

# Morgan Lewis

## Futures Industry Association

### 2019 Law & Compliance Conference Panel:

#### Tearing Down the Cross-Border Wall<sup>1</sup>

*SARAH V. RIDDELL is an associate in the Investment Management practice of Morgan, Lewis & Bockius LLP. Leveraging her experience as a lawyer at the U.S. Commodity Futures Trading Commission (CFTC), Sarah advises domestic and foreign exchanges, derivatives clearing organizations, swap execution facilities, and other financial institutions on a broad range of regulatory matters, including CFTC registration and developing related policies and procedures. Sarah represents private investment fund sponsors and advisers on regulatory matters and assists clients with regulatory examinations. Sarah works with regulators to obtain no-action and exemptive relief on behalf of clients. While at the CFTC, Sarah worked on Dodd-Frank related rulemakings and participated in examinations of derivatives clearing organizations, including those designated as systemically important.*

*HANIEL OGBURU-OGBONNAYA is an associate in the Investment Management practice of Morgan, Lewis & Bockius LLP. Her practice focuses on private investment funds, including US domestic and offshore hedge funds, private equity funds, and funds-of-funds. Haniel has represented clients engaged in fund formations and secondary transactions, including traditional purchases and sales of fund interests. Her clients include state pension plans, institutional investors, and ERISA plans.*

## I. INTRODUCTION

In the lead-up to Brexit, the U.S. Commodity Futures Trading Commission (“CFTC” or the “**Commission**”) has been taking steps to ensure consistency and continuity of CFTC regulatory obligations to which UK firms are subject with respect to their swap activities involving U.S. persons. The Commission has issued relief that permits UK entities to rely on existing no-action relief involving the European Union (“EU”), and although the relief is directed to UK entities, the entire market benefits from greater regulatory certainty.<sup>2</sup> For example, registration relief currently exists for a swap dealer’s affiliates that engage in activities (such as soliciting, negotiating, structuring, recommending, and/or accepting as agent, swap transactions on behalf of the swap dealer) that would otherwise bring an affiliate within the introducing broker or commodity trading advisor definition, as long as the affiliate satisfies various conditions.<sup>3</sup> One of the conditions requires that the affiliate be registered or licensed with, or subject to regulation by, a financial services, prudential, or banking regulator in “a country that is a member of the European Union” (among other countries).<sup>4</sup> The Commission’s most recent relief allows UK firms to rely on this

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<sup>1</sup> As of April 8, 2019.

<sup>2</sup> See, e.g., CFTC No-Action Letter No. 19-09 (Apr. 5, 2019).

<sup>3</sup> CFTC No-Action Letter No. 12-70 (Dec. 31, 2012).

<sup>4</sup> *Id.* at 5.

registration relief, notwithstanding the fact that the UK will not be a member of the EU upon the occurrence of Brexit. The relief resolves uncertainties about CFTC registration that UK affiliates, and their U.S.-based affiliates, may have had as a result of their planning in connection with Brexit.

Also in connection with Brexit, the CFTC approved an interim final rule allowing certain swap dealers and major swap participants for which there is no prudential regulator (covered swap entities or “**CSEs**”) to disregard amendments to legacy swaps for purposes of the CFTC’s uncleared swap margin rules (“**CFTC Margin Rule**”), subject to certain conditions.<sup>5</sup> In a joint statement with the CFTC, the Bank of England (“**BoE**”) and Financial Conduct Authority (“**FCA**”) confirmed that U.S. trading venues, firms and central counterparties (“**CCPs**”) will be able to continue providing services in the UK.<sup>6</sup>

