

Client Alert

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Harmony or Dissonance: The CFTC's and SEC's Cross-Border Rules

Recently, the SEC issued final rules addressing, among other things, the applicability of the security-based swap dealer ("SBSD") and major security-based swap participant ("MSBSP") definitions to cross-border security-based swap activities. See our [client alert](#). The CFTC last year adopted final guidance and an exemptive order regarding the applicability of the definitions of swap dealer ("SD") and major swap participant ("MSP") to cross-border activities. The SEC's rules have a number of differences from the CFTC's, including with respect to the definition of U.S. person and with respect to which transactions count toward determining registration status. The following tables provide a comparison of the SEC's cross-border rules and the CFTC's cross-border guidance, including the definitions of U.S. persons, transactions that count toward the SD and SBSBSP *de minimis* thresholds, and positions that count toward the MSP and MSBSP thresholds. The tables are summary in nature and should not be viewed as definitive legal advice.

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TRANSACTIONS THAT COUNT TOWARD THE SD AND SBSD *DE MINIMIS* THRESHOLDS

	CFTC Final Cross-Border Guidance	SEC Final Cross-Border Rule	Comments
U.S. Person	All swap dealing transactions	All security-based swap dealing transactions	Consistent between CFTC and SEC, although the agencies have different U.S. person definitions
Non-U.S. Person Conduit Affiliate of a U.S. Person	All swap dealing transactions	All security-based swap dealing transactions	Consistent between CFTC and SEC, although agencies have different definitions of conduit affiliate of a U.S. person
Non-U.S. Person Guaranteed by a U.S. Person¹	All swap dealing transactions	Security-based swap dealing transactions with U.S. persons Generally do not count security-based swaps with non-U.S. person counterparties, unless the non-U.S. person is guaranteed by a U.S. person affiliate, and the non-U.S. person's counterparty has a right of recourse under the guarantee against the U.S. person	SEC's rules only require a non-U.S. person whose obligations are guaranteed by a U.S. commonly controlled affiliate where the counterparty has rights of recourse to count all security-based swap dealing transactions, while the CFTC requires a non-U.S. person who is guaranteed by a U.S. person (whether or not an affiliate or the counterparty has rights of recourse) to count all dealing swaps transactions
All Other Non-U.S. Persons	(a) Swap dealing transactions with U.S. persons (other than a foreign branch of a U.S. SD) and (b) Swap dealing transactions with guaranteed affiliates of U.S. persons, excluding guaranteed affiliates that are: (i) registered SDs, (ii) affiliated with a registered SD and have <i>de minimis</i> dealing activity or	Security-based swap dealing transactions with U.S. persons, other than a transaction conducted through a foreign branch of a registered SBSB or any foreign branch prior to 60 days after the effective date of when SBSB registration is first required	Under the SEC's rules, non-U.S. persons that are not conduit affiliates and are not guaranteed by a U.S. affiliate do not have to count security-based swaps with non-U.S. persons (whether or not guaranteed by a U.S. person) toward the <i>de minimis</i> threshold. This differs from the CFTC, where transactions with guaranteed affiliates of U.S. persons (with certain

¹ The CFTC defines a guarantee more broadly than the SEC to include any financial support commitment regardless of recourse rights (e.g., keepwell agreements, liquidity puts, etc.), while the SEC's definition is limited to formal guarantees with rights of financial recourse against a U.S. person

	CFTC Final Cross-Border Guidance	SEC Final Cross-Border Rule	Comments
	(iii) guaranteed by a non-financial entity		exceptions, see first column of this row) must be counted
Exclusion for Anonymous Transactions	Non-U.S. person that is not a guaranteed or conduit affiliate may exclude any cleared transactions it enters into anonymously on a designated contract market, registered swap execution facility or foreign board of trade and cleared	A non-U.S. person (that is not a conduit affiliate) may exclude security-based swap transactions that are entered into anonymously on an execution facility or national securities exchange and cleared through a clearing agency	Consistent between CFTC and SEC
Aggregation	Commonly controlled affiliates must aggregate their swap transactions toward the <i>de minimis</i> threshold, except transactions of an affiliate that is registered as an SD	Commonly controlled affiliates must aggregate their security-based swap transaction toward the <i>de minimis</i> threshold, except transactions of an affiliate that is registered as an SBSB	Consistent between CFTC and SEC

POSITIONS THAT COUNT TOWARD THE MSP AND MSBSP THRESHOLDS

	CFTC Final Cross-Border Guidance	SEC Final Cross-Border Rule	Comments
U.S. Person	All swap positions	All security-based swap positions	Consistent between CFTC and SEC, although the agencies have different U.S. person definitions
Non-U.S. Person Conduit Affiliate of a U.S. Person	All swap positions	All security-based swap positions	Consistent between CFTC and SEC, although agencies have different definitions of conduit affiliate of a U.S. person

