Client Alert | Capital Markets

CFTC Issues Proposed Rules on Cross-Border Uncleared Swap Margin Requirements

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The CFTC has combined an entity-level approach with a transaction-level approach in its proposed cross-border uncleared swap margin requirements.

Introduction

On October 3, 2014, the Commodity Futures Trading Commission (the "**CFTC**") adopted and made public for comment proposed rules and accompanying interpretive guidance[1] (the "**Uncleared Swap Margin Proposing Release**") setting forth the initial and variation margin requirements applicable to uncleared swaps. Included in the Uncleared Swap Margin Proposing Release was an Advanced Notice of Rulemaking regarding the application of the CFTC's initial and variation margin requirements to cross-border swap transactions, which included a description of three separate methodologies the CFTC was considering.

On June 29, 2015, the CFTC adopted and made public for comment proposed rules (the "**Proposed Cross-Border Rules**") and accompanying interpretative guidance[2] to more fully address the application of the CFTC's initial and variation margin requirements to cross-border swap transactions.

This Client Alert outlines the important concepts and consequences of the Proposed Cross-Border Rules, including the application of the CFTC's initial and variation margin requirements to cross-border swap transactions as well as the CFTC's proposed approach to substituted compliance determinations.

Background

One of the key regulatory reforms contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act was to require each registered Swap Dealer ("**SD**") and Major Swap Participant ("**MSP**") that enters into swaps that are not subject to the mandatory clearing requirements of the Commodity Exchange Act to exchange both initial and variation margin with its counterparties to those uncleared swaps with the aim of protecting SDs and MSPs from the risks arising from uncleared swaps and to also protect the U.S. financial system.

SDs and MSPs that are subject to regulation by a prudential regulator will be required to satisfy the uncleared swap margin requirements set out by that prudential regulator, whilst all other SDs and MSPs will be subject to the CFTC's initial and variation swaps margin requirements. Each use of the terms "SD" and "MSP" herein refers only to SDs and MSPs subject to the CFTC's initial and variation margin requirements.

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1 Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 FR 5989 (Oct. 3, 2014), available at https://federalregister.gov/a/2014-22962.

2 Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants: Proposed rule on the cross-border application of the margin requirements, available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister062915.pdf.

In the Advanced Notice of Rulemaking, the CFTC had set out three possible methodologies for determining how the CFTC's initial and variation margin requirements would apply to cross-border swap transactions:

(i) **Entity-Level Approach**: Under this approach, the CFTC would apply the CFTC's initial and variation margin requirements to cross-border swap transactions on a firm-wide basis such that all uncleared swaps entered into by an SD or MSP would be subject to these requirements regardless of the type of counterparty and with no exclusions.

(ii) **Transaction-Level Approach**: This is the approach applied in the CFTC's cross-border guidance[3] (the "**CFTC Cross-Border Guidance**") whereby the CFTC's initial and variation margin requirements would be considered a transaction-level requirement. This would involve the CFTC's initial and variation margin requirements applying to a U.S. SD/MSP (other than a foreign branch of a U.S. bank that is a SD/MSP) for all of its uncleared swaps regardless of whether its counterparty is a U.S. person for the purposes of the CFTC Cross Border Guidance. However, for a non-U.S. SD/MSP, they would only apply to uncleared swaps entered into with U.S. person or non-U.S. person counterparties that are Guaranteed Affiliates or Conduit Affiliates.[4]

(iii) **Prudential Regulators' Approach**: In the proposal issued by the prudential regulators,[5] they proposed to apply their margin rules to all uncleared swaps entered into by SDs and MSPs under their supervision, with a limited exception for foreign uncleared swaps of certain foreign entities.

CFTC's Adopted Approach

The approach adopted by the CFTC in the Proposed Cross-Border Rules combines the entity-level and transaction-level approaches summarized above. In general, SDs and MSPs would be required to comply with the CFTC's initial and variation margin requirements (i.e., an entity-level approach). This would be the case, irrespective of the domicile of the counterparties or where the trade is executed as collecting margin from counterparties protects an entity from that counterparty's default. The entity-level approach is predicated on the reality that counterparty credit risk is not confined to swaps with U.S. counterparties. However, the CFTC has recognised that certain swaps may implicate supervisory interests of other regulators and it is therefore important to calibrate cross-border margin requirements. As a result, the Proposed Cross-Border Rules provide that certain uncleared swaps may be eligible for substituted compliance or excluded altogether from such requirements (i.e., a transaction-level approach).

