in key respects. In particular, swaps markets are institutional markets of

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[50] 7 U.S.C. § 2(i).

[51] Section 2(i) also provides that the swap provisions apply to activities outside the United States when they contravene CFTC rules or regulations, as necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act.

[52] This White Paper does not intend to determine or opine on the exact limits of the CFTC's statutory authority under Section 2(i).

[53] Soon after commencing service in 2014 as Commissioner at the CFTC and before becoming Chairman, the author expressed the view that if the CFTC overreaches, then there should be no surprise if non-U.S. regulators do the same – "turnabout is fair play." For this reason, in 2014 he called for a reset in the EU and CFTC cross-border regulatory relationship in the spirit of the G20 leaders' accord in Pittsburgh in 2009, and that call is repeated here. *See* Keynote Address of CFTC Commissioner J. Christopher Giancarlo at The Global Forum for Derivatives Markets, 35th Annual Burgenstock Conference, Geneva, Switzerland, The Looming Cross-Atlantic Derivatives Trade War: A Return to Smoot-Hawley (Sep. 24, 2014), *available at*: https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-1.

professional traders. The swaps market is not a retail market. Historically, swaps products trading has always taken place in institutional marketplaces. Until the passage of the Dodd-Frank Act, the United States generally had not permitted retail participants to transact in swaps products, and that largely remains the case today.[54] As such, many of the investor protection concerns that inform the regulation of the futures markets, where there is substantial retail participation, do not play as important of a role in the swaps markets.

Principle 1: The CFTC should recognize the distinction between swaps reforms intended to mitigate systemic risk and reforms designed to address particular market and trading practices that may be adapted appropriately to local market conditions.

A key distinction that informs this White Paper is the difference between swaps reforms that are designed to mitigate systemic risk and swaps reforms that address market and trading practices. Swaps reforms that are designed to mitigate systemic risk include swaps clearing, margin for uncleared swaps, dealer capital, and recordkeeping and regulatory reporting. These reforms specifically address systemic risk in several ways, including by mandating the use of a CCP, requiring parties to collateralize positions, requiring more capital reserves, and ensuring that sufficient information is available for effective supervision and oversight. These reforms seek to mitigate the type of risk that may have a "direct and significant" connection with the United States.

By contrast, swaps reforms that are designed to address market and trading practices include public trade reporting and price transparency, trading platform design, trade execution methodologies and mechanics, and personnel qualifications, examinations and regulatory oversight. These reforms address market integrity issues and are intended to facilitate the orderly operations of the markets, such as by requiring

[54] Section 2(e) of the CEA provides that "it shall be unlawful for any person, other than an eligible contract participant [*i.e.*, non-retail], to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market." 7 U.S.C. § 2(e).

public dissemination of trade information to promote price discovery or by mandating particular modes of trade execution. While important, these reforms generally do not have as great a "direct and significant" connection with the United States as the swaps reforms that are specifically designed to address systemic risk. Accordingly, such market structure reforms are appropriately adapted to local market characteristics, practices, and norms.

Title VII of the Dodd-Frank Act was enacted to reduce systemic risk (including risk to the U.S. financial system created by interconnections in the swaps market), increase transparency, and promote market integrity within the financial system. As noted above, Section 2(i) contains a "direct and significant" standard. Hence, rather than trying to assert the CFTC's authority to the maximum extent possible, the focus should be on how best to prevent systemic risk created outside the United States from returning to the United States. Considerations of public transparency of trading prices (as distinct from regulatory transparency) and market structure, trading platform practices, and trade execution methodologies and mechanics are not as directly related to cross-border risk transfer. Therefore, they should be of secondary importance when deciding on the necessity of applying CFTC swaps rules extraterritorially. Such an approach is consistent with the CFTC's authority under Section 2(i), which requires the CFTC to focus on activities outside the United States that have a "direct and significant" connection with the United States.

Regrettably, based on the ostensible purpose of insulating the United States from systemic risk, the CFTC's current cross-border framework demands that global swaps markets involving U.S. persons adopt all CFTC trading rules, including particular CFTC trading mechanics that do little to reduce counterparty risk. In the words of one former senior CFTC advisor, the CFTC's cross-border guidance "yoked together rules designed to reduce risk with rules designed to promote market transparency. Yet it provided almost no guidance about how to think about the extraterritorial application of market transparency rules independent of risk. As a result, [the CFTC prescribed] how to apply [U.S.] rules abroad based on considerations that are tangential to the purposes of those rules."[55]

To take one example, whether or not a non-U.S. trading venue has functionality that requires a request for quote to three dealers (**RFQ-to-3**) or thirteen dealers has little to do with the transference of counterparty risk to the U.S. financial system. To take another example, regulatory requirements for platform trade execution and real-time public trade reporting (as opposed to regulatory reporting) may be important for purposes of furthering market access and integrity (and are mandated by Title VII of the Dodd-Frank Act), but, unlike requirements for central clearing and margining for uncleared swaps, they do not serve as great a role in mitigating systemic risk. This distinction between market price transparency and healthy trading practices, on the one hand, and global systemic risk transfer, on the other, must inform the CFTC's implementation of Section 2(i) and approach to cross-border issues generally.

Principle 2: The CFTC should pursue multilateralism, not unilateralism, for swaps reforms that are designed to mitigate systemic risk.

For those swaps reforms designed to mitigate systemic risk, the CFTC should seek a stricter degree of comparability between requirements of the CFTC and the requirements of jurisdictions that have adopted the G20 reforms. Systemic risk reforms should be appropriately comparable across borders to mitigate the risk of cross-border contagion. Accordingly, with respect to swaps reforms designed to mitigate systemic risk, the CFTC's jurisdiction should continue to apply cross-border to U.S. firms on an "entity" basis, with the availability of substituted compliance for non-U.S. jurisdictions that are strictly comparable.

The G20 leaders in Pittsburgh committed "to take action at the national and international level to raise standards together so that our national authorities implement

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[55] Timothy Karpoff, The Smart Way to Regulate Non-U.S. Swaps Trading, American Banker (Jul. 21, 2014), *available at:* https://www.americanbanker.com/opinion/the-smart-way-to-regulate-non-U.S.-swaps-trading.

global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage."[56] As the CFTC's non-U.S. regulatory counterparts continue to adopt the G20 swaps reforms in their markets, the CFTC should exercise deference to ensure that its rules do not unnecessarily conflict with effective non-U.S. regulatory frameworks and fragment the global marketplace. The CFTC should operate on the basis of comity, not uniformity, with non-U.S. regulators that oversee comparable regulatory regimes. The alternative is a world in which every regulator asserts global jurisdiction over swaps trading abroad by their home-domiciled institutions, leading to a completely untenable state of overlapping and conflicting rules. This is not the right approach to cross-border, financial market regulation.[57]

Pursuing multilateralism also means that the CFTC should be committed to the work of international bodies like the International Organization of Securities Commissions (**IOSCO**) and FSB and groups like the Committee on Payments and Market Infrastructures (**CPMI**)-IOSCO, the Basel Committee on Banking Supervision (**BCBS**)-IOSCO, and the OTC Derivatives Coordination Group. It is in these bodies and groups that the CFTC, as the primary regulator and supervisor of the world's largest derivatives market, needs to lead the development, evaluation and assessment of international standards and practices. The cross-border approach set out in this White Paper is facilitated by the existence of strong, high quality, and carefully developed international standards and a firm commitment by all major market jurisdictions to adopt such international standards in an expeditious manner. The CFTC needs to drive such

[56] *See supra* note 2.

[57] Domestically, the CFTC also has closely consulted with the staff of the Securities and Exchange Commission (**SEC**) in an effort to increase understanding of each other's regulatory approaches and to harmonize the cross-border approaches of the two agencies to the greatest extent possible, consistent with their respective statutory mandates. *See* Section 712 of the Dodd-Frank Act, *supra* note 1. Recently, to help ensure continued coordination and information sharing between the two agencies, the CFTC and SEC entered into a new MOU. *See* Memorandum of Understanding, Coordination in Areas of Common Regulatory Interest and Information Sharing (July 11, 2018), *available at:* https://www.cftc.gov/sites/default/files/2018-07/CFTC_MOU_InformationSharing062818.pdf.

efforts, including chairing relevant international committees and workstreams, to ensure such international work can serve as the basis for strong regulatory coordination between the CFTC and non-U.S. jurisdictions.

[*see text box next page*]

CFTC's Leadership in International Standards Setting Bodies

The CFTC is a leader in a range of international standard-setting bodies and workstreams. The CFTC's engagement with non-U.S. counterparts in multilateral committees and fora has furthered the development and implementation of a number of key principles and standards, especially those related to the implementation of the G20 swaps reforms. The breadth and depth of the CFTC's engagement in these international bodies and workstreams is evidence of the CFTC's firm commitment to cross-border cooperation.

The CFTC is a permanent member of the Board of the International Organization of Securities Commissions (**IOSCO**) and holds leadership positions in committees and working groups of the Financial Stability Board (**FSB**), Committee on Payments and Market Infrastructures-IOSCO (CPMI-IOSCO), and Basel Committee on Banking Supervision (**BCBS**)-IOSCO. The CFTC also chairs the OTC Derivatives Regulators Group (**ODRG**), a group of authorities responsible for regulating the world's major OTC derivatives markets.

Within IOSCO, the CFTC chairs or co-chairs the IOSCO Committee on Derivatives, IOSCO Cyber Task Force, CPMI-IOSCO Policy Standing Group, and CPMI-IOSCO Working Group on Harmonization of Key OTC Derivatives Data Elements.

The CFTC also is a member of IOSCO's various policy committees as well as IOSCO's Data Protection Sub-Group, Assessment Committee, Committee on Emerging Risks, and Task Force on Financial Benchmarks.

With respect to the FSB, the CFTC co-chairs the Working Group on UPI-UTI Governance and the Derivatives Assessment Team and participates in working groups on OTC derivatives implementation, reforming interest rate benchmarks, central clearing interdependencies, resolution, cross-border crisis management for financial market infrastructures, and financial innovation.

The CFTC participates in these bodies and workstreams because the development and consistent implementation of international principles and standards is critical to well-functioning, global financial markets that benefit U.S. participants and the American economy. To this end, the CFTC has allocated precious staff time and resources to ensure international standards are high quality, consensus-based, and well-reasoned.

Yet, despite its support for international standards setting work, the CFTC does not have a full voice in all key international fora, such as the FSB. The FSB consists of authorities from all of the G20 jurisdictions with heavy representation from Europe (given the number of individual European countries in the EU system) and from prudential authorities and central banks. Despite regulating the world's largest derivatives markets and being the only authority that has implemented all of the primary G20 swaps reforms, the CFTC is not a member of the FSB and cannot directly provide final input in the FSB's work implementing the G20 commitments. Given the value the CFTC places on international cooperation, the CFTC will continue to make its case for full membership in international standard-setting bodies in line with the importance of its role in the global financial system.

Principle 3: The current division of global swaps markets into separate U.S. person and non-U.S. person marketplaces should be ended. Markets in regulatory jurisdictions that have adopted the G20 swaps reforms should each function as a unified marketplace, under one set of comparable trading rules and under one competent regulator.

The past five years provide a vantage point for how the CFTC's approach to cross-border swaps regulation has impacted global markets – not just U.S. markets, but also markets in major financial centers around the world, from London and Singapore to Tokyo and Sydney. Since the start of the CFTC's swap execution facility (**SEF**) regime in 2013 and accelerating with mandatory SEF trading in 2014, swaps trading in each of these financial centers has separated into distinct trading and liquidity pools containing U.S. market participants in one pool and non-U.S. market participants in another.[58]

The fragmentation of global swaps markets[59] means that businesses and commercial enterprises around the globe are denied access to deep, liquid, and consolidated markets for risk hedging that is necessary for business expansion, job creation, and economic development. It results in higher pricing, reduced job creation, and lower economic growth. Fragmented markets also are less resilient in the event of sudden market events, resulting in greater price and transaction volatility. This increases the potential for the systemic risk that swaps reform is premised on reducing. Such increased systemic risk from fragmentation of global swaps markets is neither

[58] *See infra* note 100.

[59] *See* ISDA, Research Note, Cross-Border Fragmentation of Global Interest Rate Derivatives: Second Half 2015 Update (May 2016), *available at*: https://www.isda.org/a/OSiDE/fragmentation-final1.pdf (noting that, as of the end of 2015, some liquidity pools continue to be split on U.S. and non-U.S. lines); ISDA, Research Note, Cross-Border Fragmentation of Global Derivatives: End-Year 2014 Update (Apr. 2015), *available at*: https://www.isda.org/a/EVDDE/market-fragmentation-final.pdf; ISDA, Research Note, Cross-Border Fragmentation of Global OTC Derivatives: An Empirical Analysis (Jan. 2014), *available at*: https://www.isda.org/a/cSiDE/cross-border-fragmentation-an-empirical-analysis.pdf; ISDA, Research Note, Footnote 88 and Market Fragmentation: An ISDA Survey (Dec. 2013), *available at*: https://www.isda.org/a/5SiDE/footnote-88-research-note-20131218.pdf.

prescribed by the G20 swaps reforms nor justified as an unavoidable by-product of reform implementation. In fact, market fragmentation is not only incompatible with global swap reform efforts, but detrimental to them. The time has come to complete the important mission of global swaps reform in a manner that is harmonious and effective without fragmenting global markets.

Principle 4: The CFTC shall be a rule maker, not a rule taker, in overseeing U.S. markets.

As an agency of the sovereign government of the United States with primary regulatory jurisdiction over the world's largest derivatives market, the CFTC shall be a rule maker, not a rule taker, with respect to U.S. trading of swaps. The CFTC has the statutory responsibility to decide what is appropriate regulation for U.S. swaps markets and market participants, consistent with its statutory mandate, just as other non-U.S. regulators should be expected to act as rule makers in their home countries. The CFTC has been successfully regulating derivatives trading for decades and has extensive systems, capabilities, and experience. It has every right to expect that non-U.S. regulators defer to it on oversight of U.S. derivatives trading markets, as the CFTC should defer to non-U.S. regulators for activities conducted primarily in their jurisdictions if they are comparable, and it should seek to reconcile its rules with rules adopted by its non-U.S. regulatory counterparts only as appropriate.[60]

Principle 5: The CFTC should act with deference to non-U.S. regulators in jurisdictions that have adopted comparable G20 swaps reforms, seeking stricter comparability for substituted compliance

[60] For example, the CFTC is working cooperatively with international efforts to harmonize data fields for swaps reporting. Despite these efforts, the CFTC could add additional fields not addressed at the international level if it deems it appropriate to do so. Of course, consistent with the previous principle, this "rule making" applies to trading within the United States. As will be discussed below, outside the United States, deference to home country regulation or "rule taking" should be encouraged, where appropriate. *See* CFTC, Roadmap to Achieve High Quality Swaps Data (July 10, 2017), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf.

for requirements intended to address systemic risk and more flexible comparability for substituted compliance for requirements intended to address market and trading practices.

