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The Delta Report

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At a Glance

A Brief Review of BMR Changes in the FCA Handbook

BMR continues to develop its impact in the different industry sectors that rely on benchmarks, e.g., derivatives, capital markets, banking, etc., as well domestic regulations. In this article, we do not look at a particular instrument or finance industry but strictly at recent regulatory changes in the United Kingdom. Although the changes are not major and do not impact the trading or negotiation of derivatives or loan facilities, it is important to monitor them and track where we are in terms of BMR implantation. This article briefly highlights the main points.

CFTC Chairman Authors White Paper on Cross-Border Swaps Regulation Version 2.0

The Chairman of the US Commodity Futures Trading Commission ("**CFTC**"), J. Christopher Giancarlo, has published a white paper outlining principles and recommendations to improve the CFTC's existing cross-border derivatives regulatory framework. The white paper offers high-level principles and recommendations for reform. This article discusses the CFTC's existing rules and guidance and the white paper's proposals for reform, as well as providing analysis and thoughts on certain of the concepts and principals set forth in the white paper.

A Brief Review of BMR Changes in the FCA Handbook

Stuart Willey and Eduardo Barrachina

Summary

BMR continues to develop its impact in the different industry sectors that rely on benchmarks, e.g., derivatives, capital markets, banking, etc., as well domestic regulations. In this article, we do not look at a particular instrument or finance industry but strictly at recent regulatory changes in the United Kingdom. Although the changes are not major and do not impact the trading or negotiation of derivatives or loan facilities, it is important to monitor them and track where we are in terms of BMR implantation. This article briefly highlights the main points.

Background

The Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 (the "**BMR**")[1], which came into force on 30 June 2016 (although most of the provisions came into force on 1 January 2018) and its main aim is to lay down a regulatory framework for benchmarks at the European Union ("**EU**").[2] The use of a regulation was deliberate, so it will ensure that provisions directly imposing obligations on persons involved in the provision, contribution and use of benchmarks are applied in a uniform manner throughout the EU.

In spite of the fact of BMR being a regulation and therefore having a direct effect, the Financial Conduct Authority ("**FCA**") had to change its Handbook to ensure consistency with the BMR. The main purpose of these changes involves removing domestic rules that are superseded by the BMR, though the FCA advised that they will continue to apply to the administrators of, and submitters to, those benchmarks the FCA already regulates, until their administrators become authorised or registered under the BMR. The FCA proposes to maintain some domestic rules on benchmark administrators in areas not covered by the BMR. This process has involved a two-fold consultation process on the proposed changes, Consultation Paper CP17/17[3] and Consultation Paper CP18/5[4].

These changes are not required in other EU Member States, as the United Kingdom is one of the few Member States that already has a system of regulating benchmarks. It was introduced by amendments to the Financial Services and Markets Act 2000 ("**FSMA**"), originally applying only to LIBOR in 2013, and has since been extended to seven more benchmarks. Currently, the FCA supervises eight "specified benchmarks", while the BMR applies much more widely, including all indices that are used in the EU as the basis for financial instruments or certain financial contracts, or that are referenced by an investment fund. As a consequence, many firms that are not currently supervised by the FCA will need to apply to the FCA for authorisation or registration under the BMR.

The BMR is directly applicable and will supersede most of the Handbook rules that deal specifically with benchmark administration and contribution. In particular, much of the benchmarks section of the Market Conduct sourcebook (MAR 8) will be deleted or amended. These changes will take effect on 1 January 2018. Generally, these changes give additional powers to the FCA over authorised persons that breach the BMR. More importantly, it provides for an specific registration and authorisation procedure of EU benchmark administrators.

On 29 June, the FCA published the Benchmarks Regulation (Amendment) Instrument 2018[5] (the "**BMR Instrument**"), which implements the proposed changes discussed in both consultation papers. Most of the BMR Instrument came into force on 29 June 2018, other than Annex J, which came into force on 1 July 2018.