Entity Classification

Under the Proposed Cross-Border Rules, how the CFTC's initial and variation margin requirements would apply to a particular SD or MSP will depend on that entity's classification as well as the classifications of its counterparties. The relevant classifications are:

(i) U.S. person;

(ii) Non-U.S. person guaranteed by a U.S. person;

(iii) U.S. branch of a non-U.S. person; and

(iv) Foreign Consolidated Subsidiary.

Determining whether an entity falls within one of the above classifications will be a matter of applying the three key definitions set out in the Proposed Cross-Border Rules, being "U.S. person", "Guarantee" and "Foreign Consolidated Subsidiary". The definitions of these terms and their applicability to the entity classifications are described below.

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3 Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 4529 (July 26, 2013).

4 For further information on these concepts and the CFTC's Cross-Border Guidance in general please refer to http://www.whitecase.com/publications/alert/cftc-issues-final-cross-border-guidance.

5 Margin and Capital Requirements for Covered Swap Entities, 79 FR 57347 (Sept. 24, 2014), available at https://federalregister.gov/a/2014-22001.

U.S. Person

In applying the Proposed Cross-Border Rules, one must first determine whether either of the counterparties to an uncleared swap is a "U.S. person". The following definition of a "U.S. person" applies only for purposes of the Proposed Cross-Border Rules and differs from the U.S. person definitions used by both the CFTC in the CFTC Cross-Border Guidance and the SEC in its cross-border rule[6] (the "**SEC Cross-Border Rule**"). The CFTC noted that the below definition is similar to the SEC's U.S. person definition. We have set out in an Appendix a table comparing each of these "U.S. person" definitions.

The proposed definition of "U.S. person" for the purposes of the Proposed Cross-Border Rules is as follows:[7]

(i) Any natural person who is a resident of the United States;

(ii) Any estate of a decedent who was a resident of the United States at the time of death;

(iii) Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of entity similar to any of the foregoing (other than an entity described in subparagraph (iv) or (v)) (a legal entity), in each case that is organized or incorporated under the laws of the United States or having its principal place of business in the United States, including any branch of the legal entity;

(iv) Any pension plan for the employees, officers or principals of a legal entity described in subparagraph (iii), unless the pension plan is primarily for foreign employees of such entity;

(v) Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;

(vi) Any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) owned by one or more persons described in subparagraph (i), (ii), (iii), (iv) or (v) who bear(s) unlimited responsibility for the obligations and liabilities of the legal entity, including any branch of the legal entity; and

(vii) Any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in subparagraph (i), (ii), (iii), (iv), (v) or (vi).

The CFTC will permit a party to reasonably rely on its counterparty's written representation in determining whether or not such counterparty is a U.S. person, absent any indications to the contrary.

Guaranteed by a U.S. person

The next step in the analysis is to determine whether either of the counterparties to an uncleared swap is a non-U.S. person whose obligations under that swap are guaranteed by a U.S. person. The proposed definition of guarantee under the Proposed Cross-Border Rules is an arrangement pursuant to which a party to an uncleared swap transaction with a counterparty that is a non-U.S. person has a legally enforceable right of recourse (whether conditional or unconditional) against at least one U.S. person (irrespective of any affiliation with the counterparty) with respect to the counterparty's obligations under the uncleared swap transaction.

Unlike in the definition of guarantee in the CFTC Cross-Border Guidance, the proposed definition of guarantee under the Proposed Cross-Border Rules generally only includes traditional guarantees and not other types of arrangements such as keepwells and certain indemnity agreements.

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6 Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities, Release No. 72472 (June 25, 2014), 79 FR 472 (August 12, 2014 (republication)).

7 Unlike the U.S. person definition in the CFTC Cross-Border Guidance, the definition in the Proposed Rule is an exhaustive definition – it does not include the prefatory phrase "includes, but is not limited to". Including an exhaustive definition is consistent with the SEC's definition of U.S. person in the SEC Cross-Border Rule.

U.S. branch of a non-U.S. person

The Proposed Cross-Border Rules distinguish between a non-U.S. person executing a swap through its U.S. branch and executing that same swap outside the United States. A non-U.S. person executing a swap outside of the United States may, in certain limited circumstances, be excluded from the Proposed Cross-Border Rules. However, that same non-U.S. person would not be eligible for the exclusion if the swap was instead executed through or by its U.S. branch. The CFTC's reasoning for making this distinction is to level the playing field in the United States. and to ensure that non-U.S. SDs and MSPs transacting through their U.S. branches do not have a competitive advantage over U.S. SDs and MSPs.