Substituted compliance (which is broadly similar to the concept of "equivalence" in the EU) is a mechanism by which the CFTC permits a swap market participant or utility (*e.g.*, an exchange or CCP) whose status or activities might bring it within the scope of certain U.S. regulations to use compliance with regulations in its home jurisdiction as a substitute for compliance with relevant CFTC regulations. This is a key component to the CFTC's cross-border approach.[61] Indeed, the CFTC pioneered the concept of substituted compliance in the 1980s, enjoying a more than 30-year history of working collaboratively with non-U.S. regulators to facilitate cross-border activity.[62] Regrettably, the way in which the CFTC has conducted its substituted compliance analysis of swaps reform in the past is one of granular, rule-by-rule comparison, regardless of the type of requirement that is the subject of the substituted compliance determination.[63]

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[61] *See* CFTC Cross-Border Guidance, 78 FR at 45340 – 46.

[62] For example, under CFTC Regulation 30.10 (17 CFR § 30.10), adopted in 1987, if the CFTC determines that a foreign regulatory regime offers comparable protections to U.S. customers transacting in foreign futures and options, and there is an appropriate information-sharing arrangement in place, the CFTC has allowed foreign brokers to comply with their home-country regulations in lieu of CFTC regulations. By analogy, since 1996 the CFTC has permitted direct access by U.S. customers to foreign boards of trade (**FBOTs**) without requiring the FBOT to register with the CFTC as a DCM. In determining the comparability of the foreign regulatory regime, the CFTC does not engage in a line-by-line examination of the foreign regulator's approach to supervising the FBOT it regulates. Rather, the CFTC conducts a principles-based review to determine whether the foreign regime supports and enforces regulatory oversight of the FBOT and its clearing organization in a substantially equivalent manner as that used by the CFTC in its oversight of DCMs and clearing organizations. *See* Registration of Foreign Boards of Trade, 76 FR 80674, 80680 (Dec. 23, 2011), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2011-12-23/pdf/2011-31637.pdf.

[63] For example, with respect to its cross-border approach to uncleared margin requirements, the CFTC did not recognize and build upon the strong foundation for recognition of foreign regulatory regimes created by the G20 commitments and the BCBS-IOSCO Working Group on Margining Requirements framework, as well as the CFTC's own history of using a principles-

Instead, the CFTC should act with deference to non-U.S. regulators in jurisdictions that have adopted comparable G20 swaps reforms, requiring stricter comparability for substituted compliance for requirements intended to address systemic risk and more flexible comparability for substituted compliance for requirements intended to address market practices, transparency, and price formation requirements that have less to do with systemic risk.

With respect to requirements that address market and trading practices, the CFTC should focus on whether a non-U.S. regulator's regime, in the aggregate, provides a sufficient level of regulatory outcomes to justify a positive comparability assessment.[64] Regulation and oversight of these requirements should be established and overseen locally if they achieve comparable regulatory outcomes to CFTC regulation, and such local regulation would apply to U.S. firms participating in those local markets. The CFTC may believe it has the best ideas for enhancing trading practices, market access, price transparency, and professional conduct, but ultimately it is for each individual regulator to adopt rules appropriate for its own domestic markets. The CFTC should defer in those cases if the regimes produce comparable outcomes.

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based, holistic approach to comparability determinations. *See* Statement of Dissent by Commissioner J. Christopher Giancarlo on the Cross-Border Application of the Margin Requirements (May 24, 2016), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement052416.

[64] *See, e.g.*, IOSCO Task Force on Cross-Border Regulation, Final Report (Sept. 2015), *available at:* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf (advocating for an outcomes-based approach as opposed to a line-by-line comparison of rules). This also is consistent with the Treasury Report on Capital Markets, which includes the following recommendations regarding substituted compliance:

- The CFTC and the SEC should adopt substituted compliance regimes that consider the rules of other jurisdictions, in an outcomes-based approach, in their entirety, rather than relying on rule-by-rule analysis. They should work toward achieving timely recognition of their regimes by non-U.S. regulatory authorities.
- The CFTC should undertake truly outcomes-based comparability determinations, using either a category-by-category comparison or a comparison of the CFTC regime to the foreign regime as a whole.

See Treasury Report on Capital Markets, supra note 47, at 135.

By contrast, for requirements intended to address systemic risk, the CFTC should expect stricter comparability with CFTC requirements. Regulatory reporting is an example of a requirement that is important to addressing systemic risk, given the critical role that regulatory reporting plays in helping agencies monitor the build-up of systemic risk. For this reason, before the CFTC would grant substituted compliance with respect to regulatory reporting, the non-U.S. jurisdiction should show a high degree of comparability with respect to applicable data reporting fields, including use of entity identifiers, product identifiers, transaction identifiers, and critical data elements.[65]

Mutual commitment to cross-border regulatory deference means that market participants can rely on one set of rules – in their totality – without fear that another jurisdiction will seek to selectively impose an additional layer of regulatory obligations. This approach is essential to ensuring strong and stable derivatives markets that support economic growth both within the United States and around the globe.[66] The terms of a substituted compliance determination should be as straightforward and unconditional as appropriate to prevent the "fragmentation of markets, protectionism, and regulatory arbitrage" that global regulators were charged to avoid.[67]

The emphasis in carrying out a substituted compliance regime should be on deference to non-U.S. regulators and a desire to work cooperatively to achieve common regulatory aims. Deference does not mean co-regulation. Rather, it means relying on

[65] This White Paper does not address, except in passing, the application of the CFTC's public trade reporting requirements (as opposed to regulatory reporting) for swaps. However, consistent with the principles articulated here, public trade reporting would be treated as a requirement that does not directly implicate systemic risk concerns. As such, local rules governing public trade reporting would apply to transactions executed in a non-U.S. jurisdiction if the jurisdiction's rules governing public trade reporting are comparable to the CFTC's.

[66] *See* Remarks of Chairman J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference, Naples, Florida (Jan. 19, 2018)\, *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo34.

[67] *See supra* note 2.

home country regulators that have primary responsibility for markets and market participants organized in their jurisdictions.[68]

Even where registration or regulation of non-U.S. entities may be required, the CFTC should endeavor to work cooperatively with other regulators in order to achieve common regulatory goals such that the actual effect of being registered or regulated is still based on deference. To make this work and ensure access to information regarding market participants that have a nexus to the United States, the CFTC should continue the practice of entering into memoranda of understanding (**MOUs**) with the relevant home country regulators to provide a framework for the sharing of information regarding entities relying on a substituted compliance determination.

The CFTC and its global counterparts should recommit themselves to working together to implement a deference process (using, for example, the tools of substituted compliance and equivalence), particularly for swaps execution and the cross-border activities of swap dealers, based on common principles to increase regulatory harmonization and reduce market fragmentation. The future of global swaps markets depends on it.[69]

Principle 6: The CFTC should act to encourage adoption of comparable swaps reform regulation in non-U.S. jurisdictions that have not adopted swaps reform for any significant swaps trading activity.

The framework that guides this White Paper includes, as a central element, the recognition that the major non-U.S. jurisdictions for swaps activity have largely adopted

[68] *See, e.g.,* Report of the OTC Derivatives Regulators Group (ODRG) on Cross-Border Implementation Issues (Mar. 2014), *available at:* https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-03-odrg_odrg_report_to_the_g20_march_2014.pdf.

[69] *See, e.g.,* Statement of CFTC Commissioner J. Christopher Giancarlo, Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties (Mar. 16, 2016) (**Giancarlo DCO Comparability Statement**), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement031616.

regulations that are comparable to the CFTC's regime. In these jurisdictions, the general approach advocated in this White Paper is deference.

With respect to those non-U.S. jurisdictions that have not adopted G20 swaps reforms that are comparable to the CFTC's, this White Paper generally recommends applying U.S. rules to U.S.-related entities, subject to materiality thresholds, rather than taking a deferential approach. This recommendation is partly to avoid creating offshore havens that could be used to avoid U.S. regulation[70] and partly to encourage broader adoption of comparable G20 swaps reform worldwide.

[70] As noted above, Section 2(i) also provides that the swap provisions apply to activities outside the United States when they contravene CFTC rules or regulations, as necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act.

III. REGISTRATION OF NON-U.S. CCPS

The clearing of swaps is a prime example of the global nature of derivatives markets. Cross-border CCPs operate in different jurisdictions and under different regulatory regimes. As clearing requirements come into effect in more jurisdictions, and as uncleared margin requirements are fully implemented, it is likely that U.S. persons will continue to seek to clear swaps at non-U.S. CCPs.[71] However, overlapping regulation and supervision create inefficiencies that limit the ability and increase the costs of U.S. persons accessing non-U.S. CCPs and hamper the growth of the global economy.

As discussed in Section III.B below, the CFTC and the European Commission (**EC**) have taken important steps to address the regulation of cross-border CCPs that clear derivatives for markets both in the United States and the EU. These steps reflect a commitment to showing deference to other regulators who have comparable regulations. Nevertheless, more needs to be done.

A. Background

The CEA provides that a "clearing organization" may not "perform the functions of a derivatives clearing organization [(**DCO**)]"[72] with respect to swaps unless the clearing organization is registered with the CFTC.[73] However, the CEA also permits the CFTC to conditionally or unconditionally exempt a clearing organization from registration for the clearing of swaps if the CFTC determines that the clearing

[71] Appendix A contains the definition of "U.S. person" adopted by the CFTC in the Final Cross-Border Margin Rules, as well as the definitions of certain other key terms used in this White Paper. Unless otherwise indicated, all key terms have the meanings set forth in Appendix A.

[72] For purposes of distinguishing between a registered DCO and a non-registered DCO organized in a non-U.S. jurisdiction (and potentially eligible for an exemption from CFTC registration), the term "DCO" refers to a CFTC-registered DCO, and the term "clearing organization" refers to a clearing organization that: (a) is organized outside of the United States; (b) is not registered with the CFTC as a DCO; and (c) falls within the definition of "derivatives clearing organization" under Section 1a(15) of the CEA, 7 U.S.C. § 1a(15), and "clearing organization or derivatives clearing organization" under Regulation 1.3, 17 CFR § 1.3.

[73] Section 5b(a) of the CEA, 7 U.S.C. § 7a-1(a).

organization is subject to "comparable, comprehensive supervision and regulation" by appropriate government authorities in the clearing organization's home jurisdiction.[74] Using this authority, the CFTC has exempted four non-U.S. CCPs from DCO registration.[75] These exemptive orders are subject to a number of conditions, including a restriction of U.S. clearing services to proprietary swap positions of U.S. clearing members and their affiliates.[76] As a result, no customer clearing is permitted under these exemptive orders.

In addition, five non-U.S. CCPs are registered with the CFTC as DCOs.[77] As registered DCOs, they may conduct both customer and proprietary clearing for U.S.

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[74] Section 5b(h) of the CEA, 7 U.S.C. § 7a-1(h).

[75] *See* Amended Order of Exemption from Registration (Jan. 28, 2016) (ASX Clear (Futures) Pty Limited), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/asxclearamdorderdcoexemption.pdf; Amended Order of Exemption from DCO Registration (May 15, 2017) (Japan Securities Clearing Corporation), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/jsccdcoexemptamdorder5-15-17.pdf; Order of Exemption from DCO Registration (Oct. 26, 2015) (Korea Exchange, Inc.), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/krxdcoexemptorder10-26-15.pdf; and Order of Exemption from DCO Registration (Dec. 21, 2015) (OTC Clearing Hong Kong Limited), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/otccleardcoexemptorder12-21-15.pdf.

[76] The CFTC recently proposed to adopt regulations that would codify the policies and procedures that the CFTC is currently following with respect to granting exemptions from DCO registration. The proposed regulations are consistent with the policies and procedures that the Commission is currently following, and with the terms and conditions that the CFTC has imposed on each of the clearing organizations to which it has previously issued orders of exemption. *See* Exemption From Derivatives Clearing Organization Registration, 83 FR 39923 (Aug. 13, 2018), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2018-08-13/pdf/2018-17335.pdf.

[77] *See* Order of Registration as a DCO (Feb. 1, 2016) (Eurex Clearing AG), *available at*: https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/orgdcoeurexclrorder212016.pdf; Amended Order of DCO Registration (Sept. 23, 2015) (ICE Clear Europe Limited), *available at*: https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/iceclreuramddcoregorder9-23-15.pdf; Amended Order of Registration as a DCO (Dec. 16,

persons. While all DCOs are subject to the CEA and CFTC regulations regardless of where they are domiciled, CFTC oversight is primarily focused on U.S. clearing activity. Consistent with that, CFTC staff has granted relief to non-U.S. DCOs that limits the applicability of many CFTC regulations to only U.S. clearing members of the non-U.S. DCO (*i.e.*, futures commission merchants (**FCMs**)).[78] For the day-to-day supervision of the non-U.S. DCO, the CFTC relies on the home country regulator to exercise oversight. In overseeing aspects of the non-U.S. DCO's operations that affect the entire entity, such as system safeguards, the CFTC works with the non-U.S. DCO's home country regulator to share information and coordinate examinations in an effort to coordinate the different regimes. This coordination is possible because most of the G20 jurisdictions have implemented CCP regimes that are consistent with the CPMI-IOSCO Principles for Financial Market Infrastructures (**PFMI**).[79]

In order to facilitate this cross-border construct, the CFTC and the home country regulator of the non-U.S. DCO communicate on a frequent basis, exchanging information as necessary to ensure effective regulation and supervision of the CCP. To date, the CFTC has generally limited the conduct of examinations of non-U.S. DCOs to

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2014) (LCH.Clearnet Limited), *available at*: https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/lchltdamddcoorder12-16-14.pdf; Order of DCO Registration (Dec. 17, 2013) (LCH.Clearnet SA), *available at*: https://www.cftc.gov/sites/default/files/stellent/groups/public/@otherif/documents/ifdocs/lchsadcoregorder.pdf; and Order of DCO Registration (Dec. 27, 2013) (Singapore Exchange Derivatives Clearing Ltd.), *available at*: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/sgxorder122713.pdf. In addition, ICE NGX Canada Inc., formerly Natural Gas Exchange Inc., is registered with the CFTC and clears futures on energy products. *See* Amended Order of Registration as a DCO (Mar. 20, 2013) (Natural Gas Exchange Inc.), *available at:* https://www.cftc.gov/sites/default/files/stellent/groups/public/@otherif/documents/ifdocs/ngxamddcoorder3-20-13.pdf.

[78] *See* CFTC Letter No. 16-26 (Mar. 16, 2016).

[79] *See* CPMI-IOSCO, Principles for financial market infrastructures (Apr. 2012), *available at:* http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377-PFMI.pdf. The PFMI set the current international standards for the risk management of four types of financial market infrastructures, including CCPs.

those that have significant U.S. activity and thus could present systemic risk to the U.S. markets. Such examinations focus primarily on the DCO's services on behalf of U.S. clearing firms and are conducted in full coordination with the home country supervisor. The CFTC relies fully on the home country regulator in the case of most other DCOs.

With well over fifteen years of experience regulating non-U.S. DCOs, the CFTC believes its current approach fosters international comity and efficiency. This approach allows the CFTC to exercise its authority over U.S. businesses without impinging on the non-U.S. DCO's home country regulator's role as the primary regulator of the DCO.

B. The 2016 CFTC-EC Agreement: Common Approach for Transatlantic CCPs

In a significant step to harmonize the regulation of the global derivatives markets, in 2016, the CFTC and the EC agreed to a common approach to cross-border swaps CCPs (**2016 Agreement**).[80] Following this agreement, the CFTC issued a comparability determination for EU-based DCOs registered with the CFTC (**dually-registered CCPs**), under which dually-registered CCPs could comply with certain CFTC requirements by satisfying corresponding European laws set forth in EMIR.[81]

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[80] *See* Joint Statement from CFTC Chairman Timothy Massad and European Commissioner Jonathan Hill, The United States Commodity Futures Trading Commission and the European Commission: Common approach for transatlantic CCPs (Feb. 10, 2016), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/speechandtestimony/eu_cftcstatement.pdf. The author fully supported this agreement. *See* Statement of CFTC Commissioner J. Christopher Giancarlo, Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties (March 16, 2016), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement031616.

[81] *See* Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, 81 FR 15260 (Mar. 22, 2016), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2016-03-22/pdf/2016-06261.pdf.

Shortly thereafter, the EC made an equivalence determination for the CFTC's DCO regime.[82] The equivalence determination requires U.S. DCOs seeking to operate in the EU to have rules consistent with three EMIR risk management provisions. The conditions relate to financial resources, procyclicality, and the collection of margin (collectively, the **Equivalence Conditions**). After the issuance of the CFTC equivalence determination, ESMA granted recognition to five U.S. DCOs.[83] Recognition status is premised on the fact that these five U.S. DCOs have demonstrated to ESMA that they have rules consistent with the Equivalence Conditions.

After three years of negotiations beginning in 2013 and hard concessions by both sides, the 2016 Agreement was a historic achievement between two of the world's largest derivatives markets. The agreement signaled to the rest of the international community that the United States and the EU could successfully work together on critical cross-border issues. It reflected the desire to support liquidity in the global derivatives markets, lower the cost and complexity of doing business for market participants, and create economic growth in the respective jurisdictions. The 2016 Agreement also established a new level of common deference between the two regimes and ensured that CCPs on both sides of the Atlantic are held to rigorous standards.[84] The EC recognized the significance of the agreement:

> This is an important step forward for global regulatory convergence. It means that European CCPs will be able to do business in the United States more easily and that [U.S.] CCPs can continue to provide services

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[82] *See* Commission Implementing Decision (EU) 2016/377 (Mar. 15, 2016), *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D0377&from=EN.

[83] ESMA recognized the following CCPs established in a third country to offer services and activities in the EU in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR): Chicago Mercantile Exchange, Inc., ICE Clear Credit LLC, ICE Clear US, Inc., Minneapolis Grain Exchange, Inc., and Nodal Clear LLC. *See* https://www.esma.europa.eu/sites/default/files/library/third-country_ccps_recognised_under_emir.pdf.

[84] *See* Giancarlo DCO Comparability Statement, *supra* note 69.

to EU companies. It has taken a long time, but it is good news that after more than three years of discussion, we are now able to provide certainty for the marketplace.[85]

C. 2017 Proposed Amendments to EMIR

The progress made by the 2016 Agreement is at risk of being reversed. In June 2017, the EC proposed legislative amendments to EMIR (**Proposal**) to expand the regulatory and supervisory authority of ESMA over both EU and third-country CCPs (including ongoing surveillance and on-site inspections), and to provide the European Central Bank (**ECB**) and other EU central banks with new oversight authority over both EU and third-country CCPs.[86] Pursuant to the Proposal, ESMA would have the ability to require third-country CCPs to comply with all provisions of EMIR not just for their European-facing clearing activities, but for their entire domestic operations as well.

[85] *See* EC Press Release, European Commission and the United States Commodity Futures Trading Commission: Common approach for transatlantic CCPs (Feb. 10, 2016), *available at:* http://europa.eu/rapid/press-release_IP-16-281_en.htm.

[86] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, COM (2017) 331 final (June 13, 2017), *available at:* https://eur-lex.europa.eu/resource.html?uri=cellar:80b1cafa-50fe-11e7-a5ca-01aa75ed71a1.0001.02/DOC_1&format=PDF and https://eur-lex.europa.eu/resource.html?uri=cellar:80b1cafa-50fe-11e7-a5ca-01aa75ed71a1.0001.02/DOC_2&format=PDF.

In May of 2018, the European Parliament approved certain edits to the EC's Proposal. While a number of changes were made, the main components of the new third-country framework remain intact. *See* Amendments by the European Parliament to the Commission proposal: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (May 25, 2018), *available at*: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BREPORT%2BA8-2018-0190%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN

Under ESMA's new authority, the Proposal would designate each recognized third-country CCP as either Tier 1 or Tier 2 depending on how systemically important the CCP's clearing activities are to the European markets. Tier 1 CCPs would be considered "non-systemic" and would be subject to essentially the current existing equivalence determination and recognition regime. Tier 2 CCPs would be considered "systemic" and would be subject to additional EU regulatory and supervisory requirements (*i.e*., must be fully consistent with all provisions of EMIR).

For Tier 2 CCPs, ESMA would determine if the third-country CCP could meet these additional EU requirements by following its home country's CCP regime pursuant to an assessment. If not, the third-country CCP would be required to **comply with** additional EU rules in order to continue to operate in the EU. Under the proposal, Tier 2 CCPs also would be subject to additional requirements from the ECB, and potentially other EU central banks of issue, based on their prudential mandate to ensure the smooth operation of monetary policy in the EU. If a Tier 2 CCP is deemed to be substantially systemic to the EU such that even full compliance with EU law would not sufficiently reduce risks, ESMA may deny recognition and ask the EC to impose a location requirement for either the whole CCP or certain clearing services (*e.g.*, only IRS products).

The CFTC welcomes reforms aimed at increasing the ability of EU authorities to monitor and mitigate the build-up of systemic risk within the EU. The CFTC does not, however, support any renegotiation of the 2016 Agreement or change in the terms of the EC's equivalence determination for the CFTC in the absence of evidence that the operations of U.S. CCPs have changed substantially enough to make it necessary to modify the existing arrangement.

The 2016 Agreement is an acknowledgement of common deference between the CFTC and the EC with respect to the regulation and supervision of CCPs. While CFTC and EU rules are not identical, the regimes are equivalent on an outcomes-basis. Under the EC's equivalence determination for the CFTC, U.S. DCOs can offer clearing services to EU market participants by adhering to U.S. law and satisfying the

Equivalence Conditions. However, the Proposal as written would require at least some currently-recognized U.S. DCOs to have rules that are fully consistent with all of EMIR – not just the three provisions that make up Equivalence Conditions. This requirement disregards the 2016 Agreement.

Moreover, in contrast to the CFTC's approach to the regulation and supervision of cross-border CCPs to limit oversight to primarily U.S. business activity, the EU's approach is to apply EU law to a CCP's entire clearing business, even business activity that occurs outside of the EU. It also would apply EU law to all asset classes cleared by U.S. CCPs, not just swaps. This effectively would mean that under the Proposal, at least some recognized U.S. DCOs would be required to follow EU law even for the clearing of domestic U.S. contracts, including listed futures, and for the clearing of U.S. customers.

As the 2016 Agreement established, EU law is not the same as U.S. law. Specifically, there are very important risk management regulations that the U.S. Congress deemed appropriate for U.S. markets that would not be applied under the EU's new third-country recognition process because these provisions are different and contrary to what is set forth in EMIR. This scenario would have a detrimental impact on U.S. customers and businesses, U.S. markets, and the broader U.S. economy.[87]

As an agency of the sovereign government of the United States with primary authority over the world's largest derivatives marketplace, the CFTC is authorized by the U.S. Congress to be a rule maker, not a rule taker, for U.S. swaps markets. The CFTC has statutory responsibility to decide what is appropriate regulation for relevant U.S. markets and market participants, just as other non-U.S. regulators should be expected to act as rule makers for their jurisdictions. The CFTC has been successfully

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[87] *See* Testimony by J. Christopher Giancarlo, Chairman of the Commodity Futures Trading Commission, Before the House Committee on Agriculture, Washington, D.C. (July 25, 2018), *available at:* https://agriculture.house.gov/uploadedfiles/07.25.18_giancarlo_testimony.pdf; Chairman J. Christopher Giancarlo, WSJ Opinion/Commentary: An EU Plan to Invade U.S. Markets (Nov. 6, 2017), *available at:* https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarloopinion110617.

regulating derivatives trading for many decades and has extensive systems, capabilities, and experience. The CFTC has every right to expect that non-U.S. regulators defer to it on oversight of U.S. CCPs, as the CFTC should defer to non-U.S. regulators for the oversight of CCPs domiciled in their jurisdictions.

The application of EU law to U.S. financial markets without deference to the CFTC is unacceptable. If the United States were to accept such a situation, it would set a dangerous precedent – potentially opening the door to all manner of other interference. It would invite other third-country regulators that oversee larger domestic derivatives markets than the EU[88] to demand similar regulatory jurisdiction over U.S. domestic markets.

As a sovereign political entity, the EU has a right to amend and revise its laws, and to regulate the entities that operate within its jurisdiction. Moreover, efforts in the EU to enhance the regulation and supervision of its domestic CCPs should be welcomed. However, with respect to the treatment of U.S. CCPs, the EC should honor its commitments under the 2016 Agreement and ensure that the application of EU law with respect to U.S. CCPs is limited to the boundaries of the EU.

D. Recommendations

Rather than renouncing the 2016 Agreement and its framework of comity, the better way forward is to build upon the 2016 Agreement and strengthen common deference among global regulators. Regulatory and supervisory deference is a key principle of a cross-border approach that fosters economic growth and resilience without jeopardizing particular laws and practices that underpin domestic derivatives markets around the globe. It is the best of both worlds – building coordination between markets and preserving the ability of primary regulators to act and regulate their markets as appropriate.

[88] The number of contracts traded on futures exchanges in each of India, Brazil, and China is greater in each case than the number traded on Europe's largest futures exchange, Eurex Exchange. *See* Top 20 Exchanges, MarketVoice (June 2018) at 41.

Consistent with the principles set forth in Section II above, this White Paper recommends that the CFTC address the regulation of swaps CCPs based on whether the CCP is located within: (1) the United States; (2) a Comparable Jurisdiction; or (3) a Non-Comparable Jurisdiction. Such an approach is based on principles of territoriality and deference, with the goal of increasing regulatory harmonization and reducing market fragmentation, while appropriately addressing risk to the U.S. financial system.

1. United States

The CFTC should continue to require a CCP located in the United States that seeks to clear swaps under the jurisdiction of the CFTC to register with the CFTC as a DCO and be subject to the agency's full oversight and supervision.[89] In addition, under Title VIII of the Dodd-Frank Act, the Financial Stability Oversight Council (**FSOC**) can designate certain financial market utilities (**FMUs)**, including DCOs, as systemically important to the United States.[90]

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[89] DCOs that clear security-based swaps may also be registered with the SEC as clearing agencies, as defined in Section 3(a)(23) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(23).

[90] Section 804(a)(1) of the Dodd-Frank Act. The term "systemically important" means "a situation where the failure of or a disruption to the functioning of a financial market utility . . . could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States." Section 803(9) of the Dodd-Frank Act. *See* FSOC, Authority to Designate Financial Market Utilities as Systemically Important, 76 FR 44763, 44774 (July 27, 2011), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2011-07-27/pdf/2011-18948.pdf.

FSOC has designated two U.S. DCOs, for which the CFTC is the primary regulator, as systemically important (**SIDCOs**) and, consequently, subject to enhanced CFTC regulation. Sections 805 and 807 of the Dodd-Frank Act provide that the FRB is consulted by the CFTC on any changes to the SIDCO's rules, procedures, or operations that could materially affect the nature or level of risk that the SIDCO presents. The final decision-making is carried out by the CFTC as the Supervisory Agency. In addition, the FRB is consulted by the CFTC regarding the scope and methodology of a SIDCO's annual examination and FRB staff may participate in such examination in a consultative role. Additionally, the FRB permits SIDCOs to establish central bank depository accounts and has discretionary authority to provide emergency liquidity to SIDCOs. *See, e.g.,* Enhanced Risk Management Standards for Systemically Important

2. Comparable Jurisdictions

Title VII of the Dodd-Frank Act permits the CFTC to exempt a non-U.S. CCP from registration for the clearing of swaps if the CFTC determines that the CCP is subject to "comparable, comprehensive supervision and regulation" by appropriate government authorities in the CCP's home country.[91] As noted earlier, the CFTC has used this authority to exempt certain non-U.S. CCPs from registration for the clearing of proprietary swap positions of U.S. clearing members and their affiliates.[92]

This White Paper recommends that the CFTC expand the use of this exemptive authority for non-U.S. CCPs that do not pose substantial risk to the U.S. financial system. Consistent with the CFTC's long-standing approach to foreign futures,[93] under this approach, such non-U.S. CCPs also would be permitted to provide clearing services to U.S. customers indirectly through non-U.S. clearing members, without the non-U.S. CCP or its non-U.S. clearing members having to register as a DCO or FCM, respectively. In this case, only local bankruptcy laws would apply.[94] Given the professional nature of the swaps market, this approach appropriately gives sophisticated, institutional market participants the commercial choice whether to rely on local, non-U.S. bankruptcy law protections or instead choose to do business with U.S. FCMs subject to U.S. bankruptcy law protections. This approach would be similar to the CFTC's long-standing, cross-border approach with respect to futures clearing. Even though futures markets have greater retail participation than swaps markets, the CFTC

Derivatives Clearing Organizations, 78 FR 49663 (Aug. 15, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-08-15/pdf/2013-19791.pdf.

[91] *See* Section 5b(h) of the CEA, 7 U.S.C. § 7a-1(h).

[92] *See supra* note 75.

[93] Information regarding CFTC Regulation Part 30.10, including a list of foreign Government Agencies and SROs that have Received CFTC Orders, is available at*:* https://www.cftc.gov/International/ForeignMarketsandProducts/foreignprodsales.html.

[94] Non-U.S. CCPs that wanted to offer U.S. bankruptcy law protections to customers would retain the option of registering as a DCO and having clearing of customers through FCMs. In such cases, the CFTC should consider an alternative registration approach that would reflect the fact that such non-U.S. CCPs are subject to comparable regulation.

has traditionally been very deferential in allowing U.S. market participants to essentially waive their U.S. bankruptcy rights by holding futures positions at unregistered market intermediaries outside the United States.

In this context, the CFTC has construed "comparable, comprehensive supervision and regulation" to mean that the home country's supervisory and regulatory framework should be consistent with, and achieve a comparable outcome as, the statutory and regulatory requirements applicable to registered DCOs.[95] This outcomes-based approach reflects the CFTC's recognition that a non-U.S. jurisdiction's supervisory and regulatory scheme applicable to its CCPs may differ from the CFTC's in certain respects, but nevertheless may achieve the same underlying goals. This approach also supports the CFTC's effort to strike an appropriate balance by focusing on the risk implications to the United States, while promoting global harmonization.

However, non-U.S. CCPs that clear swaps for U.S. persons and are deemed by the CFTC to pose substantial risk specific to the U.S. financial system would continue to be required to register with, and be regulated by, the CFTC. These CCPs would be regulated and supervised as they are today with the CFTC's regulatory and supervisory focus concentrated on the CCP's U.S.-facing clearing activity[96] while recognizing the supervisory primacy of the home country regulator.

3. Non-Comparable Jurisdictions

Although the volume of swaps activity in non-U.S. CCPs in Non-Comparable Jurisdictions constitutes a small portion of total global swaps trading,[97] the treatment of such CCPs raises a number of unique policy issues. The general approach to Non-

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[95] *See, e.g.,* Derivatives Clearing Organizations and International Standards, 78 FR 72476 (Dec. 2, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-27849.pdf.

[96] *See* Section 2(i) of the CEA, 7 U.S.C. § 2(i). Because the business of a CCP is to manage a variety of risks, including counterparty, market, liquidity, and custodial, there is no single factor that should be solely determinative of deciding whether the non-U.S. CCP poses substantial risk to the U.S. financial system.

[97] *See* BIS 2018 Outstanding Derivatives Report, *supra* note 33.

Comparable Jurisdictions recommended in this White Paper as a starting point for staff consideration is that Non-U.S. CCPs in Non-Comparable Jurisdictions that seek to clear for U.S. persons would be required to register as a DCO.

However, to facilitate access to non-U.S. markets and to provide additional time for non-U.S. jurisdictions to develop comparable standards, this White Paper recommends that the CFTC consider providing relief from DCO registration while they come into compliance for non-U.S. CCPs whose members are foreign branches of U.S. banks that are registered as swap dealers (**Foreign Branches**), provided those Foreign Branches limit their clearing activities to proprietary and affiliate accounts or clearing customers that are non-U.S. persons. This relief would be subject to reporting by the non-U.S. CCPs and the negotiation and execution of an MOU, including information-sharing arrangements, with the relevant home country regulator of the non-U.S. CCP, and would otherwise be self-executing.[98] The CFTC would retain the right to terminate the relief for a non-U.S. jurisdiction, as a whole, or for a particular CCP within the non-U.S. jurisdiction, for due cause. Any risk that such relief may pose would be mitigated by the fact that the Foreign Branch must be a registered swap dealer, subject to U.S. capital, margin, and risk management requirements. In particular, Foreign Branches have an incentive to clear transactions through a CCP that is a "Qualifying Central Counterparty" (**QCCP**) because it would provide the Foreign Branch with more favorable capital treatment.[99]

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[98] *See, e.g.,* Memorandum of Understanding, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Covered Entities (Mar. 25, 2014), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@internationalaffairs/documents/file/asc-bcsc-osc-amfmou032514.pdf; Memorandum of Understanding, Cooperation and the Exchange of Information Related to the Supervision of Cross-Border Clearing Organizations (June 5, 2014), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@internationalaffairs/documents/file/cftc-rba-asic-clearingmou06051.pdf.

[99] Pursuant to rules adopted by the U.S. banking regulators, a QCCP is defined as a CCP that, among other things, "[m]eets or exceeds the risk-management standards for central counterparties set forth in regulations established by the Board, the CFTC, or the SEC under Title VII or Title VIII of the Dodd-Frank Act; or if the central counterparty is not located in the United States, meets or exceeds similar risk-management standards established under the law

IV. REGISTRATION OF NON-U.S. TRADING VENUES

Just as with CCPs, derivatives trading venues operate in different jurisdictions and under different regulatory regimes. Swaps trading venues located outside the United States frequently seek to offer access to their home markets by providing trading services to U.S. persons as platform participants or members interacting directly with non-U.S. platform participants. However, overlapping jurisdiction and regulation limit the ability of U.S. persons to access these non-U.S. markets creating inefficiencies that are costly and detrimental to global economic growth.

The current position of the CFTC requiring registration of all non-U.S. trading venues has driven fragmentation of the global swaps markets by forcing non-U.S. trading venues to deny participation to U.S. firms.[100] It is time to rethink this approach.

A. Background

The CEA defines a "swap execution facility" or SEF as a "trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce."[101] No person may operate a facility for the trading

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of its home country that are consistent with international standards for central counterparty risk management as established by the relevant standard setting body of the Bank of International Settlements." Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 FR 62018, 62066-67 (Oct. 11, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-10-11/pdf/2013-21653.pdf.

[100] According to the U.S. Treasury, the November 2013 DMO Guidance, combined with other aspects of the CFTC's final SEF rules, prompted non-U.S. trading platforms to exclude U.S. persons in order to avoid the CFTC's SEF registration and other regulatory requirements, contributing to market fragmentation in certain products. *See* U.S. Treasury Report on Capital Markets, *supra* note 47, at 133. *See also supra* note 59.

[101] Section 1a(50) of the CEA, 7 U.S.C. § 1a(50).

or processing of swaps unless the facility is registered as a SEF or designated contract market (**DCM**).[102]

The CFTC adopted SEF registration regulations in October 2013,[103] and the mandatory trading requirement became effective in February 2014.[104] The CEA authorizes the CFTC to exempt, conditionally or unconditionally, a SEF from registration if the CFTC finds that the facility is "subject to comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental authorities in the home country of the facility."[105]

In November 2013, CFTC staff expressed the view that the SEF registration requirement applies to all multilateral swaps trading platforms that are located outside the United States where the trading or execution of swaps on or through the platform creates a "direct and significant" connection to activities in, or effect on, commerce of the United States (**2013 DMO Guidance**).[106] Specifically, based on its reading of Section 2(i), CFTC staff stated that a multilateral swaps trading platform located outside the United States that provides U.S. persons or persons located in the United States, including personnel and agents of non-U.S. persons located in the United States (**U.S.-located persons**), with the ability to trade or execute swaps on, or pursuant to, the

[102] Section 5h(a)(1) of the CEA, 7 U.S.C. § 7b-3(a)(1) and CFTC Regulation 37.3(a)(1), 17 CFR § 37.3(a)(1).

[103] *See* Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (June 4, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-12242.pdf.

[104] *See* Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (June 4, 2013) (**MAT Rules**), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-12250.pdf.

[105] Section 5h(g) of the CEA, 7 U.S.C. § 7b-3(g).

[106] CFTC Division of Market Oversight, Guidance on Application of Certain Commission Regulations to Swap Execution Facilities (Nov. 15, 2013), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmosefguidance111513.pdf.

rules of the platform, either directly or indirectly through an intermediary, generally must register with the CFTC as a SEF or DCM.[107]

According to the 2013 DMO Guidance, factors that would be relevant in evaluating the SEF/DCM registration requirement as they apply to multilateral swaps trading platforms located outside the United States generally include, but are not limited to: (1) whether a multilateral swaps trading platform directly solicits or markets its services to U.S. persons or U.S.-located persons; or (2) whether a significant portion of the market participants that a multilateral swaps trading platform permits to effect transactions are U.S. persons or U.S.-located persons.[108] The staff noted that non-U.S.-based platforms already registered with their home country may elect to register as a SEF or DCM. The staff stated that it expected to work with such platforms that apply for registration and with home country regulators to determine whether alternative compliance arrangements are appropriate in recognition of comparable and comprehensive home country regulation.[109]

Separately, the CFTC has made it clear that it is not tying the SEF registration requirement in Section 5h(a)(1) of the CEA to the trade execution requirement in Section 2(h)(8), such that only facilities trading swaps subject to the trade execution requirement would be required to register as a SEF.[110] As a result, a facility would be required to register as a SEF if it operates in a manner that meets the SEF definition and has U.S. participants even if it only executes or trades swaps that are not subject to

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See* Core Principles and Other Requirements for Swap Execution Facilities, 78 FR at 33481, n.88 (noting that transactions involving swaps on SEFs that are subject to the trade execution mandate are considered to be "Required Transactions" under Part 37 of the CFTC's regulations, whereas "Permitted Transactions" are transactions not involving swaps that are subject to the trade execution mandate, and that the regulatory obligations which pertain to Permitted Transactions differ from, and are somewhat less rigorous than, those for Required Transactions).

the trade execution mandate. Not surprisingly, this staff position caused and continues to cause enormous consternation for non-U.S.-based swaps trading platforms.

B. 2017 CFTC-EC Agreement for Derivatives Trading Venues

In 2017, the CFTC and EC announced a common approach regarding certain derivatives trading venues authorized in the United States and the EU (the **2017 Common Approach**).[111] The aim of the 2017 Common Approach was to ensure that EU counterparties were able to comply with the trading obligation under Article 28 of the Markets in Financial Instruments Regulation (**MiFIR**) by executing mandated derivatives on CFTC-authorized SEFs and DCMs as well as on EU-authorized trading venues. It also sought to ensure that U.S. counterparties could comply with the trade execution requirement under Section 2(h)(8) of the CEA by executing swaps on certain EU-authorized trading venues that are exempted from SEF registration pursuant to Section 5h(g) of the CEA, as well as on SEFs and DCMs.

Pursuant to the 2017 Common Approach, the CFTC exercised its discretion under Section 5h(g) of the CEA to determine that certain "multilateral trading facilities" (**MTFs**), as defined in Article 4(1)(22) of MiFID II, and certain "organised trading facilities" (**OTFs**), as defined in Article 4(1)(23) of MiFID II, were exempt from the requirement to register as a SEF pursuant to Section 5h(g) of the CEA.[112] In turn, the EU concluded that DCMs and SEFs are subject to legal requirements that are equivalent to the requirements for the trading venues under relevant EU law, and are

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[111] The United States Commodity Futures Trading Commission and the European Commission: A Common Approach on Certain Derivatives Trading Venues (Oct. 13, 2017), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo_cacdtv101317.pdf.

[112] Order of Exemption, In the Matter of the Exemption of Multilateral Trading Facilities and Organised Trading Facilities Authorized Within the European Union from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities (Dec. 8, 2017), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/mtf_otforder12-08-17.pdf.

subject to effective supervision and enforcement in that third country.[113] The 2017 Common Approach is an appropriate model for the treatment of swaps trading venues in Comparable Jurisdictions.

C. Recommendations

Similar to the approach to non-U.S. CCPs above, the approach recommended here for non-U.S. trading venues envisions the swaps markets being divided into three parts, namely, swaps activity within: (1) the United States; (2) Comparable Jurisdictions; and (3) Non-Comparable Jurisdictions.

1. United States

The CFTC should continue to require swaps trading venues located in the United States that meet the definition of SEF in Section 1a(50) of the CEA, and rules thereunder, to register as a SEF (or DCM) with the CFTC.

2. Comparable Jurisdictions

As noted above, Title VII of the Dodd-Frank Act permits the CFTC to exempt, conditionally or unconditionally, a non-U.S. swaps trading venue from registration if the CFTC determines that it is subject to "comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental authorities in the home country of the facility."[114] This White Paper recommends that, using this authority, the CFTC should generally exempt from SEF registration non-U.S. trading venues that are regulated in Comparable Jurisdictions with respect to all types of swaps (*i.e.*, both swaps that are subject to the trade execution requirement and swaps that are

[113] EC, Commission Implementing Decision (EU) 2017/2238 on the equivalence of the legal and supervisory framework applicable to designated contract markets and swap execution facilities in the United States of America in accordance with Regulation (EU) No 600/2014 of the European Parliament and of the Council (Dec. 5, 2017), *available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2238&from=en.

[114] Section 5b(h) of the CEA, 7 U.S.C. § 7a-1(h).

not). This would permit such non-U.S. trading venues to have U.S. participants[115] without being required to register with the CFTC. It also would permit U.S. participants to satisfy their trade execution requirements on the platforms as well. Consistent with the principles set forth above, such exempt swaps trading venues would not be required to have rules regarding trading methodologies and mechanics that are identical to CFTC rules (*e.g.*, RFQ-to-3) in order to be deemed comparable. Instead, under the territorial approach advocated above, comparable local (non-U.S.) trading rules would apply.

As a result, transactions involving swaps that are subject to the trade execution requirement in Section 2(h)(8) of the CEA, as discussed more fully below, could be executed on exempt swaps trading venues in Comparable Jurisdictions. The primary benefit of this approach is that U.S. market participants would have access to non-U.S. trading markets in Comparable Jurisdictions, without such markets becoming subject to U.S. registration requirements and having to adopt particular U.S. trading mechanics. Moreover, those local trading markets would not be bifurcated as they are today between U.S. and non-U.S. market participants and trading practices. Instead, they would be subject to comparable swaps regulation and G20 reforms and regulated uniformly by their home country regulator responsible for promulgating professional conduct standards and market integrity requirements (*e.g.*, price transparency requirements).

3. Non-Comparable Jurisdictions

Although the volume of swaps executed on non-U.S. trading venues in Non-Comparable Jurisdictions may constitute a relatively small portion of the total volume of global swaps trading, the treatment of such trading venues raises a number of unique policy issues. The general approach to Non-Comparable Jurisdictions recommended in this White Paper as a starting point for staff consideration is that non-U.S. trading venues in Non-Comparable Jurisdictions would be required to register as a SEF or

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[115] This would be limited to U.S. participants that are eligible contract participants (**ECPs**). *See supra* note 54.

