

THE CFTC'S CROSS-BORDER GUIDANCE FOR SWAPS AND SUBSTITUTED  
COMPLIANCE REGIME

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The derivatives market was seen as having contributed substantially to the financial crisis of 2007–08.<sup>1</sup> This led to efforts to regulate derivatives in many of the countries in which their use was commonplace.<sup>2</sup> Historically, the swaps market consisted primarily of bilateral transactions agreed upon by telephone or electronic messages, which, in the absence of any reporting or clearing requirement, remained known only to the two principals.<sup>3</sup> At a September 2009 summit in Pittsburgh, however, G-20 leaders agreed in concept to wholesale reforms.<sup>4</sup> These reforms included the requirements that by the end of 2012, "all standardized OTC [over-the-counter] derivative contracts should be traded on exchanges or electronic trading platforms[] where appropriate," "cleared through [a] central counterpart[y]" standing between the two original parties, and "reported to [a] trade repositor[y]."<sup>5</sup>

The G-20's original timeframe did not hold, and today, almost a year after the G-20's 2012 year-end target date, implementation of the contemplated reforms remains problematic.<sup>6</sup> Many of the delays reflect issues on the national level—mainly that the de-

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<sup>1</sup> See, e.g., Colin Barr, *Geithner to Rein in Derivatives*, CNNMONEY (May 13, 2009), <http://money.cnn.com/2009/05/13/news/derivatives.fortune/>.

<sup>2</sup> See, e.g., G-20, Leaders' Statement: The Pittsburgh Summit (September 24–25, 2009) [hereinafter Leaders' Statement], available at [http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh\\_summit\\_leaders\\_statement\\_250909.pdf](http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf).

<sup>3</sup> See, e.g., RANDALL DODD, DERIVATIVE STUDY CENTER, THE STRUCTURE OF OTC DERIVATIVES MARKETS 2 (2002), <http://www.financialpolicy.org/dscotcstructure.pdf>.

<sup>4</sup> See Leaders' Statement, *supra* note 2.

<sup>5</sup> Leaders' Statement, *supra* note 2.

<sup>6</sup> See, e.g., JAMES K. JACKSON & RENA S. MILLER, CONG. RESEARCH SERV., COMPARING G-20 REFORM OF THE OVER-THE-COUNTER DERIVATIVES MARKETS (2013),

derivatives market is large, complex, and not especially familiar to many policymakers. However, beyond the need for action at the national level, the regulation of the swaps market, in which transactions between counterparties in wide-ranging jurisdictions have long been routine, requires international coordination and cooperation. If this were lacking, the consequences could include regulatory arbitrage, outsized compliance costs for, or incomplete compliance by, market participants, the fracturing of liquidity among different jurisdictions, and perhaps even political tensions.

The most aggressive regulator of the swaps market to date has been the U.S. Commodity Futures Trading Commission (CFTC), the primary U.S. regulator of derivatives. The CFTC is empowered to regulate the swaps market under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>7</sup> The CFTC's rules are significantly closer to being implemented than those of many regulators outside the U.S.<sup>8</sup> As a result of the CFTC's guidance regarding the extraterritorial application of

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<http://www.fas.org/sgp/crs/misc/R42961.pdf>.

<sup>7</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 701–74, 124 Stat. 1376, 1641–802 (2010) (codified as amended in scattered sections of 7, 12 and 15 U.S.C. (2012)). The Dodd-Frank Act permits the U.S. Commodity Futures Trading Commission (CFTC) to exercise authority with respect to activities outside of the United States if those activities “have a direct and significant connection with activities in, or effect on, commerce of the United States” or “contravene such rules or regulations as the [CFTC] may prescribe [] as are necessary or appropriate to prevent the evasion of any provision of [the Dodd-Frank Act]”. *Id.* at § 722(d) (codified at 7 U.S.C. § 2(1)). Title VII of the Dodd-Frank Act gives the CFTC jurisdiction over “swaps” and the U.S. Securities and Exchange Commission (SEC) jurisdiction over “security-based swaps.” *Id.* at §§ 722(a), 761(a) (codified at 7 U.S.C. § 2(a)(1), 15 U.S.C. § 78c(a)). The Dodd-Frank Act defines each term, *id.* at §§ 721(a), 722(a), and a joint rulemaking by the CFTC and the SEC has further defined them. *See* Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208 (Aug. 13, 2012) (to be codified at 17 C.F.R. pts. 1, 230, 240, and 241). Unlike the CFTC, the SEC has not yet finalized its rules regarding extraterritoriality, and its proposed cross-border rules are outside the scope of this article. *See* Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,968 (proposed May 23, 2013) (to be codified at 17 C.F.R. pts. 240, 242, and 249). More broadly, in contrast with the CFTC, the SEC has finalized few of its rulemakings under the Dodd-Frank Act, and has postponed the application of many provisions that would treat security-based swaps as “securities” or would otherwise subject security-based swaps to the Dodd-Frank Act. *See* Extension of Exemptions for Security-Based Swaps, 78 Fed. Reg. 7,654 (February 4, 2013); Order Extending Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With the Revision of the Definition of “Security” to Encompass Security-Based Swaps, and Request for Comment, 78 Fed. Reg. 10,218 (February 13, 2013); Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, 76 Fed. Reg. 36,287 (June 22, 2011).