Outside the context of Brexit, the CFTC has continued its substituted compliance efforts related to CSEs. The CFTC’s swap regulations broadly apply to CSEs, not only those located in the U.S. but also to those located in non-U.S. jurisdictions, based on the CFTC’s extraterritorial approach to swap regulation. However, a non-U.S. CSE is not required to comply with all of the CFTC Margin Rule if the CFTC permits the non-U.S. CSE to avail itself of substituted compliance – which is only available where the CFTC has made a comparability determination on specific regulatory requirements. The CFTC’s 2016 Japan comparability determination did not definitively state whether Japanese entities subject to margin requirements were comparable to those in the U.S. The Commission has clarified that Japanese entities subject to margin requirements are comparable in a recent March 2019 comparability determination, resolving doubts as to whether Japanese CSEs could rely on substituted compliance.<sup>7</sup> The CFTC also approved a comparability determination for CSEs subject to regulation by Australian authorities.<sup>8</sup>

## **II. CFTC DEVELOPMENTS RELATED TO BREXIT**

### **A. Maintaining the Status Quo for U.S. and UK Firms and CCPs After Brexit**

In a recent statement, the CFTC, BoE, and FCA confirmed that firms operating in the UK and U.S. would continue to be able to rely on existing relief or provide services to U.S. or UK firms, as applicable, on the same basis as they currently provide services, providing continuity and

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<sup>5</sup> See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34,818 (May 31, 2016); see also Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636 (Jan. 6, 2016); see also 7 U.S.C. § 1a(39) (defining the term “Prudential Regulator” to include the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency).

<sup>6</sup> CFTC Joint Statement with the BoE and FCA, with support from Her Majesty’s Treasury (“**HM Treasury**”). Joint Statement by UK and US Authorities on Continuity of Derivatives Trading and Clearing Post-Brexit, CFTC Release No. 7876-19 (Feb. 25, 2019).

<sup>7</sup> Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. 12,074 (Apr. 1, 2019). See also CFTC Issues Amended Margin Comparability Determination for Japan, CFTC Release No. 7899-19 (Mar. 26, 2019).

<sup>8</sup> See Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. 12,908 (Apr. 03, 2019).

regulatory certainty to market participants who may feel the brunt of Brexit. Subsequent to the statement, the CFTC’s Divisions of Market Oversight (“**DMO**”), Clearing and Risk (“**DCR**”), and Swap Dealer and Intermediary Oversight (“**DSIO**” and, collectively with DMO and DCR, the “**Divisions**”) issued no-action relief confirming the extension of no-action relief to UK firms.<sup>9</sup>

In the statement, the CFTC also announced its intention that it would extend relief granted to EU firms to UK firms upon Brexit. On April 5, 2019, the Divisions issued no-action relief to permit UK entities to rely on existing relief applicable to EU-member state firms. The relief will be effective “if and when the UK withdraws from the EU”, subject to the conditions and expiration dates of the existing no-action relief.<sup>10</sup> The Divisions provided UK firms confirmation that the following no-action letters would continue to apply to them after Brexit:

- Letter No. 12-70: Relief for Certain Swap Dealers, De Minimis Dealers, Agent Affiliates, and Associated Persons from Registration as an Introducing Broker under Section 4d or a Commodity Trading Advisor under Section 4m of the Commodity Exchange Act, and Interpretation that Certain Employees of De Minimis Dealers are not an Introducing Broker as defined in Section 1a(31) of the Commodity Exchange Act.<sup>11</sup>
- Letter No. 13-45: No-Action Relief for Registered Swap Dealers and Major Swap Participants from Certain Requirements under Subpart I of Part 23 of Commission Regulations in Connection with Uncleared Swaps Subject to Risk Mitigation Techniques under the European Market Infrastructure Regulation (“**EMIR**”).<sup>12</sup>
- Letter No. 17-64: Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission’s Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland.<sup>13</sup>
- Letter No. 17-66: No-Action Relief from Certain Provisions of the Outward-Facing Swaps Condition in the Inter-Affiliate Exemption from the Clearing Requirement.<sup>14</sup>

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<sup>9</sup> CFTC No-Action Letter No. 19-08 (Apr. 5, 2019); CFTC No-Action Letter No. 19-09 (Apr. 5, 2019).

