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A Promise Made, a Promise Kept: CFTC Adopts Final Cross-Border Swaps Rules Largely as Proposed

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KEY POINTS

- The Commodity Futures Trading Commission (CFTC) has finalized its proposed new rule (Final Rule) relating to the cross-border application of certain of its swap regulations.
- The Final Rule supersedes the CFTC's 2013 interpretive guidance and policy statement regarding the cross border reach of the agency's swap regulations (Cross-Border Guidance).[1]
- The Final Rule also overrides the staff policy advisory (Staff Policy Advisory)[2] regarding the application of certain compliance obligations to a non-U.S. swap dealer's transactions with other non-U.S. persons that are arranged, negotiated or executed by personnel or agents located in the United States (ANE Transactions).

On July 23, the CFTC approved its final rule addressing the cross?border application of certain swap provisions in the Commodity Exchange Act (CEA), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[3] The Final Rule is largely in line with the proposed rulemaking (Proposal)[4] that was approved by the CFTC in December 2019 and discussed in Katten's advisory, "The CFTC Proposes New Rules Walking Back Its Maximalist Cross-Border Swaps Regulatory Approach."

The vote on the Final Rule was relatively contentious, resulting in a party-line split of three CFTC

commissioners (including Chairman Tarbert) in favor and two commissioners opposed. The Final Rule's supporters emphasized the need for a measured and territorial approach to swaps regulation, which protects principles of international comity in light of developments abroad that have led to the adoption of comparable swaps regulatory regimes in other major countries.[5] Critics of the Final Rule argued that it represents a dangerous retreat from the Cross-Border Guidance, which "has helped protect the U.S. financial system from risky overseas swap activity."[6]

While the Final Rule takes effect 60 days after its publication in the *Federal Register*, swap dealers do not have to comply with the Final Rule's requirements until 365 days after that publication date.

This advisory addresses six notable aspects of the Final Rule, in comparison with the Cross-Border Guidance and the Staff Policy Advisory, including the following: (1) the handling of ANE Transactions; (2) the "U.S. Person" definition and the definitions of other key terms; (3) the CFTC's revised approach towards determining whether collective investment vehicles are U.S. Persons; (4) the narrower treatment of guarantees; (5) changes to the methodology for determining which swaps count towards the swap dealer (SD) registration *de minimis* threshold; and (6) the re-categorization and application of swap requirements to cross-border swap transactions (including new standards for substituted compliance determinations).

1. ANE Transactions

As was widely anticipated, the Final Rule abandoned CFTC staff's controversial interpretation regarding ANE Transactions for certain swap requirements and distinguished its regulatory approach with respect to these transactions from the approach of the Securities and Exchange Commission (SEC). In particular, the Final Rule explicitly withdrew both the Staff Policy Advisory, interpreting its view respect to the application of certain transaction-level requirements to ANE Transactions,[7] and staff's concurrently issued no-action relief (which CFTC staff extended several times including most recently in No-Action Letter No. 17-36), delaying the effect of the Staff Policy Advisory.[8] As a result, all foreign-based swaps entered into between a non-U.S. SD and a Non-U.S. Person will be treated the same regardless of whether the swap is an ANE Transaction.

In reaching its decision to formally withdraw the Staff Policy Advisory, the CFTC cited its experience in regulating the U.S. derivatives markets in the period following the issuance of Staff Policy Advisory and related no-action relief as evidence that failing to apply the CFTC's transaction-level requirements to ANE Transactions has not had a negative effect on either the CFTC's ability to effectively oversee non-U.S. SDs, or the integrity and transparency of those markets. The CFTC also noted that the consequences of abandoning this interpretation would be mitigated in two respects. First, ANE Transactions will still remain subject to the CFTC's anti-fraud and anti-manipulation authority under the CEA and CFTC regulations.[9] Second, the Non-U.S. Persons entering into ANE Transactions would likely be subject to regulation and oversight in their home jurisdictions, which have similar requirements to the CFTC's transaction-level requirements.

