



U.S. COMMODITY FUTURES TRADING COMMISSION

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No-Action
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Division of Clearing and Risk

No-Action Relief for Swaps Between Affiliated Counterparties That Are Neither Swap Dealers Nor Major Swap Participants from Certain Swap Data Reporting Requirements Under Parts 45, 46, and Regulation 50.50(b) of the Commission's Regulations

Ladies and Gentlemen:

This letter responds to requests received from multiple parties,¹ by the Division of Market Oversight (“DMO”) and the Division of Clearing and Risk (“DCR”) (collectively the “Divisions”) of the Commodity Futures Trading Commission (the “Commission”), to provide no-action relief for certain market participants who are neither swap dealers (“SDs”) nor major swap participants (“MSPs”) from certain swap data reporting requirements under parts 45 and 46 of the Commission’s regulations, and the reporting requirements related to the end-user exception from required clearing under regulation 50.50(b) of the Commission’s regulations, for swaps entered into between affiliates, subject to certain conditions.

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)² added to the Commodity Exchange Act (“CEA”)³ provisions requiring the retention and reporting of data relating to swaps. Pursuant to these statutory provisions, the Commission promulgated part 45 of its regulations,⁴ which establishes ongoing swap data recordkeeping and

¹ This letter responds to, but does not fully grant all no-action relief requested in, the following: Letter from Gibson, Dunn & Crutcher LLP on behalf of the Coalition for Derivatives End-Users (Feb. 26, 2013); Letter from Sidley Austin LLP on behalf of The Western Union Company (Mar. 1, 2013); Letter from Mondelēz International (Mar. 26, 2013); Letter from Sutherland Asbill & Brennan LLP on behalf of the Coca-Cola Company (Mar. 31, 2013); Letter from DLA Piper LLP on behalf of “a number of large public companies whose businesses are predominantly non-financial in nature, and whose parent is organized in, and whose principal place of business is located in, the United States.” (Apr. 2, 2013)

² Pub. L. 111-203, 124 Stat. 1376 (2010).

³ 7 U.S.C. § 1, *et seq.*

⁴ 17 C.F.R. pt. 45 (2012); Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012).

reporting requirements, and part 46,⁵ which establishes recordkeeping and reporting requirements for historical swaps. Part 45, among other requirements, sets forth obligations to report swap creation data (*i.e.*, data relating to the primary economic terms and confirmation of a swap) and certain swap continuation data to a swap data repository (“SDR”).⁶ Part 46, among other requirements, sets forth obligations to report certain data for pre-enactment swaps (swaps entered into prior to July 21, 2010, the terms of which have not expired as of that date) and transition swaps (swaps entered into on or after July 21, 2010 and prior to the applicable compliance date for swap data reporting) to an SDR.

Pursuant to section 2(h)(7) of the CEA and § 50.50 of the Commission’s regulations, counterparties to a swap that is subject to the clearing requirement⁷ may elect the end-user exception from required clearing provided that one of the two counterparties is not a financial entity, as defined in section 2(h)(7)(C) of the CEA, and the non-financial counterparty otherwise meets the requirements of § 50.50 of the Commission’s regulations. Thus, the end-user exception from required clearing may be elected for swaps that are entered into between two non-financial entities, or between a non-financial entity and a financial entity. As a further condition to electing the end-user exception, § 50.50(b) requires that the reporting counterparty, as determined in accordance with § 45.8, report certain information, pertaining to the non-financial entity, to a registered SDR (or if no registered SDR is available to receive the information, to the Commission) including a notice of the election of the exception.

On April 1, 2013, the Commission adopted final rules that provide a clearing exemption for swaps between certain affiliated entities, subject to several conditions.⁸ While affiliated counterparties, as defined in § 50.52(a) of the final rules, that are either financial entities or non-financial entities may elect the inter-affiliate exemption from required clearing, the Commission anticipates that the inter-affiliate exemption primarily will be elected where both of the swap counterparties are financial entities, and thus are not eligible to claim the end-user exception under § 50.50.⁹ Among other conditions, the inter-affiliate exemption requires the reporting counterparty, as determined in accordance with § 45.8, to report certain information, pertaining to both affiliated counterparties, to a registered SDR (or if no registered SDR is available to

⁵ Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (Jun. 12, 2012) (to be codified at 17 C.F.R. pt. 46).

⁶ See 17 C.F.R. §§ 45.3 (creation data) and 45.4 (continuation data).

⁷ See section 2(h)(1)(A) of the CEA and Part 50 of the Commission’s regulations.

⁸ Clearing Exemption for Swaps Between Certain Affiliated Entities (Apr. 1, 2013), available at <http://www.cftc.gov/uclm/groups/public/@newsroom/documents/file/federalregister040113.pdf>.

⁹ Given the additional conditions required under the inter-affiliate exemption from required clearing pursuant § 50.52, unless a non-financial entity is using intra-group swaps for purposes other than hedging or mitigating commercial risk, such non-financial entity is more likely to use the end-user exception pursuant to § 50.50 from required clearing, rather than the inter-affiliate exemption from required clearing, when electing not to clear its intra-group swaps.

receive the information, to the Commission) including a notice of the election of the exemption.¹⁰

The relief described in this letter provides additional conditional relief to certain entities other than SDs or MSPs with respect to certain swaps entered into between affiliated entities.

II. Requests for No-Action Relief

The Divisions have received multiple requests from market participants to provide no-action relief from swap data reporting obligations provided in parts 45 and 46 of the Commission's regulations and the reporting requirements related to the end-user exception from required clearing under regulation 50.50(b), for swaps between affiliates within the same corporate group ("intra-group swaps"). Market participants have submitted that such intra-group swaps are used only for managing risk within a corporate group, and therefore do not increase overall systemic risk or warrant the same reporting requirements as external swaps (*i.e.*, swaps with unaffiliated entities) ("outward-facing swaps"). In addition, certain market participants have reported that compliance with parts 45 and 46 of the Commission's reporting rules for intra-group swaps is proving difficult and extremely costly for market participants that lack the resources and dedicated staff of more sophisticated financial entities such as SDs and MSPs.

Accordingly, subject to the terms and conditions set forth below, the Divisions are granting conditional no-action relief to certain entities other than SDs or MSPs from certain reporting obligations under part 45 and part 46 of the Commission's regulations and the reporting requirements related to the end-user exception from required clearing under regulation 50.50(b) with respect to certain intra-group swaps.

As described in section III.A below, the Divisions are granting conditional no-action relief from certain requirements of part 45 and the reporting requirements related to the end-user exception from required clearing under regulation 50.50(b) for certain intra-group swaps involving wholly-owned affiliates. For reporting counterparties that do not qualify for the relief described in section III.A below, the Divisions are granting alternative relief for intra-group swaps involving majority-owned affiliates, which will permit qualifying reporting counterparties to report certain intra-group swaps on a quarterly basis under part 45 and regulation 50.50(b), as described in section III.B below.

In addition, DMO is granting no-action relief from reporting obligations under part 46 of the Commission's regulations for all reporting counterparties and transactions that satisfy certain conditions listed in either sections III.A or III.B below, as described in section IV below.¹¹

¹⁰ The reporting requirements under § 50.52(c) are nearly identical to the reporting requirements of § 50.50(b), except that the information required to be reported under the final rules adopting the inter-affiliate exemption pertains to both affiliate counterparties. Reporting pursuant to § 50.52(c) begins 60 days after the final rulemaking is published in the Federal Register.

The relief described in this letter does not apply to any swaps for which swap counterparties elect the exemption from required clearing pursuant to the terms of regulation 50.52. Such swaps are required to be reported to an SDR under regulation 50.52(c), and by implication, part 45.

III. Part 45 and Regulation 50.50(b) Relief

A. Relief for Non-SD/MSPs from Reporting of Intra-Group Swaps Involving Wholly-Owned Subsidiaries under Part 45 and Regulation 50.50(b)

The Divisions will not recommend that the Commission commence an enforcement action against a “reporting counterparty,” as defined in part 45 of the Commission’s regulations, for failure to comply with its obligations to report data for certain intra-group swaps to an SDR pursuant to §§ 45.3(d)(1), 45.3(d)(3), 45.4(c)(1)(ii), 45.4(c)(2)(ii), 45.5, or 50.50(b) of the Commission’s regulations,¹² subject to each of the following conditions:

1. This relief is limited to swaps between affiliated counterparties where (i) one affiliated counterparty, directly or indirectly, holds a 100% ownership interest in the other counterparty, and the affiliated counterparty that holds the 100% ownership interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the 100%-owned counterparty; or (ii) a third party, directly or indirectly, holds a 100% ownership interest in both affiliated counterparties, and the third party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of both of the affiliated counterparties. For purposes of this condition, an affiliated counterparty or third party directly or indirectly holds a 100% ownership interest if it directly or indirectly holds 100% of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, 100% of the capital of a partnership.
2. This relief does not apply to any swap entered into by an affiliated counterparty that is (i) a swap dealer or a major swap participant;¹³ (ii) affiliated with a swap dealer or

¹¹ Relief from § 50.50(b) is not necessary in this context because reporting obligations under part 46 only apply to swaps entered into prior to April 10, 2013, which is prior to any relevant compliance date for a market participant to elect an exception or exemption from required clearing.

¹² This relief applies only with respect to §§ 45.3(d)(1), 45.3(d)(3), 45.4(c)(1)(ii), 45.4(c)(2)(ii), 45.5, and 50.50(b) of the Commission’s regulations. It does not apply to any other regulation, including but not limited to, the recordkeeping requirements under §§ 45.2 and 45.6 of the Commission’s regulations.

¹³ For purposes of this letter, the terms “swap dealer” and “major swap participant” are defined in CEA section 1a and § 1.3 of the Commission’s regulations.

a major swap participant;¹⁴ or (iii) affiliated with a financial company that has been designated as systemically important by the Financial Stability Oversight Council pursuant to section 113 of the Dodd-Frank Act.

3. This relief does not apply to any swap executed on or pursuant to the rules of a designated contract market, a swap execution facility, a foreign board of trade that is either registered with the Commission pursuant to section 4(b) of the CEA and part 48 of the Commission's regulations or operating pursuant to no-action relief granted by the staff of the Commission, a trading facility,¹⁵ or any other trading platform where the orders of the affiliated counterparties may be exposed to potential execution against unaffiliated counterparties.
4. This relief does not apply to any swap that either affiliated counterparty submits for clearing to a derivatives clearing organization.
5. This relief does not apply to any swap for which both affiliated counterparties elect the exemption from required clearing pursuant to § 50.52. The reporting requirements of § 50.52(c) and the applicable part 45 requirements shall apply to all such swaps.¹⁶
6. All swaps entered into between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR registered with the Commission, pursuant to, or as if pursuant to, parts 43, 45, and 46 of the Commission's regulations.¹⁷
7. A reporting counterparty relying on this relief must maintain records of all swap data as required by part 45 of the Commission's regulations. In addition, the reporting counterparty must maintain, as part of such records, internally generated swap identifiers for each swap subject to this relief.¹⁸ The reporting counterparty must

¹⁴ In effect, this condition requires that the affiliated counterparties are not part of a corporate group that includes an affiliate that is a swap dealer or a major swap participant.

¹⁵ For purposes of this letter, "trading facility" is defined in CEA section 1a.

¹⁶ Clearing Exemption for Swaps Between Certain Affiliated Entities (Apr. 1, 2013), available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister040113.pdf>.

¹⁷ Staff clarifies that if the unaffiliated counterparty is the required reporting party under part 45 then the affiliated counterparty may rely on the unaffiliated counterparty to report.