<sup>10</sup> CFTC No-Action Letter No. 19-09 at 1, 3.

<sup>11</sup> See *supra* notes 2-3 and related text.

<sup>12</sup> CFTC No-Action Letter No. 13-45 (Jul. 11, 2013) (providing relief to registered swap dealers and major swap participants (“**MSPs**”) from “CFTC Risk Mitigation Rules” (as defined in the letter) for transactions where (i) one of the counterparties is established in the EU or otherwise subject to EMIR; (ii) one of the counterparties is a US person; and (iii) one of the counterparties is a swap dealer or MSP registered with the Commission, so long as the registered swap dealer or MSP complies with the EMIR Risk Mitigation Rules (as defined in the letter)).

<sup>13</sup> CFTC No-Action Letter No. 17-64 (Nov. 30, 2017) (providing relief to a non-U.S. swap dealer or a non-U.S. MSP established in Australia, Canada, the EU, Japan or Switzerland, that is not part of an affiliated group in which the ultimate parent entity is a U.S. swap dealer, U.S. MSP, U.S. bank, U.S. financial holding company, or U.S. bank holding company, for failure to comply with the swap data reporting requirements of Part 45 and Part 46 of the CFTC’s regulations, with respect to its swaps with non-U.S. counterparties that are not guaranteed affiliates, or conduit affiliates, of a U.S. person, subject to conditions).

<sup>14</sup> CFTC No-Action Letter No. 17-66 (Dec. 14, 2017) (providing relief to certain swap counterparties from compliance with provisions of the Commission’s exemption from the swap clearing requirement for affiliated counterparties, provided that the counterparties satisfy an alternative compliance framework).

- Letter No. 17-67: Extension of No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52.<sup>15</sup>

In addition, DMO and DSIO issued relief to confirm that, effective upon the UK's withdrawal from the EU, existing relief would continue to apply to UK firms. The relevant relief includes substituted compliance for EU entity-level and transaction-level requirements (Dec. 27, 2013) and substituted compliance for EU margin requirements for uncleared swaps (Oct. 18, 2017) ("**EU Comparability Determinations**"), and an exemption of multilateral trading facilities and organized trading facilities authorized within the EU from the requirement to register as swap execution facilities (Dec. 8, 2017) ("**Exemptive Order**"), collectively with the EU Comparability Determinations, the "**Existing Commission Actions**").

In the event that the UK withdraws from the EU without a negotiated agreement with the EU (a "**no-deal Brexit**"), DSIO has provided no-action relief for registered swap dealers that are subject to UK regulation if, instead of complying with CFTC regulations as they relate to the EU Comparability Determinations, they comply with UK laws and regulations transposed pursuant to the European Union (Withdrawal) Act 2018.<sup>16</sup> The DSIO relief will expire on the earlier of (1) the effective date of any comparability determination issued by the CFTC for the UK to the extent that such determination encompasses the subject matter of EU Comparability Determinations; or (2) the date that is six months from the date of the UK's withdrawal from the EU.<sup>17</sup> Alternatively, if the EU and UK ratify a withdrawal agreement with a "Transition Period" during which EU law and EU regulatory, budgetary, supervisory, judiciary, and enforcement instruments and structures continue to apply to the UK as if it were still an EU member state ("**soft Brexit**"), DSIO staff will provide the same relief during the Transition Period while it determines whether to recommend that the CFTC make technical amendments to the EU Comparability Determinations to clarify the precise manner in which the determinations should apply after the UK is no longer an EU member state.<sup>18</sup> The DSIO's soft Brexit relief will expire on the earlier of (1) the effective date of any technical amendments to the EU Comparability Determinations; or (2) the expiration of the Transition Period.<sup>19</sup>