Since the Final Rule only covers the cross-border application of the CFTC's business conduct standard requirements as now categorized into Group B and C requirements, discussed below in Section 6 of this advisory, and not the CFTC's transaction-level requirements regarding clearing and swap processing, mandatory trade execution and real-time public reporting (the Unaddressed Requirements), the CFTC stated that it intends to address whether the Unaddressed Requirements should apply to ANE Transactions in future cross-border rulemakings related to such requirements. Until that time, however, the CFTC noted that it will not consider, as a matter of policy, a non-U.S. SD's use of U.S. personnel or agents to arrange, negotiate or execute swap transactions with Non-

U.S. Persons to be subject to the Unaddressed Requirements.

To that end, on the same day on which the CFTC adopted the Final Rule, CFTC staff from the Division of Swap Dealer and Intermediary Oversight (DSIO), the Division of Clearing and Risk (DCR) and the Division of Market Oversight (DMO; together with DSIO and DCR, the Divisions) issued No-Action Relief Letter No. 20-21 (NAL 20-21) with respect to the applicability of the Unaddressed Requirements to the ANE Transactions.[10] The Divisions noted that the relief in NAL 20-21 will continue to apply until the effective date of any CFTC action addressing whether a particular Unaddressed Requirement is or is not applicable to ANE Transactions. Interestingly, NAL 20-21 also notes that any future CFTC action will be just that — CFTC action subject to public notice and comment — and not a policy statement similar to the Staff Policy Advisory or other CFTC-staff delegated release. In addition, the Final Rule clarified, at the request of commenters, that any prior no-action relief or guidance relating to the Unaddressed Requirements will remain effective to the extent that such relief or guidance is not specifically revoked in the Final Rule, and that any transactions entered prior to the Final Rule's compliance date are grandfathered.

As a result of these changes, the CFTC's position on ANE Transactions in the Final Rule now diverges from the SEC's approach for ANE security-based swaps.[11] In the Final Rule, the CFTC explained this divergence by noting that because security-based swaps can affect the price and liquidity of the underlying security, the SEC has a legitimate interest in requiring ANE security-based swap transactions to be reported. By contrast, because commodities are traded throughout the world, there is less need for the CFTC to apply its swaps rules to ANE Transactions.

2. "U.S. Person" Definition and Other Key Terms

A critical aspect of the Final Rule is the adoption of a formal definition for the term "U.S. Person" that replaces the "interpretation" of that term found in the Cross-Border Guidance. The new definition eliminates some problematic elements of the interpretation and, most importantly, is identical to the definition of the same term adopted by the SEC in relation to security-based swaps.[12] The chart below shows the elements of the new definition.[13]

New CFTC Definition of U.S. Person (by subsection in new Rule 23.23(a)(23))
U.S. Person means any person that is:
(A) a natural person resident in the United States;
(B) an estate of a decedent who was a resident of the United States at the time of death;
(C) a partnership, corporation, trust, investment vehicle or other legal person organized, incorporated or es under the laws of the United States or having its principal place of business in the United States;
(D) an account (whether discretionary or non?discretionary) of a U.S. Person; or
(E) an estate of a decedent who was a resident of the United States at the time of death.

Until December 31, 2027, a person may continue to classify counterparties as U.S. Persons based on:

- representations made pursuant to the "U.S. Person" definition in § 23.160(a)(10) prior to the

effective date of the new definition; or

- representations made pursuant to the interpretation of the term "U.S. Person" in the Cross-Border Guidance prior to the effective date of the new definition.[14]

As expected, the Final Rule eliminates the concept of a "Conduit Affiliate" used in the Cross-Border Guidance. Instead, the Final Rule introduces a new category of non-U.S. entity called a "Significant Risk Subsidiary" (SRS) that must be treated like a U.S. Person for regulatory purposes because of the risks it poses to an ultimate and significant U.S. parent entity. The definition of SRS begins with the condition that the entity must have an ultimate U.S. parent that has more than $50 billion in global consolidated assets, so the scope of the definition is relatively narrow and becomes even narrower because there are additional conditions that must be met before an entity falls within its scope. Based on the points Commissioner Berkovitz made about SRSs in the CFTC meetings proposing and adopting the new definition, it is highly likely that there is no current entity that will qualify as an SRS, making this definition another null set like the definition of "Major Swap Participant" and the term "Conduit Affiliate" in the Cross-Border Guidance.[15]

3. Collective Investment Vehicles

The Final Rule makes certain changes to the U.S. Person definition as it applies to collective investment vehicles that lessen the potential cross-border reach of the CEA and related CFTC regulations over such entities.

Majority-Owned Vehicles

Under the Cross-Border Guidance, even if a collective investment vehicle is not organized, incorporated or established under the laws of the United States and does not have its principal place of business in the United States, it is nonetheless a U.S. Person if it is majority-owned by certain U.S. Persons. The Final Rule's amended U.S. Person definition eliminates this possibility. This change saves collective investment vehicles currently from the efforts and costs necessary to verify the U.S. Person status of their investors and conforms the Final Rule's U.S. Person definition to be identical to the SEC's U.S. person definition in this regard.[16]

The Final Rule notes that requiring collective investment vehicles to assess the U.S. Person status of their investors would be likely to impose additional "programmatic" costs in complying with the applicable U.S. regulatory requirements, especially in the case of fund-of-funds and master-feeder structures, while not significantly increasing "programmatic" benefits. The Final Rule observes that the U.S. Person status of any investor should not have a significant impact on the amount of risk a collective investment vehicle poses to the U.S. financial system. The Final Rule also notes that while the default of a collective investment vehicle's swap counterparty could significantly harm any underlying U.S. investors, the size of any U.S. Person investor's loss would be limited to the amount of their investment. Additionally, systemic risk would be mitigated by any margin obligations imposed on a collective investment vehicle in a foreign jurisdiction.

Vehicles Publicly Offered Only to Non-U.S. Persons and Not Offered to U.S. Persons

The Final Rule confirms that the Cross-Border Guidance's exemption from the U.S. Person definition for collective investment vehicles publicly offered only to non-U.S. persons and not offered to U.S. Persons would be maintained.

Principal Place of Business

The Final Rule's U.S. Person definition includes any collective investment vehicle with its "principal place of business" in the United States. The Final Rule, as does the Cross-Border Guidance, defines "principal place of business" to be the location from which the manager "primarily directs, controls, and coordinates the investment activities of the vehicle."[17] The Cross-Border Guidance includes an additional prong of the principal place of business definition, extending its reach to the location of the senior personnel responsible for the "formation and promotion of the collective investment vehicle." The Final Rule eliminates this additional prong.[18]

4. Redefining Guarantees

Under the CEA, as amended by the Dodd-Frank Act, additional rules and obligations can apply to counterparties when entering into a swap with a Non-U.S. Person that has a guarantee from a U.S. Person than to a Non-U.S. Person without a U.S. Person guarantee. Moreover, non?U.S. counterparties with a U.S. Person guarantee are required to count all of their dealing swaps towards the SD *de minimis* registration threshold, and Non-U.S. Persons must count all swap dealing activity with a Non-U.S. Person with a U.S. Person guarantee towards their SD *de minimis* registration threshold. The definition of "guarantee," therefore, is critical in determining the cross-border reach of the CEA and related CFTC regulations.

The Final Rule narrows the definition of guarantee from the Cross-Border Guidance to be consistent with the definition provided in the SEC's security-based swap rules and the CFTC's rules relating to cross-border margin (Cross-Border Margin Rules).[19] Under the Final Rule, the term guarantee would be limited to "an arrangement pursuant to which one party to a swap has rights of recourse against a guarantor, with respect to its counterparty's obligations under the swap."[20] A party to a swap would have rights of recourse against a guarantor if it either has a conditional or unconditional legally enforceable right to receive or otherwise collect payments from the guarantor with respect to its counterparty's obligations under the swap. The term guarantee also would include 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.

