



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Data

Re: No-Action Position from Certain Reporting Obligations for Counterparties Clearing Swaps through Derivatives Clearing Organizations Acting Under Exemptive Orders or No-Action Letters

Dear Mr. Young:

This letter responds to a request received by the Division of Data (“DOD”) of the Commodity Futures Trading Commission (the “Commission” or “CFTC”) from the International Swaps and Derivatives Association, Inc. (“ISDA”), pursuant to Commission Regulation 140.99.¹

ISDA has requested, on behalf of its members with swap data reporting obligations and other similarly situated persons, that DOD renew the no-action position provided in CFTC Letter No. 21-12² regarding certain reporting obligations under Part 45 of the Commission’s regulations in connection with the clearing of swaps with derivatives clearing organizations (“DCOs”) operating pursuant to (a) exemptive orders issued by the Commission,³ or (b) a no-action letter granted by the Commission’s Division of Clearing and Risk (“DCR”).⁴ ISDA has also requested that DOD renew certain no-action positions relating to the identification of swaps to be cleared with such DCOs in swap data reporting under Parts 43 and 45 of the Commission’s regulations.

I. Definitions for No-Action Position

Exclusively for the purposes of this letter, DOD will define the following terms:

¹ Letter from Christopher Young, Head of U.S. Public Policy, ISDA, to Dr. Tamara Roust, Director, CFTC Division of Data, dated April 18, 2022 (the “ISDA Letter”), to be available at <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm> soon after the issuance of this letter.

² CFTC Letter 21-12 (Apr. 28, 2021), available at <https://www.cftc.gov/cs/21-12/download>, renews relief extended in CFTC Letter 18-03 (Feb. 20, 2018), available at <https://www.cftc.gov/cs/18-03/download>. CFTC Letter 18-03 renewed relief originally granted in CFTC Letter 16-85 (Dec. 19, 2016), available at <http://www.cftc.gov/idc/groups/public/@lrlattergeneral/documents/letter/16-85.pdf>. The relief granted in CFTC Letter No. 21-12 will expire on May 25, 2022.

³ The Commission adopted regulations for exempt DCOs in 2021. See Exemption From Derivatives Clearing Organization Registration, 86 FR 949 (Jan. 7, 2021). However, exempt DCOs still operate pursuant to the exemptive orders issued by the Commission.

⁴ CFTC Letter No. 16-56 (May 31, 2016), available at <http://www.cftc.gov/idc/groups/public/@lrlattergeneral/documents/letter/16-56.pdf>.

- (a) Relief DCO: Any DCO or central counterparty acting pursuant to a current and valid exemptive order issued by the Commission, or a current and valid no-action letter issued by DCR. As of the date of this letter, there are four DCOs acting pursuant to exemptive orders: ASX Clear (Futures) Pty Limited, Japan Securities Clearing Corporation, Korea Exchange, Inc., and OTC Clearing Hong Kong Limited. Additionally, there is one DCO acting pursuant to a DCR no-action letter: Shanghai Clearing House.
- (b) Relief DCO Counterparty: Any market participant, not acting as a DCO or central counterparty, that is a counterparty to a swap cleared by a Relief DCO.
- (c) Relief DCO Original Swap: A swap reported or required to be reported pursuant to Part 45 of the Commission’s regulations that is subsequently accepted for clearing by a Relief DCO.
- (d) Relief DCO Clearing Swap: Any swaps created pursuant to the rules of a Relief DCO between a Relief DCO and Relief DCO Counterparty.
- (e) Relief ITBC Swap: Any swap which, at the time it is executed, is intended by the counterparties to be cleared by a Relief DCO.

II. **Background**

A. *Certain Reporting Obligations*

On June 27, 2016, the Commission published its final rule on Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps (the “Cleared Swap Rule”).⁵ The Cleared Swap Rule amended Part 45 of the Commission’s regulations⁶ to clarify or address certain reporting obligations, including the obligations for DCOs to (a) report the termination of swaps accepted for clearing by the DCO (defined as “original swaps” and known in the industry as “alpha swaps”);⁷ (b) report creation data and continuation data for swaps to which the DCO is a counterparty (defined as “clearing swaps”)⁸; and (c) generate the unique swap identifier (“USI”) for each clearing swap and transmit that USI to the DCO’s counterparty.⁹

The Cleared Swap Rule defined “derivatives clearing organization” exclusively as a DCO registered with the Commission.¹⁰ Because a Relief DCO would not be a “derivatives clearing

⁵ 81 FR 41736 (June 27, 2016). The compliance date for the Cleared Swap Rule was December 27, 2016.

⁶ 17 CFR part 45.

⁷ 17 CFR 45.4(c).

⁸ 17 CFR 45.3(e) (creation data for clearing swaps); 17 CFR 45.4(b) (continuation data for clearing swaps).

⁹ 17 CFR 45.5(d).

¹⁰ 17 CFR 45.1 (definition of “derivatives clearing organization”); Cleared Swap Rule, 81 FR at 41739 (declining to extend the definition of “derivatives clearing organization” to include exempt DCOs). While the Commission recently amended certain Part 45 regulations, Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020), the definition of “derivatives clearing organization” remains a DCO registered with the

organization” for purposes of the Cleared Swap Rule, a swap accepted for clearing by a Relief DCO would not be an “original swap” under § 45.4 of the Commission’s regulations.¹¹

Therefore, the obligation to terminate the Relief DCO Original Swap did not fall to the Relief DCO. Further, it meant Relief DCO Clearing Swaps were not considered “clearing swaps” for purposes of the Cleared Swap Rule. As a result, reporting obligations for Relief DCO Clearing Swaps fell to the Relief DCO Counterparty (either a swap dealer (“SD”), major swap participant (“MSP”), or non-SD/MSP counterparty) by operation of the reporting hierarchy under § 45.8.¹²

While not subject to reporting obligations imposed on registered DCOs under the Cleared Swap Rule, Relief DCOs are required pursuant to a term of an exemptive order or as condition to no-action letters to fulfill many of the same obligations. As noted above, there are currently four DCOs acting under exemptive orders issued by the Commission¹³ and an additional DCO, Shanghai Clearing House, acting pursuant to a no-action letter from DCR (“Shanghai NAL”).

Each of the exemptive orders includes the following requirement:

(10) Swap Data Recordkeeping and Reporting Requirements. If a clearing member clears through [Relief DCO] a swap that has been reported to a Commission-registered swap data repository (“SDR”) pursuant to Part 45 of the Commission’s regulations, then [Relief DCO] must report to an SDR, pursuant to this Order, data regarding the two swaps resulting from the novation of the original swap that had been submitted to [Relief DCO] for clearing. [Relief DCO] must also report the termination of the swap accepted for clearing by [Relief DCO], to the SDR to which the swap was originally reported. In order to avoid duplicative reporting for such transactions, [Relief DCO] shall have rules that prohibit the Part 45 reporting of the two new swaps by the original counterparties to the original swap.¹⁴

While the exemptive orders and Shanghai NAL place certain reporting obligations on the Relief DCOs, neither the exemptive orders nor Shanghai NAL provide any relief or no-action position to the Relief DCO Counterparty for any reporting obligations.

B. Certain Reporting Data Fields in Parts 43 and 45

The Cleared Swap Rule’s definition of “derivatives clearing organization” also implicates certain data elements that must be reported for Relief ITBC Swaps. When the Cleared Swap Rule was promulgated in 2016, Part 45 of the Commission’s regulations required certain primary economic terms (“PET”) data to be reported for every swap. Two PET data fields, “Clearing

Commission. Therefore, Relief DCO counterparties would still need the relief described below from their reporting obligations.

¹¹ 17 CFR 45.4.

¹² 17 CFR 45.8.

¹³ ASX Clear (Futures) Pty Limited, Japan Securities Clearing Corporation, Korea Exchange, Inc., and OTC Clearing Hong Kong Limited.

¹⁴ E.g., <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/asxclearamdorderdcoexemption.pdf> (ASX exemptive order). The Shanghai NAL includes similar language.

indicator” and “Clearing venue,” referenced DCOs.¹⁵ As Relief DCOs would not be “derivatives clearing organizations” for purposes of those data fields, absent relief any entity reporting a Relief ITBC Swap would have had to indicate that the swaps are not intended to be cleared under the terms of the Cleared Swap Rule.