<sup>8</sup> As the CFTC has noted, “many foreign jurisdictions have been implementing OTC derivatives reforms in an incremental manner,” and “because many jurisdictions are in the process of finalizing and implementing their derivatives reforms incrementally,” the CFTC's determinations, discussed *infra* text

its regulations<sup>9</sup> and the timeframe that the CFTC has set for implementation of that guidance, December 21 of this year may be a key date for many market participants.<sup>10</sup> On that day, according to the CFTC's current timetable, many of the CFTC's rules may become applicable to many transactions involving U.S. counterparties acting through non-U.S. offices or non-U.S. swap dealers registered with the CFTC by reason of their substantial U.S.-facing swap activities.<sup>11</sup>

Under the terms of the CFTC exemptive order issued on July 22, 2013, many such market participants are exempted from compliance with a number of the CFTC's rules until the earlier of December 21, 2013 or thirty days following the issuance of an applicable substituted compliance determination.<sup>12</sup> As detailed below, a substituted compliance determination is an assessment by the CFTC that the relevant foreign jurisdiction's rules are sufficiently comprehensive and comparable to the CFTC's own rules to be followed in lieu of the CFTC's rules.<sup>13</sup>

The CFTC's timeframe, and the uncertain prospects of such substituted compliance determinations,<sup>14</sup> have put many market participants in an uncomfortable position.

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accompanying notes 38–50, as to which foreign rules are sufficiently comprehensive and comparable to the CFTC's own rules “may need to take into account the timing of regulatory reforms that have been proposed or finalized, but not yet implemented.” Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292, 45,343–44 (July 26, 2013) (to be codified at 17 C.F.R. § 1). For an analysis of one area in which there is a significant difference in timing between U.S. rules and analogous foreign rules, see James E. Schwartz, Marissa N. Golden & Robert J. Dilworth, *First Steps on the Path Forward*, 32 INT'L FIN. L. REV. 36, 36–37 (2013), available at <http://www.iflr.com/Article/3247985/The-path-forward-for-EU-US-derivatives-regulation.html> (analyzing the status of the trade execution mandate in the U.S. and the EU, and noting that while the CFTC's mandate will be in effect shortly, the EU's is not expected to be in place until possibly as late as 2016).

<sup>9</sup> See Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292.

<sup>10</sup> See Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 43,785, 43,794–95 (July 22, 2013) (stating that numerous requirements for certain non-U.S. market participants and certain non-U.S. branches of U.S. swap dealers will go into effect on the earlier of December 21, 2013 or 30 days after the issuance of an applicable substituted compliance determination).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* at 43,789.

<sup>14</sup> Even close followers of regulatory matters could be forgiven for not recognizing the words “substituted compliance” when the CFTC used and defined the term in its 2012 proposed interpretive guidance regarding cross-border matters. See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41214, 41229 (proposed July 12, 2012). The term appears to have its origins in a seminal 2007 article in the Harvard International Law Journal, in which the authors argued that foreign stock exchanges and broker-dealers should be able to provide services in the United States “based on their compliance with substantively comparable foreign securities regulations and laws and supervision by a foreign securities regulator with oversight powers and a regulatory and enforcement

Because foreign swaps regulations are generally in a less advanced state than the CFTC's own rules, the extent to which substituted compliance determinations may even be possible by December 21 is not entirely clear. Where the corresponding non-U.S. rules are in place, it is unclear whether the CFTC will actually make substituted compliance determinations related to those rules. Where the corresponding foreign rules are not yet in place, these could come into effect shortly after December 21. If the CFTC on December 21 requires compliance with U.S. rules, this could mean that market participants will be required to comply with both sets of rules. Moreover, the CFTC's cross-border guidance contemplates requirement-by-requirement determinations on comparability of non-U.S. swaps regulatory regimes.<sup>15</sup> This mix-and-match approach makes it likely that many market participants will be required to comply both with certain (as yet unspecified) elements of the CFTC's rules and certain (as yet unspecified) elements of non-U.S. regulatory regimes.