1 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN

2 Please see our previous Delta Report on the BMR. Available at: https://www.whitecase.com/publications/article/end-libor-preliminary-reflections-its-implications-derivatives

3 Available at: https://www.fca.org.uk/publication/consultation/cp17-17.pdf

4 Available at: https://www.fca.org.uk/publication/consultation/cp18-05.pdf

5 Available at: https://www.handbook.fca.org.uk/instrument/2018/FCA_2018_29.pdf

New Regulated Activity

Administering a benchmark will be now a regulated activity and essentially will involve acting as the administrator of a benchmark as defined in article 3.1(3) of BMR.[6] The new benchmark activities include: (a) the regulated activity of administering a benchmark or (b) contributing input data to a BMR benchmark administrator. However, it is important to highlight that neither acting as a benchmark contributor nor contributing input data is a regulated activity. A benchmark contributor will include both a third country[7] benchmark contributor and a UK benchmark contributor.

The FCA has clarified that the activity of administering a regulated benchmark will always be regarded as being conducted as "by way of business", and that a firm must apply under the BMR according to where it is located, that is, where its registered office is[8].

Third-Country Benchmark Contributor

A third-country benchmark is defined as a firm which: (a) contributes input data to a BMR benchmark administrator; (b) is located in a non-EU state; and (c) either is a supervised entity or would be a supervised entity if it were located in the EU.

This follows the same approach that has been adopted with other regulatory frameworks, mainly EMIR.

Publication of FCA Decisions

Article 34 of the BMR requires the administrator of a benchmark to be authorised or registered. The BMR Instrument makes no distinction between authorisation or registration, so firms already subject to supervision under an EU piece of legislation will apply for registration. On the contrary, firms not subject to supervision should apply for authorisation. Therefore, an important aspect for users of benchmarks is to ensure the relevant administrators are duly authorised or registered. During the consultation papers, it became clear that a main concern for users was to know well in advance whether a request for authorisation or registration had been refused. Although refusals for endorsement and recognition have different consequences, the same approach will be followed.

CFTC Chairman Authors White Paper on Cross-Border Swaps Regulation Version 2.0

Ian Cuillerier, Edward So and Rhys Bortignon

Introduction

On October 1, 2018, Chairman J. Christopher Giancarlo of the Commodity Futures Trading Commission ("**CFTC**") published a white paper entitled "Cross-Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-US Regulation" (the "**White Paper**").[9] The White Paper is intended to contribute to the process of cross-border swaps reform to produce a regulatory framework consistent with congressional intent, while balancing the need to both (i) mitigate systemic risk and support swap market activity to promote economic growth and (ii) show deference to non-US regulation when it achieves comparable outcomes to CFTC regulation.

The White Paper offers high-level principles and recommendations for reform. It does not propose detailed modifications to specific CFTC regulations, and refrains from setting any timetables for implementation. Chairman Giancarlo considered the CFTC's experience over the last few years in regulating the US derivatives market, the need for comity with non-US regulators and the implementation of swaps reforms in non-US jurisdictions to determine where the original regulatory efforts would benefit from reconsideration. From this, Chairman Giancarlo developed the principles and recommendations set out in the White Paper.

The White Paper complements the white paper previously published by CFTC Chairman J. Christopher Giancarlo and CFTC Chief Economist Bruce Tuckman on April 26, 2018. For further information on that white paper, please refer to our client alert available at the link here.[10]

This article will discuss the CFTC's existing rules and guidance as well as the White Paper's proposals for further reform of the CFTC's cross-border framework.

6 Article 63S of the Regulated Activities Order.

7 The BMR contemplates three ways by which benchmark issued by non-EU administrators may be approved for use in the EU: equivalence (Article 30 BMR); recognition (Article 32 BMR) and endorsement (Art 33 BMR).

8 Handbook Notice No 56, June 2018. Available at: https://www.fca.org.uk/publication/handbook/handbook-notice-56.pdf

9 CFTC Chairman J. Christopher Giancarlo, "Cross Border Swaps Regulation Version 2.0: A Risk-Based Approach with Deference to Comparable Non-US Regulation", available here.

10 This White Paper assessed the successes and deficiencies of the CFTC's implementation of the Dodd-Frank Act in five areas: central counterparty clearing, trade reporting, trade execution, swap dealer capital and the end-user exception.

