



Commission Regulations Parts 45 and 46

Vincent McGonagle  
Director, Division of Market Oversight  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

Re: Request for Extension of No-Action Letter 20-37

Dear Mr. McGonagle:

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”) <sup>1</sup> 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. 20-37 (“Letter 20-37”), <sup>2</sup> which currently is scheduled to expire on December 1, 2022.

Letter 20-37 extended certain no-action relief from the requirements of Parts 45<sup>3</sup> and 46<sup>4</sup> of the Commission’s regulations (collectively, the “SDR Reporting Rules”) to a non-U.S. swap dealer (“SD”) or a non-U.S. major swap participant (“MSP”) established in Australia, Canada, the European Union, Japan, Switzerland or the United

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<sup>1</sup> Information regarding the Associations is set forth in Appendix A.

<sup>2</sup> CFTC Letter No. 20-37, dated November 18, 2020, available at <https://www.cftc.gov/csl/20-37/download>.

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

<sup>4</sup> 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).

Mr. Vincent McGonagle

October 13, 2022

Page 2

Kingdom (each, an “Enumerated Jurisdiction”), 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 (such a non-U.S. SD or non-U.S. MSP, a “Covered Registrant”), 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 2013 cross-border guidance (the “Cross-Border Guidance’)).<sup>5</sup>

Pending further developments relevant to the cross-border application of the SDR Reporting Rules, we believe it would be appropriate for the Division to extend this reporting relief.

In particular, the Cross-Border Guidance envisioned that a Covered Registrant could satisfy the SDR Reporting Rules by substituting compliance with comparable home country reporting rules, subject to certain data-sharing arrangements.<sup>6</sup> To date, however, the Commission has not yet issued any comparability determinations with respect to the SDR Reporting Rules in the Enumerated Jurisdictions. In particular, our members understand 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.

In addition, in 2020, when the Commission adopted rules codifying and modifying certain aspects of the Cross-Border Guidance, it also stated its intent to address the cross-border application of the SDR Reporting Rules in the future.<sup>7</sup> In this connection, we believe the Commission should consider permanently codifying the relief reflected in Letter 20-37, in recognition that the swaps covered by the relief have a limited nexus to the U.S. financial system and other jurisdictions generally do not take a similarly extraterritorial approach to reporting rules as does the Cross-Border Guidance.

If Letter 20-37 were to expire without such codification or comparability determinations, Covered Registrants would face significant challenges applying the SDR Reporting Rules to their swaps with non-U.S. counterparties that are not guaranteed or conduit affiliates:

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

<sup>6</sup> *Id.* at 45,345.

<sup>7</sup> See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56,924, 56,923, n.354 (Sept. 14, 2020).

- To address conflicts with non-U.S. privacy laws, Covered Registrants would need consent from many of these non-U.S. counterparties to report their swaps in accordance with the SDR Reporting Rules. In addition, to complete required data elements pertaining to the status of those non-U.S. counterparties under U.S. law, such as whether a non-reporting counterparty is a “financial entity” as defined by the Commodity Exchange Act (“CEA”), Covered Registrants may need to collect information from those counterparties.<sup>8</sup> On the other hand, those non-U.S. counterparties may be reluctant or unwilling to provide such consents or information, as they may question why their swaps with non-U.S. SDs are subject to U.S. reporting rules. This could lead to market fragmentation, as those counterparties instead elect to trade with non-U.S. firms not registered with the Commission.
- Other jurisdictions’ definitions for “OTC derivatives” subject to reporting rules do not match the CEA’s “swap” definition. For example, in Europe it is common for foreign exchange and commodity warrants to trade as securities, whereas they might be swaps under the CEA. Because these products trade on exchanges as securities, it is not possible to report them as swaps. The Commission previously granted relief to address this issue for a U.S.-controlled SD,<sup>9</sup> but if Letter 20-37 expired it would become relevant for several Covered Registrants, too.
- Many Covered Registrants’ reporting systems are not centralized, but rather use multiple systems for different locations or business lines. Changing these disparate operations and technology systems and processes to address specific details of the SDR Reporting Rules (such as data format, reporting deadlines, treatment of lifecycle events, etc.) would require a significant investment of resources, approaching that required for compliance with existing home country reporting rules.
- Backloading of historical swaps would pose major issues. Depending on how long ago a swap expired, sufficient data to backload it might no longer exist or be accessible. Also, it may not be possible for Covered Registrants to obtain consents required under non-U.S. privacy laws to report expired swaps with counterparties who are no longer clients. Even where reporting is possible, gathering and formatting data for what could be more than 10 years of activity

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<sup>8</sup> A similar issue arises with respect to legal entity identifiers for counterparties in jurisdictions where local rules permit other types of counterparty identifiers.

<sup>9</sup> See CFTC Letter No. 20-18, dated May 18, 2020, [available at https://www.cftc.gov/csl/20-18/download](https://www.cftc.gov/csl/20-18/download).

would consume substantial resources and time and likely present bandwidth issues at swap data repositories.<sup>10</sup>

Extending Letter 20-37 would also be warranted given the practical reality that Covered Registrants have been focusing their resources in the trade reporting area on implementing the substantial amendments to the SDR Reporting Rules adopted by the Commission in 2020.<sup>11</sup> Those amendments are largely scheduled to take effect December 5, 2022,<sup>12</sup> just four days following the scheduled expiration of Letter 20-37. The Division has previously indicated its expectation that these efforts would be completed before expiration of the no-action relief,<sup>13</sup> and we continue to believe it appropriate to sequence enhancements to the domestic U.S. reporting regime prior to any further extraterritorial application of that regime.

In light of the foregoing, we request that the Division extend the no-action relief contained in Letter 20-37. In order to allow time for the Commission to complete its ongoing efforts to address the cross-border application of the SDR Reporting Rules, the Associations respectfully request that the Division extend the no-action relief in Letter 20-37 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 Covered Registrant is established and (b) December 1, 2025.

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<sup>10</sup> There are also several legal ambiguities in the backloading context. For example, the definition of “transition swap” includes swaps entered into after the enactment of Dodd-Frank and prior to the “applicable compliance date” on which an SD subject to the Commission’s jurisdiction is required to commence reporting pursuant to Part 46. To comply with Part 46, Covered Registrants would need guidance on what the Commission would interpret the “applicable compliance date” to be.

<sup>11</sup> Swap Data Recordkeeping and Reporting Requirements, 85 Fed. Reg. 75,503 (Nov. 25, 2020).

<sup>12</sup> See CFTC Letter No. 22-03, dated Jan. 31, 2022, [available at https://www.cftc.gov/csl/22-03/download](https://www.cftc.gov/csl/22-03/download).

<sup>13</sup> See CFTC Letter No. 17-64, dated Nov. 30, 2017, [available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/17-64.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/17-64.pdf).

Mr. Vincent McGonagle

October 13, 2022

Page 5

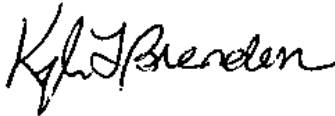
Thank you for your consideration of this request. Please do not hesitate to contact the undersigned or Colin D. Lloyd of Sullivan & Cromwell LLP (125 Broad Street, New York, New York 10004; lloyd@sullcrom.com; (212) 558-3040) with any questions you may have. Pursuant to Commission Regulation 140.99(c)(3)(ii), 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,



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Stephanie Webster  
General Counsel  
Institute of International Bankers



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Kyle Brandon  
Managing Director, Head of Derivatives Policy  
SIFMA



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

cc: The Honorable Rostin Behnam, Chairman  
The Honorable Kristin N. Johnson, Commissioner  
The Honorable Christy Goldsmith Romero, Commissioner  
The Honorable Summer K. Mersinger, Commissioner  
The Honorable Caroline D. Pham, Commissioner

## Appendix A: Information Regarding the Associations

The Institute of International Bankers 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.

Since 1985, the International Swaps and Derivatives Association has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 960 member institutions from 78 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. Information about ISDA and its activities is available on the Association's website: <https://www.isda.org/>. Follow us on Twitter, LinkedIn, Facebook and YouTube.

The Securities Industry and Financial Markets Association 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 one 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). For more information, visit <http://www.sifma.org>.