Issues in the cross-border market brought about by the CFTC's mandatory clearing requirement, which went into effect on October 9 of this year for many market participants,<sup>16</sup> indicate that a significant delay in substituted compliance determinations could be the worst outcome for the U.S. swaps market. Upon the CFTC's clearing requirement becoming effective, the absence of a substituted compliance determination with respect to clearing prompted certain non-U.S. market participants to avoid dealing with U.S. swap dealers.<sup>17</sup> This has moved swap trading activities with non-U.S. market participants into non-U.S. affiliates.<sup>18</sup> A further, related concern that may be limiting trading by swap dealers through their non-U.S. branches, in the absence of a substituted compliance determination, is that if transactions entered into by such branches are subject

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philosophy substantively similar to the SEC's," instead of based on compliance with U.S. securities regulations and SEC supervision. Ethiopis Tafara & Robert J. Peterson, *A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L.J. 31, 32 (2007). Although the SEC signed a "mutual recognition agreement" with Australian regulators in 2008, it apparently shelved its plans to increase mutual recognition activities shortly thereafter, driven partly by the financial crisis. See Jerry Ellig & Housman B. Shadab, *Talking the Talk, or Walking the Walk? Outcome-Based Regulation of Transnational Investment*, 41 N.Y.U. J. INT'L L. & POL. 265, 268 (2009).

<sup>15</sup> See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. at 41,229.

<sup>16</sup> See Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. at 43,794.

<sup>17</sup> See, e.g., Anish Puaar, *EU Firms Forced to Take Action to Avoid US Clearing Rules*, FINANCIAL NEWS (October 10, 2013), <http://www.efinancialnews.com/story/2013-10-10/eu-firms-forced-to-take-action-to-avoid-us-clearing-rules?ea9c8a2de0ee111045601ab04d673622> ("[S]ome European buy-side firms are not prepared to clear their swap trades, leading them to either switch to US banks' European entities or stop trading with them altogether.").

<sup>18</sup> See *id.*

to mandatory clearing, they may soon also be subject to U.S. rules which in certain cases will likely require execution on a swap execution facility.<sup>19</sup>

The CFTC's approach to cross-border matters is complex and nuanced. It divides the CFTC's requirements into two separate categories: Transaction-Level Requirements and Entity-Level Requirements.<sup>20</sup> It then splits each of these categories into two subcategories.<sup>21</sup> The Transaction-Level requirements are split into Category A Transaction-Level Requirements (which include clearing and swap processing, trade execution, swap trading relationship documentation, and real-time public reporting of swap data) and Category B Transaction-Level Requirements (which consist of the CFTC's external business conduct standards).<sup>22</sup> Similarly, the Entity-Level Requirements are divided into First Category Entity-Level Requirements (which include capital adequacy, chief compliance officer, risk management, and most swap data recordkeeping) and Second Category Entity-Level Requirements (which include, among others, swap data repository reporting and reporting for large traders of swaps linked to certain commodities).<sup>23</sup>

The CFTC's regime, with respect to the Transaction-Level Requirements, may be summarized—albeit in a vastly simplified manner—as a continuum.<sup>24</sup> At one end of the spectrum such requirements will apply to swaps involving a CFTC-registered swap dealer (whether or not a U.S. Person<sup>25</sup>) acting through a U.S. branch or a U.S. Person