DCM if they provide U.S. persons access to the trading venue directly or indirectly through a non-U.S. intermediary, subject to an appropriate materiality threshold. The materiality threshold should be based on a level of trading involving U.S. persons that does not meet the Section 2(i) "direct and significant" standard. The precise standard would be set by the CFTC based on appropriate criteria.[116]

If the universe of swaps subject to the trade execution requirement is expanded to include all swaps that are subject to the CFTC's clearing mandate, as recommended in the April 2018 White Paper, it is likely that any Non-Comparable Jurisdiction that seeks to attract participation by U.S. participants would be incentivized to adopt comprehensive swaps reform comparable to that of the CFTC, or to get an exemption in order to permit its U.S. participants to satisfy mandatory trade execution requirements. However, by adopting a materiality threshold, the CFTC would permit non-U.S. trading venues in Non-Comparable Jurisdictions to provide trading services to U.S. persons on a limited basis without registration.

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[116] It is worth considering whether such criteria should be based upon CFTC research into entity-net notionals (**ENN**). *See* Richard Haynes, John Roberts, Rajiv Sharma, and Bruce Tuckman, Introducing ENNs: A Measure of the Size of Interest Rate Swap Markets (Jan. 2018), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_enns0118.pdf.

V. REGISTRATION OF NON-U.S. SWAP DEALERS

A key component of Title VII of the Dodd-Frank Act is the registration and regulation of swap dealers.[117] As noted above, the Dodd-Frank Act amended the CEA by adding Section 2(i), which provides that the swaps provisions of the CEA apply to cross-border activities when such activities have a "direct and significant connection with activities in, or effect on, commerce of the United States."[118] In the CFTC Cross-Border Guidance and the 2016 Proposed Cross-Border Rules, the CFTC sought to register as swap dealers persons or entities whose swap dealing business outside the United States is deemed to pose a "direct and significant" risk to the U.S. financial system.[119]

While it is right to address the risk that non-U.S. swap dealing activity poses to the United States, the CFTC has applied its swap dealer rules extraterritorially without sufficient consideration of whether the activity truly poses a "direct and significant" risk

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[117] Section 1a(49) of the CEA, 7 U.S.C. § 1a(49), defines the term "swap dealer" to include any person who: (1) holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. *See* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 FR 30596 (May 23, 2012), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-10562.pdf.

[118] *See supra* note 51 and accompanying text.

[119] *See* CFTC Cross-Border Guidance, 78 FR at 45297. The SEC has proposed or adopted similar cross-border rules. *See* Application of the "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities, 79 FR 47278 (Aug. 12, 2014) (**Final SEC Cross-Border Rules**), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2014-08-12/pdf/R1-2014-15337.pdf; Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer *De Minimis* Exception, 81 FR 8598 (Feb. 19, 2016) (**SEC ANE Rules**), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2016-02-19/pdf/2016-03178.pdf; and Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 FR 30968 (May 23, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf.

to the U.S. financial system. For example, in some cases, the CFTC has failed to adequately recognize swap dealing activity that does not have a direct and significant connection to the U.S. financial system in applying its registration regime to non-U.S. swap dealers. This has led to an inappropriate extraterritorial application of the CFTC's swap dealing rules and a failure to give appropriate deference to non-U.S. regulators.

A. Background

Under CFTC regulations, a person is deemed to be a swap dealer as a result of its swap dealing activity if, during the preceding 12 months, the aggregate gross notional amount of the swap dealing exceeds the *de minimis* threshold.[120] Otherwise a person engaged in swap dealing activity is not required to register as a swap dealer with the CFTC. Domestically, the application of this rule is relatively straightforward.[121] Application of the *de minimis* exception becomes more complicated in the cross-border context. When swap transactions have cross-border aspects, it is necessary to determine whether the swap dealing activity has a "direct and significant" effect on the U.S. financial system and therefore should count toward the *de minimis* threshold.

The CFTC has divided non-U.S. swap dealers into the following categories, each of which poses a different level of risk to the United States:[122]

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[120] 17 CFR § 1.3, Swap dealer, paragraph (4). There are very limited exceptions for certain types of swaps that are not discussed here. *See, e.g.,* 17 CFR § 1.3, Swap dealer, paragraph (6)(iii) (excluding certain swaps entered into for the purpose of hedging physical positions). The definition of swap dealer also requires that, in determining whether its swap dealing activity exceeds the *de minimis* threshold, a person must include the aggregate notional value of the swap positions connected with the dealing activities of its affiliates under common control. 17 CFR § 1.3, Swap dealer, paragraph (4)(i)(A).

[121] The CFTC recently proposed amendments to the *de minimis* exception as part of a review process established in the regulation defining "swap dealer." *See* De Minimis Exception to the Swap Dealer Definition, 83 FR 27444 (June 12, 2018), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2018-06-12/pdf/2018-12362.pdf.

[122] Appendix A contains definitions or descriptions of each of the terms addressed in this paragraph.

- **Guaranteed Entities** – Guaranteed Entities are non-U.S. persons whose swaps are guaranteed by a U.S. person.[123] A "guarantee" would include an arrangement, pursuant to which one party to a swap has a right of recourse against a guarantor, with respect to its counterparty's obligations under the swap.[124] For these purposes, a party to a swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the swap.[125]

- **Foreign Consolidated Subsidiaries (FCS)** – FCS are non-U.S. persons whose operating results, financial position, and statement of cash flows are consolidated, in accordance with U.S. Generally Accepted Accounting Principles (**U.S. GAAP**), with those of an ultimate parent entity that is a U.S. person.[126] In some cases, FCS are former Guaranteed Entities that have removed their parental guarantee.[127]

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[123] The term "Guaranteed Entity" is taken from the 2016 Proposed Cross-Border Rules.

[124] Appendix A contains a description of the meaning of "guarantee," as set forth in the Final Cross-Border Margin Rules, which was proposed, with no substantive change, in the 2016 Proposed Cross-Border Rules.

[125] An "ultimate parent entity" is the parent entity in a consolidated group in which none of the other entities in the consolidated group has a controlling interest (under U.S. GAAP). *See* Appendix A.

[126] Appendix A contains a definition of "Foreign Consolidated Subsidiary," as set forth in the 2016 Final Cross-Border Margin Rules, which was adopted, substantively as proposed, in the 2016 Proposed Cross-Border Rules.

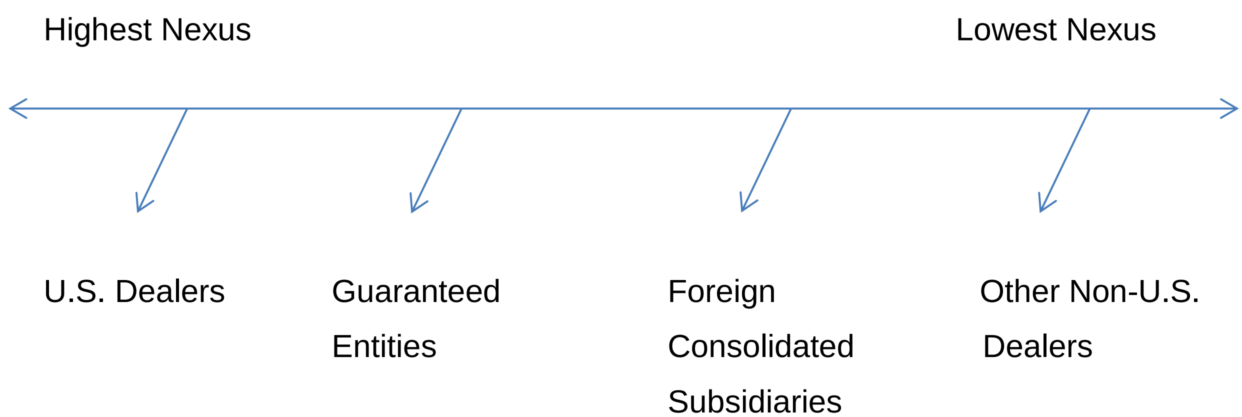
[127] As the CFTC has previously recognized, there are some important differences between a Guaranteed Entity and an FCS. In contrast with a Guaranteed Entity, in the event of an FCS's default, the U.S. ultimate parent entity does not have a legal obligation to fulfill the obligations of the FCS. Rather, that decision would depend on the business judgment of its parent. *See* 2016 Proposed Cross-Border Rules, 81 FR at 71950, n.40.

- **Other Non-U.S. Persons** – These are non-U.S. persons that are not Guaranteed Entities or FCS.[128]

The following chart places these different types of non-U.S. dealing entities on a spectrum that shows their relative nexus to the United States, assuming the same volume and mix of swaps activities. The nexus is based on contractual counterparty risk transfer. This spectrum will guide the subsequent analysis.

Swap Dealer

U.S.-Nexus Spectrum



On this spectrum, a dealer that is located or maintains its principal place of business in the United States would generally have the most direct nexus to the United States,

[128] The CFTC Cross-Border Guidance also introduced the concept of "conduit affiliate." A "conduit affiliate" is defined to mean a non-U.S. person (1) that is a majority-owned affiliate of a U.S. person; (2) that is controlling, controlled by or under common control with the U.S. person; (3) whose financial results are included in the consolidated financial statements of the U.S. person; and (4) in the regular course of business, engages in swaps with non-U.S. third-party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates. CFTC Cross-Border Guidance, 78 FR at 45359. The CFTC eliminated this concept when it introduced the concept of FCS and did not propose to apply this definition in the 2016 Proposed Cross-Border Rules. It is not addressed in this White Paper.

given its location and involvement in the U.S. financial system. A Guaranteed Entity generally would have a less direct nexus to the U.S. financial system, despite the existence of a U.S. guarantee, given its non-U.S. location and likely predominant involvement in non-U.S. markets. An FCS generally would have even less nexus to the United States because there is no explicit guarantee by a U.S. person, making the risk to the United States less tangible. Finally, Other Non-U.S. Persons engaged in dealing activity have relatively the least direct nexus to the United States.

In applying the swap dealer registration requirement to non-U.S. persons, the CFTC has proposed in the 2016 Proposed Cross-Border Rules that Guaranteed Entities and FCS must count every dealing swap, regardless of the counterparty, toward their *de minimis* threshold.[129] Other Non-U.S. Persons are required to count all of their dealing swaps with not only U.S. Persons (including Foreign Branches of U.S. banks), but also with all Guaranteed Entities and FCS, subject to only very limited exceptions.[130] Essentially, the CFTC has proposed to count toward the swap dealer *de minimis* threshold every single dealing swap that involves a U.S. person or a non-U.S. person that is connected in some way with a U.S. person, regardless of the statutory standard of whether the swap activity has a "direct and significant connection with activities in, or effect on, commerce of the United States."

In the 2016 Proposed Cross-Border Rules, the CFTC applied its swap rules even more expansively than it did in the CFTC Cross-Border Guidance. There can only be one of two results if the 2016 Proposed Cross-Border Rules are adopted as proposed: either (1) most of the world's swap dealers register with the CFTC; or, more likely, (2) the swaps market becomes more firmly divided into two separate markets and liquidity pools – one for U.S. persons and one for non-U.S. persons. Neither alternative is tenable, as both would have deleterious effects on the global economy.

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[129] *See* 2016 Proposed Cross-Border Rules, 81 FR at 71954-58.

[130] *Id.*

The task should be to assess the "direct and significant" risk that that each type of swap dealer poses to the U.S. financial system as Congress intended, while showing appropriate deference to non-U.S. regulatory regimes in all other cases.[131]

B. Exceptions to Counting Toward the *De Minimis* Threshold

The CFTC Cross-Border Guidance, which was issued by the CFTC three years before the 2016 Proposed Cross-Border Rules, contains certain exceptions to allow a non-U.S. person not to count a dealing swap toward its *de minimis* threshold in recognition of the fact that such swaps do not have a direct and significant effect on the U.S. financial system – specifically, anonymously executed trades that are centrally cleared and swaps with registered non-U.S. swap dealers. While the exception for anonymously executed trades was retained in the 2016 Proposed Cross-Border Rules, the exception for swaps with registered non-U.S. swap dealers was not. As explained below, this was a mistake.

1. Anonymously executed trades that are centrally cleared

In the CFTC Cross-Border Guidance and the 2016 Proposed Cross-Border Rules, the CFTC recognized that certain swaps trading platforms permit counterparties to be matched up anonymously on the platform prior to the trades being centrally cleared.[132] The CFTC included an exception from the swap counting rules for non-U.S. dealers' swaps executed anonymously on a SEF, DCM, or FBOT and cleared by a registered or exempt DCO, even if the dealing activity involved U.S. persons.[133] As a rationale for this exception, the CFTC stated that a non-U.S. dealer would not know the identity of its counterparty. Therefore, it would not be practical in such cases to require

[131] As noted above, Section 2(i) also provides that the CFTC's swap provisions apply to activities outside the United States when they contravene CFTC rules or regulations, as necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act.

[132] *See* CFTC Cross-Border Guidance, 78 FR at 45325; 2016 Proposed Cross-Border Rules, 81 FR at 71956-57.

[133] *Id.*

the non-U.S. dealer to count trades with U.S. persons toward its *de minimis* threshold.[134]

However, the CFTC also stated that, even more importantly, the risk posed to the U.S. financial system in such cases is already addressed, principally because the swap would be cleared and, therefore, subject to ongoing margin requirements. The CFTC would be relying on the CCP to manage the risk of the transaction under comparable home country regulation. Furthermore, after the trade is novated to the CCP, the non-U.S. dealer would no longer be involved in the transaction with the U.S. counterparty. Requiring the non-U.S. dealer to register with the CFTC and comply with all the regulations applicable to swap dealers, such as capital and margin requirements, would therefore not serve any of the objectives of Title VII of the Dodd-Frank Act. Such swaps do not have a direct and significant connection with the U.S. financial system.

2. Swaps with Registered Non-U.S. Swap Dealers

In the CFTC Cross-Border Guidance, the CFTC included exceptions from the requirement to permit Other Non-U.S. Persons <u>not</u> to count toward their *de minimis* threshold swaps with: (1) a Foreign Branch of a U.S. bank that is registered as a swap dealer; (2) a Guaranteed Entity that is registered as a swap dealer; or (3) a Guaranteed Entity that is affiliated with a registered swap dealer.[135] The justification given by the CFTC for these exceptions was that in these cases one counterparty to the swap is a swap dealer that is subject to comprehensive swap regulation and operates under the oversight of the CFTC.[136] For example, the registered U.S. swap dealer would be subject to the CFTC's clearing and trade execution requirements, as well as capital and margin requirements.

As a result, the CFTC would have all the tools necessary to address the risk of this swap activity given its supervision of the registered swap dealer counterparty.

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[134] *Id.*

[135] CFTC Cross-Border Guidance, 78 FR at 45324.