A guarantee does not have to be in writing or included within the swap documentation, provided that the swap counterparty has legally enforceable rights (conditional or unconditional) under the laws of the relevant jurisdiction to collect from the U.S. Person with respect to the Non?U.S. Person's swap obligations. Additionally, the term guarantee includes any arrangement whereby a swap counterparty has the right of recourse against at least one U.S. Person (individually, jointly, and/or severally with others) for the Non-U.S. Person's obligations under the swap. Thus, a non-U.S. entity that has a guarantee from a non-U.S. entity with respect to its swap obligations, which are in turn guaranteed by a U.S. entity, would be deemed to have a guarantee from a U.S. Person. The definition of guarantee is not dependent upon whether the guarantor is an affiliate of the Non-U.S. Person.

The Final Rule's changes to the definition of guarantee would no longer extend the definition to other formal arrangements that support the non-U.S. Person's ability to pay or perform its swap obligations, as had been covered under the Cross-Border Guidance. Such arrangements include keepwells and liquidity puts, certain types of indemnity agreements, master trust agreements, and liability or loss transfer or sharing arrangements. In narrowing the scope of the term guarantee, the Final Rule notes that it intends both to create a more workable regulatory framework and to align the definition with the one detailed in the Cross-Border Margin Rules, as noted above. Although the Final Rule

acknowledges that the narrower definition of guarantee could lead to certain Non-U.S. Persons counting fewer swaps towards their SD *de minimis* registration threshold, the Final Rule suggests that this risk would be mitigated to the degree such non-U.S. Persons fall within the definition of a SRS.[21]

A Non-U.S. Person with a guarantee from a U.S. Person is defined as a "Guaranteed Entity." The Final Rule clarifies that a Non-U.S. Person could be a Guaranteed Entity with respect to some counterparties but not with respect to others, depending upon whether its swaps were guaranteed by a U.S. Person.[22]

Pursuant to the Final Rule, and in parallel with certain provisions noted above with respect to the definition of U.S. Person, until December 31, 2027, a person may continue to classify counterparties based on:

- representations made pursuant to the "guarantee" definition in § 23.160(a)(2) prior to the effective date of the new definition; or
- representations made pursuant to the interpretation of the term "guarantee" in the Cross-Border Guidance prior to the effective date of the new definition.[23]

5. SD Registration Threshold

The Final Rule changes some of the current methodology under the Cross-Border Guidance for determining which swaps are counted for a particular counterparty towards its SD *de minimis* registration threshold.[24]

U.S Person

Under the Final Rule, a U.S. Person must count all of its swap dealing swaps with any type of counterparty toward the SD *de minimis* threshold, as is currently the case under the Cross-Border Guidance. A U.S. Person must include in its calculation all of the swap dealing swaps of any of its foreign branches, as such branches are part of the same legal person.

Guaranteed Entity or SRS

A Guaranteed Entity and a SRS also must be required under the Final Rule to count all of their swaps dealing swaps (including those of any foreign branch) with any type of counterparty toward the SD *de minimis* threshold, in the same manner in which a U.S. Person would be required to do so.

Other Non-U.S. Persons

In contrast with the Cross-Border Guidance, under the Final Rule, an "Other Non-U.S. Person" is required to count the following swaps toward its SD *de minimis* threshold: (1) dealing swaps with a U.S. Person, except for swaps conducted through a foreign branch of a registered SD; and (2) dealing swaps with a Guaranteed Entity, except when (a) the Guaranteed Entity is registered as a SD, (b) the Guaranteed Entity is affiliated with an SD and is also below the *de minimis* threshold, or (c) the Guaranteed Entity's swaps are subject to a guarantee by a U.S. Person that is a non-financial entity.

An Other Non-U.S. Person, however, is not required to count toward its SD *de minimis* threshold any swaps it has entered into anonymously on a designated contract market, a registered or exempt swap execution facility, or a registered foreign board of trade which swaps were also cleared through a registered or exempt derivatives clearing organization.