The Proposed Cross-Border Rules do not contain a methodology for determining whether a swap is executed through or by a U.S. branch of a non-U.S. person. However, the CFTC did request comment on whether such a determination should be made based on where the personnel who arrange, negotiate or execute the applicable swap are located. This is a similar concept to that used in the Volcker Rule, CFTC Staff Advisory 13-69 and the SEC in its recently published proposed rules on the application of certain of the security-based swap rules to cross-border transactions.[8]

Foreign Consolidated Subsidiary

The final step is to determine whether either party to the swap is a "Foreign Consolidated Subsidiary". This term captures any SD or MSP that is not a U.S. person in which an ultimate parent entity that is a U.S. person has a controlling interest, in accordance with U.S. GAAP, such that the ultimate parent entity includes the non-U.S. SD or MSP's operating results, financial position and statement of cash flows in its consolidated financial statements.

Application of the CFTC's initial and variation margin requirements

As mentioned above, the classifications of the counterparties to a particular uncleared swap will determine the extent to which the CFTC's initial and variation margin requirements will apply in the circumstances of cross-border swaps. The possible outcomes fall into the following five categories which have been color-coded to correspond to the cells in the below table. We remind you that each use of the terms "SD" and "MSP" in the table refers only to SDs and MSPs subject to the CFTC initial and variation margin requirements. Should an uncleared swap be entered into with an SD or MSP that is subject to regulation by a prudential regulator, the outcome may be different than that set out in the below table. The requirements of the prudential regulator's rules must be considered.

Apply	CFTC's initial and variation margin requirements apply and substituted compliance is not available.
Apply with Partial Substituted Compliance (Initial Margin Collection)	An SD or MSP would benefit from a substituted compliance determination, if available, with respect to initial margin *collected* from its counterparty. This only applies where the counterparty is an SD or MSP that is a U.S. person or a non-U.S. person whose swaps are guaranteed by a U.S. person. The CFTC's initial and variation margin requirements would still apply (i) to initial margin *collected* by an SD or MSP *from* its counterparty to the extent not covered by the substituted compliance determination, (ii) to initial margin *posted* by an SD or MSP to its counterparty and (iii) to all variation margin requirements.
Apply with Partial Substituted Compliance (Initial Margin Posting)	An SD or MSP would benefit from a substituted compliance determination, if available, with respect to initial margin *posted* to its counterparty. The counterparty cannot be a U.S. person or a non-U.S. person whose swaps are guaranteed by a U.S. person. Also, the counterparty must be subject to a foreign jurisdiction's margin requirements. The CFTC's initial and variation margin requirements would still apply (i) to initial margin *posted* by an SD or MSP *to* its counterparty to the extent not covered by the substituted compliance determination, (ii) to initial margin *collected* by an SD or MSP to its counterparty and (iii) to all variation margin requirements.
Apply with Full Substituted Compliance	An SD or MSP would benefit from a substituted compliance determination, if available, with respect to all the CFTC's initial and variation margin requirements.
Do Not Apply	The CFTC's initial and variation margin requirements do not apply. In these circumstances it is likely that a foreign jurisdiction's uncleared swap margin requirements will apply.

[8] Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected with a Non-U.S. Person's Dealing Activities 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, Release No. 34-74834 (April 29, 2015), 80 FR 27443 (May 13, 2015), available at https://federalregister.gov/a/2015-10382.

			SD/MSP				
			U.S. Person	Non-U.S. Person			
			All	Guaranteed	U.S. Branch	Foreign Consolidated Subsidiary	Other
SD/MSP Counterparty	U.S. Person	All	Apply	Apply	Apply with Partial Substituted Compliance (Initial Margin Collection)	Apply with Partial Substituted Compliance (Initial Margin Collection)	Apply with Partial Substituted Compliance (Initial Margin Collection)
	Non-U.S. Person	Guaranteed	Apply	Apply	Apply with Partial Substituted Compliance (Initial Margin Collection)	Apply with Partial Substituted Compliance (Initial Margin Collection)	Apply with Partial Substituted Compliance (Initial Margin Collection)
		U.S. Branch	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance
		Foreign Consolidated Subsidiary	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance
		Other	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance	Do Not Apply
Non-SD/MSP Counterparty	U.S. Person	All	Apply	Apply	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance
	Non-U.S. Person	Guaranteed	Apply	Apply	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance
		Other	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Partial Substituted Compliance (Initial Margin Posting)	Apply with Full Substituted Compliance	Apply with Full Substituted Compliance	Do Not Apply

Substituted Compliance

Should substituted compliance be granted with respect to some or all of a foreign jurisdiction's uncleared margin requirements, then SDs and MSPs will be entitled in the circumstances set out in the table above to comply with the foreign jurisdiction's uncleared swap margin requirements in order to satisfy the CFTC's requirements. This will be permitted to the extent of the substituted compliance determination. SDs and MSPs will remain subject to the CFTC's examination and enforcement authority.

