



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

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CFTC Letter No. 13-45 Corrected
No-Action
July 11, 2013
Division of Swap Dealer and Intermediary Oversight

Re: 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 EMIR

Ladies and Gentlemen:

The Division of Swap Dealer and Intermediary Oversight (Division) of the Commodity Futures Trading Commission (Commission) has determined that relief from certain requirements applicable to registered swap dealers (SDs) or major swap participants (MSPs) organized or established in the United States or European Union¹ is warranted with respect to certain transactions (as defined below) entered into by registered SDs when such transactions are subject to both section 4s of the Commodity Exchange Act (CEA) and Article 11 of the European Market Infrastructure Regulation (EMIR),² including the related regulatory technical standards (EMIR Regulatory Technical Standards), for which, under both regimes, the requirements are essentially identical.³

Regulatory Background

Following the financial crisis of 2008, the United States (US) and the European Union (EU) undertook efforts to regulate over-the-counter (OTC) derivatives markets and market

¹ Of the 80 SDs currently registered with the Commission, 35 are organized or established outside the United States, of which 22 are established in the European Union.

² See Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

³ See Articles 11, 12, 13, 14, 15, 16 and 17 of the Commission Delegated Regulation (EU) No. 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for over-the-counter (OTC) derivatives contracts not cleared by a central counterparty (CCP).

participants. For swaps, Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) added a new section 4s(i) to the CEA, which required the Commission to prescribe standards for SDs and MSPs related to the timely and accurate confirmation, processing, netting, documentation, and valuation of swaps. The Commission's rules include, but are not limited to, requirements applicable to SDs and MSPs for swap confirmation, portfolio reconciliation, portfolio compression, valuation, and dispute resolution.

On August 16, 2012, the European Commission (EC), on behalf of the EU, adopted EMIR to establish standards regarding the registration and operation of clearinghouses and trade repositories; the clearing and regulatory reporting of OTC transactions; and risk mitigation techniques relating to uncleared OTC transactions. Pursuant to authority granted under EMIR, the European Securities and Markets Authority (ESMA) developed technical standards that were adopted by the European Commission on December 19, 2012, published in the Official Journal on February 23, 2013 and entered into force on March 15, 2013.

The Division has determined to provide the relief described herein to certain registered SDs and MSPs because, except as may be noted below, the Division believes Regulation §§ 23.501, 23.502 (other than 23.502(c)), 23.503, 23.504(b)(2), and 23.504(b)(4), as promulgated under section 4s(i) of the CEA and codified in Subpart I of Part 23 of the Commission's regulations (solely for purposes of this letter, these requirements will be referred to as the "CFTC Risk Mitigation Rules") are essentially identical to provisions set forth under Article 11 of EMIR and the related EMIR Regulatory Technical Standards (solely for purposes of this letter, these requirements will be referred to as the "EMIR Risk Mitigation Rules").

The Division's view that the CFTC Risk Mitigation Rules and the EMIR Risk Mitigation Rules are essentially identical, as described in greater detail below, is based upon consultation and coordination with representatives of the EC and ESMA. Accordingly, it is the view of the Division that a registered SD's or MSP's compliance, in the alternative, with EMIR Risk Mitigation Rules with respect to certain swaps (as defined below) be deemed to constitute compliance with the CFTC Risk Mitigation Rules, and the Division will not recommend enforcement action for failure to comply with CFTC Risk Mitigation Rules, subject to the conditions in this letter.

The Division believes the relief provided by this letter is appropriate because it will enable SDs and MSPs to mitigate the risks associated with swap transactions that are subject to both the CEA and EMIR in an effective and efficient manner.

Scope of Relief

The scope of relief provided in this letter is limited by the following statements regarding products and participants.

Products

The no-action relief provided in this letter applies to swap transactions⁴ that are: (1) uncleared⁵ swaps⁶ or (2) physically-settled foreign exchange forwards and swap agreements that have been exempted from the definition of swap by the U.S. Department of the Treasury.⁷ In such instances, the relief applies where such swap transactions are subject to both CFTC Risk Mitigation Rules and EMIR Risk Mitigation Rules. For purposes of this letter swap transactions that are subject to both sets of rules will be referred to as “Covered Swaps.”

Participants

Part 23 of the Commission’s regulations applies only to swap transactions that are entered into by an SD or MSP registered with the Commission; no rules under part 23 apply if neither counterparty to the swap transaction is an SD or MSP registered with the Commission. Thus, for the CFTC Risk Mitigation Rules to apply to a swap transaction between a counterparty in the US and a counterparty in the EU, at least one of such counterparties must be an SD or MSP registered with the Commission. A swap transaction between a US counterparty that is not an SD or MSP and an EU counterparty that also is not an SD or MSP would not be subject to the CFTC Risk Mitigation Rules.

Conversely, if either the US counterparty or the EU counterparty were an SD or MSP, the CFTC Risk Mitigation Rules would apply to a swap transaction between them, regardless of the registration status of the other counterparty, and, of course, the CFTC Risk Mitigation Rules would apply to a swap transaction if both the US counterparty and the EU counterparty were an SD or MSP.

The EMIR Risk Mitigation Rules apply to financial counterparties and non-financial counterparties which have non-hedging positions above a certain clearing threshold⁸ and that are

⁴ For purposes of this letter, the term “swap transaction” has the same meaning as Commission regulation § 23.500(l): “any event that results in a new swap or in a change to the terms of a swap, including execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap.”

⁵ For purposes of this letter, “uncleared” refers to (1) a swap that is not subject to the clearing requirement of section 2(h)(1)(A) of the CEA and part 50 of the Commission’s regulations, and (2) a swap that is entered into without the intention that it be cleared contemporaneously with execution.

⁶ Swaps are defined in section 1a(47) of the CEA and Commission regulation § 1.3(xxx), 17 CFR 1.3(xxx).

⁷ Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 FR 69694 (Nov. 20, 2012).

⁸ Pursuant to Article 10 of EMIR and Article 11 of the EMIR Regulatory Technical Standards, the clearing threshold values for determining if the EMIR Risk Mitigation Rules apply to a non-financial counterparty are:

established in the EU or otherwise subject to EMIR. In addition, certain risk mitigation techniques under the EMIR Risk Mitigation Rules (*i.e.*, timely confirmation, portfolio reconciliation and compression, and dispute resolution) apply to non-financial counterparties below the clearing threshold that are established in the EU or otherwise subject to EMIR.⁹ Thus, the EMIR Risk Mitigation Rules apply to a swap transaction whenever at least one of the counterparties is established in the EU or otherwise subject to EMIR.¹⁰

As stated above, the relief provided under this letter applies where a swap transaction that is subject to both CFTC Risk Mitigation Rules and EMIR Risk Mitigation Rules. Accordingly, the relief provided in this letter is available 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 an SD or MSP registered with the Commission.¹¹ Relief is also available in other circumstances where swap transactions are subject to both CFTC Risk Mitigation Rules and EMIR Risk Mitigation Rules.¹²

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- (a) EUR 1 billion in gross notional value for OTC credit derivative contracts;
 - (b) EUR 1 billion in gross notional value for OTC equity derivative contracts;
 - (c) EUR 3 billion in gross notional value for OTC interest rate derivative contracts;
 - (d) EUR 3 billion in gross notional value for OTC foreign exchange derivative contracts;
 - (e) EUR 3 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not defined under points (a) to (d).

⁹ Absent express authorization from the Division or the Commission, the relief provided in the letter will not extend to swaps executed pursuant to the laws of a third country (*i.e.*, a jurisdiction other than the EU or the US) that the EC has deemed to be equivalent with EMIR.

¹⁰ It is the Division's understanding that EMIR will apply to the counterparties unless and until the EC makes an "equivalency" determination with respect to a foreign jurisdiction's regulatory regime governing OTC derivatives. If the EC finds such regulatory regime "equivalent" then a Covered Swap between an EU counterparty and a counterparty in the foreign jurisdiction could be subject only to the foreign regulatory regime. The EC is expected to make a number of equivalency determinations by the end of 2013. As noted above, this relief does not extend to third countries deemed by the EC to be equivalent with EMIR.

¹¹ The Division notes that other foreign jurisdictions have made significant steps toward implementing new regulations for swaps market participants. However, as of the date of this letter, with regard to the important risk mitigation techniques discussed herein, the Division is not aware of regulations in other jurisdictions that are essentially identical to the requirements under the CFTC Risk Mitigation Rules and the EMIR Risk Mitigation Rules. The Division may consider similar relief with respect to other jurisdictions, provided that such foreign jurisdictions adopt essentially identical risk mitigation requirements.

¹² Guaranteed affiliates of US persons organized in jurisdictions outside the US have a direct and significant connection with activities in, or effect on, commerce of the US and must comply with the Dodd-Frank Act. Thus swap transactions of an SD or MSP that is established in the EU and a guaranteed affiliate of a US person would be subject to both CFTC Risk Mitigation Rules and EMIR Risk Mitigation Rules.

In addition, to the extent not otherwise included, the definition of “Covered Swaps” and the relief provided under this letter applies to swap transactions between two SDs or MSPs that are registered with the Commission, but are organized under the laws of the EU, and that are: (1) uncleared swaps or (2) physically-settled foreign exchange forwards and swap agreements that have been exempted from the definition of swap by the U.S. Department of the Treasury.

Comparison of Corresponding Regulatory Provisions Under Part 23 and EMIR

A. Swap Confirmation

1. *Commission Rule*

In promulgating its swap confirmation standards, the Commission stated that “timely and accurate confirmation of swaps is critical for all downstream operational and risk management processes, including the correct calculation of cash flows, margin requirements, and discharge of settlement obligations as well as accurate measurement of counterparty credit exposures.”¹³

To that end, pursuant to section 4s(i) of the CEA, Commission regulation § 23.501 requires SDs and MSPs to confirm their swap transactions¹⁴ with counterparties that are also SDs or MSPs as soon as technologically practicable, but in any event by the end of the first business day following the day of execution. With respect to swap transactions with non-SDs and non-MSPs, SDs must establish policies and procedures reasonably designed to ensure confirmation by the end of the first business day following the day of execution if the counterparty is a financial entity, or the end of the second business day if the counterparty is a non-financial entity. SDs are also required to send an acknowledgement of a swap transaction to a counterparty that is not an SD by the end of the first business day following the day of execution. SDs are required to provide a draft confirmation to non-SDs prior to execution of a swap transaction, if requested. Each of the time requirements described are subject to phase-in periods provided in § 23.501(c).

Pursuant to Commission regulation § 23.501(a)(5), the “day of execution” of a swap transaction is determined by reference to the business days of the counterparties and whether the swap was executed after 4:00 p.m. in the place of at least one of the counterparties. Regulation § 23.501 does not apply to swaps executed on a swap execution facility (SEF) or designated contract market (DCM) if the trading platform provides for confirmation of swap transactions at the same time as execution, nor does the rule apply to swap transactions that are submitted for clearing on a derivatives clearing organization (DCO) within the time otherwise required for confirmation.

¹³ See Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55917 (Sept. 11, 2012).

¹⁴ As defined in Commission regulation § 23.500(l). See note [4] above.

2. Comparison with EMIR Risk Mitigation Rules

Pursuant to the EMIR Risk Mitigation Rules, and subject to a phase-in period, OTC derivative contracts entered into between financial counterparties or non-financial counterparties above the clearing threshold must be confirmed as soon as possible and at the latest by the end of the next business day following the date of execution,¹⁵ which corresponds to Commission regulation § 23.501(a)(1) and (3)(i), requiring confirmation with other SDs, MSPs, and financial entities by the end of the first business day following the day of execution.

For OTC derivative contracts with all other non-financial counterparties, confirmation is required as soon as possible and, at the latest, by the end of the second business day following the date of execution.¹⁶ This approach corresponds to the Commission regulation § 23.501(a)(3)(ii), which requires written policies and procedures reasonably designed to ensure confirmation with non-SDs, non-MSPs, or non-financial entities by the end of the second business day following the day of execution.

As with Commission regulation § 23.501(a)(5), which provides for a next business day adjustment for transactions executed after 4:00 pm or on a non-business day, the EMIR Risk Mitigation Rules provide that transactions concluded after 4:00 p.m. local time, or with a counterparty located in a different time zone that does not allow confirmation by the set deadline, the confirmation must take place as soon as possible and, at the latest, one business day following the otherwise applicable deadline.

Based on the foregoing, the Division believes that the swap transaction confirmation requirements of the EMIR Risk Mitigation are essentially identical to the swap transaction confirmation requirements of Commission regulation § 23.501.

B. Portfolio Reconciliation

1. Commission Rule

In promulgating its rule on portfolio reconciliation, the Commission stated that “for the swap market to operate efficiently and to reduce systemic risk . . . portfolio reconciliation should be a proactive process that delivers a consolidated view of counterparty exposure down to the transactional level.”¹⁷ Thus, pursuant to section 4s(i) of the CEA, the Commission adopted

¹⁵ See Article 12 of the EMIR Regulatory Technical Standards.

¹⁶ See *id.*

¹⁷ See Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55926 (Sept. 11, 2012).

regulation § 23.502, requiring SDs and MSPs to engage in portfolio reconciliation with other SDs and MSPs, as well as non-SD/MSP counterparties.

