



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Market Oversight

Dorothy DeWitt
Director

Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan, Switzerland or the United Kingdom

This letter responds to requests received by the Division of Market Oversight of the Commodity Futures Trading Commission (the "Commission" or "CFTC"), pursuant to Commission Regulation 140.99, to extend certain staff no-action relief provided in CFTC Letter No. 13-75 and extended under CFTC Letter Nos. 14-141, 15-61, 16-79, and 17-64.¹

I. Background

On December 20, 2013, the Division of Market Oversight issued CFTC Letter No. 13-75 to provide Commission-registered swap dealers ("SDs") and major swap participants ("MSPs") that are non-U.S. persons² established under the laws of Australia, Canada, the European Union, Japan or Switzerland (collectively, the "Prior Jurisdictions"), and that are not part of an affiliated group in which the ultimate parent entity is a U.S. SD, U.S. MSP, U.S. bank, U.S. financial holding company or U.S. bank holding company, with time-limited no-action relief from requirements of the swap data reporting rules set forth in Part 45³ and Part 46⁴ of the Commission's regulations (collectively, the "SDR Reporting Rules"). The Division of Market

¹ Letter from the Institute of International Bankers, the International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association, Request for Extension of No-Action Letter 17-64 (November 3, 2020) (the "Request Letter").

² For purposes of this letter, the term "U.S. person" has the meaning used in the Commission's Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) (hereinafter "Cross-Border Guidance"), and a person that is not a U.S. person is a "non-U.S. person." For purposes of this letter, an SD that is a non-U.S. person is a "non-U.S. SD" and an MSP that is a non-U.S. person is a "non-U.S. MSP."

³ Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (January 13, 2012).

⁴ Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012).

Oversight extended this relief most recently⁵ on November 30, 2017 in CFTC Letter No. 17-64. On April 5, 2019, the Division of Market Oversight extended the relief to cover non-U.S. persons established under the laws of the United Kingdom (collectively with the Prior Jurisdictions, the “Enumerated Jurisdictions”) in CFTC Letter No. 19-09. CFTC Letter No. 17-64 (as extended to United Kingdom entities by CFTC Letter No. 19-09) is set to expire no later than December 1, 2020.

As noted in the Request Letter and the prior no-action letters, the Commission has not yet issued comparability determinations with respect to the SDR Reporting Rules.⁶ The Division of Market Oversight understands that the Commission and regulators from the Enumerated Jurisdictions have not been able to reach an arrangement regarding swap data sharing because of certain outstanding issues, including lack of direct access by the Commission to foreign trade repository data. The Division of Market Oversight remains steadfast in assisting the Commission in fully implementing the standards for OTC derivatives markets agreed at the 2009 Pittsburgh G-20 summit, and is actively working to address the outstanding issues. These efforts include amending rules governing certain foreign and domestic authorities’ access to swap data maintained by swap data repositories (“SDRs”)⁷ and adopting technical guidance published by Financial Stability Board (“FSB”) and CPMI-IOSCO working groups for standardizing OTC derivatives data.⁸ The amended rules adopting FSB and CPMI-IOSCO technical guidance were adopted by the Commission on September 17, 2020 as part of a recent final Commission rulemaking (“Adopting Release”) adopting comprehensive changes to Parts 45 and 46 (“Amended SDR Reporting Rules”).⁹ As stated in the Adopting Release, the Commission set the compliance date for adhering to the comprehensive changes to Parts 45 and 46 as 18 months after the date the Amended SDR Reporting Rules are published in the Federal Register (“Compliance Date”) in order to meet deadlines set by the FSB and CPMI-IOSCO.

The Division of Market Oversight urges regulators from the Enumerated Jurisdictions to actively work to successfully address the outstanding issues impeding substituted compliance determinations, including by granting the Commission direct access to foreign trade repository data, resolving remaining data privacy issues, and recognizing the Commission’s data reporting requirements as comparable to their own. The Division of Market Oversight is committed to working cooperatively with the Enumerated Jurisdictions in this regard, including evaluating requests for substituted compliance.

⁵ On November 24, 2014, in CFTC Letter No. 14-141, the Division of Market Oversight extended certain of the relief provided in CFTC Letter No. 13-75 with respect to swaps with non-U.S. counterparties that are not guaranteed affiliates, or conduit affiliates, of a U.S. person, and the Division of Market Oversight further extended the relief on November 9, 2015 in CFTC Letter No. 15-61 and again on November 21, 2016 in CFTC Letter No. 16-79.

⁶ The process for comparability determinations is discussed in the Cross-Border Guidance. See 78 Fed. Reg. at 45344-45.

⁷ Amendments to the Swap Data Access Provisions of Part 49 and Certain Other Matters, 83 Fed. Reg. 27410 (June 12, 2018).

⁸ *See* Swap Data Recordkeeping and Reporting Requirements, available at <https://www.cftc.gov/media/4781/federalregister091720b/download>.

⁹ For example, CPMI-IOSCO’s *Governance Arrangements for critical OTC derivatives data elements (other than UTI and UPI)* published in October 2019 recommended that jurisdictions implement CDE by October 2022.

To provide adequate time to allow for a successful resolution to the outstanding issues listed above, the Division of Market Oversight believes that it is appropriate to provide an additional two-year extension of the time-limited no-action relief provided in CFTC Letter No. 17-64.

II. Extension of No-Action Relief

- (i) Based on the foregoing, and subject to clause (ii) below, the Division of Market Oversight will not recommend that the Commission take an enforcement action against a non-U.S. SD or a non-U.S. MSP established in Australia, Canada, the European Union, Japan, Switzerland or the United Kingdom, that is not part of an affiliated group in which the ultimate parent entity is a U.S. SD, U.S. MSP, U.S. bank, U.S. financial holding company, or U.S. bank holding company, for failure to comply with the requirements of the SDR Reporting Rules (or, on and after the Compliance Date, with the requirements of the Amended SDR Reporting Rules) with respect to its swaps with non-U.S. counterparties that are not guaranteed affiliates, or conduit affiliates,¹⁰ of a U.S. person, until the earlier of: (a) 30 days following the issuance of a comparability determination by the Commission with respect to the SDR Reporting Rules for the jurisdiction in which the non-U.S. SD or non-U.S. MSP is established, and (b) December 1, 2022.
- (ii) The no-action relief provided in this letter does not extend to the recordkeeping requirements of Commission Regulations 45.2,¹¹ 45.6, 46.2 and 46.4.¹²

The no-action relief provided herein is provided to certain non-U.S. SDs and non-U.S. MSPs, as specified herein, and does not extend to any other entities with reporting obligations under the SDR Reporting Rules or Amended SDR Reporting Rules.¹³

This letter, and the no-action position taken herein, represent the views of the Division of Market Oversight only, and do not necessarily represent the position or views of the Commission

¹⁰ For purposes of this letter, the terms “guaranteed affiliate” and “conduit affiliate” have the respective meanings used for those terms in the Cross-Border Guidance.

¹¹ The requirement in Commission Regulation 45.2(a)(4) that the records required to be kept by an SD or MSP include, without limitation, all records required by Part 23 of the Commission’s regulations, is independently governed by the applicability of such underlying Part 23 requirements.

¹² However, during the period of this relief, the Division of Market Oversight will not recommend an enforcement action based on the failure by a non-U.S. SD or non-U.S. MSP, in the records that the non-U.S. SD or non-U.S. MSP is required to maintain pursuant to Commission Regulations 45.2, 45.6, 46.2 and 46.4, to identify a non-U.S. counterparty to a swap by means of a legal entity identifier, or “LEI”, issued pursuant to Part 45 of the Commission’s regulations, if: (i) the counterparty’s LEI is not publicly available, (ii) the counterparty has not already provided its LEI to the non-U.S. SD or non-U.S. MSP, and (iii) the counterparty does not provide its LEI to the non-U.S. SD or non-U.S. MSP in connection with the swap transaction, provided that the non-U.S. SD or non-U.S. MSP generates a substitute counterparty identifier for such counterparty and utilizes such identifier in the records that the non-U.S. SD or non-U.S. MSP is required to maintain pursuant to Commission Regulations 45.2, 45.6, 46.2 and 46.4.

¹³ For example, the Part 45 reporting obligations of a swap execution facility (“SEF”) or designated contract market (“DCM”), with respect to swaps executed on or pursuant to the rules of such SEF or DCM, are not affected by the no-action relief provided herein.

or of any other division or office of the Commission's staff. The no-action position taken herein does not excuse affected persons from compliance with any other applicable requirements of the Commodity Exchange Act or the regulations thereunder. As with all no-action letters, the Division of Market Oversight retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Should you have any questions concerning this correspondence, please contact David Aron, Special Counsel, Division of Data, at (202) 418-6621 or daron@cftc.gov, Tom Guerin, Special Counsel, Division of Data, at (202) 836-1933 or tguerin@cftc.gov, or Dan Bucsa, Deputy Director, Division of Data, at (202) 418 5435 or dbucsa@cftc.gov.

Sincerely,

Dorothy DeWitt
Director
Division of Market Oversight



ISDA[®] | Safe,
Efficient
Markets



November 3, 2020

Commission Regulations Parts 45 and 46

Dorothy DeWitt
Director, Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Request for Extension of No-Action Letter 17-64

Dear Ms. DeWitt:

The Institute of International Bankers (“IIB”), the International Swaps and Derivatives Association (“ISDA”) and the Securities Industry and Financial Markets Association (“SIFMA”) and, together with IIB and ISDA, the “Associations”) ¹ are writing on behalf of their member organizations to respectfully request that the Division of Market Oversight (the “Division”) extend the no-action relief contained in Commodity Futures Trading Commission (the “CFTC” or “Commission”) Letter No. 17-64 (“Letter 17-64”), ² which is currently scheduled to expire on December 1, 2020. Specifically, Letter 17-64 extended certain no-action relief from the requirements of Parts 45³ and 46⁴ of the Commission’s regulations (the “Reporting Rules”) to

¹ Information regarding the Associations is set forth in Appendix A.

² CFTC Letter No. 17-64, dated November 30, 2017, *available at* <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/17-64.pdf>.

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

⁴ 17 C.F.R. Part 46; Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35,200 (June 12, 2012).

non-U.S. swap dealers (“SDs”) and major swap participants (“MSPs”) established in Australia, Canada, the European Union, Japan or Switzerland (the “Enumerated Jurisdictions”) that are not part of an affiliated group in which the ultimate parent entity is a U.S. SD, U.S. MSP, U.S. bank, U.S. financial holding company or U.S. bank holding company (such non-U.S. SDs and MSPs, “Covered Registrants”), with respect to swaps with non-U.S. counterparties that are not guaranteed affiliates, or conduit affiliates, of a U.S. person (as those terms are defined in the Commission’s cross-border guidance (the “Cross-Border Guidance”).⁵ On April 5, 2019, Commission Letter No. 19-09 extended the relief to cover non-U.S. SDs and MSPs established under the laws of the United Kingdom post-Brexit.⁶

To date, the Commission has not issued any comparability determinations with respect to the Reporting Rules in the Enumerated Jurisdictions. Further, the Commission recently amended the Reporting Rules⁷ and modified and codified its Cross-Border Guidance,⁸ which may also affect the cross-border application of the Reporting Rules. We believe that the Commission should extend Letter 17-64 until such ongoing efforts are complete. Specifically, we believe that such extension is warranted in light of the following:

- If Letter 17-64 expires without codification or comparability determinations, the difference between the Reporting Rules and reporting rules in the Enumerated Jurisdictions are likely to cause market fragmentation. Such differences can include different required data fields, reporting deadlines, or reporting mechanics. Even though the Commission has recently adopted changes to Part 45 that will narrow these differences,⁹ reporting rules will not be fully harmonized internationally. Such differences would also potentially cause confusion and disruption in the local markets if Covered Registrants were required to collect additional information from local counterparties (e.g., LEI information, where local rules do not yet require LEIs) or needed to change their booking structure to address technology issues (e.g., if a local branch is not set up for trade reporting in conformance with the Reporting Rules).
- Further, applying the Reporting Rules to a Covered Registrant’s swaps with non-U.S. persons can cause the Covered Registrant to violate local blocking, privacy or secrecy laws.

⁵ See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013).

⁶ In light of this relief, for purposes of this letter, the United Kingdom is also an Enumerated Jurisdiction.

⁷ See Swap Data Recordkeeping and Reporting Requirements (Sept. 17, 2020) (“Revised Reporting Rules”), available at <https://www.cftc.gov/media/4701/votingdraft091720Part45/download>.

⁸ See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56924, 56963 n.354 (Sept. 14, 2020) (noting that the Commission intends to address the cross-border application of the Reporting Rules).

⁹ See *id.*

- Such concerns are especially heightened as they relate to the expiration of Letter 17-64’s relief from Part 46 requirements. Covered Registrants would face difficulties in obtaining the counterparty consents needed in order to report swaps without violating local privacy laws. For example, there may no longer be an open position with certain counterparties, some counterparties may have ceased to exist, and contact details on file for counterparties may no longer be correct. The masking relief provided by Commission Letter No. 17-16 does not address this issue because it only covers jurisdictions where counterparty consent is not sufficient to override the local privacy restrictions.
- There are additional concerns that are specific to the expiration of the relief from Part 46’s requirements, some of which are also applicable to the expiration of the relief with respect to Part 45, including the following:
 - Commission Regulation 46.2 provides required retention periods for records of pre-enactment and transition swaps for the life of the swap and for a period of five years from the final termination of the swap. A question arises regarding whether the reporting requirements in Commission Regulation 46.3 should apply to such a swap to the extent that the retention period in Commission Regulation 46.2 has ended for that swap. The same question arises under Commission Regulations 45.2 and 45.3 for swaps that are not pre-enactment or transition swaps.
 - The definition of “transition swap” in Commission Regulation 46.1 references “any swap entered into on or after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the applicable compliance date on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part, as set forth in the preamble to this part.” A question arises regarding whether this reference to the “applicable compliance date” should take into account the functional delay in compliance with Part 46 resulting from Letter 17-64 and its predecessors.
 - Unlike some of the Commission’s other no-action letters relating to Part 45, Letter 17-64 does not set forth a timeframe in which Covered Registrants are required to report pre-existing swap transactions once Letter 17-64 expires. Due to the volume of affected transactions and likely bandwidth issues at the DTCC Data Repository LLC (“DTCC”), such back-loading would likely require Commission involvement to help stagger schedules among Covered Registrants.
 - In addition, Covered Registrants would face several practical issues:
 - Covered Registrants would need to gather and format data from over an almost 10-year period (since the Dodd-Frank Act’s enactment in 2010), with the extent and format for the required data differing depending on whether the swap was executed before or after July 21, 2010 and in existence on or after April 25, 2011 as well as what information relating to the terms of the swap was in the Covered Registrant’s possession on or after October 14, 2010 or December 17, 2010.

- This would be a burdensome exercise due to the length of time that has passed since these dates, especially considering that Covered Registrants may have de-commissioned the trade capture systems that contained some of the relevant dates and would therefore need to retrieve data from archival systems.
 - Additionally, given the age of the affected transactions, many of them were confirmed on paper, and back-loading these confirmations will result in a significant resource drain.
 - Further, some of the relevant non-U.S. trading desks would need to build, test and maintain new connections with DTCC in order to report in a manner compliant with the Reporting Rules.
 - Covered Registrants will also need to consider how reporting utilities (*e.g.*, MarkitWire) would need to get involved and any operational steps such reporting utilities would need to take to facilitate reporting these transactions.
- More generally, it would be highly inefficient for Covered Registrants that currently rely on Letter 17-64 to develop systems to report swaps that are currently covered by that letter if there is a reasonable possibility that the Commission may later codify Letter 17-64 as a part of its ongoing efforts to modify and codify its Cross-Border Guidance. This is especially the case considering the need for firms to prioritize IT efforts relating to business continuity during the ongoing COVID-19 pandemic. As it stands, few if any Covered Registrants would be in a position to meet the December 1, 2020 deadline if the Division does not extend it.
- Further, the Division would be justified to grant an extension in light of the recent revisions the Reporting Rules.
 - Letter 17-64 expressly stated that the Division expected revisions to the Reporting Rules as contemplated by the Roadmap to Achieve High Quality Swaps Data¹⁰ to be completed before the no-action relief expired. However, as things stand, the recently adopted reporting rulemakings will not take effect until early 2022 at the earliest given that they contemplate an 18-month transition period.¹¹
 - Further, although Covered Registrants are potentially eligible for substituted compliance with comparable home country reporting rules under the Commission’s current Cross-Border Guidance—which, if granted, would also obviate the need to come into compliance with the Reporting Rules for the swaps covered by Letter 17-64—Covered Registrants could not have reasonably requested substituted

¹⁰ https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf

¹¹ Revised Reporting Rules at p.172.

compliance until they knew what the finalized revisions to the Reporting Rules would look like. Therefore, there needs to be some period of time now that the proposed reporting rules have been finalized for Covered Registrants to apply for substituted compliance. Covered Registrants should not have to implement the Reporting Rules until they know whether or not they will be able to rely on substituted compliance.

In light of the foregoing, we request that the Division extend the no-action relief contained in Letter 17-64. In order to allow time for the Commission to complete its ongoing efforts to address the cross-border application of the Reporting Rules, the Associations respectfully request that the Division extend the no-action relief in Letter 17-64 until the earlier of (a) 30 days following the issuance of a comparability determination by the Commission with respect to the Reporting Rules for the jurisdiction in which the Covered Registrant is established and (b) December 1, 2023.

* * *

Thank you for your consideration of this request. Please do not hesitate to contact the undersigned or Colin Lloyd of Cleary Gottlieb Steen & Hamilton LLP (One Liberty Plaza, New York, New York 10006; clloyd@cgsh.com; (212) 225-2809) with any questions you may have. Pursuant to Commission Regulation 140.99(c)(3)(ii), the Associations hereby undertake that, if at any time prior to the issuance of a no-action letter, any material representation made in this letter ceases to be true and complete, they will promptly inform Commission staff in writing of all materially changed facts and circumstances.

Respectfully submitted,



Briget Polichene
Chief Executive Officer
IIB



Bella Rozenberg
Senior Counsel and Head of Legal and Regulatory
Practice Group
ISDA



Kyle Brandon
Managing Director, Head of Derivatives Policy
SIFMA

cc: The Honorable Heath P. Tarbert, Chairman
The Honorable Brian D. Quintenz, Commissioner
The Honorable Rostin Behnam, Commissioner
The Honorable Dawn DeBerry Stump, Commissioner
The Honorable Dan M. Berkovitz, Commissioner

Appendix A: Information Regarding the Associations

IIB is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. The IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. IIB's main business address is 299 Park Avenue, 17th Floor, New York, New York 10171 and its main telephone number is (212) 421-1611. Further information is available at www.iib.org.

Since 1985, **ISDA** has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 73 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. ISDA's main business address is 10 E. 53rd Street, 9th Floor, New York, New York 10022 and its main telephone number is (212) 901-6000. Information about ISDA and its activities is available on ISDA's website: www.isda.org. Follow us on Twitter @ISDA.

SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). SIFMA's main business address is 120 Broadway, 35th Floor, New York, New York 10271 and its main telephone number is (212) 313-1200. For more information, visit <http://www.sifma.org>.

Certification
(Pursuant to Commission Regulation 140.99(c)(3)(i))

The undersigned hereby certify that the material facts set forth in the attached letter, dated November 3, 2020, are true and complete to the best of their knowledge.



By: _____
Name: Briget Polichene
Title: Chief Executive Officer
IIB



By: _____
Name: Bella Rozenberg
Title: Senior Counsel and Head of Legal and Regulatory Practice Group
ISDA



By: _____
Name: Kyle Brandon
Title: Managing Director, Head of Derivatives Policy
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