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<sup>19</sup> The Dodd-Frank Act amended the Commodity Exchange Act, 7 U.S.C. §§ 1–27f (2012), to provide that swaps that the CFTC subjects to mandatory clearing must be executed on either a swap execution facility or a designated contract market, unless no swap execution facility or designated contract market makes the swap available to trade. *See* Dodd-Frank Act at § 723(a)(8); 7 U.S.C. § 2(h)(8). Mandatory execution on a swap execution facility for certain transactions is expected to commence in the near future, as swap execution facilities have started submitting “made available to trade” determinations, which the CFTC will consider pursuant to its rules. *See* Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 Fed. Reg. 33,606 (June 4, 2013) (to be codified at C.F.R. pts. 37 and 38); Provisions Common to Registered Entities, 76 Fed. Reg. 44,776, 44,793–96 (July 27, 2011) (to be codified at C.F.R. pt. 40); Silla Brush, *Javelin Files to Trade Interest-Rate Swaps, Spurring Sef Shift*, BLOOMBERG (October 19, 2013), <http://www.bloomberg.com/news/2013-10-19/javelin-files-to-trade-interest-rate-swaps-spurring-sef-shift.html>.

<sup>20</sup> *See* Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292, 45,331–40 (July 26, 2013) (to be codified at 17 C.F.R. § 1).

<sup>21</sup> *See id.* at 45,335–36.

<sup>22</sup> *See id.* at 45,336.

<sup>23</sup> *See id.* at 45,335–36.

<sup>24</sup> *See id.* at 45,369 apps. D & E.

<sup>25</sup> The CFTC's cross-border guidance defines a U.S. Person “generally to include, but not be limited to: (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 enterprise similar

other than a swap dealer.<sup>26</sup> Contrariwise, at the other end of the spectrum, such requirements will not apply (unless one party is a swap dealer acting through a U.S. branch<sup>27</sup> or a U.S. Person<sup>28</sup>) to swaps involving a party that is not a U.S. Person and not otherwise linked to the U.S. as a “guaranteed affiliate”<sup>29</sup> or an “affiliate conduit.”<sup>30</sup> With respect to swaps that do not fall at either end of the spectrum, such as swaps involving a CFTC-registered swap dealer acting through a non-U.S. branch, a substituted compliance determination is possible in relation to many such requirements.<sup>31</sup> With respect to the Entity-

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to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a ‘legal entity’), in each case that is 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; (iv) any pension plan for the employees, officers or principals of a legal entity described in prong (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 commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), 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; (vii) 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 prong (i), (ii), (iii), (iv), or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and (viii) 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 prong (i), (ii), (iii), (iv), (v), (vi), or (vii).” *Id.* at 45,316–17.

<sup>26</sup> *See id.* at 45,369 apps. D & E.

<sup>27</sup> *See id.* at 45,350 n.513.

<sup>28</sup> *See id.* at 45,369 apps. D & E.

<sup>29</sup> A “guaranteed affiliate” is a “non-U.S. person that is an affiliate of a U.S. person and that is guaranteed by a U.S. person.” *Id.* at 45,318.

<sup>30</sup> *See id.* at 45,369 apps. D & E. The CFTC has not precisely defined “affiliate conduit” but has stated that certain factors are relevant to the consideration of whether a non-U.S. Person constitutes an affiliate conduit. *See id.* at 45,369 app. D n.1. Such factors include “whether (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person controls, is controlled by, or is under common control with the U.S. person; (iii) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with such U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates; and (iv) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person.” *Id.*

<sup>31</sup> *See id.* at 45,369 app. D. Substituted compliance does not apply with respect to the external business conduct rules that constitute the Category B Transaction-Level Requirements. *See id.* at 45,369 app. E. This may be partly because such rules, which require dealers in certain transactions to provide pre-trade and daily mid-market marks, and, upon request, scenario analyses, are not expected to have analogs in many non-U.S. jurisdictions. *See Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties*, 77 Fed. Reg. 9,734 (February 17, 2012) (to be codified at 17 C.F.R. pts. 4 and 23).

Level Requirements, for U.S. dealers, such requirements will apply, and for non-U.S. CFTC-registered swap dealers, substituted compliance determinations will be possible for many such requirements.<sup>32</sup>

On its face, this approach has a certain logic to it—the more closely linked to the U.S. a counterparty or transaction is, the more likely it is that the CFTC’s rules or similar rules, by way of substituted compliance, should apply. In practice, however, the approach seems likely to cause significant issues in the absence of substantial and close coordination among regulators—which, to date, does not appear overly abundant.<sup>33</sup>

These issues can be illustrated using the first cross-border example above, a transaction involving a U.S. swap dealer acting through a U.S. branch. If the swap were transacted between, for example, the New York head office of a U.S. swap dealer and the Paris head office of a French swap dealer, the EU’s rules should presumably govern the transaction to the same extent the U.S. rules do. If the EU were to take a position parallel to that of the CFTC and require the application of the EU’s rules to a transaction involving an EU swap dealer, the transaction would be governed by both U.S. and EU rules. Any material differences between these two sets of rules could be a significant issue for the parties to such a transaction and, by extension, for the swaps market as a whole.