[136] *Id.*

There is therefore no need to assert the CFTC's jurisdiction over non-U.S. dealers that engage in dealing activity outside the United States with other non-U.S. dealers that are already registered with the CFTC. Such an approach would only lead to further market fragmentation and fragility.

Regrettably, eliminating these exceptions is exactly what the CFTC proposed to do in the 2016 Proposed Cross-Border Rules. As a justification, the CFTC stated that such an exception would "result in a substantial amount of dealing activity with U.S. counterparties occurring outside the comprehensive Dodd-Frank swap regime, undermining the effectiveness of the proposed rule."[137] This is incorrect. The exceptions discussed above are only for swap activity by certain non-U.S. persons with registered swap dealers, who are already subject to CFTC supervision and oversight, including capital and margin requirements. As such, the transactions do not occur outside the comprehensive Dodd-Frank swap regime and, therefore, do not have a direct and significant connection with the U.S. financial system.

There may be concern that such swaps will benefit from an exception in the CFTC Cross-Border Guidance from certain transaction-level requirements. However, with the adoption of mandatory clearing by competent regulators of the world's major swaps trading markets and the ensuing global increase in central clearing, the swaps that fall within this exception will likely be cleared pursuant to comparable supervision and regulation in the home country of the non-U.S. dealer. For this reason, it may no longer be necessary to impose the CFTC's rules outside the United States because other jurisdictions have similar risk mitigation features (*e.g.*, clearing), which warrant deference by the CFTC.

Accordingly, this White Paper recommends retaining these exceptions as they were set forth by the CFTC in 2013. Requiring non-U.S. persons to count swaps with Guaranteed Entities who are registered as swap dealers (or are affiliated with a registered swap dealer) or Foreign Branches of U.S. banks that are registered as swap dealers toward their *de minimis* threshold is not supported by the Dodd-Frank Act

[137] 2016 Proposed Cross-Border Rules, 81 FR at 71956.

because such swaps do not have a direct and significant connection with the U.S. financial system. Moreover, it would only incentivize non-U.S. market participants to continue to avoid financial firms bearing the scarlet letters of "U.S. person" in order to steer clear of the CFTC's regulations,[138] a dynamic that increases trading liquidity risk rather than reduces it.

These instances provide examples of situations where the CFTC Cross-Border Guidance showed reasonable restraint in applying its swaps rules extraterritorially in cases where the swap dealing activity did not pose a "direct and significant" effect on the U.S. financial system, as required by Section 2(i). Consistent with the law, the CFTC should seek to identify only that dealing activity that poses a direct and significant risk to the United States and, therefore, warrants applying the swap dealer registration regime.

[*see text box next page*]

[138] *See* Giancarlo 2015 U.S. House Testimony, *supra* note 44.

CFTC Visibility into Swaps Activity of Large Bank Holding Companies with Foreign Consolidated Subsidiaries

A criticism of the CFTC's current cross-border approach is that the CFTC has limited data regarding the non-U.S. swaps operations of U.S.-based entities, unless they receive a U.S. affiliate guarantee. Some critics allege that U.S. swap dealers have moved swaps trades into such operations to avoid regulatory oversight, thereby ostensibly creating unmonitored systemic risk.

This criticism is misinformed. It fails to take into account swaps data the CFTC receives as a result of the enormous increase in central counterparty clearing of the major financial swap asset classes through clearinghouses directly overseen by the CFTC.

Based on CFTC staff analysis, as of March 2018, the CFTC receives and monitors detailed data on the vast amount of all derivatives across the major product types held by large U.S. bank holding companies (**BHCs**) in the United Kingdom (**UK**), where most BHCs have subsidiaries, including both guaranteed and non-guaranteed subsidiaries. Competent UK authorities, with whom the CFTC works closely, receive detailed data on the remainder of these derivatives. This effective transparency into the derivatives exposure of overseas subsidiaries of U.S. banks is in stark contrast to the situation prior to the 2008 financial crisis.

Data Visibility Across Product Types

The CFTC is adept at using an array of data streams to gain visibility into market conditions and counterparty exposures. While the development of swaps data repositories and uniform product and transaction identifiers remains to be perfected through the concerted efforts of the CFTC and international bodies, the CFTC is not hindered from monitoring swaps trading activities of non-U.S. operations of U.S.-based entities.

The CFTC receives detailed data across the three major swaps product types, which are, in descending order of notional amounts: interest rate swaps (**IRS**), foreign exchange (**FX**) swaps, and credit defaults swaps (**CDS**).

- **Interest Rate Swaps**: Unlike during the financial crisis, most of the world's IRS are now cleared. Of that cleared amount, close to 95 percent are cleared at LCH Limited (**LCH**), registered with the CFTC as a Derivatives Clearing Organization. This provides the CFTC with data on the swaps positions of clearing members, including the non-guaranteed subsidiaries of large U.S. BHCs which are clearing members of LCH. As a result, the CFTC sees all of the swaps of the U.S. reporting affiliates of BHCs and all the cleared swaps of their non-guaranteed UK subsidiaries. Furthermore, the total notional amount of swaps of each BHC can be found in its "call reports," filed with the CFTC.
- **Foreign Exchange Swaps**: Most FX swaps do not have to be cleared, but many are cleared for commercial reasons. While the non-guaranteed UK subsidiaries do not have to report their FX swaps to the CFTC, many are reported voluntarily. As a result, combined with the fact that some of these subsidiaries' FX swaps are executed with U.S.-reporting counterparties, the CFTC sees practically all of the notional amount of the relevant BHCs' FX swaps activity.
- **Credit Defaults Swaps**: The voluntary reporting of CDS positions by dealers to the Trade Information Warehouse (**TIW**) pre-dates the Dodd-Frank Act and continues to the present. Data sharing agreements allow the CFTC access to TIW data. This means that the CFTC receives both its regulatory data on CDS and data from TIW. As a result, the CFTC sees all of the CDS of the BHCs in question.

C. Recommendations

Similar to the discussion in previous sections of this White Paper, the approach recommended here envisions the swaps market being divided into three parts: (1) swaps activity in the United States; (2) swaps activity in Comparable Jurisdictions; and (3) swaps activity in Non-Comparable Jurisdictions.

1. United States

The CFTC should continue to require U.S. persons to count all of their swap dealing transactions toward the *de minimis* threshold, including transactions conducted through a Foreign Branch, whether with U.S. or non-U.S. persons. Clearly all of a U.S. person's swap dealing activities, whether with U.S. persons or non-U.S. persons, have the requisite jurisdictional nexus and potential to impact the U.S. financial system to require registration if the dealing activity exceeds the *de minimis* threshold.[139]

2. Comparable Jurisdictions

In this context, Comparable Jurisdictions are non-U.S. jurisdictions in which non-U.S. regulators have established comparable requirements for entities engaged in swap dealing activity. While such jurisdictions may not have a separate registration category for swap dealers, it would be sufficient if they have comparable requirements governing entities engaged in swap dealing activity. The principal focus in making a comparability determination should be on whether the non-U.S. regime has comparable requirements with respect to risk mitigation requirements – particularly, capital, margin, and risk management requirements (*e.g.*, Basel-compliant capital oversight by another G20 prudential supervisor). This is consistent with the approach discussed in Section II, where it is argued that in applying swaps rules to cross-border activities in Comparable Jurisdictions, the CFTC should focus on systemic risk, not market structure and trading practices.

[139] *See* CFTC Cross-Border Guidance, 78 FR at 45318.

For Comparable Jurisdictions, this White Paper recommends the following approach:

- **Guaranteed Entities** – They should be required to count all of their swap dealing activity toward their *de minimis* threshold, regardless of the status of their counterparties. Such an approach is warranted based on the direct connection to the United States as a result of the explicit guarantee by a U.S. person. However, in deference to the home country regulator in Comparable Jurisdictions, Guaranteed Entities would be permitted to rely on substituted compliance with respect to applicable requirements.

- **FCS and Other Non-U.S. Persons** – They should be required to count swap dealing activity with U.S. persons and Guaranteed Entities, except swaps with: (1) Guaranteed Entities that are registered as swap dealers (or are affiliated with a registered swap dealer); (2) Guaranteed Entities that are guaranteed by a non-financial guarantor;[140] or (3) Foreign Branches of U.S. banks that are registered as swap dealers.[141] Like Guaranteed Entities, both FCS and Other Non-U.S. Persons should be able to rely on substituted compliance with respect to applicable requirements.

In addition, all non-U.S. dealers should be permitted to exclude from their *de minimis* threshold swaps executed anonymously on a registered or exempt SEF, DCM, or FBOT and cleared by a registered or exempt clearing organization, even if the dealing activity involves U.S. persons.

[140] *See, e.g.,* CFTC Cross-Border Guidance, 78 FR at 45324.

[141] In addition, this White Paper recommends, as an alternative, that the CFTC should consider not requiring Other Non-U.S. Persons to count dealing swaps with Guaranteed Entities toward their *de minimis* threshold. Risk posed by those swaps to the U.S. financial system arguably is adequately addressed by requiring the Guaranteed Entities themselves to count their dealing swaps toward their *de minimis* threshold. Such an approach would be consistent with the approach adopted by the SEC and therefore lead to greater harmonization between the two agencies' cross-border rules. *See* Final SEC Cross-Border Rules, 79 FR at 47322.

The above approach to Guaranteed Entities and Other Non-U.S. Persons is generally consistent with the approach taken by the CFTC in the CFTC Cross-Border Guidance. It differs from the 2016 Proposed Cross-Border Rules, however, particularly with respect to the treatment of FCS. As discussed above, the CFTC has proposed to require an FCS to include all of its swap dealing transactions toward its *de minimis* threshold, even if the dealing activity takes place completely outside the United States.[142] This effectively treats an FCS as a Guaranteed Entity for purposes of the swap dealer registration regime. The CFTC argued that expanding its authority to non-U.S. subsidiaries of U.S. persons, even in the absence of an explicit guarantee on the swap, was necessary because an FCS potentially creates a direct risk for the U.S. ultimate parent entity by virtue of consolidated reporting under U.S. GAAP.[143] The CFTC also was concerned that offering FCS disparate treatment compared to Guaranteed Entities could incentivize U.S. entities to conduct swap activities with non-U.S. counterparties through unguaranteed, but consolidated, non-U.S. subsidiaries in order to avoid application of the Dodd-Frank Act.

While it is right to limit regulatory evasion, there are better means to address the potential risk that might flow to the United States due to de-guaranteeing. It is an overreach to require FCS that engage in swap dealing activity wholly outside the United States to register with the CFTC, based on the theory that they pose a hypothetical risk to the U.S. financial system due to an accounting connection. The CFTC has failed to take into account steps U.S. parent companies take to limit the risk they face from their non-U.S. operations, such as the use of limited liability structures. When the CFTC exercises jurisdiction over non-U.S. affiliates of U.S. persons merely on the basis of accounting consolidation, the CFTC effectively acts as a federal consolidated holding company supervisor without any express Congressional authorization.

A better approach would be to not require FCS to register as swap dealers if their dealing activities occur wholly outside the United States and are addressed, from a risk

[142] *See* 2016 Proposed Cross-Border Rules, 81 FR at 71955.

[143] *Id*.

perspective, by their home country regulator through comparable regulation. Showing deference implies a level of confidence in the competence of home country regulators that have a legitimate interest in overseeing activity that occurs in their jurisdictions but that might spill over into the general financial system. Accordingly, in Comparable Jurisdictions, this White Paper recommends that FCS whose swap dealing activity occurs outside the United States and does not involve direct activity in the United States with U.S. persons not be required to register as swap dealers if they are subject to comparable regulation by a non-U.S. regulator, including being subject to robust capital and margin requirements for uncleared swaps.

In support of this approach, it should be noted that the CFTC increasingly has access to swap trading information regarding U.S.-related entities, such as FCS. As summarized above, the CFTC currently obtains swap trading data regarding cleared positions from the CCPs that it regulates.[144] The high percentage of interest rate swaps and CDS that are centrally cleared represents a significant portion of the U.S.-related swaps market. For the remaining portion of the U.S.-related swaps market (namely, the uncleared portion that is reported to SDRs), the CFTC obtains swaps trading information from the entities that the CFTC regulates regarding such entities' own trading activity. In addition, the CFTC obtains swaps trading data from regulated entities regarding their entities' U.S. and non-U.S. guaranteed and unguaranteed affiliates.

As a result, the CFTC can monitor for practices that raise systemic risk concerns, including the build-up of risk at FCS as a result of swaps activity. This should give the CFTC a comprehensive view of the U.S.-related swaps marketplace from which it can monitor the build-up of risk in U.S.-related entities, regardless of whether they are registered as swap dealers.

The alternative approach proposed by the CFTC in 2016 of trying to regulate non-U.S. persons whose swap dealing activity occurs solely outside the United States is

[144] This includes swap trading information from LCH Limited that is understood to clear well over 90% of global interest rate swaps.

not only unnecessary to address systemic risk, it does not respect non-U.S. regulators that engage in comparable swap dealing regulatory supervision. Moreover, it only encourages such regulators to similarly attempt to regulate subsidiaries of their domestic entities operating in the United States, leading to costly overlapping and duplicative regulation. It is not a good expenditure of the CFTC's time and resources to attempt to regulate entities whose only connection to the United States is their inclusion on a consolidated financial statement.

3. Non-Comparable Jurisdictions

Although the volume of swaps activity in Non-Comparable Jurisdictions by non-U.S. dealers and foreign branches of U.S. banks that are registered as swap dealers is small relative to global swaps trading,[145] the treatment of such swap dealers raises a number of unique policy issues. The general approach to Non-Comparable Jurisdictions recommended in this White Paper as a starting point for staff consideration is set out below.

For Non-Comparable Jurisdictions, this White Paper recommends a different approach due to the increased risk swap activity by swap dealers in those jurisdictions may pose to the U.S. financial system given the lack of comparable regulation:

- **Guaranteed Entities** – They should continue to be required to count all of their swap dealing activity toward their *de minimis* threshold, regardless of the status of their counterparties. Effectively, this approach would treat Guaranteed Entities as U.S. persons for purposes of the CFTC's swap dealer regime in jurisdictions that do not have comparable requirements.

- **Other Non-U.S. Persons** – They should continue to be required to count dealing swaps with U.S. persons and Guaranteed Entities, except swaps with: (1) Guaranteed Entities that are registered as swap dealers (or are affiliated with a registered swap dealer); (2) Guaranteed Entities that are guaranteed

[145] *See* BIS 2018 Outstanding Derivatives Report, *supra* note 33.

by a non-financial guarantor; or (3) Foreign Branches of U.S. banks that are registered as swap dealers.[146]

The treatment of FCS raises more complex issues. FCS that are part of bank holding companies are subject to consolidated supervision and regulation by the FRB**,** including with respect to capital and risk management. This could provide a basis for limiting the swaps an FCS would need to count toward its *de minimis* threshold (possibly subject to a materiality threshold), in as much as such FCS would likely be regulated in a way similar to entities subject to regulation by home country regulators in Comparable Jurisdictions. Similarly, with respect to FCS that are part of non-financial organizations headquartered in the United States, because they may not pose systemic risk on the U.S. financial system, it may be appropriate to similarly treat them as Other Non-U.S. Persons, requiring them to count their dealing swaps in a similar way (as described above). Such an approach may be consistent with an interpretation of Section 2(i), which looks to whether activity has a "direct and significant" connection to the United States.