Background

CFTC's Jurisdiction

Section 2(i) of the US Commodity Exchange Act provides in pertinent part that the CFTC's jurisdiction over swaps shall not apply to activities outside the US unless they have a "direct and significant connection with activities in, or effect on, commerce in the United States…".[11] The scope of the CFTC's extraterritorial jurisdiction has been the subject of several CFTC rules, rule proposals, guidance, staff advisories and no-action relief. In the White Paper, Chairman Giancarlo argues that the CFTC's existing cross-border framework, in certain respects, extends the CFTC's jurisdiction beyond what Congress intended when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**").

CFTC Cross-Border Guidance

On July 26, 2013, the CFTC issued interpretive guidance (the "**CFTC Cross-Border Guidance**")[12] setting forth its views on the cross-border application of certain provisions of the Dodd-Frank Act. The CFTC Cross-Border Guidance addressed several important topics:

- the final definition of the term "US person," including the treatment of foreign branches of US swap dealers and major swap participants, guaranteed affiliates, and conduit affiliates;
- the determinations of whether a non-US person is engaged in more than a *de minimis* level of swap dealing or holds swap positions above any of the major swap participant thresholds; and
- compliance obligations, including substituted compliance by non-US persons, foreign branches of US swap dealers and major swap participants with entity-level requirements and transaction-level requirements.

The CFTC noted in the CFTC Cross-Border Guidance that it has a strong supervisory interest in swap dealing activities that occur within the US, regardless of the status of the counterparties.

For further information on the CFTC Cross-Border Guidance, please refer to our client alert available here.

CFTC Staff Advisory 13-69

In response to requests from market participants for clarification regarding the applicability of US transaction-level requirements for swaps between a non-US swap dealer and a non-US counterparty, the CFTC issued Staff Advisory 13-69 (the "**Staff Advisory**") on November 14, 2013.[13] In the Staff Advisory, the CFTC concluded that personnel or agents of a non-US swap dealer, regardless of whether the non-US swap dealer is an affiliate of a US person, are generally required to comply with transaction-level requirements if such personnel or agents (i) are located in the US and (ii) regularly *arrange, negotiate or execute swaps* with a non-US person. In reaching this conclusion, the CFTC reasoned that agents of a non-US swap dealer that regularly arrange, negotiate or execute swaps are performing core, front-office activities, and to the extent these activities are conducted in the US, they would be within the scope of regulation by the Dodd-Frank Act.

Following the release of the Staff Advisory, the CFTC received multiple requests from non-US swap dealers for no-action relief to extend the timeline for compliance with such transaction-level requirements in order to allow regulated entities to make the necessary internal policy adjustments to comply with the requirements. In response, on November 26, 2013, the CFTC granted time-limited relief, which was subsequently extended by a series of no-action letters, the most recent of which extended the deadline to the effective date of any corresponding CFTC action specifically addressing whether a particular transaction-level requirement is applicable to such situation.[14]

Cross-Border Application of the CFTC's Initial and Variation Margin Rules

On May 24, 2016, the CFTC issued final rules and accompanying interpretative guidance setting forth the application of the CFTC's initial and variation margin rules to cross-border swap transactions (the "**CFTC Cross-Border Margin Rules**")[15] The application of the CFTC's final initial and variation margin rules to cross-border swap transactions was not set out in the CFTC Cross-Border Guidance, but was rather explicitly addressed in this separate rulemaking.

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11 Section 2(i), Commodity Exchange Act (7 USC § 2(i)).

12 Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45291 (July 26, 2013), available here.

13 CFTC Staff Advisory No. 13-69 (November 14, 2013), available here.

14 CFTC No-Action Letter 13-71 (granting relief to January 14, 2014), CFTC No-Action Letter 14-01 (extending relief to September 15, 2014), CFTC No-Action Letter 14-74 (extending relief to December 31, 2014), CFTC No-Action Letter 14-140 (extending relief to September 30, 2015), CFTC No-Action Letter 15-48 (extending relief to September 30, 2016), CFTC No-Action Letter 16-64 (extending relief to the earlier of September 30, 2017 or the effective date of any corresponding CFTC action) and CFTC No-Action Letter 17-36 (extending relief to the effective date of any corresponding CFTC action). CFTC No-Action Letter 17-36, available here.

15 Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34817 (May 31, 2016), available here. Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 635 (January 6, 2016), available here.