In connection with the Exemptive Order, DMO provided relief that applies in the event of either a no-deal Brexit or a soft Brexit, providing certainty not only to UK swap trading facilities but to swap counterparties that trade on these facilities. In the Exemptive Order, the Commission granted EU multilateral trading facilities ("**MTFs**") and organised trading facilities ("**OTFs**") an exemption from swap execution facility ("**SEF**") registration, allowing swap counterparties to

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<sup>15</sup> CFTC No-Action Letter No. 17-67 (Dec. 14, 2017) (permitting an eligible affiliate counterparty that executes a swap transaction with another eligible affiliate counterparty to execute such a swap without complying with the trade execution requirement in section 2(h)(8) of the Act).

<sup>16</sup> CFTC No-Action Letter No. 19-08 at 3. Upon a no-deal Brexit, the European Union (Withdrawal) Act 2018 "will transpose relevant EU law and regulations into UK law and regulations, and grant existing authority vested in certain EU institutions to the Financial Conduct Authority, the Bank of England including the Prudential Regulation Authority, and Her Majesty's Treasury." *Id.* at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

satisfy the trade execution requirement in Section 2(h)(8) of the Commodity Exchange Act of 1936, as amended (the “Act”), if they engage in swaps on the MTFs and OTFs specified in the Exemptive Order.<sup>20</sup> The DMO relief confirms that UK MTFs and OTFs, and swap counterparties that trade on UK MTFs and OTFs, may avail themselves of the Exemptive Order’s relief by providing (1) no-action relief from SEF registration to an MTF or OTF that is authorized within the UK and listed in Appendix A to the Exemptive Order; and (2) clarification that a counterparty subject to the trade execution requirement of Section 2(h)(8) of the Act is in compliance with this requirement if the counterparty executes a swap subject to the trade execution requirement on such a UK MTF or OTF.<sup>21</sup> With respect to a no-deal Brexit, the relief expires on the earlier of (1) the effective date of any CFTC-issued exemptive order for MTFs and OTFs authorized within the UK; or (2) the date that is six months from the date of the UK’s withdrawal from the EU.<sup>22</sup> If there is a soft Brexit, DMO staff will determine whether technical amendments to the Exemptive Order are necessary to clarify the precise manner in which the Exemptive Order applies to UK-authorized MTFs and OTFs.<sup>23</sup> The relief will expire, in the event of a soft Brexit, on the earlier of (1) the effective date of any amendment to the Exemptive Order; or (2) the expiration of the Transition Period.<sup>24</sup>

The joint statement also addressed the status of CCPs. HM Treasury, BoE, and the CFTC announced that they have prioritized, and are cooperating on, the process of making equivalence and recognition decisions regarding CFTC-registered CCPs. In the event of a no-deal Brexit, BoE confirmed that U.S. CCPs may continue to provide services in the UK and to UK firms on the same basis as they currently provide services under the UK’s “temporary recognition regime” for non-UK CCPs, which lasts for up to three years with a possibility of extension. According to the statement, four CFTC-registered CCPs have notified the BoE of their intention to rely on this regime. In addition, HM Treasury confirmed in the statement that the European Commission’s equivalency decisions related to risk mitigation (including margin requirements for uncleared derivatives) and trading venues will continue to apply after Brexit.

In addition, the CFTC, BoE, and FCA announced that they would continue their supervisory cooperation, including by updating the BoE and CFTC Memorandum of Understanding (“MoU”) in connection with the UK’s forthcoming recognition of CFTC-registered CCPs and two FCA and CFTC MoUs covering certain firms in the derivatives and alternative investment funds industries.<sup>25</sup> The CFTC also confirmed that UK CCPs registered with the CFTC will be able to continue providing services in the U.S. after Brexit on the same basis that they currently provide services.

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<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Joint Statement by UK and US Authorities on Continuity of Derivatives Trading and Clearing Post-Brexit, CFTC Release No. 7876-19 (Feb. 25, 2019).