In general, the CFTC staff should consider how to treat non-U.S. dealers operating in Non-Comparable Jurisdictions consistent with the principles set forth above, to facilitate access to emerging markets, with the recognition that they pose relatively less systemic risk to the U.S. financial system.

[146] In addition, this White Paper recommends, as an alternative, that the CFTC should consider not requiring Other Non-U.S. Persons to count dealing swaps with Guaranteed Entities toward their *de minimis* threshold. *See supra* note 141.

VI. CLEARING AND TRADE EXECUTION REQUIREMENTS

Consistent with the commitments at the Pittsburgh G20 Summit, Title VII of the Dodd-Frank Act mandates that certain standardized swaps be submitted to CCPs for clearing and executed on a DCM, a registered SEF, or SEF that is exempt from registration (**exempt SEF**), unless no DCM or SEF "makes the swap available to trade" or an exception applies. The CFTC Cross-Border Guidance addressed the cross-border application of the swap clearing and trade execution requirements.[147] The 2016 Proposed Cross-Border Rules, however, did not address these requirements.

The following discussion recommends an approach to establishing the scope of the swaps clearing and trade execution requirements that recognizes their different policy objectives: swaps clearing is focused primarily on managing and mutualizing the accumulation of counterparty credit risk; whereas swaps trade execution is primarily concerned with market integrity and trade practice issues.[148] Furthermore, while many G20 jurisdictions have adopted clearing requirements, fewer have adopted trade execution requirements.[149]

A. Background

Section 2(h)(1) of the CEA requires a swap to be submitted for clearing to a registered DCO or a DCO exempt from registration (collectively, **eligible DCOs**) if the CFTC has determined that the swap is required to be cleared, unless one of the parties to the swap is eligible for an exception or exemption from the clearing requirement and elects not to clear the swap.[150] A DCO manages this risk, among other ways, by

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[147] CFTC Cross-Border Guidance, 78 FR at 45333.

[148] In addition, the discussion below should be read in conjunction with the previous discussion of the registration of non-U.S. trading venues and non-U.S. CCPs, where this White Paper recommends recognizing swaps trading venues and CCPs in Comparable Jurisdictions by relying on an outcomes-based approach to substituted compliance. This approach should enable parties to satisfy the CFTC's swaps clearing and trade execution requirements by trading in their local markets, subject to local rules.

[149] *See* Twelfth FSB Progress Report, *supra* note 18.

[150] 7 U.S.C. § 2(h)(1).

collecting initial and variation margin from its clearing members. The collection of margin allows a DCO to cover the losses due to default of a clearing member in many cases. CFTC Regulation 50.2 establishes the treatment of swaps subject to the clearing requirement, and CFTC Regulation 50.4 establishes clearing requirements for certain classes of swaps (**50.4 Swaps**).[151]

Generally, if a swap is subject to the clearing requirement (*i.e.*, a 50.4 Swap), it must be cleared through an eligible DCO, unless: (1) one of the counterparties is eligible for and elects the end-user exception under CFTC Regulation 50.50 (**End-User Exception**);[152] (2) one of the counterparties is eligible for and elects the cooperative exemption under CFTC Regulation 50.51 (**Cooperative Exemption**);[153] or (3) both counterparties are eligible for and elect an inter-affiliate exemption under CFTC Regulation 50.52 (**Inter-Affiliate Exemption**).[154] To elect the End-User Exception, the Cooperative Exemption, or the Inter-Affiliate Exemption, the electing party or parties and the swap must meet certain requirements set forth in the regulations.[155]

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[151] 17 CFR § 50.2 and § 50.4. *See* Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012), *available at: https://www.gpo.gov/fdsys/pkg/FR-2012-12-13/pdf/2012-29211.pdf*; Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps, 81 FR 71202 (Oct. 14, 2016), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2016-10-14/pdf/2016-23983.pdf.

[152] End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (July 19, 2012), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2012-07-19/pdf/2012-17291.pdf.

[153] Clearing Exemption for Certain Swaps Entered Into by Cooperatives, 78 FR 52286 (Aug. 22, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-08-22/pdf/2013-19945.pdf.

[154] Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750 (Apr. 11, 2013), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2013-04-11/pdf/2013-07970.pdf.

[155] Swaps entered into before July 21, 2010, and swaps entered into before the application of the clearing requirement for a particular class of swaps, are exempt from the clearing requirement if reported to an SDR. *See* CFTC Regulations 50.5(a) and (b), 17 CFR §§ 50.5(a)-(b). The CFTC recently proposed that swap transactions entered into by certain bank holding companies, savings and loan holding companies, and community development financial institutions be exempt from the clearing requirement under Regulation 50.2 if certain conditions are met. *See* Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 FR 44001 (Aug. 29, 2018), *available at:*

Integrally linked to the clearing requirement is the trade execution requirement, which is intended to bring the trading of swaps that are required to be cleared and are made available to trade onto regulated exchanges or SEFs. Specifically, Section 2(h)(8) of the CEA provides that, unless a clearing exception applies and is elected, a swap that is subject to a clearing requirement must be executed on a DCM, registered SEF, or exempt SEF, unless no such DCM or SEF makes the swap available to trade.[156] The CFTC has adopted regulations implementing the process for a DCM or SEF to make a swap available to trade.[157] By requiring swaps that are required to be cleared and are made available to trade to be executed on a regulated exchange or a SEF – each with its attendant safeguards to ensure market integrity – the trade execution requirement furthers the statutory goals of market efficiency and enhanced transparency. Unlike the clearing requirement, however, the trade execution requirement does not address systemic risk to the U.S. financial system.

B. Recommendations

The framework used to analyze the swaps clearing and trade execution requirements is similar to the one used elsewhere in this White Paper. The following recommendations consider the application of these requirements in (1) the United States, (2) Comparable Jurisdictions, and (3) Non-Comparable Jurisdictions.

1. United States

U.S. persons (including Foreign Branches) should continue to be subject to the CFTC's swaps clearing and trade execution requirements for all applicable swaps, unless an exception or exemption applies. Thus, all 50.4 Swaps entered into by a U.S. person would continue to be required to be cleared through a registered or exempt DCO, unless an exception or exemption applies. A U.S. person entering into a 50.4

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https://www.gpo.gov/fdsys/pkg/FR-2018-08-29/pdf/2018-18618.pdf. These proposals would codify existing staff no-action letters.

[156] 7 U.S.C. § 2(h)(8).

[157] *See* MAT Rules, *supra* note 104.

Swap with a non-U.S. person would be permitted to satisfy the CFTC's clearing requirement by clearing the swap at a non-U.S. CCP that has been exempted by the CFTC from registration, including exempt non-U.S. CCPs that engage in customer clearing for U.S. persons. Furthermore, a U.S. person entering into a swap subject to the trade execution requirement must continue to trade the swap on a DCM or a registered or exempt SEF.

2. Comparable Jurisdictions

Non-U.S. persons, including Guaranteed Entities and FCS, in Comparable Jurisdictions should be eligible to rely on substituted compliance granted by the CFTC with respect to the CFTC's swap clearing and trade execution requirements. As a result, the Comparable Jurisdiction's local (non-U.S.) rules should apply to all of the non-U.S. person's swaps, including 50.4 Swaps, executed in the Comparable Jurisdiction.[158] Accordingly, the non-U.S. persons should look to the local rules regarding the scope of products and counterparties to determine whether they would be required to clear a particular swap or execute it on a trading venue.

The CFTC's approach to substituted compliance should differ with respect to the clearing requirement and the trade execution requirement. Because the clearing requirement is focused on systemic risk, the CFTC should expect a stricter degree of comparability than with respect to comparability determinations for the trade execution requirement, which pertains to local market structure and trade practice. As a result, in jurisdictions that have generally adopted trade execution requirements under the G20 reforms, it should be relatively straight forward for the CFTC to determine whether the jurisdiction is comparable to the CFTC's. However, for the clearing requirement, a stricter degree of comparability should be required. Such a tiered approach to substituted compliance is warranted based on the different policy objectives of the clearing and trade execution requirements.

[158] Because of differences in scope (counterparty and product), the CFTC has not yet found any other jurisdictions to be comparable with respect to the CFTC's swap clearing requirement.

3. Non-Comparable Jurisdictions

As noted above, although the volume of swaps activity in Non-Comparable Jurisdictions may constitute a relatively small portion of the total global swaps trading, the application of the clearing and trade execution requirements in those jurisdictions raises a number of unique policy issues. The general approach to Non-Comparable Jurisdictions recommended in this White Paper as a starting point for staff consideration is set out below.

The application of the CFTC's swap clearing requirements should apply as follows:

- **Foreign Branches** – The CFTC's swap clearing requirement should apply to all 50.4 Swaps of Foreign Branches, subject to a materiality threshold for swaps with Other Non-U.S. Persons in Non-Comparable Jurisdictions. The materiality threshold should facilitate Foreign Branches' access to swaps markets in Non-Comparable Jurisdictions, while minimizing the direct and significant risk that could flow into the United States. The precise determination of the threshold should be set by the CFTC based on appropriate criteria.[159]

- **Guaranteed Entities** – The CFTC's clearing requirement would apply to 50.4 Swaps between Guaranteed Entities and: (1) U.S. persons, including Foreign Branches; (2) Guaranteed Entities; and (3) Other Non-U.S. Persons, unless the swaps are subject to initial and variation margin requirements for uncleared swaps that are consistent with the standards established by the BCBS-IOSCO Working Group on Margining Requirements (**WGMR Margin Requirements**). With respect to swaps with Other Non-U.S. Persons, consistent with the approach to Foreign Branches of U.S. banks, this White Paper also recommends providing an exception from the clearing requirement

[159] Such criteria could be based on research the CFTC has done into ENNs. *See supra* note 116.

for swaps below a certain materiality threshold. As with Foreign Branches, this materiality threshold would facilitate access of Guaranteed Entities to swaps markets in Non-Comparable Jurisdictions, without permitting direct and significant risk to flow into the United States.

- **Other Non-U.S. Persons** – The CFTC's swap clearing requirement should apply to 50.4 Swaps with (1) U.S. persons, including Foreign Branches; and (2) Guaranteed Entities, unless the swaps are subject to WGMR Margin Requirements. In addition, Other Non-U.S. persons may benefit from the materiality exceptions discussion for Foreign Branches and Guaranteed Entities above.

An approach to the treatment of FCS for purposes of the clearing requirement will need to be developed by the CFTC at a later time and will depend on, among other things, how FCS are treated for other purposes of the CFTC's cross-border rules (*e.g.*, the swap dealer rules).

The application of the CFTC's trade execution requirement poses even more difficult issues in Non-Comparable Jurisdictions. As noted above, unlike the clearing requirement, the trade execution requirement does not directly address systemic risk concerns. Although the trade execution and clearing requirements are integrally linked within the United States, it may not be appropriate to extend the trade execution requirement to the same extent as the clearing requirement outside the United States. Furthermore, jurisdictions take different approaches to market practice issues and trade execution requirements. Therefore, it may not be possible to formulate a general approach to the trade execution requirement. Instead, it may be better to deal with non-U.S. jurisdictions on a case by case basis.

VII. ANE TRANSACTIONS

This final section of this White Paper addresses swap transactions by non-U.S. counterparties that are "arranged, negotiated, or executed" within the United States by personnel or agents of a non-U.S. person located in the United States (**ANE Transactions**). ANE Transactions raise a number of challenging policy considerations and have been the subject of a number of comment letters to the CFTC.[160] As the staff works out the details of an approach to ANE Transactions, it should attempt to draw regulatory lines that capture activity that has a direct and significant effect on the U.S. financial system and exclude other more incidental activity.

Generally, however, for purposes of this White Paper, the terms "arranging" and "negotiating" would refer to market-facing activity normally associated with sales and trading as opposed to internal, back-office activities, such as ministerial or clerical tasks, performed by personnel not involved in the actual sale or trading of the relevant swap.[161]

This White Paper recommends an approach that is consistent with the principles described herein, including the territorial approach to regulating swaps trading. It is the principle of one unified marketplace, under one set of comparable trading rules and under one competent regulator.

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[160] The CFTC solicited public comment on the application of Title VII to ANE Transactions. *See* Request for Comment on Application of Commission Regulations to Swaps Between Non- U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States, 79 FR 1347 (Jan. 8, 2014), *available at:* https://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2014-00080.pdf. Comment letters on this request for comment are available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1452.

The SEC also has addressed application of Title VII of the Dodd-Frank Act to ANE Transactions. *See* SEC ANE Rules, 81 FR at 8598.

[161] Accordingly, the terms would not encompass activities such as swap processing, preparation of the underlying swap documentation (including negotiation of a master agreement and related documentation), or the mere provision of research information to sales and trading personnel located outside the United States. *See* 2016 Proposed Cross-Border Rules, 81 FR at 71953.

This White Paper should be read in conjunction with the April 2018 White Paper, in which the author contends that, rather than achieving the desired outcomes of promoting swaps trading on SEFs and pre-trade price transparency, the CFTC's SEF rules have incentivized the shift of swaps price discovery and liquidity formation away from SEFs to introducing brokers (**IBs**).[162] IBs are a regulatory category intended for futures trading. IBs are not appropriate vehicles to formulate swaps transactions under the regulatory framework adopted by Congress.[163] The author recommends that, for swaps required to be cleared, all trading activity in the United States – from liquidity formation to trade execution – be conducted on regulated SEFs regardless of whether the counterparties are U.S. persons or non-U.S. persons on the principle of one consolidated marketplace, one set of comparable trading rules and one competent regulator.

This section addresses the following two scenarios where ANE Transactions may occur:

1. A third-party U.S. intermediary located in the United States, such as an IB, arranges or negotiates swaps among multiple non-U.S. participants; and

2. A U.S.-based agent/employee of a non-U.S. swap dealer arranges or negotiates a swap by the non-U.S. swap dealer with a non-U.S. person, where the trade is executed and booked outside the United States.

A. Background

In a November 2013 advisory that was not part of the CFTC Cross-Border Guidance, CFTC staff stated that non-U.S. swap dealers must comply with the transaction-level requirements (*e.g.*, mandatory clearing, trade execution, and external

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[162] *See* April 2018 White Paper at 46.