Among the various concepts used in the CFTC Cross-Border Margin Rules, the CFTC introduced a new entity classification of "foreign consolidated subsidiary" ("**Foreign Consolidated Subsidiary**"). This was defined to capture any swap dealer or major swap participant subject to the CFTC's jurisdiction that is not a US person in which an ultimate parent entity that is a US person has a controlling interest, in accordance with US GAAP, such that the ultimate parent entity includes the non-US swap dealer or major swap participant's operating results, financial position and statement of cash flows in its consolidated financial statement, in accordance with US GAAP.

Notwithstanding that the Foreign Consolidated Subsidiary entity classification was also included in the 2016 Proposed Cross-Border Rule (as defined and discussed below), Chairman Giancarlo stated in the White Paper that he did not consider this entity classification, on its own, to be an appropriate method of determining the cross-border applicability of Dodd-Frank Act requirements. We note that the White Paper did not discuss the CFTC Cross-Border Margin Rules.

For further information on the CFTC Cross-Border Margin Rules, please refer to our client alert, available here.

2016 CFTC Cross-Border Proposed Rules

On October 11, 2016, the CFTC released proposed rules and accompanying interpretative guidance (the "**2016 CFTC Cross-Border Proposed Rules**")[16] which set forth the application of certain requirements under the Dodd-Frank Act to cross-border swap transactions. The purpose of the 2016 CFTC Cross-Border Proposed Rules was to codify a definitional foundation for the CFTC's cross-border framework and the rules regarding the cross-border application of both swap dealer and major swap participant *de minimis* threshold calculations and certain of the CFTC's external business conduct standards applicable to swap dealers and major swap participants.

It was intended that the 2016 CFTC Cross-Border Proposed Rules, along with other future rulemakings, would supersede the CFTC Cross-Border Guidance with respect to the matters covered by such rules. However, following the release of the White Paper, it would seem that these proposed rules are unlikely to be finalized in their proposed form and will instead be replaced with new proposals that are consistent with the concepts and principles outlined in the White Paper.

White Paper's Proposed Cross-Border Approach of the CFTC

In the White Paper, Chairman Giancarlo first maintains that it is inappropriate for the CFTC to continue to rely on interpretative policy statements or guidance (such as the CFTC Cross-Border Guidance) in lieu of formal rules and advocates that it should instead adopt rules through a process that complies with notice-and-comment and cost-benefit consideration requirements.

The White Paper notes that the CFTC Chairman intends to direct CFTC staff to develop new rule proposals based on the principles set forth in the White Paper to address cross-border swaps transactions. The resulting final rules would replace the existing mixture of CFTC rules and guidance as well as certain CFTC staff advisories and no-action letters.

The White Paper recommends that any such new rule proposals should be guided by the following six (6) principles:

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.** 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 seek to mitigate the type of risk that may have a "direct and significant" connection with the US. 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 generally have less of a "direct and significant" connection with the US and it may therefore be more appropriate for these rules to be adapted to suit individual local markets.
Principle 2	**The CFTC should pursue multilateralism, not unilateralism, for swaps reforms that are designed to mitigate systemic risk.** The CFTC's jurisdiction should continue to apply cross-border to US firms on an "entity" basis, with substituted compliance available for non-US jurisdictions that are "strictly comparable."

16 Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants, 81 FR 71946 (October 18, 2016), available here.

Principle 3	**The current division of global swaps markets into separate US person and non-US 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 fragmentation of global swaps markets into distinct trading and liquidity pools containing US market participants in one pool and non-US market participants in others is incompatible with, and detrimental to, global swaps reform efforts.
Principle 4	**The CFTC shall be a rule maker, not a rule taker, in overseeing US markets.** Non-US regulators should defer to the CFTC with respect to oversight of US derivatives trading markets and, conversely, the CFTC should defer to non-US regulators for activities conducted primarily in their jurisdictions if their regulatory framework is comparable to the CFTC's. The CFTC should seek to reconcile its rules with those adopted in non-US jurisdictions as appropriate.
Principle 5	**The CFTC should act with deference to non-US 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 with deference to non-US regulators in jurisdictions that have adopted comparable G20 swaps reforms. However, the CFTC should undertake a tiered approach to substituted compliance by requiring stricter comparability for requirements intended to address systemic risk and allowing more flexible comparability for requirements intended to address mawrket practices such as market access, price transparency, and professional conduct requirements which have less to do with systemic risk.
Principle 6	**The CFTC should act to encourage adoption of comparable swaps reform regulation in non-US jurisdictions that have not adopted swaps reform for any significant swaps trading activity.** The CFTC should generally defer to non-US jurisdictions that have adopted regulations comparable to the CFTC's regime. For those non-US jurisdictions that have not adopted comparable reforms, US rules should apply to US-related entities, subject to materiality thresholds.