Additionally, when the Cleared Swap Rule was promulgated, Part 43 of the Commission’s regulations required certain data to be reported for every publicly reportable swap transaction, including whether the swap is “Cleared or Uncleared” with a “derivatives clearing organization.”¹⁶ The term “derivatives clearing organization” was not defined in Part 43 of the Commission’s regulations, making it ambiguous as to whether a Relief ITBC Swap was “Cleared or Uncleared” for the purposes of reporting pursuant to Part 43.

On September 17, 2020, the Commission amended certain Parts 45 and 43 regulations.¹⁷ As part of these amendments, the Commission updated the technical specifications for the data fields to specify that exempt DCOs should report swaps to SDRs.¹⁸ The compliance date for the regulations amending Parts 45 and 43 is May 25, 2022. However, on January 31, 2022, DOD issued CFTC Letter No. 22-03, stating that DOD will not recommend that the Commission take an enforcement action against an entity for failure to comply with the regulations amending Parts 45 and 43 before December 5, 2022.¹⁹ If the no-action position granted in CFTC Letter No. 21-12 is not renewed, market participants will need to comply with portions of the amended Parts 45 and 43 regulations before December 5, 2022.

III. **Requested No-Action Position**

ISDA requests the renewal of the no-action position ISDA originally requested regarding reporting obligations for counterparties facing Relief DCOs.²⁰ First, ISDA requested that reporting counterparties that are neither DCOs nor central counterparties be relieved of the following reporting obligations:

1. Reporting swap continuation data for alpha swaps that have been accepted for clearing by a Relief DCO;²¹

¹⁵ Appendix 1 to Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012).

¹⁶ Appendix A to Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012).

¹⁷ Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020); Real-Time Public Reporting Requirements, 85 FR 75422 (Nov. 25, 2020).

¹⁸ For instance, the instructions on how to report whether a swap has been “Cleared” specify that references to “central counterparty” in the data fields should be read to mean “derivatives clearing organizations” and “exempt derivatives clearing organizations.” See Parts 43 and 45 Technical Specifications – September 2021, available at https://www.cftc.gov/media/6576/Part43_45TechnicalSpecification093021CLEAN/download.

¹⁹ CFTC Letter No. 22-03 (Jan. 31, 2022), available at <https://www.cftc.gov/cs/22-03/download>.

²⁰ Letter from Tara Kruse, Co-Head, Reporting & FpML, ISDA, to Vincent McGonagle, Director, Division of Market Oversight (“DMO”), dated December 1, 2016, attached to the ISDA Letter as Attachment A.

²¹ ISDA requested certain relief relating to swaps intended to be cleared with central counterparties exempted by the Commission and central counterparties that received no-action letters from DCR. DMO and DOD have combined these two types of central counterparties as “Relief DCOs” for purposes of CFTC Letters 16-85, 18-03, 21-12, and this letter.

2. Reporting any creation data and continuation data for swaps resulting from novation of an alpha swap accepted for clearing by a Relief DCO, as well as any related swaps which may be entered into as part of post-trade activities including netting or compression exercises or novations; and
3. Generating USIs for swaps created through the process of clearing a swap with a Relief DCO.

Second, ISDA requested that reporting counterparties be allowed to report the “Clearing indicator” and “Clearing venue” PET data fields for swaps intended to be cleared by a Relief DCO as if those swaps would be cleared by a registered DCO. DOD notes this no-action position would also be relevant to reporting entities other than the counterparties to a Relief DCO Original Swap, such as swap execution facilities and designated contract markets.

ISDA has requested DOD renew the no-action position in CFTC Letters 16-85, 18-03, and 21-12 to provide certainty as to the reporting obligations for the relevant market participants and to resolve any conflicting reporting obligations of Relief DCOs and Relief DCO Counterparties. To do so, DOD will renew the no-action position originally provided in CFTC Letters 16-85, 18-03, and 21-12 as follows.

IV. **Time Limited No-Action Position**

A. *Certain Reporting Obligations*

Based on the facts presented and the representations that ISDA has made, DOD will not recommend enforcement action to the Commission against Relief DCO Counterparties, solely for failure to comply with the following reporting obligations:

- a. Reporting continuation data pursuant to § 45.4 on Relief DCO Original Swaps after the acceptance of such Relief DCO Original Swaps for clearing by the Relief DCO, including reporting the termination of the Relief DCO Original Swap;
- b. Reporting creation data pursuant to § 45.3 and continuation data pursuant to § 45.4 on Relief DCO Clearing Swaps; and
- c. Generating USIs for Relief DCO Clearing Swaps pursuant to § 45.5.