[163] *Id.* The impact of this flawed implementation has been to fragment swaps trading into numerous artificial market segments, increase market liquidity risk, hinder swaps market technological innovation, and incentivize a significant amount of price discovery and liquidity formation to take place off-SEF rather than on-SEF, contrary to Congressional intent.

business conduct requirements) with respect to ANE Transactions.[164] To address operational challenges posed by this guidance, CFTC staff has issued a series of no-action letters to grant relief to non-U.S. dealers affected by the staff advisory which temporarily suspended its application.[165]

The 2016 Proposed Cross-Border Rules proposed that these ANE Transactions should fall within the scope of the Dodd-Frank Act, and that it may therefore be appropriate to apply specific swap requirements to such transactions to advance the Dodd-Frank Act's regulatory objectives.[166] The 2016 Proposed Cross-Border Rules preliminarily determined that applying registration thresholds and external business conduct standards to such ANE Transactions would not further the Dodd-Frank Act's regulatory objectives, except for certain abusive practices and fair dealing rules with respect to external business conduct standards. Since the proposal only addressed registration thresholds and external business conduct standards, the CFTC in the 2016 Proposed Cross-Border Rules said it intended to address the application of other Dodd-Frank swap requirements to ANE Transactions in subsequent rulemakings as necessary and appropriate.[167]

B. Recommendations

The following recommendations are predicated on two preliminary points. First, if a swap is executed in the United States (the "E" in "ANE Transaction"), then the counterparties should be required to follow U.S. swap execution rules. Any swap that is subject to the CFTC's clearing and trade execution requirements would be required to

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[164] *See* CFTC Staff Advisory 13-69, Applicability of Transaction-Level Requirements to Activity in the United States (Nov. 14, 2013), *available at:* https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/13-69.pdf.

[165] *See* CFTC Staff No-Action Letters Nos. 13-71 (Nov. 26, 2013), 14-01 (Jan. 3, 2014), 14-74 (June 4, 2014), 14-140 (Nov. 14, 2014), 15-48 (Aug. 13, 2015), and 17-36 (July 25, 2017). CFTC Staff Letters are available on the CFTC's website at: http://www.cftc.gov/LawRegulation/CFTCStaffLetters/No-ActionLetters/index.htm.

[166] *See* 2016 Proposed Cross-Border Rules, 81 FR at 71951-54.

[167] *Id*. at 71953.

be traded on a SEF and centrally cleared, unless an exception or exemption applies. Otherwise, there would be a series of bifurcated markets within the United States, where certain standardized swaps are traded on or off SEFs based solely on the nationality of the institutional counterparties. The goal advocated in the April 2018 White Paper was to have the entire process of swap liquidity formation, price discovery, and trade execution take place on licensed SEF platforms.[168] It is detrimental to healthy market activity and effective regulation to have in the same jurisdiction separate fora for liquidity formation and trade execution and further separate pools of trading liquidity that are determined solely on the nationality of the trading counterparties. Thus, the two scenarios discussed below are limited to situations in which a swap is arranged or negotiated in the United States, but executed (and booked) outside the United States in a Comparable Jurisdiction.

Second, ANE Transactions are, by definition, between non-U.S. persons and do not pose systemic risk to the U.S. financial system merely by virtue of being arranged, negotiated, or executed within the United States (although they may be systemically significant for other reasons). For this reason, this White Paper recommends that ANE Transactions not count toward a potential non-U.S. dealer's *de minimis* threshold if the non-U.S. dealer is in a Comparable Jurisdiction. The CFTC put forth a generally similar approach in the 2016 Proposed Cross-Border Rules.[169] This approach also is supported by the policy analysis in the CFTC Cross-Border Guidance, which stated that, in applying the "direct and significant" test to registration of non-U.S. swap dealers, the policy of the CFTC is that "a person generally would not be required to register as a swap dealer if the person's only connection to the United States is that the person uses a U.S.-registered [SEF] or [DCM] in connection with its swap dealing activities."[170] The CFTC argued that solely using U.S. facilities for executing or clearing swaps is not a "direct and significant" contact with the United States. The fact that swaps are arranged or negotiated in the United States but executed in a Comparable Jurisdiction does not

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[168] *See* April 2018 White Paper at 39-57.

[169] *See* 2016 Proposed Cross-Border Rules, 81 FR at 71956.

[170] *See* CFTC Cross-Border Guidance, 78 FR at 45324.

involve sufficient “direct and significant” contact with the United States to justify counting the transactions toward the non-U.S. persons *de minimis* threshold.

With these two points in mind, consider the following two scenarios:

1. Scenario 1 – IB Scenario

The first scenario is where a third-party U.S. intermediary located in the United States, such as an IB, arranges or negotiates swaps among multiple non-U.S. participants. In this case, the U.S. intermediary engaged in arranging or negotiating swaps among multiple non-U.S. participants should be a SEF under the approach to SEF registration advocated in the April 2018 White Paper.[171] As such, the execution of the trade would also be subject to the rules of the SEF.[172] This is consistent with the territorial approach that transactions conducted in the United States should be subject to U.S. rules. Under the principle of “one unified marketplace, under one set of comparable trading rules and one competent regulator,” the fact that the trade is ultimately booked outside the United States is not relevant, because the actual activity of price formation occurs within the United States.

2. Scenario 2 – U.S. Agent/Employee

The second scenario is where a U.S.-based agent/employee of a non-U.S. swap dealer located in the United States arranges or negotiates a swap with a non-U.S. person. As a general matter, the White Paper recommends taking a territorial approach to swaps trading – if a person is engaged in swaps trading activity in the United States, the person should generally be subject to U.S. swaps trading rules. In this scenario, the activity of the U.S.-based agent/employee makes this a U.S. trade. This approach is consistent with the principles set forth above – one unified marketplace, under one set of comparable trading rules and one competent regulator. As such, this approach avoids bifurcating the swaps market, with some activity occurring in the United States subject to U.S. rules and some U.S. activity not subject to U.S. rules. The involvement

[171] *See* April 2018 White Paper at 39-57.

[172] In this case, the swap would be subject to public trade reporting requirements.

of the U.S. agent adds knowledge and expertise of local markets and conditions, which makes the swap effectively a U.S. trade.[173]

At the same time, however, when a non-U.S. dealer in an ANE Transaction is subject to regulation in a Comparable Jurisdiction, there may be a basis to defer to the non-U.S. jurisdiction. This would reflect a decision to show deference to the home country regulator of the non-U.S. dealer that is operating out of the United States in the ANE Transaction. An example would be where two non-U.S. persons that are counterparties to a swap transaction obtain advice from a U.S.- based market professional about the transaction or asset, but the transaction is nevertheless conducted outside the United States under the regulation of a Comparable Jurisdiction.

As the CFTC staff proposes rules to address ANE Transactions, it will need to work through the various permutations and fact patterns to develop an approach that both avoids fragmenting the swaps market in the United States and imposing unwarranted costs on market participants. The goal must be, both in non-U.S. markets and in the United States: one unified marketplace, under one set of comparable trading rules and one competent regulator.

[173] As noted above, this White Paper is not recommending that such swaps would count toward a non-U.S. dealer's *de minimis* threshold if the non-U.S. dealer is in a Comparable Jurisdiction.

VIII. CONCLUSION

Although important work remains to be done, it is undeniable that great progress has been made around the world in implementing the swaps reforms called for by the G20 leaders in Pittsburgh in 2009. This is especially true in the jurisdictions in which the vast majority of institutional swaps transactions take place: the United States, the EU (including the UK), Switzerland, Singapore, Hong Kong, Japan, Australia, and Canada. Arriving at the present juncture is an enormous accomplishment and deserves to be recognized as such.

Early leadership in swaps reform was notably provided by the U.S. Congress in enacting Title VII of the Dodd-Frank Act. Given its responsibility to implement Title VII, the CFTC also acted expeditiously in completing a comprehensive set of swap regulations by 2014. At that point, many non-U.S. jurisdictions were still in the process of implementing their swaps reforms.

In the early void of comparable reform, the CFTC adopted its current approach to the cross-border application of its regulatory framework. The CFTC Cross-Border Guidance of 2013 is not promulgated as regulation, but only Commission "guidance." The approach assumes that almost every swap that a U.S. person enters into, no matter where or how it is transacted, has a direct and significant connection with activities in, and effect on, commerce of the United States that requires imposing CFTC transaction rules. While possibly justifiable at its inception, the CFTC Cross-Border Guidance is an approach that is increasingly out of step with the world's major swaps trading regimes that have now adopted and implemented their own swaps reforms. The broad overreach imposed by the CFTC brings the CFTC regime into conflict with non-U.S. regulatory regimes and squanders an opportunity for important American leadership in regulatory coordination based on deference to comparable jurisdictions.

The problem is that the CFTC's current approach demands that U.S. firms trading abroad strictly comply with CFTC swaps regulations, even with rules and practices that have little to do with reducing cross-border risk transfer. This has caused numerous harms, foremost of which is driving global market participants away from transacting with entities that are subject to CFTC swaps regulation. It has resulted in segmentation of trading liquidity into separate markets for U.S. persons and non-U.S. persons. The result has been to fragment global markets into a series of distinct liquidity pools, sometimes within the same regional marketplace. This has unnecessarily impeded hedging of financial risk necessary for healthy extension of credit necessary for global economic growth.

Fragmented markets are shallower, more brittle, and less resilient to market shocks. They lead to greater price and transaction volatility. They increase the potential for systemic risk that the G20 swaps reforms were premised on reducing. Fragmentation of global swaps markets is neither prescribed by the G20 swaps reforms nor justified as an unavoidable by-product of reform implementation. Market fragmentation is not only incompatible with global swap reform effort, but detrimental to it.

The CFTC must retain a leadership role in global swaps reform. That purpose is best served if the CFTC's approach to cross-border swaps reform is not viewed as unilateralist and dismissive of local regulatory jurisdiction. The CFTC seeks to oversee an effective swaps regulatory regime with a conceptually coherent approach to cross-border regulation. That purpose is best served by distinguishing between reforms intended to mitigate systemic risk and reforms designed to address particular market and trading practices. Global swaps market participants seek access to deep and unified pools of trading liquidity in territorial markets. That purpose is best served by not dividing global markets into artificially separate and less resilient liquidity pools based on the nationality of trading participants.

This White Paper recommends a new approach that recognizes the broad implementation of swaps reform that has taken place in the world's key swaps trading jurisdictions. The new approach is based on concepts of risk proportionality, sovereignty, territoriality, and deference to comparable non-U.S. regulation. The approach is built upon the following principles:

- The CFTC should recognize the distinction between swaps reforms intended to mitigate systemic risk and reforms designed to address particular market and trading practices that may be adapted appropriately to local market conditions.

- The CFTC should pursue multilateralism, not unilateralism, for swaps reforms that are designed to mitigate systemic risk.

- The CFTC should end the current division of global swaps markets into separate U.S. person and non-U.S. person marketplaces. Markets in regulatory jurisdictions that have adopted G20 swaps reforms should each function as a unified marketplace, under one set of comparable trading rules and under one competent regulator.

- The CFTC shall be a rule maker, not a rule taker, in overseeing U.S. markets.

- The CFTC should act with deference toward jurisdictions that have adopted comparable G20 swaps reforms, seeking stricter comparability for substituted compliance for requirements intended to address systemic risk and more flexible comparability for substituted compliance for requirements intended to address market and trading practices.

- The CFTC should act to encourage adoption of comparable swaps reform regulation in non-U.S. markets that have not adopted swaps reform for any significant swaps trading activity.

Building upon the CFTC's experience over the last five years and taking into account the dramatic changes in the derivatives regulatory landscape, the recommendations made in this White Paper constitute a concept release for Cross-Border Swaps Regulatory Version 2.0. The goal is to develop the next version of cross-border regulation, replacing agency "guidance" with proper rules that are better calibrated to mitigate systemic risk while fostering innovation, competition, and international cooperation. The proposals set forth in this White Paper seek to meet that objective while staying true to the Pittsburgh G20 reforms and the letter and spirit of Title VII of the Dodd-Frank Act.

APPENDIX A: CORE DEFINITIONS

The following definitions are based on the definitions of those terms in the CFTC's Final Cross-Border Margin Rules, which were proposed by the CFTC in the 2016 Proposed Cross-Border Rules largely without change.[174]

U.S. Person Definition
"U.S. person" is defined to mean: 1. A natural person who is a resident of the United States; 2. An estate of a decedent who was a resident of the United States at the time of death; 3. A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of entity similar to any of the foregoing (other than an entity described in paragraph (1) or (5) (**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 the legal entity; 4. A pension plan for the employees, officers or principals of a legal entity described in paragraph (3) above, unless the pension plan is primarily for foreign employees of such entity; 5. 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; 6. 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 paragraph (1) through (5) 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; or

[174] *See* Final Cross-Border Margin Rules; 2016 Proposed Cross-Border Rules.

7. 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 paragraphs (1) through (6) above.[175]

Definition of Foreign Branch

A "foreign branch" is a non-U.S. branch of a U.S. swap dealer that:

1. Is a "foreign branch," as defined in the applicable banking regulation, of a U.S. bank that is subject to Regulation K or the FDIC International Banking Regulation;
2. Maintains accounts independently of the home office and of the accounts of other foreign branches, with the profit or loss accrued at each branch determined as a separate item for each foreign branch; and
3. Is subject to substantive regulation in banking or financing in the jurisdiction where it is located.

The CFTC also will consider other relevant facts and circumstances.

Meaning of the Term "Guaranteed"

A "guarantee" would include arrangements, pursuant to which one party to a swap has rights of recourse against a guarantor, with respect to its counterparty's obligations under the swap. For these purposes, a party to a swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the swap.

This "guarantee" definition also 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.

[175] The CFTC generally treats international financial institutions as non-U.S. persons for purposes of Title VII, even though some or all of these international financial institutions may have their principal place of business in the United States.

The Definition of “Foreign Consolidated Subsidiary”
“**Foreign consolidated subsidiary**” is defined to mean a non-U.S. person in which an ultimate parent entity that is a U.S. person (“U.S. ultimate parent entity”) has a controlling financial interest, in accordance with U.S. generally accepted accounting principles, such that the U.S. ultimate parent entity includes the non-U.S. person’s operating results, financial position and statement of cash flows in the U.S. ultimate parent entity’s consolidated financial statements, in accordance with U.S. generally accepted accounting principles. The term “**U.S. ultimate parent entity**” is defined to mean the parent entity in a consolidated group in which none of the other entities in the consolidated group has a controlling interest, in accordance with U.S. generally accepted accounting principles.

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