

November 17, 2022

Vincent McGonagle
Director
Division of Market Oversight
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Request for Extension of CFTC No-Action Relief 22-05: No-action Relief for SDR Reporting Requirements for Swaps Cleared by Exempt and No-Action DCOs

Dear Mr. McGonagle:

The International Swaps and Derivatives Association, Inc.¹ (“ISDA”) requests the Division of Market Oversight (“DMO”) of the Commodity Futures Trading Commission (“CFTC” or the “Commission”) issue no-action relief for the Part 45 obligations of reporting counterparties² with respect to swaps that are accepted for clearing by a central counterparty (“CCP”) which has been granted and is subject to (i) an Order of Exemption from the obligation to register with the Commission as a derivatives clearing organization (“DCO”) or (ii) no-action relief issued by Commission staff with respect to the obligation to register as a DCO, as described below.

Background

Section 5b(a) of the Commodity Exchange Act (“CEA”) requires certain CCPs which accept swaps for clearing to register with the Commission as DCOs. Section 5b(h) of the CEA permits the Commission to exempt a CCP from registration as a DCO if the CCP is subject to comparable, comprehensive supervision and regulation by the authorities in its home jurisdiction. Accordingly, the Commission has exempted several non-U.S. CCPs from the requirement to register as DCOs in order to allow them to clear swaps for U.S. clearing members

¹Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 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: www.isda.org.

²17 CFR Part 45 Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan 13, 2012). CFTC regulation 45.1 defines the term “reporting counterparty” to mean “the counterparty required to report swap data pursuant to this [Part 45], selected as provided in §45.8.”

and their affiliates on a proprietary basis³ (each when conducting clearing as addressed under the relevant Order, an “Exempt DCO”).

On several occasions, the CFTC’s Division of Clearing and Risk (“DCR”) have granted conditional, temporary no-action relief permitting some non-U.S. CCPs to clear certain swaps for U.S. persons prior to becoming registered with the Commission as a DCO or becoming exempted from registration, as applicable,⁴ each when conducting clearing as addressed under the relevant no-action relief, a “No-Action DCO”.

On June 14, 2016, the Commission approved *Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps*⁵ (the “Cleared Swap Rule”) which amended the Part 45 regulations, providing clarity to swap counterparties and registered entities regarding their reporting obligations for cleared swap transactions, defined therein as “Clearing Swaps”. The Cleared Swap Rule unambiguously assigns the sole reporting obligation under Part 45 for Clearing Swaps to the DCO. However, in section 45.1 of the regulation, the Commission has both limited the definition of a DCO to include only DCOs which are *registered* with the Commission and limited the definition of Clearing Swaps to swaps cleared through such registered DCOs. On November 25, 2020, the Commission published further amendments to the “CFTC Swap Data Reporting Rules”⁶ (“CFTC Rewrite”). However, there were no changes to the definition of “DCO” or “clearing swap” in Part 45.1 in the CFTC Rewrite, as well as the requirement that the Part 45 reporting obligation for clearing swaps is with the DCO (as defined). However, the CFTC Technical Specifications issued in connection with the CFTC Rewrite provide a footnote to reportable data element “Cleared” that for purposes of those technical specifications, “central counterparty” should be read to mean “derivatives clearing organization” and “exempt derivatives clearing organization”.

As a result, swaps which are accepted for clearing by either an Exempt DCO or a No-Action DCO are technically not Clearing Swaps under the Part 45 regulations. This contradicts the conditions of the Order of Exemption (each an “Order”) or no-action letter (each an “NAL”), as applicable, issued to each CCP by either the Commission or DCR. In each case, the Order or NAL provide that the Exempt DCO or No-Action DCO is required to report to a swap data repository (“SDR”), pursuant to Part 45, “data regarding the two swaps resulting from the novation of the original swap” (the “Alpha” or “Alpha swap”) that has been submitted to the CCP for clearing. In each case the Exempt DCO or No-Action DCO is also required to report the termination of the Alpha swap accepted for clearing to the SDR where the swap was

³Exempted CCPs currently include ASX Clear (Futures) Pty Limited (*see* <http://www.cftc.gov/idx/groups/public/@otherif/documents/ifdocs/asxclearamdorderdcoexemption.pdf>), Japan Securities Clearing Corporation (*see* <http://www.cftc.gov/idx/groups/public/@otherif/documents/ifdocs/jscdcoexemptorder10-26-15.pdf>), Korea Exchange, Inc. (*see* <http://www.cftc.gov/idx/groups/public/@otherif/documents/ifdocs/krxdcoexemptorder10-26-15.pdf>), and OTC Clearing Hong Kong Limited (*see* <http://www.cftc.gov/idx/groups/public/@otherif/documents/ifdocs/otcclearcoexemptorder12-21-15.pdf>).