	CFTC Final Cross-Border Guidance	SEC Final Cross-Border Rule	Comments
Non-U.S. Person Guaranteed by a U.S. Person²	Swap positions generally are not counted toward the non-U.S. person's MSBSP thresholds, but are attributed to the U.S. guarantor	Security-based swap positions with U.S. persons Generally do not count security-based swap positions with non-U.S. person counterparties, unless the counterparty has a right of recourse against a U.S. person in connection with the non-U.S. person's obligations under the security-based swap	SEC's rules require a non-U.S. person whose obligations are guaranteed by a U.S. person where the counterparty has rights of recourse to count all security-based swap positions (the U.S. person guarantor must also count these positions, see attribution row below), while the CFTC does not require a non-U.S. person who is guaranteed by a U.S. person to count swap positions, but attributes them to the U.S. guarantor
All Other Non-U.S. Persons	Swap positions with U.S. persons and guaranteed affiliates of U.S. persons, with the following exceptions for a non-U.S. person that is not a guaranteed affiliate: if a financial entity, it excludes swap positions with foreign branches of U.S. SDs and guaranteed affiliates that are SDs, provided that such swaps are either cleared or subject to daily variation margin if a non-financial entity, excludes swap positions with foreign branches of U.S. SDs or guaranteed affiliates that are SDs	Security-based swap positions with U.S. persons, other than a transaction conducted through a foreign branch of a registered SBSB or any foreign branch prior to 60 days after the effective date of when SBSB registration is first required	Under the SEC's rules, a non-guaranteed, non-U.S. person is not required to count positions with a guaranteed affiliate of a U.S. person counterparty in its MSBSP calculations, which differs from the CFTC's approach, which requires counting of swaps with guaranteed affiliates of U.S. persons, subject to certain conditions (see first column of this row)
Attribution	In addition to direct swap positions, a person must attribute to itself for purposes of the MSP calculations swap positions that it guarantees under the following rules: <u>U.S. Person Guarantor:</u> All swap positions it guarantees	In addition to direct security-based swap positions, a person must attribute to itself for purposes of the MSBSP calculations security-based swap positions that it guarantees under the following rules: <u>U.S. Person Guarantor:</u> All security-	The SEC requires both the U.S. person guarantor and the non-U.S. person it guarantees to count all security-based swap positions in their respective MSBSP calculations, while the CFTC does not require the non-U.S. person guaranteed by a U.S. person to count its swap positions in its MSP calculations

² See note 1, *supra*.

	CFTC Final Cross-Border Guidance	SEC Final Cross-Border Rule	Comments
	<p><u>Non-U.S. Person Guarantor</u>: All swap positions of a U.S. person or guaranteed affiliate that it guarantees and swap positions of a non-U.S. person and a U.S. person or guaranteed affiliate, where it guarantees the obligations of the non-U.S. person thereunder</p> <p>Except that a guarantor does not need to attribute guaranteed positions of a person that is subject to capital oversight by the CFTC, SEC, banking regulator or is subject to the Capital Accord of the Basel Committee on Banking Supervision</p>	<p>based swap positions it guarantees</p> <p><u>Non-U.S. Person Guarantor</u>: All security-based swap positions of a U.S. person that it guarantees and security-based swap positions of a non-U.S. person that it guarantees with U.S. persons</p> <p>Except both U.S. and non-U.S. person guarantors are not required to attribute to itself guaranteed positions of a person who is subject to capital regulation by the SEC or CFTC, regulated as a bank in the U.S., subject to capital standards that are consistent with the Capital Accord of the Basel Committee on Banking Supervision, or deemed not to be an MSBSP during the two-month grace period after the thresholds are exceeded</p>	<p>Both the CFTC and SEC do not require attribution of guaranteed positions of persons subject to CFTC/SEC/banking capital oversight or Basel-compliant capital standards</p>

DEFINITION OF “U.S. PERSON” IN FINAL CFTC AND SEC CROSS-BORDER RELEASES

Counterparty Type	CFTC Final Cross-Border Guidance	SEC Final Cross-Border Rule
Natural Person	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
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 Pension Plan or Trust, as defined below), 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 (as defined above), unless the pension plan is primarily for foreign employees of such entity	<i>Not separately addressed in SEC “U.S. Person” definition</i>
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	Refer to Legal Entity definition in this column above
Majority-Owned Investment Vehicle	Any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not a Legal Entity (as defined above) and that is majority-owned by one or more Natural Persons, Estates, Legal Entities, Pension Plans or Trusts (as defined 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	<i>Not separately addressed in SEC “U.S. Person” definition</i>

Counterparty Type	CFTC Final Cross-Border Guidance	SEC Final Cross-Border Rule
Majority-Owned 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) that is directly or indirectly majority-owned by one or more Natural Persons, Estates, Legal Entities, Pension Plans, or Trusts (as defined above) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity	<i>Not separately addressed in SEC “U.S. Person” definition</i>
Discretionary or Other 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 U.S. person	An account (whether discretionary or non-discretionary) of a U.S. person
Exclusion for certain international organizations	<i>Not separately addressed in CFTC “U.S. Person” definition</i>	U.S. person does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans