

Finally, I would like to thank the staff of DCR for their diligence in completing this rulemaking.

#### Appendix 4—Concurring Statement of Commissioner Rostin Behnam

I support today's adoption of amendments to the exemption from the swap clearing requirement for certain affiliated entities within a corporate group. The amendments that update the conditions for the exemption incorporate several years of observation and analysis to build upon its utility within the global regulatory landscape, while affirming the Commission's appropriate use of its public interest authority under section 4(c) of the Commodity Exchange Act. It can be tempting to use somewhat fluid and undeniably desirable objectives such as the promotion of responsible economic and financial innovation and fair competition to support all manner of regulatory changes. And I have not hesitated to highlight my own concerns for the imprudent use of 4(c) exemptive authority. However, I am pleased that when it comes to the risks associated with U.S. firms entering into uncleared swaps with non-U.S. affiliates or evading the clearing requirement altogether, the Commission has consistently demonstrated that its reliance on the 4(c) authority provides the checks to ensure that the policy and outcomes remain legally sound and rational.

I support today's final rule, as I did the proposal, because it provides legal certainty, benefits from careful analysis and consideration of the data as well as the global regulatory landscape as it has developed, and leaves in place critical tools for Commission monitoring, oversight, and enforcement.<sup>1</sup> However, I am mindful that guardrails put firmly in place by today's amendments as a substitute for clearing outward-facing swaps may produce additional risk to external creditors and/or third parties, and that there may be an increased likelihood of risk to the financial system resulting from the availability of the exemption. While I encouraged interested parties to comment on this aspect of the exemption—the alternative compliance framework—the Commission did not receive any responsive comments.<sup>2</sup> Without comments, the Commission's findings and conclusions remain neither vigorously supported nor expressly undermined, and we will continue to discharge our regulatory responsibilities, remaining quick to respond as we closely monitor the data and global regulatory developments to ensure that the exemption does not add unnecessary and preventable risk to the U.S. financial system.

I thank staff from the Division of Clearing and Risk for their thoughtful responses to my questions, and for making edits that reflect my comments and suggestions.

<sup>1</sup> Exemption from the Swap Clearing Requirement for Certain Affiliated Entities, 84 FR 70446, 70460–1 (proposed Dec. 23, 2019).

<sup>2</sup> *Id.* at 70461.

#### Appendix 5—Statement of Commissioner Dan M. Berkovitz

I support today's final rule making permanent the alternative compliance frameworks for certain swaps involving the foreign affiliates of U.S. firms and their non-U.S. counterparties. The final rule upholds the Dodd-Frank Act's clearing mandate, deters evasion, and protects against systemic risk from swaps executed overseas by foreign affiliates. The final rule, which adopts the rule as proposed,<sup>1</sup> codifies existing practice and addresses anti-evasion provisions governing inter-affiliate swaps that the Commission first issued in 2013 and later extended through staff no-action letters.

Commission regulations provide a limited, conditional "Inter-Affiliate Exemption" from clearing for swaps between certain affiliate counterparties, including U.S. firms and their foreign affiliates. Notably, the Inter-Affiliate Exemption includes an important "Outward-Facing Swaps Condition" to prevent U.S. firms from routing swaps through foreign affiliates to evade the Commission's clearing requirement.<sup>2</sup> The Outward-Facing Swaps Condition allows outward-facing swaps to be cleared pursuant to a comparable and comprehensive foreign clearing regime.

Where the Commission has not made a comparability determination, the alternative compliance frameworks permit the foreign affiliate to exchange full, daily variation margin for the swap with its U.S. affiliate or its non-U.S. counterparty, rather than clearing the outward-facing swap. The alternative compliance frameworks preserve the competitiveness of the foreign affiliates of U.S. firms without importing significant risks into the U.S. Today's final rule makes the alternative compliance frameworks permanent, with certain modifications.<sup>3</sup>

I support the final rule's emphasis on clearing, anti-evasion, and systemic risk. The final rule also expands the jurisdictions subject to one of the alternative compliance frameworks to include additional jurisdictions that have adopted and implemented their respective domestic clearing mandates. By extending and making permanent the alternative compliance frameworks, the final rule addresses the lack of comparability determinations for foreign clearing regimes, while ensuring the continued operation of anti-evasion and anti-systemic risk provisions in the Commission's rules.