## **B. Legacy Swaps Will Retain Status in the Event of a No-Deal Brexit for Purposes of the CFTC Margin Rule**

The CFTC recently confirmed the status of legacy swaps that are amended as a result of Brexit planning. The general rule is that an uncleared swap entered into before the applicable compliance date of a CSE, a “**legacy swap**”, is not subject to the CFTC Margin Rule’s requirements.<sup>26</sup> A legacy swap loses its status as such if it is amended in a material or immaterial way subsequent to the CSE’s compliance date with regard to the counterparty. The CFTC Margin Rule permits a CSE to calculate uncleared swap margin requirements on an aggregate net basis across uncleared swaps that are executed under the same eligible master netting agreement.<sup>27</sup> If a netting portfolio (a group of uncleared swaps whose margin obligations can be netted only against each other) under the same eligible master netting agreement contains swaps subject to the CFTC Margin Rule and legacy swaps, the entire netting portfolio is subject to the CFTC Margin Rule, including the legacy swaps in the portfolio. If a legacy swap loses its status as such and becomes subject to the CFTC Margin Rule, the entire netting portfolio in which it is included (which may otherwise not be subject to the CFTC Margin Rule) would become subject to the CFTC Margin Rule.

Recognizing that legacy swaps may be amended in light of Brexit and that these amendments could impose new margin requirements for CSEs and other financial institutions, the Commission determined to maintain the status quo as it relates to legacy swaps by adopting an interim final rule. Thus, in the event of a no-deal Brexit, swap counterparties will not risk losing legacy status of swaps entered into before a swap counterparty’s compliance date with the CFTC Margin Rule with regard to a particular counterparty, subject to the relief’s conditions.<sup>28</sup>

In light of the fact that financial entities, if located in the UK, may become unable to continue providing investment services in the EU under the current passporting regime, such financial entities may attempt to transfer their swaps to a related establishment in an EU member state or to another related entity outside of the EU.<sup>29</sup> The Commission expressed its view that, irrespective of location, financial entities may be affected by a no-deal Brexit and could choose to reorganize or consolidate their swaps business in response to or planning for a no-deal Brexit.<sup>30</sup> The Commission has asked for comments on the interim final rule, due 60 days after publication in the Federal Register. Under the interim final rule, legacy swaps will maintain their status as such, notwithstanding an amendment, as long as the following conditions are satisfied:

- A party transfers a swap to its margin affiliate, a branch, or other authorized form of establishment of the transferor and the swap counterparties make no other transfers of the

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<sup>26</sup> 17 C.F.R. § 23.161(d).

<sup>27</sup> 17 C.F.R. §§ 23.152(c), 23.153(d).

<sup>28</sup> *See, e.g.*, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 83 Fed. Reg. 60,341 (Nov. 26, 2018).

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.* at 8.

swap. The transfer is made solely in connection with a party to the swap's planning for or response to a no-deal Brexit.

- A CSE is a transferee or a remaining party to the relevant swap.
- The amendments to the swap do not modify the payment amount calculation methods, the maturity date, or the notional amount of the swap.
- The amendments to the swap take effect no earlier than the date of a no-deal Brexit but no later than (i) the date that is one year after the date of a no-deal Brexit or (ii) such other date permitted by transitional provisions under Article 35 of Commission Delegated Regulation (EU) No. 2016/2251, as amended.<sup>31</sup>