Even in this relatively straightforward case, some understanding among relevant regulators with regard to cross-border swaps would seem highly desirable. The genius of the CFTC’s approach is that, by implementing its rules first and, by means of substituted compliance determinations, setting a bar for other regulators to reach, it has claimed the power to shape significantly discussions in foreign jurisdictions regarding the substance of swaps regulations. On the other hand, by making its own rules without agreements from other regulators and then delaying compliance dates, the CFTC is putting pressure on other regulators to fall into line to avoid causing conflict.<sup>34</sup> Given the need for cooperation, this approach seems incongruous and even slightly imperious.<sup>35</sup> There is a distinct lack of an institutional framework for making international regulatory swaps deter-

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<sup>32</sup> See Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. at 45,368.

<sup>33</sup> Even with regard to the EU, one of the only foreign regulators with which the CFTC has appeared to have tangibly productive discussions, see *infra* n.51–53 and accompanying text, the lack of a detailed agreement between regulators is reportedly harming the negotiation of a U.S.-EU free trade agreement. Luke Baker & Stephen Adler, *Derivatives Dispute Harming EU-U.S. Free-Trade Talks*, REUTERS (October 29, 2013), <http://uk.reuters.com/article/2013/10/29/uk-eu-us-regulation-idUKBRE99S0G220131029>.

<sup>34</sup> See Edward F. Greene & Ilona Potiha, *Issues in the Extraterritorial Application of Dodd-Frank's Derivatives and Clearing Rules, the Impact on Global Markets and the Inevitability of Cross-Border and US Domestic Coordination*, 8 Cap. Mkts. L.J. 338, 353 (2013).

<sup>35</sup> See *id.*

minations,<sup>36</sup> in the absence of which the CFTC contemplates that foreign regulators, industry groups and even individual market participants may request a substituted compliance determination.<sup>37</sup>

Even for requirements in which substituted compliance is possible, the CFTC's guidance is unclear. It offers scant insight into whether the CFTC will in fact make a substituted compliance determination, and, if it does make such a determination, what conditions it may impose on market participants seeking to rely on such determination. In order for a party to a swap to substitute compliance with the requirements of a non-U.S. jurisdiction for compliance with the CFTC's own requirements, the CFTC must determine that the foreign jurisdiction's requirements "are comparable with and as comprehensive as the corollary area(s) of regulatory obligations encompassed by the Entity- and Transaction-Level Requirements."<sup>38</sup> However, they need not be "identical requirements to those established under the Dodd-Frank Act."<sup>39</sup> In cases where the CFTC does not find foreign laws and regulations to merit substituted compliance, the relevant non-U.S. Person or foreign branch of a U.S. Person "may be required to comply" with the applicable CFTC regulations.<sup>40</sup>

The CFTC may consider both swap-specific regulations of the relevant foreign regulator and other provisions that may "achieve comparable and comprehensive regulatory objectives as the Dodd-Frank Act requirements, but on a more general, entity-wide, or prudential, basis."<sup>41</sup> Moreover, the CFTC may vary its approach depending on the particular foreign jurisdiction.<sup>42</sup> In certain cases it may seek to influence the contents of foreign regulations by "coordinating with the foreign regulators in developing appropriate regulatory changes or new regulations, particularly where changes or new regulations already are being considered or proposed by the foreign regulators or legislative bodies."<sup>43</sup> In other cases, the CFTC "may include conditions that take into account timing and other

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<sup>36</sup> *See id.* at 386.

<sup>37</sup> *See* Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. at 45,344.

<sup>38</sup> *Id.* at 45,342.

<sup>39</sup> *Id.* at 45,342–43. "In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the [Commodity Exchange Act] and Commission regulations, the Commission will take into consideration all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and objectives of the relevant regulatory requirement(s), the comprehensiveness of the foreign regulator's supervisory compliance program, as well as the home jurisdiction's authority to support and enforce its oversight of the registrant." *Id.* at 45,343.