Aggregation Requirement

Consistent with the Cross-Border Guidance, in determining whether a swap dealing transaction exceeds the SD *de minimis* threshold, a person must include the aggregate notional amount of any swap dealing transactions entered into by its affiliates under common control, which includes both U.S. Persons and Other Non-U.S. Persons.

When the affiliated group meets the SD *de minimis* threshold in the aggregate, one or more affiliate(s) (whether U.S. or non-U.S.) must register as an SD so that the relevant swap dealing activity of the unregistered affiliates remains below the threshold.

6. New Categorization and Application of Swap Requirements

The Final Rule makes significant changes to the cross-border application of SD compliance requirements, including the introduction of a new approach to substituted compliance as well as several new exemptions for qualifying SDs when transacting in "foreign-based swaps."[25] Notably, however, the Final Rule does not address all of the legacy compliance obligations set out in the Cross-Border Guidance; the compliance consequences for SDs with respect to these obligations remains unclear.

New Classification Scheme

The Cross-Border Guidance established a taxonomy of SD compliance obligations distinguishing between so-called "entity-level" and "transaction-level" requirements. These two sets of requirements were then further sub-divided: entity-level requirements were allocated between "first" and "second" categories,[26] while transaction-level requirements were split between "Category A" and "Category B" requirements.[27]

The Final Rule reclassifies these compliance obligations into Groups A, B and C. Group A requirements are classified together on the basis that it would be impractical to apply these requirements only to specific transactions or counterparty relationships, and it is, therefore, most appropriate to apply these requirements across an entire enterprise.[28] Group B requirements, on the other hand, can be applied on a bifurcated basis between U.S. and non-U.S. transactions or counterparty relationships. This approach affords the CFTC "greater flexibility" in applying these requirements to non-U.S. swap entities and foreign branches of U.S. swap entities.[29] Finally, the Group C requirements — which are limited to a SD's external business conduct standards — represent obligations that are directed more towards customer protection, rather than systemic or market protection, issues. Consequently, the CFTC will defer to the applicable customer protection rules of the local regulatory regime applicable to a non-U.S. SD or the foreign branch of a U.S. SD.

The chart below sets out the reclassification of SD compliance requirements under the Final Rule.[30] Note, in particular, that antitrust issues, which were absent from the Cross-Border Guidance, have been added to the Group A requirements. The Final Rule also adds the rules on elective segregation of initial margin for uncleared swaps to the Group C requirements.[31]

CFTC Requirement	Prior Classification	New Classification
Chief Compliance Officer	Entity-Level / First	Group A
Risk Management	Entity-Level / First	Group A
Swap Data Recordkeeping (except marketing / complaints)	Entity-Level / First	Group A
Swap Data Recordkeeping (marketing / complaints)	Entity-Level / Second	Group A
Antitrust	Absent	Group A
Swap Trading Relationships Documentation	Transaction-Level / A	Group B
Portfolio Reconciliation / Compression	Transaction-Level / A	Group B
Trade Confirmations	Transaction-Level / A	Group B
Daily Trading Records	Transaction-Level / A	Group B
External Business Conduct	Transaction-Level / B	Group C
Elective Initial Margin Segregation	Absent	Group C

Substituted Compliance

The Final Rule further develops the current substituted compliance program for those non?U.S. swap entities and foreign branches of U.S. entities that are subject to a comparable regulatory regime in their respective home jurisdictions. The Final Rule's new approach would apply with respect to Group A and Group B requirements only. For Group A requirements, which cannot be applied effectively on a fragmented basis across a single entity, a non-U.S. SD would be allowed to comply solely with its local, comparable regulations without regard to the identity of the counterparty (i.e., whether transacting with U.S. or non-U.S. counterparties). On the other hand, no substituted compliance is available for Group C requirements because they will not apply to non-U.S. SDs or the foreign branches of U.S. SDs.

For Group B requirements, which can be applied on a transaction-by-transaction or relationship-specific basis, the Final Rule clarifies that, where substituted compliance is available, and subject to the terms of the relevant comparability determination:

- A Non-U.S. Swap Entity and the Foreign Branch of a U.S. Swap Entity may satisfy any Group B requirement on the basis of substituted compliance when entering into foreign-based swaps with any foreign counterparty; and

- A Non-U.S. Swap Entity may satisfy any Group B requirement for any swap booked in a U.S. branch provided that the counterparty is neither a Foreign Branch nor a Guaranteed Entity.

The Final Rule also contains a more flexible standard of review when making substituted compliance determinations. Specifically, the Final Rule permits the CFTC to consider any factor it deems appropriate when performing its review, with the express intent of taking an even more holistic review than prior outcomes-based determinations. Among other factors, the Commission would consider: (1) the scope and objectives of the relevant foreign jurisdiction's regulatory standards; (2) whether, despite differences, a foreign jurisdiction's regulatory standards achieve comparable regulatory outcomes to the CFTC's corresponding requirements; (3) the ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's regulatory standards; and (4) whether the relevant foreign jurisdiction's regulatory authorities have entered into a memorandum of understanding or similar cooperative arrangement with the CFTC regarding the oversight of swap entities.

Exemptive Relief

The Final Rule does not provide any exceptions from Group A requirements; however, there are five new exemptions from some or all of the Group B and Group C requirements when transacting in foreign-based swaps. Specifically, exceptions have been provided for: (1) certain exchange-traded and cleared foreign-based swaps; (2) certain foreign-based swaps with foreign counterparties; (3) certain non-U.S. swap entities for certain foreign-based swaps with specified foreign counterparties; (4) foreign- based swaps of foreign branches of U.S. swap entities with certain foreign counterparties, subject to limitations including a quarterly cap on the total gross notional amount of such swaps; and (5) foreign-based swaps between an SRS Swap Entity or Guaranteed Swap Entity, on the one hand, and certain non-U.S. persons, on the other hand.

The chart below summarizes the material terms of each of these exceptions.

Exception	**Criteria**		
	Eligibility	***Counterparties***	***Conditions of Relief***
Exchange-Traded Exception (Group B* and Group C)[32]	Non-U.S. Swap Entity / Foreign Branch of U.S. Swap Entity	Any	Trading must be: • anonymous • on a designated contract market (DCM), registered or exempt swap execution facility (SEF), or registered Foreign Board of Trade (FBOT) • cleared on a registered or

			exempt derivatives clearing organization (DCO)
Foreign Swap Exception (Group C)[33]	Non-U.S. Swap Entity / Foreign Branch of U.S. Swap Entity	Foreign counterparty	Not available for trades with U.S. Persons** or U.S. branches of Non-U.S. Persons
Non-U.S. Swap Entity Exception (Group B)[34]	Non-U.S. Swap Entity that is an Other Non-U.S. Person	• Foreign counterparty that is an Other Non-U.S. Person • SRS End User	None stated
Foreign Branch Exception (Group B)[35]	Foreign Branch of U.S. Swap Entity	• Foreign counterparty that is an Other Non-U.S. Person • SRS End User	Not available for swaps between swap entities Not available if substituted compliance is available Capped at 5 percent total gross notional swaps in a given quarter
Limited Swap Entity SRS / Guaranteed Entity Exception[36]	Guaranteed Swap Entity / SRS Swap Entity	Foreign counterparty (other than a foreign branch) that is not a Swap Entity or a Guaranteed Entity	Not available if substituted compliance is available Capped at 5 percent total gross notional swaps in a given quarter***

* Except with respect to daily trading records requirements.

** Other than a foreign branch of a U.S. Person where the swap is conducted through such foreign branch.

*** The numerator and the denominator also include all swaps conducted by affiliated SRS Swap Entities and Guaranteed Swap Entities in reliance on the exception.

Legacy Compliance Obligations

As noted above, the Final Rule does not address all of the SD compliance obligations set out in the Cross-Border Guidance. In particular, the Final Rule does not address the following: capital adequacy; clearing and swap processing; mandatory trade execution; swap data repository reporting; large trader reporting; margining of uncleared swaps; and real-time public reporting. The Final Rule recognizes this disparity and notes its intention to "separately address" the cross-border application of these requirements.[37]

For certain compliance obligations, such as capital adequacy and margining of uncleared swaps, the relevant CFTC rulemakings include detailed provisions on the cross?border application of their provisions.[38] For the other legacy compliance obligations, as discussed above in Section 1 of this advisory, the practical consequences are less clear, and non-U.S. SDs may encounter challenges in implementing an only partial migration of their compliance framework from the Cross-Border Guidance to the terms of the Final Rule.

The chart below summarizes the treatment of these legacy compliance obligations.

CFTC Requirement	**Prior Classification**	**Treatment Under Guidance**	**Commentary**
Capital Adequacy	Entity-Level / First	Substituted compliance applicable (where available) for trades with U.S. and Non-U.S. Persons	Rule adopted at July 22, 2020 open meeting
Swap Data Repository (SDR) Reporting	Entity-Level / Second	Substituted compliance applicable (where available) for trades with Non-U.S. Persons*	To be addressed separately
Large Trader Reporting	Entity-Level / Second	No substituted compliance available	To be addressed separately
Margin / Seg for Uncleared Swaps	Transaction-Level / A	N/A	*See* CFTC Rule 23.160**
Swap Clearing / Processing	Transaction-Level / A	*See* Exhibit 5 of 2013 Katten Client	To be addressed separately

		Advisory	
Mandatory Trade Execution	Transaction-Level / A	*See* Exhibit 5 of 2013 Katten Client Advisory	To be addressed separately
Real-Time Trade Reporting	Transaction-Level / A	*See* Exhibit 5 of 2013 Katten Client Advisory	To be addressed separately

* The CFTC also requires access to foreign SDR data, which has not occurred in practice.

** *See supra* note 38.

Glossary

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1 Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,291 (July 26, 2013).

2 Applicability of Transaction-Level Requirements to Activity in the United States, Division of Swap Dealer and Intermediary Oversight (DSIO), CFTC Staff Advisory No. 13-69 (Nov. 14, 2013).

3 Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, CFTC Final Rule (Voting Draft), to be codified at 17 CFR Part 23, https://www.cftc.gov/media/4346/votingdraft072320/download.

4 Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 952 (Jan. 8, 2020).

5 *See* Chairman Heath P. Tarbert, Statement in Support of Final Cross-Border Swap Rule (July 23, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement072320b.

6 Comm'r Dan M. Berkovitz, Dissenting Statement on the Final Rule for Cross-Border Swap Activity of Swap Dealers and Major Swap Participants July 23, 2020), https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement072320.

7 Those requirements included: (1) required clearing and swap processing; (2) margining (and segregation) for uncleared swaps; (3) mandatory trade execution; (4) swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; (8) daily trading records; and (9) external business conduct standards.

8 The initial no-action relief was extended in CFTC Staff Letter No. 13-71, No-Action Relief: Certain Transaction?Level Requirements for Non-U.S. Swap Dealers (Nov. 26, 2013). In addition to CFTC Letter No. 17-36, CFTC staff extended such relief in CFTC Letter Nos. 14-01, 14-74, 14-140, 15-48, and 16-64.

9 *See, e.g.*, 7 U.S.C. § 9(1); 17 C.F.R. § 180.1.

10 *See* CFTC Division Staff Letter No. 20-21 (July 23, 2020), https://www.cftc.gov/csl/20-21/download. The specific CFTC regulations covered by NAL

20-21 are: 23.205, 23.505, 23.610 and applicable regulations in parts 37, 38, 43 and 50, and CEA section 2(h)(8).