To determine whether a particular foreign jurisdiction will have comparable margin requirements and, therefore, whether substituted compliance will be granted with respect to that jurisdiction's rules, the CFTC is proposing an outcomes-based approach focusing on whether the foreign jurisdiction's margin requirements achieve the same objectives/outcomes as those of the CFTC, rather than looking at whether the particular rules and regulations are the same. To make this determination, the CFTC will use a two stage process to review the foreign jurisdiction's margin requirements.

STAGE 1

The CFTC will consider whether the foreign jurisdiction's uncleared swap margin requirements *are* consistent with international standards as set out in the margin policy framework for non-cleared, bilateral derivatives issued by the Basel Committee on Banking Supervision and the International Organization of Securities Commissions in September 2013. The CFTC also has the ability to recognize any other future international standards, principals or guidance relating to margin requirements for non-cleared, bilateral derivatives.

STAGE 2

If the foreign jurisdiction's uncleared swap margin requirements are consistent under Stage 1, then the CFTC will evaluate each of the elements of the foreign jurisdiction's uncleared margin requirements to determine whether the substituted compliance determination should be made with respect to some or all of that foreign jurisdiction's requirements. SDs and MSPs will still be required to comply with the CFTC's initial and variation margin requirements to the extent not covered by a substituted compliance determination.

The elements that the CFTC will be analyzing include:

1. the transactions subject to the foreign jurisdiction's margin requirements;
2. the entities subject to the foreign jurisdiction's margin requirements;
3. the methodologies for calculating the amounts of initial and variation margin;
4. the process and standards for approving models for calculating initial and variation margin models;
5. the timing and manner in which initial and variation margin must be collected and/or paid;
6. any threshold levels or amounts;
7. risk management controls for the calculation of initial and variation margin;
8. eligible collateral for initial and variation margin;
9. the requirements of custodial arrangements, including rehypothecation and the segregation of margin;
10. documentation requirements relating to margin; and
11. the cross-border application of the foreign jurisdiction's margin regime.

Additionally, the CFTC may take into account all other relevant factors in its determination, including:

1. the scope and objectives of the foreign jurisdiction's margin requirement(s) for uncleared swaps;
2. how the foreign jurisdiction's margin requirements compare to international standards;
3. whether the foreign jurisdiction's margin requirements achieve comparable outcomes to the CFTC's corresponding margin requirements;
4. the ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the foreign jurisdiction's margin requirements; and
5. any other facts and circumstances the CFTC deems relevant.

Appendix

U.S. Person Definition Comparison

Entity Type	U.S. Person Definitions		
	Proposed Cross-Border Rules	CFTC Cross-Border Guidance	SEC Cross-Border Rule
Natural Person	Any natural person who is a resident of the United States.	Any natural person who is a resident of the United States.	A natural person resident in the United States.
Estate	Any estate of a decedent who was a resident of the United States at the time of death.	Any estate of a decedent who was a resident of the United States at the time of death.	Any estate of a decedent who was a resident of the United States at the time of death.
Corporation	Any 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 the pension plan and trust prongs below) (a legal entity), in each case that is organized or incorporated under the laws of the United States or having its principal place of business in the United States, including any branch of the legal entity.	Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund, or any form of enterprise similar to any of the foregoing (other than a legal entity described in the pension plan or trust prongs below) (a "legal entity"), in each case that organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States.	A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States.
Pension Plan	Any pension plan for the employees, officers or principals of a legal entity described in the corporation prong above, unless the pension plan is primarily for foreign employees of such entity.	Any pension plan for the employees, officers or principals of a legal entity (as defined above), unless the pension plan is primarily for foreign employees of such entity.	No separate test is provided.
Trust	Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust.	Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust.	No separate test is provided as trusts have been included in the corporation test above.

Entity Type	U.S. Person Definitions		
	Proposed Cross-Border Rules	CFTC Cross-Border Guidance	SEC Cross-Border Rule
Collective Investment Vehicle	No separate test is provided.	Any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in the corporation prong above and that is majority-owned by one or more persons described in the natural person, estate, corporation, pension plan or trust prongs above, except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons	No separate test is provided.
Unlimited Liability Entity	Any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) owned by one or more persons described in the natural person, estate, corporation, pension plan and trust prongs above who bear(s) unlimited responsibility for the obligations and liabilities of the legal entity, including any branch of the legal entity.	Any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in the natural person, estate, corporation, pension plan or trust prongs above and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity.	No separate test is provided.
Account	Any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in the natural person, estate, corporation, pension plan, trust and unlimited liability entity prongs above.	Any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in the natural person, estate, corporation, pension plan, trust, collective investment vehicle or unlimited liability entity prongs above.	An account (whether discretionary or non-discretionary) of a U.S. person.

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