<sup>40</sup> *Id.* at 45,344.

<sup>41</sup> *Id.* at 45,343.

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 45,343–44.

issues related to coordinating the implementation of reform efforts across jurisdictions”<sup>44</sup> or otherwise “include in its substituted compliance determination a description of the means by which certain swaps market participants can achieve substituted compliance within the construct of the foreign regulatory regime.”<sup>45</sup>

The CFTC does not intend to make substituted compliance determination with respect to foreign regulations as a whole, but instead with respect to particular foreign regulations.<sup>46</sup> Partly because “many foreign jurisdictions” are in the process of implementing derivatives market reforms “in an incremental manner,” a “comparability analysis will be based on a comparison of specific foreign requirements against specific” provisions of the Dodd-Frank Act and CFTC regulations for each of the categories of regulatory obligations for which substituted compliance may be available.<sup>47</sup> As a result, the swap counterparties to whom substituted compliance may apply will likely be expected to comply with a mixture of U.S. and non-U.S. regulations.

At the same time, however, the CFTC, somewhat puzzlingly, has stated that it expects to “rely upon an outcomes-based approach to determine whether these requirements achieve the same regulatory objectives of the Dodd-Frank Act.”<sup>48</sup> In this context, “outcomes-based” is often understood to refer not to what regulations state, but instead to the actual consequences that they cause.<sup>49</sup> It is not clear why an outcomes-based approach would necessitate a requirement-by-requirement review such as the CFTC contemplates. The SEC, in contrast to the CFTC, stated in its proposed cross-border rules that it would not focus on “a rule-by-rule comparison” but instead “on regulatory outcomes” with a “holistic approach.”<sup>50</sup>

If the CFTC guidance regarding substituted compliance sounds vague enough to support whatever ad hoc arrangement the regulator believes is warranted in any particular case, perhaps that is exactly the point. A commitment to the substituted compliance regime did not prevent the CFTC from agreeing to another approach entirely just days be-

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<sup>44</sup> *Id.* at 45,343.

<sup>45</sup> *Id.* at 45,344.

<sup>46</sup> *See id.* at 45,343.

<sup>47</sup> *Id.* at 45,343–44.

<sup>48</sup> *Id.* at 45,342.

<sup>49</sup> *See* Ellig & Shadab, *supra* note 14, at 282 (“Outcomes are the actual benefits created, or harms avoided, for citizens. . . . [R]egulations issued are outputs that may affect outcomes, but they are not outcomes.”).

<sup>50</sup> Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 Fed. Reg. 30,968, 30,975 (proposed May 23, 2013) (to be codified at 17 C.F.R. pts. 240, 242, and 249).

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fore the release of its cross-border guidance.<sup>51</sup> In one of the relatively few concrete signs of cooperation with foreign regulators, the CFTC and EU authorities agreed in July of 2013 to an understanding known as the “path forward.”<sup>52</sup> In that understanding, they agreed to a “stricter-rule-applies” approach with regard to mandatory clearing, one of the fundamental reforms sought by the G-20.<sup>53</sup> This approach, not referenced in the CFTC’s cross-border guidance, would be applicable “where exemptions from mandatory clearing would exist in one jurisdiction but not in the other.”<sup>54</sup> Although this approach may indeed “prevent loopholes and any potential for regulatory arbitrage,”<sup>55</sup> imposing stricter regulations on cross-border swap transactions than on transactions undertaken in a single jurisdiction would seem not to promote a liquid international market.

In the longer run, it seems likely that the swaps regulations of the major jurisdictions will converge. For the foreseeable future, however, both before and after December 21, questions will continue to abound, and the swaps market will continue to be burdened by regulatory uncertainty. As it was the G-20 process that delineated and put in process the swaps market reforms in G-20 member nations, international bodies such as the Basel Committee on Banking Supervision and the Financial Stability Board could likely play a productive role in minimizing confusion and disruption and in bringing much needed clarity to the swaps market.<sup>56</sup>

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<sup>51</sup> See Press Release, U.S. Commodity Future Trading Commission, The European Commission and the CFTC Reach a Common Path Forward on Derivatives (July 11, 2013), *available at* <http://www.cftc.gov/PressRoom/PressReleases/pr6640-13>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Greene & Potiha, *supra* note 34, at 385–92.