Pursuant to regulation § 23.502(a) and (b), SDs and MSPs must agree in writing with their counterparties on the terms of portfolio reconciliation to be conducted with each counterparty.¹⁸ With respect to counterparties that are also SDs or MSPs, an SD or MSP must reconcile the terms and valuations of each uncleared swap in the swap portfolio no less frequently than:

- Each business day for portfolios of 500 or more swaps;
- Once each week for portfolios of 50 to 500 swaps; and
- Quarterly for portfolios of less than 50 swaps.

Commission regulation § 23.502(a)(5) requires SDs and MSPs to resolve discrepancies in material terms discovered under portfolio reconciliation immediately; and SDs and MSPs must have policies and procedures to resolve discrepancies of more than 10% in valuations within 5 business days, provided that the SD or MSP has policies and procedures for identifying how it will comply with variation margin requirements pending resolution of a valuation dispute.

For swap portfolios with other counterparties, Commission regulation § 23.502(b) requires SDs and MSPs to establish policies and procedures for engaging in portfolio reconciliation no less frequently than quarterly for portfolios of more than 100 swaps and annually for portfolios of less than 100 swaps. Discrepancies in material terms and valuations of more than 10% discovered as part of the portfolio reconciliation or otherwise must be subject to procedures for resolving such discrepancies in a timely fashion.

SDs and MSPs must report any valuation dispute exceeding \$20 million (or the equivalent in any other currency) to the Commission, and to its applicable US prudential regulator, if not resolved within 3 business days, with respect to disputes with other SDs, or 5 business days, with respect to disputes with any other counterparty. While the Division recognizes that the notice provision in EMIR is similar, reporting valuation disputes over \$20 million directly to the Commission is essential for Commission staff to monitor the swap market and SD and MSP swap activities. Therefore, Commission regulation § 23.502(c) has been excluded from the definition of “CFTC Risk Mitigation Rules” for purposes of the relief provided in this letter.

2. *Comparison with EMIR Risk Mitigation Rules*

Pursuant to the EMIR Risk Mitigation Rules, financial and non-financial counterparties must agree in writing with each of their OTC derivatives counterparties on the terms on which

¹⁸ Commission regulations § 23.502(a)(2) and (b)(2) allow portfolio reconciliation to be performed on behalf of the counterparties by a third-party.

portfolios will be reconciled,¹⁹ which corresponds to the requirement in Commission regulation § 23.502(a) and (b) that SDs and MSPs agree in writing with each counterparty (financial and non-financial) on the terms for conducting portfolio reconciliation.

The EMIR Risk Mitigation Rules require portfolio reconciliation covering key trade terms of each OTC derivative contract, including at least the valuation of each contract,²⁰ which corresponds to the requirements under Commission regulation § 23.502 that discrepancies in material terms and valuations be resolved.

Frequency of reconciliation required under the EMIR Risk Mitigation Rules for financial counterparties and non-financial counterparties over the clearing threshold is daily when the number of outstanding OTC derivative contracts between counterparties is greater than 500, weekly when the number of outstanding OTC derivative contracts between counterparties is greater than 50 and less than 500, and quarterly when the number of OTC derivative contracts between counterparties is less than 50,²¹ which corresponds with the frequency required of SDs and MSPs outlined above with respect to portfolios with other SDs and MSPs. EMIR requires reconciliation with non-financial counterparties less frequently; quarterly for portfolios of 100 or more transactions; annually otherwise,²² which corresponds with the requirement of Commission regulation § 23.502(b)(3).

The EMIR Risk Mitigation Rules require financial counterparties to report to the relevant competent authority any disputes between counterparties relating to an OTC derivative contract, its valuation or the exchange of collateral for an amount or a value higher than €15 million and outstanding for at least 15 business days,²³ while Commission regulation § 23.502(c) has a similar reporting requirement for disputes of at least \$20 million outstanding from 3 to 5 days, depending on counterparty type. The EMIR Risk Mitigation Rules, similar to § 23.502(a)(5), require financial and non-financial counterparties to have detailed procedures and processes for resolving disputes related to valuation.

Based on the foregoing, the Division believes that the portfolio reconciliation requirements of the EMIR Risk Mitigation Rules are essentially identical to the portfolio reconciliation requirements of Commission regulation § 23.502.

¹⁹ See Article 13 of the EMIR Regulatory Technical Standards. In addition, Article 13(2) permits the reconciliation to be performed by a third-party, which corresponds to Commission regulation § 23.502(a)(2) and (b)(2).

²⁰ See Article 13(2) of the EMIR Regulatory Technical Standards.

²¹ See Article 13(3)(a) of the EMIR Regulatory Technical Standards.

²² See Article 13(3)(b) of the EMIR Regulatory Technical Standards.

²³ See Article 15(2) of the EMIR Regulatory Technical Standards.

C. Portfolio Compression

1. *Commission Rule*

In promulgating its portfolio compression rule, the Commission stated that “[p]ortfolio compression is an important, post-trade processing and netting mechanism that can be an effective and efficient tool for the timely and accurate processing and netting of swaps by market participants.”²⁴

Thus, pursuant to section 4s(i) of the CEA, the Commission adopted regulation § 23.503, under which SDs and MSPs must establish policies and procedures for: (i) terminating fully offsetting uncleared swaps, when appropriate; (ii) periodically engaging in bilateral and multilateral compression exercises for uncleared swaps with other SDs and MSPs, when appropriate; and (iii) engaging in such exercises for uncleared swaps with any other counterparty to the extent requested by such counterparty.

2. *Comparison with EMIR Risk Mitigation Rules*

The EMIR Risk Mitigation Rules require financial counterparties and non-financial counterparties with 500 or more OTC uncleared derivative contracts outstanding with a counterparty to have procedures to regularly, and at least twice a year, analyze the possibility to conduct a portfolio compression exercise in order to reduce their counterparty credit risk and engage in such a portfolio compression exercise,²⁵ which corresponds to the requirement under § 23.503 that SDs and MSPs establish procedures for periodically engaging in compression exercises with their counterparties.

Under the EMIR Risk Mitigation Rules, financial counterparties and non-financial counterparties also must ensure that they are able to provide a reasonable and valid explanation to the relevant competent authority for concluding that a portfolio compression exercise is not appropriate.²⁶ This requirement corresponds directly to regulation § 23.503 that SDs and MSPs engage in compression exercises with their counterparties “when appropriate,” which would necessarily require such registrants to demonstrate to the Commission why a compression opportunity was not appropriate.

Based on the foregoing, the Division believes that the portfolio compression requirements of the EMIR Risk Mitigation Rules are essentially identical to the portfolio compression requirements of Commission regulation § 23.503.

²⁴ See Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55932 (Sept. 11, 2012).

²⁵ See Article 14 of the EMIR Regulatory Technical Standards.

²⁶ See *id.*

D. Swap Trading Relationship Documentation

1. *Commission Rule*

To promote the “timely and accurate documentation of all swaps” the Commission promulgated, pursuant to section 4s(i) of the CEA, regulation § 23.504, which sets forth the requirements for swap trading relationship documentation. The Division notes that this letter only provides relief from two provisions of the rule (*i.e.*, § 23.504(b)(2) and (4)), discussed below. Relief is not provided from the core requirement that SDs and MSPs establish policies and procedures, approved in writing by senior management of the SD or MSP, reasonably designed to ensure that they have entered into swap trading relationship documentation with each counterparty prior to or contemporaneously with entering into a swap transaction with such counterparty.²⁷

Moreover, the relief provided herein does not extend to the requirement that such documentation include terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and netting of obligations upon termination, transfer of rights and obligations, governing law, dispute resolution, and credit support arrangements, as well as notice of the status of the counterparty under the orderly liquidation procedures of Title II of the Dodd-Frank Act, and the effect of clearing on swaps executed bilaterally.²⁸ Nor does this letter relieve an SD or MSP from the documentation audit and recordkeeping requirements under § 23.504(c) and (d).

Commission regulation § 23.504(b)(2) brings the written confirmations of swap transactions required under Commission regulation § 23.501 into swap trading relationship documentation, making clear that the such written confirmations are part of the documentation of an SD’s or MSP’s swap trading relationship.

Regulation § 23.504(b)(4) requires SDs and MSPs to include in their relationship documentation with counterparties that are other SDs and MSPs, financial entities, and (upon request) other counterparties, the process for determining the value of each swap at any time from execution to termination or maturity for the purposes of complying with the Commission’s margin requirements under section 4s(e) of the CEA and risk management requirements for SDs under section 4s(j) of the CEA.²⁹ Documentation of the agreement on valuation must include a dispute resolution process and alternative methods for determining the value of a swap if any input required to value the swap becomes unavailable. The valuation must be based on recently-

²⁷ See Commission regulation § 23.504(a)(2), 17 CFR 23.504(c)(2).

²⁸ See § 23.504(b)(1), (3), (5), and (6).

²⁹ The Commission has promulgated risk management requirements for SDs and MSPs. See 17 CFR 23.600.

executed transactions, valuations provided by independent third parties, or other objective criteria, to the maximum extent practicable.

2. *Comparison with EMIR Risk Mitigation Rules*

The EMIR Risk Mitigation Rules, as discussed above, require OTC derivative contracts entered into between financial counterparties or non-financial counterparties to be confirmed in writing,³⁰ which corresponds to the requirements of Commission regulation § 23.504(b)(2).

Pursuant to EMIR Article 11, financial counterparties and non-financial counterparties above the clearing threshold are required to value outstanding OTC derivatives contracts on a mark-to-market basis daily, or where market conditions determine otherwise, a “reliable and prudent marking to model” may be used.³¹ This corresponds with Commission regulation § 23.504(b)(4)(i), which requires SDs and MSPs to engage in daily valuation with other SDs and MSPs, and financial entities, but allows such procedures to be included in documentation with non-financial counterparties to the extent such counterparties request them.

Under Article 15 of the EMIR Regulatory Technical Standards, when concluding OTC derivative contracts with each other, counterparties must have agreed detailed procedures and processes in relation to the identification, recording, and monitoring of disputes relating to the recognition or valuation of the contracts and to the exchange of collateral between counterparties and in relation to the resolution of disputes in a timely manner, including a specific process for disputes that are not resolved within five business days. These aspects of the EMIR Risk Mitigation Rules correspond to the valuation documentation requirements under Commission regulation § 23.504(b)(4), which also require use of market transactions for valuations to the extent practicable, or other objective criteria, and an agreement on detailed processes for valuation dispute resolution for purposes of complying with margin requirements.

Based on the foregoing, the Division believes the confirmation and valuation documentation requirements of the EMIR Risk Mitigation Rules are essentially identical to the swap trading relationship documentation requirements of Commission regulations § 23.504(b)(2) and (4).

³⁰ See Article 12 of the EMIR Regulatory Technical Standards.

³¹ See Article 11(2) of EMIR. See also Article 16 of the EMIR Regulatory Technical Standards (describing the market conditions that prevent marking-to-market) and Article 17 of the EMIR Regulatory Technical Standards (describing the criteria for using marking-to-model).

Division No-Action Position

Based upon the foregoing, the Division believes that no-action relief for SDs and MSPs is warranted for CFTC Risk Mitigation Rules with respect to Covered Swaps. Accordingly, the Division will not recommend that the Commission commence an enforcement action against an SD or MSP for failure to comply with the CFTC Risk Mitigation Rules, and for complying, in the alternative, with the EMIR Risk Mitigation Rules, when entering into Covered Swaps, subject to the following conditions:

1. The SD or MSP fully complies with the EMIR Risk Mitigation Rules applicable to the Covered Swaps, the SD or MSP, and its counterparty;³² and
2. The SD or MSP fully complies with all requirements of Subpart I of Part 23 of the Commission's Regulations that are otherwise applicable to the SD or MSP.³³

This letter, and the positions taken herein, represent the views of this Division only, and do not necessarily represent the positions or views of the Commission or any other office or division of the Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the Commodity Exchange Act or in the regulations issued thereunder. In particular, the Division notes that the Commission retains the right to access the books and records of any registered SD or MSP, regardless of its location, pursuant to sections 4s(f)(1) and 4s(j)(4) of the CEA and Commission regulations § 23.203 and § 23.606.

³² Nothing in this letter provides relief to any SD or MSP from compliance with all registration requirements under Part 23 of the Commission's regulations, including, but not limited to, the submission of all required policies and procedures to the National Futures Association.

³³ The relief described in this letter does not apply to other sections of subpart I of Part 23. These requirements include § 23.502(c) (requiring reporting to the Commission of any swap valuation dispute in excess of \$20,000,000 (or its equivalent in any other currency)), § 23.504 (except for (b)(2) and (b)(4)), § 23.505 (end-user exception documentation), and § 23.506 (swap processing and clearing).

Further, this letter, and the relief contained herein, is based upon the Division's understanding of the regulatory provisions applicable in the European Union. Any different, changed, or omitted material facts or circumstances might render this no-action relief void.

Should you have any questions, please do not hesitate to contact Frank Fisanich, Chief Counsel, at 202-418-5949, Erik Remmler, Deputy Director, at 202-418-7630, or Andrew Chapin, Associate Director, at 202-418-5465.

Very truly yours,

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