Below we address each of the areas of swaps reform considered in the White Paper: Registration of Non-US CCPs, Registration of Non-US Trading Venues, Registration of Non-US Swap Dealers, Clearing and Trade Execution Requirements, and ANE Transactions.

White Paper's Cross-Border Recommendations

Consistent with the above principles, the White Paper recommends that the CFTC address cross-border regulation of swaps based on whether the applicable entity or activity is within (i) the US, (ii) a Comparable Jurisdiction or (iii) a Non-Comparable Jurisdiction.

Comparable Jurisdiction	A foreign jurisdiction that has adopted the G20 reforms such that a CFTC comparability determination would conclude that the jurisdiction' regime was comparable to the CFTC's regime.
Non-Comparable Jurisdiction	A jurisdiction that does not have a comparable regime to the CFTC's regime.

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Registration of Non-US CCPs

Given that many regulated central counterparties ("**CCPs**") operate in non-US jurisdictions and under different regulatory regimes, Chairman Giancarlo argues in the White Paper that overlapping regulation and supervision should be avoided as this creates inefficiencies and increases the costs of US persons accessing non-US CCPs.

United States	The CFTC should continue to require a CCP located in the US that seeks to clear swaps under the jurisdiction of the CFTC to register with the CFTC as a derivatives clearing organization ("**DCO**") and be subject to the CFTC's oversight and jurisdiction.
Comparable Jurisdiction	The CFTC should use its exemptive authority[17] for non-US CCPs that do not pose substantial risk to the US financial system, thereby permitting non-US CCPs to provide clearing services to US customers indirectly through non-US clearing members that are not registered with the CFTC. However, non-US CCPs that clear swaps for US persons and are deemed by the CFTC to pose substantial risk specific to the US financial system would continue to be required to register with, and be regulated by, the CFTC.
Non-Comparable Jurisdiction	The starting point for CFTC staff consideration is that non-US CCPs that seek to clear for US persons would be required to register as a DCO. To provide more time for non-US jurisdictions to develop comparable standards, the CFTC should consider providing relief from DCO registration for non-US CCPs whose members are foreign branches of US 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-US persons. Risks would be mitigated as the Foreign Branch must be a registered swap dealer, subject to US capital, margin and risk management requirements. Any such relief would be subject to reporting and information-sharing arrangements as well as the right of the CFTC to terminate the relief for cause.

Registration of Non-US Trading Venues

The CFTC currently requires that a multilateral trading platform located outside the US that provides US persons located in the US, including personnel and agents of non-US persons located in the US, with the ability to trade or execute swaps on the platform to register with the CFTC as either a swap execution facility ("**SEF**") or derivatives contract market ("**DCM**").[18]

The White Paper argues that this registration requirement has resulted in the bifurcation of the global swaps markets by forcing non-US trading venues to deny participation to persons located in the US.

United States	The CFTC should continue to require swaps trading venues located in the US that satisfy the SEF definition to register with the CFTC as a SEF or DCM.
Comparable Jurisdiction	The CFTC should generally exempt from SEF registration non-US trading venues that are regulated by Comparable Jurisdictions with respect to all types of swaps. This would permit such venues to have US and non-US participants, with the intention of reducing or even eliminating the bifurcation of global swaps markets by permitting each Comparable Jurisdiction to function as a unified marketplace under that jurisdiction's own rules.
Non-Comparable Jurisdiction	Non-US trading venues in Non-Comparable Jurisdictions should be required to register as a SEF or DCM if they provide US persons access to the trading venue directly or indirectly through a non-US intermediary, subject to a materiality threshold to be set by the CFTC. The threshold should be based on a level of trading involving US persons that does not meet the "direct and significant" standard. By adopting a materiality threshold, the CFTC would permit non-US trading venues in Non-Comparable Jurisdictions to provide trading services to US persons on a limited basis without registration.