⁴Such no-action relief currently in effect under CFTC Letter No. 16-56 for the benefit of Shanghai Clearing House (<https://www.cftc.gov/sites/default/files/idx/groups/public/@llettergeneral/documents/letter/16-56.pdf>).

⁵81 Fed. Register 41736

⁶Parts 45, 46, 49 Swap Data Recordkeeping and Reporting Requirements, P43 Real-Time Public Reporting Requirements, and Parts 43, 45, and 49 Certain Swap Data Repository and Data Reporting Requirements.

originally reported. The reporting obligations of Exempt DCOs under Part 45 are now also addressed in CFTC Part 39.6(d)⁷ and are consistent with the conditions in the respective Exempt DCO Orders. These requirements mirror those of DCOs under the current Part 45 regulations. In order to avoid duplicative reporting, Exempt DCOs and No-Action DCOs are also required by their Order/NAL to have rules which prohibit their counterparties from reporting the cleared swaps.

If the Part 45 reporting requirements assigned to Exempt DCOs and No-Action DCOs in their Orders/NALs are compiled with the obligations of DCOs under the Part 45 regulations, it appears as though the counterparties which have entered into cleared swaps with either a DCO, an Exempt DCO or a No-Action DCO have no obligation to report the cleared swaps since such obligation has been assigned, in each case, to the relevant CCP. However, by limiting the definition of DCO to include only registered DCOs (and thereby excluding Exempt DCOs and No-Action DCOs), the Part 45 regulations, even as amended under the CFTC Rewrite, do not relieve reporting counterparties from the obligation to report swaps that have been cleared with an Exempt DCO or No-Action DCO and therefore do not qualify as Clearing Swaps. The Orders/NALs that are currently in effect which assign an obligation for Exempt DCOs and No-Action DCOs to report under Part 45, also do not relieve reporting counterparties from their obligation to report these cleared swaps under the Part 45 regulations.

In sum, both an Exempt DCO or No-Action DCO and its non-CCP counterparty to a cleared swap have an obligation to report the swap between them, notwithstanding the fact that as one of the conditions of its Order/NAL each Exempt DCO or No-Action DCO is required to have a rule to prohibit its counterparties from reporting the swaps under Part 45. In other words, existing Part 45 reporting obligations are not aligned.

Further, when it comes to reporting of clearing related data fields and information, as mentioned before, the CFTC Technical Specifications provide in a footnote that for purposes of the technical specifications “central counterparty” should be read to mean “derivatives clearing organization” and “exempt derivatives clearing organization”, but there is no similar clarification for No-Action DCOs. This creates a challenge for the reporting of the clearing indicator⁸ and clearing venue⁹ fields as required by Part 45. Data element #1, “cleared,” provides the options Yes/Intent to clear/No, and is defined as an “[i]ndicator of whether the transaction has been cleared, or is intended to be cleared, by a central counterparty.” Data element #2, “central counterparty,” is defined as the LEI, the “[i]dentifier of the central counterparty (CCP) that cleared the transaction.” The definition also specifies that the data element is not applicable if the value of the “cleared” data element is “No, not centrally cleared,” represented by “N,” or “Intent to clear,” represented by “I.” Since there is only clarification from the CFTC in the Technical Specifications that central counterparty includes Exempt DCOs but no such clarification is provided for No-Action DCOs, for a swap submitted and accepted for clearing (i.e. the Alpha) with a No-Action DCO, a strict interpretation of the rule would require the reporting counterparty to report “No” to the cleared field in such cases and would disallow the reporting in

⁷ 17 CFR Parts 39 and 140, 86 FR 949 (January 7, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/2020-26527.pdf>.

⁸ Data element #1 “Cleared”.

⁹ Data element #2 “Central counterparty”.

the central counterparty field of the LEI of the CCP through which the swap is intended to be cleared.

To bifurcate the approach to the cleared and central counterparty fields, reporting parties would need to establish and maintain static data which distinguishes DCOs and Exempt DCOs from No-Action DCOs and implement alternative reporting logic with respect to the cleared and central counterparty fields in each case. This runs contrary to existing industry builds which have established a consistent relationship between the swaps for which a reporting counterparty reports “Yes” to the cleared field and identification in the central counterparty field of the relevant CCP which is required by the Commission to terminate the Alpha and report the related cleared swaps.

If the cleared field is reported as “No,” the Commission would not be able to tell from the reported data that a swap intended for clearing with a No-Action DCO is an Alpha swap for which there is a CCP (whether it be an Exempt DCO or a No-Action DCO) which is obligated by the Commission to report the termination of that Alpha swap and report the data which ties it to the reported data of the related cleared swaps (e.g., UTIs of the cleared swaps, LEI of the SDR where the cleared swaps have been reported). This would limit the ability of Commission staff to monitor whether the Alphas are being terminated, as required by the Orders/NALs, and following the entire life of the Alpha swap through to clearing. Additionally, reporting of the LEI of the CCP in the central counterparty field will help the Commission to identify those swaps which are submitted for clearing at a No-Action DCO.

ISDA believes that the duplicative and contradictory reporting requirements described above for swaps accepted for clearing by and resulting from the novation to Exempt DCOs and No-Action DCOs are unintentional consequences and would benefit from being addressed by the Commission through no-action relief.

ISDA also observes that the Orders/NALs currently in effect refer generically to the obligation of an Exempt DCO or a No-Action DCO to report “data” pursuant to Part 45 for the swaps resulting from novation to the CCP of the original swap submitted for clearing. ISDA understands that “data” refers to the obligation to report all of the creation data and the continuation data for the cleared swaps, including the creation of the associated Unique Transaction Identifier (“UTI”) and reporting of swap valuation data, in each case as defined and prescribed in Part 45. ISDA believes it would be beneficial to clarify the definition of “data” in the Orders/NALs to eliminate any ambiguity regarding the obligations of Exempt DCOs and No-Action DCOs pursuant to the Part 45 regulations.

Relief request

In order to resolve these conflicting obligations and provide further clarity and certainty to market participants regarding their respective obligations for the reporting of Alpha swaps and cleared swaps pursuant to the Part 45 regulations when Exempt DCOs or NAL DCOs are involved in clearing, ISDA requests that DMO provide no-action relief to reporting counterparties as described below.

ISDA respectfully requests that DMO issue no-action relief to reporting counterparties which are neither DCOs nor CCPs from their Part 45 obligations to report:

- swap continuation data for Alpha swaps which have been accepted for clearing by either an Exempt DCO or a No-Action DCO; and
- any creation and continuation data (including UTI generation and transmission) for swaps resulting from novation of an Alpha swap by an Exempt DCO or a No-Action 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 (the “Exempt DCO/No-Action DCO Swaps”).

ISDA requests that the no-action relief issued to reporting counterparties confirm that:

- The Exempt DCO or the No-Action DCO is solely responsible for (i) reporting both swap creation and swap continuation data for swaps cleared at an Exempt DCO/No-Action DCO (including creation and transmission of the UTIs for these swaps) and (ii) swap continuation data reporting (including termination) for the Alpha which has been accepted for clearing by an Exempt DCO or No-Action DCO, as applicable, in the SDR to which the data for the Alpha was reported.

Furthermore, ISDA respectfully requests clarification that reporting counterparties as specified in Part 45 shall:

- report a value of “Yes” in the cleared field for swaps intended to be submitted for clearing to a No-Action DCO; and
- report the LEI of the No-Action DCO in the central counterparty field for swaps intended to be cleared at a No-Action DCO.

ISDA asks that the no-action relief requested above be granted to reporting counterparties and remain in effect the earlier of (a) December 5, 2025; (b) the revocation or expiration of the exemptive order or no-action letter issued to the relevant Exempt DCO or No-Action DCO; or (c) until further Commission action resolves these overlapping and contradictory reporting obligations in respect of the Part 45 obligations for Exempt DCO/No-Action DCO swaps and related Alphas accepted for clearing by those Exempt DCOs/No-Action DCOs.

Thank you for your consideration of these concerns. Please do not hesitate to contact me or Eleanor Hsu at (212) 901-6051 if you have any questions.

Sincerely,



Christopher Young
Head of U.S. Public Policy
International Swaps and Derivatives Association, Inc.

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

As required by Commission Regulation 140.99(c)(3), I, Christopher Young, hereby (i) certify that the material facts set forth in the attached letter dated November 17, 2022 are true and complete to the best of my knowledge; and (ii) undertake to advise the Commission, prior to the issuance of a response thereto, if any material representation contained therein ceases to be true and complete.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Young", written in a cursive style.

Christopher Young
Head of U.S. Public Policy
ISDA