### III. RECENT CFTC COMPARABILITY DETERMINATIONS

The CFTC recently issued two comparability determinations for margin requirements for uncleared swaps under the laws of Japan and Australia. In adopting the comparability determinations, the CFTC applied an “outcome-based approach”, described as a holistic assessment of margin requirements in non-U.S. jurisdictions by giving due consideration to the jurisdiction's prevailing market conditions and recognizing the principle of comity.<sup>32</sup> In contrast to the outcome-based approach, the Commission's early comparability determinations applied a narrow “element-by-element” approach that ultimately caused the non-US jurisdictions to submit no-action relief for such transactions.<sup>33</sup> The Commission's most recent comparability determinations suggest that the outcome-based approach will be applied to future comparability determinations. However, Commissioner Berkovitz “encourages” CFTC staff to assess the determination in the future to confirm that the Commission's initial understanding of the jurisdiction's regulatory structure and its expectations of outcomes are accurate.<sup>34</sup> Although it is unclear whether such periodic assessments will occur in the future and what impact they will have on the ongoing effectiveness of a comparability determination, the CFTC's most recent Japanese comparability determination provides greater regulatory certainty for swaps entered into by Japanese CSEs, at least for the time being.

The CFTC issued an amended comparability determination with respect to Japanese CSEs to amend two critical points in the CFTC's original determination, issued in 2016. In the original comparability determination, the CFTC's analysis primarily focused on the comparability of certain requirements instead of an analysis of the requirement's impact on entities in Japan.<sup>35</sup> For example, the Japan Financial Services Agency (“**JFSA**”) determined that the inter-affiliate margin requirement was unnecessary for Japanese CSEs. Instead, under Japanese law, CSEs are subject to a capital requirement, requiring entities to “hold enough capital to cover exposures under non-cleared over the counter derivatives to individual entities in the same consolidated group”, which

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<sup>31</sup> 83 Fed. Reg. at 60,346.

<sup>32</sup> 84 Fed. Reg. at 12,080.

<sup>33</sup> See, e.g., CFTC No-Action Letter No. 17-13 (Feb. 23, 2017); CFTC No-Action Letter No. 17-64 (Nov. 30, 2017).

<sup>34</sup> 84 Fed. Reg. at 12,081.

<sup>35</sup> Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. at 63,376 (Sep. 15, 2016).

could be reduced if the entity adhered to the JFSA’s uncleared swap margin requirement.<sup>36</sup> Under the amended comparability determination, the CFTC noted the CFTC’s and JFSA’s approaches to managing credit risk with regard to uncleared swaps with affiliates. The CFTC requires that this credit risk be managed by posting or collecting variation margin, while the JFSA takes the position that the credit risk can be managed by specific capital requirements and general risk management standards.<sup>37</sup>

Australian CSEs are now able to rely on substituted compliance as a result of the CFTC’s other recent comparability determination.<sup>38</sup> The CFTC analyzed various requirements under the CFTC Margin Rule, as compared against the rules of the Australian Prudential Regulation Authority (“**ARPA**”), and concluded that despite differences between the two regulatory regimes, ARPA’s margin rules are comparable in outcome to the CFTC Margin Rule.<sup>39</sup>

The chart below summarizes the extent to which Japanese and Australian CSEs may rely on substituted compliance.

<b>CFTC Margin Rule Requirement</b>	<b>CFTC Determination for Japanese Firms<sup>40</sup></b>	<b>CFTC Determination for Australian Firms<sup>41</sup></b>
1. Products Subject to Margin Requirements	Definitional differences exist. In the 2016 determination, the CFTC stated that a CSE is responsible for determining whether a particular transaction is both an “uncleared swap” under CFTC rules and a “non-cleared OTC derivative” under Japanese rules before relying on substituted compliance with regard to the CFTC’s comparability determinations.	Comparable, although definitional differences exist. A CSE is solely responsible for determining whether a transaction is an “uncleared swap” under CFTC rules and a “non-cleared OTC derivative” under APRA rules.
2. Entities Subject to Margin Requirements	In the 2016 comparability determination, the CFTC did not make a determination of comparability or non-comparability but instead noted differences in the scope of application of the two regimes. In the 2019 determination, the CFTC found that the JFSA rules are comparable in purpose and outcome to the CFTC Margin Rule and a CSE that is a JFSA covered entity and eligible for substituted compliance may comply with any	Comparable

<sup>36</sup> *Id.* at 63,394.