¹⁸ Such internally generated swap identifiers must be sufficient to identify each swap uniquely, and thereby facilitate the aggregation of all data regarding each swap into a single data record that can track the swap over the course of its existence. Such identifier must be an alphanumeric code which is unique in relation to all other such codes generated and assigned to any swaps that are (i) not reported to an SDR in reliance on the no-action relief described section III.A of this letter, and (ii) entered into by the reporting counterparty or any of its affiliated entities. Such internally generated swap identifier will act in lieu of a unique swap identifier ("USI") described in § 45.5 of the Commission's regulations. If, however, a swap that is not reported to an SDR in reliance on this

make all such records available to the Commission for inspection and production promptly upon request, in a reportable form pursuant to §§ 45.2 and 45.6 of the Commission's regulations,¹⁹ or any other form or manner as may be requested by Commission staff.

B. Quarterly Reporting Relief for Non-SD/MSPs from Reporting of Intra-Group Swaps Involving Majority-Owned Subsidiaries under Part 45 and Regulation 50.50(b)

The Divisions will not recommend that the Commission commence an enforcement action against a "reporting counterparty," as defined in part 45 of the Commission's regulations, for failure to comply with its obligations to report data for certain intra-group swaps to an SDR pursuant to §§ 45.3(d)(1), 45.3(d)(3), 45.4(c)(1)(ii), 45.4(c)(2)(ii), or 50.50(b) of the Commission's regulations,²⁰ within the time frames set forth in such regulations, subject to each of the following conditions:

1. This relief is limited to swaps between affiliated counterparties where (i) one affiliated counterparty, directly or indirectly, holds a majority ownership interest in the other counterparty, and the affiliated counterparty that holds the majority ownership interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned counterparty; or (ii) a third party, directly or indirectly, holds a majority ownership interest in both affiliated counterparties, and the third party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of both of the affiliated counterparties. For purposes of this condition, an affiliated counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.
2. This relief does not apply to any swap entered into by an affiliated counterparty that is (i) a swap dealer or a major swap participant; (ii) affiliated with a swap dealer or a major swap participant; or (iii) affiliated with a financial company that has been designated as systemically important by the Financial Stability Oversight Council pursuant to section 113 of the Dodd-Frank Act.

relief must be reported to an SDR in the future (by requirement of the Commission or otherwise), the reporting counterparty will be required to obtain a USI for that swap pursuant to § 45.5.

¹⁹ See 17 C.F.R. §§ 45.2 and 45.6, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136, 2198-2199, 2204-2207 (Jan. 13, 2012).

²⁰ This relief applies only with respect to §§ 45.3(d)(1), 45.3(d)(3), 45.4(c)(1)(ii), 45.4(c)(2)(ii), and 50.50(b) of the Commission's regulations. It does not apply to any other regulation, including but not limited to, the recordkeeping requirements under §§ 45.2, 45.5, and 45.6 of the Commission's regulations.

3. This relief does not apply to any swap executed on or pursuant to the rules of a designated contract market, a swap execution facility, a foreign board of trade that is either registered with the Commission pursuant to section 4(b) of the CEA and part 48 of the Commission's regulations or operating pursuant to no-action relief granted by the staff of the Commission, a trading facility, or any other trading platform where the orders of the affiliated counterparties may be exposed to potential execution against unaffiliated counterparties.
4. This relief does not apply to any swap that either affiliated counterparty submits for clearing to a derivatives clearing organization.
5. This relief does not apply to any swap for which both affiliated counterparties elect the exemption from required clearing pursuant to § 50.52. The reporting requirements of § 50.52(c) and the applicable part 45 requirements shall apply to all such swaps.
6. All swaps entered into between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR registered with the Commission, pursuant to, or as if pursuant to, parts 43, 45, and 46 of the Commission's regulations.²¹
7. A reporting counterparty relying on this relief must maintain records of all swap data as required by part 45 of the Commission's regulations and, in addition, must make such records available to the Commission for inspection and production promptly upon request, in a reportable form pursuant to §§ 45.2, 45.5 and 45.6 of the Commission's regulations, or any other form or manner as may be requested by Commission staff.²²
8. This relief does not apply to any swap that is required to be reported pursuant to part 43 of the Commission's regulations.²³
9. A reporting counterparty relying on this relief must report all swap data to an SDR as described in part 45 of the Commission's regulations, no later than 30 days following the end of each fiscal quarter.²⁴

²¹ Staff clarifies that if the unaffiliated counterparty is the required reporting party under part 45 then the affiliated counterparty may rely on the unaffiliated counterparty to report.