I thank staff of the Division of Clearing and Risk for their work on this final rule and for their effective cooperation with my office.

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<sup>1</sup> Exemption From the Swap Clearing Requirement for Certain Affiliated Entities—Alternative Compliance Frameworks for Anti-Evasion Measures, 84 FR 70446 (Dec. 23, 2019).

<sup>2</sup> The Outward-Facing Swaps Condition requires the foreign affiliates of U.S. firms to clear their outward-facing swaps if such swaps are subject to the Commission's clearing requirement and entered into with unaffiliated counterparties in foreign jurisdictions.

<sup>3</sup> The original alternative compliance frameworks expired in 2014, but have been repeatedly extended through no-action letters.

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

#### 19 CFR Chapter I

#### Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico

**AGENCY:** Office of the Secretary, U.S. Department of Homeland Security; U.S. Customs and Border Protection, U.S. Department of Homeland Security.

**ACTION:** Notification of continuation of temporary travel restrictions.

**SUMMARY:** This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to "essential travel," as further defined in this document.

**DATES:** These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on July 22, 2020 and will remain in effect until 11:59 p.m. EDT on August 20, 2020.

**FOR FURTHER INFORMATION CONTACT:** Alyce Modesto, Office of Field Operations, U.S. Customs and Border Protection (CBP) at 202–344–3788.

#### SUPPLEMENTARY INFORMATION:

##### Background

On March 24, 2020, DHS published notice of the Secretary's decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to "essential travel," as further defined in that document.<sup>1</sup> The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, the Secretary had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico posed a "specific threat to human life or national interests." The Secretary later published a series of

<sup>1</sup> 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of the Secretary's decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to "essential travel," as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

notifications continuing such limitations on travel until 11:59 p.m. EDT on July 21, 2020.<sup>2</sup>

The Secretary has continued to monitor and respond to the COVID-19 pandemic. As of July 16, there are over 13.3 million confirmed cases globally, with over 580,000 confirmed deaths.<sup>3</sup> There are over 3.4 million confirmed and probable cases within the United States,<sup>4</sup> over 311,000 confirmed cases in Mexico,<sup>5</sup> and over 108,000 confirmed cases in Canada.<sup>6</sup>

### Notice of Action

Given the outbreak and continued transmission and spread of COVID-19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico poses additional risk of transmission and spread of the virus associated with COVID-19 and places the populace of both nations at increased risk of contracting the virus associated with COVID-19. Moreover, given the sustained human-to-human transmission of the virus, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID-19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),<sup>7</sup> I have

determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (e.g., to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (e.g., individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (e.g., government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (e.g., truck drivers

supporting the movement of cargo between the United States and Mexico);

- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (e.g., sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on August 20, 2020. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

**Chad R. Mizelle,**

*Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.*

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<sup>2</sup> See 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of the Secretary’s decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

<sup>3</sup> WHO, Coronavirus disease 2019 (COVID-19) Situation Report—178 (July 16, 2020), available at [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200716-covid-19-sitrep-178.pdf?sfvrsn=28ee165b\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200716-covid-19-sitrep-178.pdf?sfvrsn=28ee165b_2).

<sup>4</sup> CDC, Cases of COVID-19 in the U.S. (last updated July 16, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

<sup>5</sup> WHO, Coronavirus disease 2019 (COVID-19) Situation Report—178 (July 16, 2020).

<sup>6</sup> *Id.*

<sup>7</sup> 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*)

or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. See 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. See Treas. Dep’t Order No. 100-16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).