11 The SEC applies a very expansive approach to regulating ANE Transactions. Not only does it apply certain security-based swap requirements to ANE Transactions (similar to the approach in the Staff Policy Advisory), it also counts ANE Transactions towards applicable security-based swap dealer registration thresholds. *See* Final Rules, Cross-Border Application of Certain Security-Based Swap Requirements, SEC Release No. 34-87780 (Dec. 18, 2019).

12 *Compare* 17 C.F.R. § 3a71-3(a)(4) *with* Final Rule at 293-94.

13 Note that, consistent with the SEC's usage of the same term, the term "U.S. Person" in the Proposal does not include any of the following international organizations: the International Monetary Fund; the International Bank for Reconstruction and Development; the Inter-American Development Bank; the Asian Development Bank; the African Development Bank; the United Nations; any agencies or pension plan of any of the foregoing entities; and any other similar international organization (together with its agencies and pension plans). Final Rule at 294.

14 Final Rule at 294.

15 Significant Risk Subsidiary Test Flow Chart, https://katten.com/webfiles/Significant%20Risk%20Subsidiary%20Test%20Flow%20Chart.pdf. CFTC, Comm'r Dan M. Berkovitz, CFTC to Hold an Open Commission Meeting on December 10, *YouTube* 1:30:07 (Dec. 19, 2020), https://www.youtube.com/watch?v=CUy97DkydxU.

16 *See supra* note 12.

17 Final Rule at 294.

18 *Id*.

19 Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants-Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34,817 (May 31, 2016).

20 Final Rule at 290.

21 *Id.* at 70.

22 *Id.* at 73.

23 *Id.* at 294.

24 Under the CFTC rules, a counterparty is only required to register with the CFTC as an SD if the aggregate gross notional amount of its swaps connected with swap dealing activity when aggregated with the aggregate gross notional amount of the swaps of its affiliates under common control connected with swap dealing activity during the preceding 12 months is equal to or greater than $8 billion USD across all counterparties, of $25 million USD for swaps with pension plans, municipalities or other "Special Entities."

25 See the definition of this term in the Glossary of this advisory.

26 The "first" category includes capital adequacy, chief compliance officer, risk management, and swap recordkeeping (other than customer complaints and marketing materials). The "second" category includes swap data repository reporting, swap recordkeeping for customer complaints and marketing materials, and large trader reporting. *See* 78 Fed. Reg. at 45,331.

27 Under the Cross-Border Guidance, Category A includes clearing and swap processing, margin and segregation for uncleared swaps, trade execution, swap trading relationship documentation, portfolio reconciliation and compression, real-time public reporting, trade confirmations, and daily trading records. Category B includes external business conduct standards. *See* 78 Fed. Reg. at 45,333.

28 Final Rule at 165.

29 *Id.* at 171.

30 The Final Rule also adds CFTC Rule 45.2(a) to the Group A requirements, but only to the extent that it duplicates the swap data recordkeeping requirements in Group A; we do not consider this inclusion to materially affect the scope of the regulatory requirements falling within Group A.

31 *See* Subpart L of the Part 23 Regulations, §§ 23.700-.704. These rules were included in the Group C requirements as they, like the external business conduct standards, focus on customer protection rather than risk mitigation, and accordingly should benefit from a similar level of deference by the CFTC. Final Rule at 179.

32 *See* Final Rule at 297 (§ 23.23(e)(1)(i)).

33 *See id.* at 297 (§ 23.23(e)(1)(ii)).

34 *See id.* at 297-98 (§ 23.23(e)(3)).

35 *See id.* at 298 (§ 23.23(e)(4)).

36 *See id.* at 298-99 (§ 23.23(e)(5)).

37 *Id.* at 162 n.354.

38 *See id*. Footnote 354 of the Final Rule only mentions the CFTC's recent adoption of capital adequacy rulemaking rules. Although not expressly stated, in our view, the absence of any reference to margin requirements for uncleared swaps in footnote 354 of the Final Rule suggests that the CFTC believes that the relevant cross-border issues have already been addressed in the relevant rulemakings.

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