17 Section 725(h) of the Dodd-Frank Act permits the CFTC to exempt a non-US 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.

18 CFTC Division of Market Oversight, Division of Market Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities (November 15, 2013), available here.

Registration of Non-US Swap Dealers

In the White Paper, Chairman Giancarlo argues that the CFTC's approach to its swap dealer registration rules has resulted in an inappropriate extraterritorial application of those rules that does not appropriately consider whether the dealing activity truly poses a "direct and significant" risk to the US financial system.

The White Paper sets out the following with respect to the cross-border application of swap dealer registration and the counting of swaps notional amounts to the swap dealer *de minimis* registration threshold.

United States	The CFTC should continue to require US persons to count all of their swap dealing transactions toward the *de minimis* threshold, including transactions conducted through a Foreign Branch, whether with US or non-US persons.
Comparable Jurisdiction	**Guaranteed Entities**:[19] The CFTC should require these entities to count all of their swap dealing activity toward their *de minimis* threshold, regardless of the status of their counterparties. In deference to home country regulators, Guaranteed Entities would be permitted to rely on substituted compliance for applicable requirements. **Other Non-US Persons (including Foreign Consolidated Subsidiaries)**: The CFTC should require these entities to count their swap dealing activity with US persons and Guaranteed Entities, except swaps with (1) Guaranteed Entities that are registered as swap dealers (or are affiliated with registered swap dealers), (2) Guaranteed Entities that are guaranteed by a non-financial guarantor or (3) Foreign Branches.[20] These entities would be permitted to rely on substituted compliance with respect to applicable requirements. As an alternative, the White Paper suggests that the CFTC consider not requiring Other Non-US Persons to count dealing swaps with Guaranteed Entities toward their *de minimis* threshold. In addition, all non-US swap dealers would not be required to count the following towards their *de minis* threshold: □ swaps executed anonymously on a registered or exempt trading platform and that are cleared by a registered or exempt clearing organization; and □ ANE Transactions (see below).
Non-Comparable Jurisdiction	**Guaranteed Entities**: The CFTC should continue to require these entities to count all of their swap dealing activity toward their *de minimis* threshold, regardless of the status of their counterparty. Substituted compliance would not be available. **Other Non-US Persons**:[21] The CFTC should continue to require these entities to count their swap dealing activity with US persons and Guaranteed Entities, except swaps with (1) Guaranteed Entities that are registered as swap dealers (or are affiliated with registered swap dealers), (2) Guaranteed Entities that are guaranteed by non-financial guarantor or (3) Foreign Branches. Substituted compliance would not be available. As an alternative, the White Paper suggests that the CFTC consider not requiring Other Non-US Persons to count dealing swaps with Guaranteed Entities toward their *de minimis* threshold.

19 The White Paper notes that the term "Guaranteed Entity" has the same definition as in the 2016 CFTC Proposed Cross-Border Rules (i.e., a non-US person whose swaps are guaranteed by a US person).

20 In the 2016 CFTC Proposed Cross-Border Rules, these exemptions were removed. The White Paper, however, recommends that these exemptions be retained as the types of transactions captured by these exemptions do not have a direct and significant connection with the US financial system.

21 For Non-Comparable Jurisdictions, the White Paper notes that the issue of Foreign Consolidated Subsidiaries is more complex and that the CFTC should consider the issue in light of the requirements of the Dodd-Frank Act and the concepts and principles set out in the White Paper.

Clearing and Trade Execution Requirements

Broadly, the Dodd-Frank Act requires that a swap be cleared if the CFTC has issued a clearing determination that the swap is required to be cleared, unless an exception or exemption applies.[22] Additionally, if a swap is required to be cleared, the Dodd-Frank Act requires that the swap be executed on a DCM or SEF, unless no DCM or SEF makes the swap available to trade.[23] The White Paper reasons that, while the clearing requirement addresses systemic risk to the US financial system, the accompanying trade execution requirement does not and instead furthers the goals of market efficiency and enhanced transparency. The White Paper recommends a cross-border approach that takes into account the differing purposes of these requirements.

