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Division of Market Oversight

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Extension of Time-Limited No-Action Position 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 a request 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 position provided in CFTC Letter No. 20-37.[1]

I. Background

On December 20, 2013, the Division of Market Oversight issued CFTC Letter No. 13-75. The letter provided Commission-registered swap dealers ("SDs") and major swap participants ("MSPs") that are non-U.S. persons[2] 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 45[3] and Part 46[4] of the Commission's regulations (collectively, the "SDR Reporting Rules"). During April 2019, DMO expanded its no-action position to cover non-U.S. SDs and non-U.S. MSPs established under the

[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 20-37 (October 13, 2022) (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).

laws of the United Kingdom (collectively with the Prior Jurisdictions, the "Enumerated Jurisdictions") in CFTC Letter No. 19-09.[5] The Division of Market Oversight extended its no-action position most recently on November 18, 2020 in CFTC Letter No. 20-37. CFTC Letter No. 20-37 is set to expire no later than December 1, 2022.

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 is actively working to address the outstanding issues related to fully implementing the standards for OTC derivatives reporting agreed to at the 2009 Pittsburgh G-20 summit. 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. The amended rules adopting FSB and CPMI-IOSCO technical guidance were published on November 25, 2020,[8] making comprehensive changes to Parts 45 and 46 ("Amended SDR Reporting Rules").[9] In January of 2022, Division of Data staff published a No-Action Letter stating that staff would not recommend an enforcement action against an entity for failure to comply with the Amended SDR Reporting Rules before December 5, 2022.[10]

The Division of Market Oversight urges regulators from the Enumerated Jurisdictions to continue 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.

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

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[5] *See* CFTC Letter 19-09 (April 5, 2019).

[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] Swap Data Recordkeeping and Reporting Requirements, 85 Fed. Reg. 75503, 75550 (November 25, 2020).

[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.

[10] *See* CFTC Letter 22-03 (Jan. 31, 2022).

additional three-year extension of the time-limited no-action position provided in CFTC Letter No. 20-37.

II. Extension of No-Action Position

(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,[11] 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, 2025.

(ii) The no-action position provided in this letter does not extend to the recordkeeping requirements of Commission Regulations 45.2,[12] 45.6, 46.2 and 46.4.[13]

The no-action position 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.[14]

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[11] 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.

[12] 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.

[13] However, during the period of this no-action position, 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.

[14] 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

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 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 position provided herein, in its discretion.

Should you have any questions concerning this correspondence, please contact Isabella Bergstein, Assistant Chief Counsel, Division of Market Oversight, at (202) 993-1384 or ibergstein@cftc.gov, or Owen Kopon, Associate Chief Counsel, Division of Market Oversight, at (202) 418-5360 or okopon@cftc.gov.

Sincerely,

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DCM, are not affected by the no-action position provided herein.