This no-action position is subject to the condition that the Relief DCO Counterparty must provide to the Relief DCO all information on the Relief DCO Original Swap required by the Relief DCO in its clearing agreement.

For Relief DCO Original Swaps and Relief DCO Clearing Swaps, the no-action position taken in this section will continue until the earlier of: (a) December 5, 2022; or (b) the revocation or expiration of the exemptive order or no-action letter issued to the relevant Relief DCO. Relief DCO Counterparties retain all other reporting obligations for which they are responsible under Parts 43 and 45 of the Commission’s regulations, and would be relieved of no obligations if the Relief DCO rejects the swap for clearing.

B. *Certain Reporting Data Fields in Parts 43 and 45*

Based on the facts presented and the representations that ISDA has made, DOD grants this time-limited no-action letter to entities reporting Relief ITBC Swaps²² with respect to the reporting of the PET data elements “Clearing indicator” and “Clearing venue,” pursuant to Part 45 of the Commission’s regulations. DOD will not recommend enforcement action to the Commission against an entity reporting Relief ITBC Swaps for identifying such swaps as intended to be cleared in the “Clearing indicator” PET data field, or for identifying the legal entity identifier (“LEI”) of the Relief DCO in the “Clearing venue” PET data field.

In order to avoid any potential confusion over the requirements to report certain data fields for Relief ITBC Swaps pursuant to Part 43 of the Commission’s regulations, DOD also will not recommend enforcement action to the Commission against an entity reporting Relief ITBC Swaps for identifying such swaps as intended to be cleared in the “Cleared or Uncleared” data field to be reported pursuant to Part 43.

This no-action position is subject to the condition that the entity reporting a Relief ITBC Swap must populate all “Clearing indicator” PET fields in Part 45 reporting, and all “Cleared or Uncleared” fields in Part 43 reporting, for all swaps intended to be cleared through the relevant Relief DCO. To comply with this relief, the entity reporting such swap must report all swaps intended to be cleared by a particular Relief DCO as being intended for clearing in both Parts 43 and 45 reporting.

This no-action position is subject to the additional condition that the entity reporting a Relief ITBC Swap must report the LEI of the relevant Relief DCO with all Part 45 reports for all swaps intended to be cleared with that Relief DCO.

For all Relief ITBC Swaps, the no-action position taken in this section will continue until the earlier of: (a) December 5, 2022; or (b) the revocation or expiration of the exemptive order or no-action letter issued to the relevant Relief DCO.

The no-action positions taken herein do not excuse affected persons from compliance with any other applicable CEA requirements or the Commission’s regulations, in particular, the applicable swap reporting requirements and clearing requirements.²³ This letter and the no-action positions taken herein represent the views of DOD only, and do not necessarily represent the positions or views of the Commission or of any other division or office. As with all no-action letters, DOD retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action positions provided herein, at its discretion.

²² ISDA requested relief on the PET fields related to swaps intended to be cleared with a Relief DCO. Should the Relief DCO reject such swaps from clearing, the swaps would not be “Relief DCO Original Swaps” under the terms of this letter. Therefore, the Commission uses the term Relief ITBC Swaps to clarify that the relief relating to data fields would apply even if the Relief DCO rejects the swap for clearing.

²³ The applicable swap reporting requirements are set forth under Parts 43, 45, 46, and 50 of the Commission’s regulations, 17 CFR parts 43, 45, 46 and 50, respectively. The applicable clearing requirements are set forth under CEA section 2(h)(1), 7 U.S.C. § 2(h)(1), and Part 50 of the Commission’s regulations.

If you have any questions concerning this correspondence, please contact Richard Mo, Special Counsel, Division of Data, at (202) 418-7637 or rmo@cftc.gov, or Owen Kopon, Associate Director, Division of Data, at (202) 418-5360 or okopon@cftc.gov.

Sincerely,

Tamara Roust
Director
Division of Data