United States	US persons (including their 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.
Comparable Jurisdictions	Non-US persons, including Guaranteed Entities and FCS, should be permitted to rely on substituted compliance with respect to the CFTC's swap clearing and trade execution requirements. There should be a tiered approach to substituted compliance. As the clearing requirements are focused on systemic risk, the CFTC should expect a stricter degree of comparability than with respect to comparability for trade execution (which pertains to local market structure and trade practice).
Non-Comparable Jurisdictions	**Foreign Branches**: The CFTC's swap clearing requirement should apply to all swaps of Foreign Branches that are subject to the clearing requirement, subject to a materiality threshold for swaps with Other Non-US Persons. **Guaranteed Entities**: The CFTC's swap clearing requirement should apply to all swaps subject to the clearing requirement between Guaranteed Entities and (1) US persons, including Foreign Branches, (2) Guaranteed Entities and (3) subject to a materiality threshold, other Non-US Persons, unless the swaps are subject to initial margin or variation margin requirements consistent with established international standards. **Other Non-US Persons**: The CFTC's swap clearing requirement should apply to all swaps subject to the clearing requirement with (1) US persons, including Foreign Branches and (2) Guaranteed Entities, unless the swaps are subject to initial margin or variation margin requirements consistent with established international standards. The CFTC should further consider the treatment of FSC as well as the application of the trade execution requirement.

ANE Transactions

2016 CFTC Cross-Border Proposed Rules

The 2016 CFTC Cross-Border Proposed Rules addressed the regulation of swap activity by non-US entities that would fall within the scope of transactions that are arranged, negotiated or executed using personnel located in the US ("**ANE Transactions**"). These terms do not include internal back-office activities such as clerical tasks that are performed by personnel who are not involved in the sale or trading of the swap.

White Paper

The recommendations of the White Paper in connection with the regulation of ANE Transactions are predicated on two preliminary points:

- If a swap is executed in the US (irrespective of whether or not it is also arranged or negotiated), then the counterparties should be required to follow US swap execution rules. That is, it would be subject to the CFTC's clearing and trade execution requirements, which would require such swap to be traded on a SEF and centrally cleared, unless an exception or exemption applied.

22 Section 2(h)(1), US Commodity Exchange Act (7 USC § 2(h)(1)).

23 Section 2(h)(8), US Commodity Exchange Act (7 USC § 2(h)(8)).

- ANE Transactions are, by definition, between non-US persons and do not pose systemic risk to the US financial system merely by virtue of being arranged, negotiated or executed within the US and, for this reason, ANE Transactions should not count toward a potential non-US swap dealers' *de minimis* threshold if the non-US dealer is in a Comparable Jurisdiction.

Taking into account the above preliminary points, the White Paper sets out two scenarios where swaps are arranged or negotiated in the US but executed in a Comparable Jurisdiction (i.e., the first preliminary point above does not apply as the swap is not executed in the US).

Intermediary Scenario	**Third-party US intermediary located in the US, such as an Introducing Broker, arranges or negotiates among multiple non-US participants.** The White Paper notes that the intermediary should be a SEF, with the effect that the trade would be subject to the SEF rules.[24] The White Paper argues that this is consistent with the territorial approach that transactions conducted in the US should be subject to US rules.
Agent/Employee Scenario	**US-based agent/employee of a non-US swap dealer located in the US arranges or negotiates a swap with a non-US person.** The White Paper's territorial approach would require that the activity of the US-based agent/employee be subject to US swaps trading rules. As mentioned above, this trade would not count toward a non-US swap dealers' *de minimis* threshold if the non-US swap dealer is in a Comparable Jurisdiction. The White Paper mentions that where the non-US swap dealer is subject to regulation in a Comparable Jurisdiction, there may be a basis for substituted compliance to be available.

Analysis and Final Thoughts

We highlight below some analysis and final thoughts on certain of the concepts and principles set forth in the White Paper.