<sup>37</sup> Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. at 12,079.

<sup>38</sup> Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. at 12,908.

<sup>39</sup> *Id.* at 12,928.

<sup>40</sup> Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. at 63,376; Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. at 12,074.

<sup>41</sup> Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. at 12,908.



CFTC Margin Rule Requirement	CFTC Determination for Japanese Firms <sup>40</sup>	CFTC Determination for Australian Firms <sup>41</sup>
	relevant aspect of the CFTC Margin Rule by complying with JFSA Supervisory Guidelines. Despite the definitional and other differences between the regimes, the CFTC noted that the CFTC Margin Rule and JFSA margin requirements require both initial and variation margin for swaps between counterparties with the highest levels of activity.	
3. Treatment of Inter-Affiliate Derivative Transactions (§ 23.159)	In 2016, the CFTC determined that the JFSA margin requirements' treatment of inter-affiliate derivatives were not comparable to the CFTC Margin Rule. In the recent comparability determination, the CFTC amended this determination, having reconsidered the requirements' outcomes in the "broader context of the JFSA's prudential oversight of risk management and capital requirements". <sup>42</sup> Based on the outcome-based approach, the CFTC now takes the position that the JFSA requirements are comparable.	Comparable
4. Methodologies for Calculating the Amounts of Initial and Variation Margin (§§ 23.154, 155)	Comparable (2016)	Comparable
5. Process and Standards for Approving Margin Models (§ 23.154(b))	Comparable (2016)	Comparable
6. Timing and Manner for Collection or Payment of Initial and Variation Margin (§ 23.152, 153)	Comparable (2016)	Comparable
7. Margin Threshold Levels or Amounts (§ 23.154(a)(3))	Comparable (2016)	Comparable
8. Risk Management Controls for the	Comparable (2016)	Comparable

<sup>42</sup> Amendment to Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 84 Fed. Reg. at 12,079.

<b>CFTC Margin Rule Requirement</b>	<b>CFTC Determination for Japanese Firms<sup>40</sup></b>	<b>CFTC Determination for Australian Firms<sup>41</sup></b>
Calculation of Initial and Variation Margin (§ 23.154(b)(5))		
9. Eligible Collateral for Initial and Variation Margin (§ 23.156)	Comparable (2016)	Comparable
10. Requirements for Custodial Arrangements, Segregation, and Rehypothecation (§ 23.157)	Comparable (2016)	Comparable
11. Requirements for Margin Documentation (§ 23.158)	Comparable (2016)	Comparable
12. Cross-Border Application of the Margin Regime (§ 23.160)	Comparable (2016)	Comparable

#### **IV. CONCLUSION**

The Commission's efforts to provide certainty in the event of a no-deal Brexit or soft Brexit are helpful to the industry but emphasize the work that still needs to be done to resolve outstanding issues related to swaps. For example, the CFTC has extended no-action relief in connection with swaps, and the underlying no-action relief is time limited, with some letters expiring on the earlier of December 31, 2020 or the effective date of a final rulemaking with respect to the relevant regulation. Further, the relief to extend Existing Commission Actions to UK firms and trading venues is time-limited such that UK MTFs and OTFs can rely on the DMO relief until it expires, six months after a no-deal Brexit (unless the Commission issues an exemptive order for MTFs and OTFs authorized with the UK before then). Despite the Commission's Project KISS initiative to identify rules that could be simplified or made less burdensome, staff will need to continue extending no-action relief until there is a final rulemaking and the industry should expect extensions to the Brexit-related no-action relief.

The Commission's most recent comparability determinations also provide regulatory certainty to non-U.S. CSEs, especially those in Japan. By applying an outcome-based approach to the comparability determination process, with a consistent theme of the principle of international comity, CSEs in Japan and Australia can truly begin to rely upon the Commission's substituted compliance regime with greater certainty.