²² See 17 C.F.R. §§ 45.2, 45.5, and 45.6, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136, 2198-2199, 2204-2207 (Jan. 13, 2012).

²³ See Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012).

²⁴ This quarterly reporting condition will commence on June 30, 2013. A reporting counterparty subject to this condition must make an initial quarterly report within 30 days after the end of the first fiscal quarter ending on or after June 30, 2013, and such report must include all swap transaction data required to be reported under part 45 for the period between April 10, 2013 and the end of such fiscal quarter. Subsequent quarterly reports must be

IV. Relief from Part 46 Reporting of Intra-Group Swaps

DMO will not recommend that the Commission commence an enforcement action against a “reporting counterparty,” as defined in part 46 of the Commission’s regulations, for failure to comply with its obligations to report pre-enactment or transition swap data to an SDR as required by §§ 46.3(a) or 46.3(b) of the Commission’s regulations,²⁵ subject to each of the following conditions:

1. In order to rely on this relief for a particular swap, the reporting counterparty must satisfy conditions 1-4 listed in section III.A of this letter, or alternatively, conditions 1-4 listed in section III.B of this letter.
2. A reporting counterparty relying on this part 46 relief must maintain records of all pre-enactment and transition swap data as required by part 46 of the Commission’s regulations, and in addition, must make such records available to the Commission for inspection and production promptly upon request, in a reportable form pursuant to § 46.2 of the Commission’s regulations, or any other form as may be requested by Commission staff.²⁶

V. Conclusion

This letter and the no-action positions taken herein represent the views of the Divisions only, and do not necessarily represent the positions or views of the Commission or of any other division or office of the Commission’s staff. Should the Commission promulgate rules in the future that are in conflict with any no-action relief granted in this letter, any such rules will supersede this letter. The no-action positions taken herein do not excuse affected persons from compliance with real-time public reporting obligations under part 43 of the Commission’s regulations, or any other applicable requirements of the CEA or the regulations thereunder. As with all no-action letters, the Divisions retain the authority to, in their discretion, further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided in this letter.

The no-action relief provided herein contains a collection of information, as that term is defined in the Paperwork Reduction Act. Therefore, a control number for the collection must be obtained from the Office of Management and Budget (“OMB”). In accordance with 44 U.S.C. §

completed no later than 30 days following the end of each fiscal quarter, and include all part 45 swap transaction data for the most recently completed fiscal quarter.

²⁵ This relief applies only with respect to §§ 46.3(a) and 46.3(b) of the Commission’s regulations. Sections 46.3(a) and 46.3(b) require pre-enactment and transition swap data to be reported to an SDR. The relief provided by section IV herein does not apply to any other regulation, including but not limited to the recordkeeping requirements under § 46.2 of the Commission’s regulations.

²⁶ See Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200, 35227-35228 (Jun. 12, 2012) (§ 46.2, to be codified at 17 C.F.R. § 46.2).

3507(d) and 5 C.F.R. §§ 1320.8 and 1320.10, the Divisions will, by separate action, prepare an information collection request for review and approval by OMB, and will publish in the Federal Register a notice and request for public comments on the collection burdens associated with the no-action relief. If approved, an agent may not rely on the Divisions' determination not to recommend enforcement action the Commission unless it provides the information the Divisions have determined is essential to the provision of no-action relief.

If you have any questions concerning this letter, please contact Aleko Stamoulis, Attorney Advisor, Division of Market Oversight, at (202) 418-5714.

Sincerely,

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