Foreign Consolidated Subsidiaries

Unlike the 2016 CFTC Proposed Cross-Border Rules and the CFTC Cross-Border Margin Rules, Chairman Giancarlo did not include a separate "Foreign Consolidated Subsidiary" category in the White Paper. Chairman Giancarlo argues that it is overreach to require a Foreign Consolidated Subsidiary that engages in swap dealing activity wholly outside the United States to register with the CFTC, based solely on the theory that they pose a hypothetical risk to the US financial system due to an accounting connection. Instead, a better approach would be to not require a Foreign Consolidated Subsidiary to register as a swap dealer if their dealing activities occur wholly outside the US and are addressed, from a risk perspective, by their home country regulator through comparable regulation. Accordingly, in Comparable Jurisdictions, the White Paper recommends that Foreign Consolidated Subsidiaries whose swap dealing activity occurs outside the United States and does not involve direct activity in the US with US persons not be required to register as a swap dealer if they are subject to comparable regulation by a non-US regulator, including being subject to capital and margin requirements for uncleared swaps. For Non-Comparable Jurisdictions, the White Paper notes that this is more complex and that the CFTC should consider the issue in light of the requirements of the Dodd-Frank Act and the concepts and principles set out in the White Paper.

Non-US Banks and Brokers: Counting of Dealing Swaps

Non-US banks and brokers engaged in swap dealing activity in non-US markets regularly look to the deeper liquidity found in the New York and London markets to hedge their local client facing swaps. Assuming that the regularity and nature of their swaps business constitutes swap dealing activity, swaps entered into in order to hedge risk and exposure from this local market activity would also be included in the swap dealing activity of the non-US bank or broker. Both the original local market client-facing swap and the related hedging swap with a dealer in a larger market are likely within the scope of what the CFTC would consider to be "swap dealing activity".

24 For further information on the CFTC Chairman's view of how the SEF rules should apply, as well as other swap regulations, please refer to our client alert available here.

Under the CFTC Cross-Border Guidance, a non-US person (that is not a guaranteed affiliate or a conduit affiliate[25]) is only required to count towards its swap dealer *de minimis* threshold those dealing swaps that are entered into with US persons (other than foreign branches of a US swap dealer) and guaranteed affiliates (except where the guaranteed affiliate is a registered swap dealer, is engaged in a *de minimis* level of swap dealing activity and is affiliated with a swap dealer, or is guaranteed by a non-financial entity).

The result was different, however, under the 2016 CFTC Proposed Cross-Border Rules, which would have required the non-US person to count each swap entered into with any US person, Guaranteed Entity or Foreign Consolidated Subsidiary toward its swap dealer *de minimis* threshold. In addition, Foreign Consolidated Subsidiaries themselves were also required to count all their dealing swaps. By treating Foreign Consolidated Subsidiaries the same as Guaranteed Entities, the CFTC significantly expanded its jurisdiction over non-US banks and brokers that were not otherwise captured under the CFTC Cross-Border Rules by requiring them to count additional swaps, which had the practical effect of increasing the likelihood that they would exceed the *de minimis* threshold and be required to register as swap dealers.

Under the White Paper, the entity classifications found in the 2016 Proposed Cross-Border Rules were retained (e.g., no "affiliate conduit" classification) and the exemptions found in the CFTC Cross-Border Guidance were generally restored with respect to non-US banks and brokers in Comparable Jurisdictions and Non-Comparable Jurisdictions. However, for Foreign Consolidated Subsidiaries themselves, the position remains somewhat uncertain as the White Paper does not provide a firm recommendation on how they should be treated – while the White Paper presents some examples of situations where Foreign Consolidated Subsidiaries should be treated similarly to Other Non-US Persons, the White Paper concludes that further consideration was warranted by CFTC staff in order to determine how to properly treat Foreign Consolidated Subsidiaries.

Next Steps

The White Paper marks a continuation of Chairman Giancarlo's focus on reassessing the efficacy of existing CFTC swap regulations. In particular, the White Paper indicates a strong preference to consolidate the current approach on cross-border application of CFTC swap regulations into a single set of coherent rules, which would replace the existing mixture of CFTC rules and guidance as well as certain CFTC staff advisories and no-action letters. While market participants may welcome many of the principals and recommendations set forth in the White Paper, it remains to be seen to what extent these will influence future CFTC rulemakings.

25 Under the CFTC Cross-Border Guidance, "guaranteed affiliate" refers to a non-US person that is affiliated with and guaranteed by a US person and the concept of a "conduit affiliate" is used by the CFTC to capture vehicles or conduits that effect swap transactions with third parties on behalf of US persons, but generally do not include swap dealers or affiliates of swap dealers.

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