



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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Market Participants  
Division

Amanda L. Olear  
Director

**Re: Revised No-Action Positions for Swaps Intended to be Cleared**

Ladies and Gentlemen:

This letter responds to a request received by the Market Participants Division (“**MPD**”) of the Commodity Futures Trading Commission (“**CFTC**” or “**Commission**”) from the International Swaps and Derivatives Association, Inc. (“**ISDA**”) on behalf of its members that are swap dealers (“**SDs**”). ISDA requested, in a letter dated May 31, 2022 (“**ISDA Letter**”),<sup>1</sup> that MPD confirm that it will not recommend an enforcement action with respect to certain business conduct and documentation requirements for swaps that are intended to be cleared. Specifically, ISDA requested that the Commission expand the scope of the swaps covered in CFTC Staff Letter 13-70 (“**Letter 13-70**”)<sup>2</sup> to include: (i) all swaps that are of a type accepted for clearing at execution; and (ii) swaps that are intended to be cleared through a clearing organization that has been exempted from registration by the Commission pursuant to section 5b(h) of the Commodity Exchange Act (“**CEA**”)<sup>3</sup> (an “**Exempt DCO**”) or that are executed on or pursuant to the rules of a swap execution facility exempted from registration by the Commission pursuant to section 5h(g) of the CEA.<sup>4</sup>

This letter supersedes Letter 13-70 in its entirety. No person may rely upon Letter 13-70 after the date hereof.

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<sup>1</sup> Available with this letter at <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm>.

<sup>2</sup> CFTC No-Action Letter No. 13-70 (Nov. 15, 2013), available at <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm>.

<sup>3</sup> 7 U.S.C. § 7a-1(h).

<sup>4</sup> 7 U.S.C. § 7b-3(g).

## I. Background

### A. Relevant SD and MSP Regulatory Obligations

The Commission's business conduct requirements for SDs and major swap participants ("MSPs")<sup>5</sup> under subpart H of part 23 of the Commission's regulations, which set forth business conduct standards for SDs and MSPs in their dealings with counterparties (the "**External BCS**"),<sup>6</sup> require SDs and MSPs to provide or obtain specific information from their counterparties, to obtain specific representations in writing from their counterparties, and to perform certain due diligence inquiries with respect to their counterparties prior to entering into (or in some cases, offering to enter into) a swap with such counterparties.<sup>7</sup> Certain safe harbors under the External BCS permit SDs and MSPs to rely on written representations from their counterparties and standardized disclosures, each of which may require amendments or supplements to an SD's or an MSP's relationship documentation with such counterparties prior to entering into a swap with such counterparties.<sup>8</sup> In addition to the safe harbors, many of the External BCS do not apply either (i) when the SD or MSP does not know the identity of the counterparty to a swap prior to the execution of the swap, or (ii) when the swap is initiated on a

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<sup>5</sup> There are currently no MSPs registered with the Commission; however, because MSPs are subject to regulatory requirements relevant to this letter, MPD is including MSPs within the scope of this letter.

<sup>6</sup> 17 CFR 23.400-23.451. *See generally* Business Conduct Standards for SDs and MSPs with Counterparties, 77 FR 9734 (Feb. 17, 2012).

<sup>7</sup> Commission regulation 23.402(b), 17 CFR 23.402(b) (requiring SDs to obtain essential facts about their counterparty prior to execution of a transaction); 23.430(a), 17 CFR 23.430(a) (requiring SDs and MSPs to verify that a counterparty meets the eligibility standards for an eligible contract participant before offering to enter into or entering into a swap with such counterparty); 23.431(a), 17 CFR 23.431(a) (requiring SDs and MSPs to provide material information concerning a swap to certain types of counterparties at a reasonably sufficient time prior to entering into the swap); 23.431(b), 17 CFR 23.431(b) (requiring SDs to provide notice to certain types of counterparties that they can request and consult on the design of a scenario analysis); 23.431(d), 17 CFR 23.431(d) (requiring SDs and MSPs to provide notice to certain types of counterparties of the right to receive the daily mark from a DCO for cleared swaps); 23.432, 17 CFR 23.432 (requiring SDs and MSPs to provide notice to certain types of counterparties of the right to select clearing and the DCO on which a swap is to be cleared); 23.434, 17 CFR 23.434 (requiring SDs, which recommend a swap to certain types of counterparties, to have a reasonable basis to believe that the swap is suitable for the counterparty); 23.440, 17 CFR 23.440 (requiring SDs that act as an advisor to a Special Entity as defined in Commission regulation 23.401, 17 CFR 23.401, to act in such entity's best interest when the SD is recommending a swap tailored to the needs of the Special Entity or a trading strategy involving such a swap); 23.450, 17 CFR 23.450 (requiring SDs and MSPs to inquire into the knowledge and status of a representative of a counterparty that is a Special Entity); and 23.451, 17 CFR 23.451 (prohibiting SDs from entering into swaps with governmental Special Entities if it has made political contributions to an official of such entity).

<sup>8</sup> Commission regulations 23.402(d), (e), and (f), 17 CFR 23.402(d), (e), and (f).

swap execution facility (“**SEF**”)<sup>9</sup> or designated contract market (“**DCM**”), and the SD or MSP does not know the identity of the counterparty to a swap prior to the execution of the swap.<sup>10</sup>

In addition, documentation standards for SDs and MSPs have been adopted by the Commission pursuant to sections 4s(i)(1) and 4s(h) of the CEA.<sup>11</sup>

Commission regulation 23.504 requires that an SD or MSP execute swap trading relationship documentation, meeting the requirements of the rule with a counterparty, prior to or contemporaneously with entering into a swap transaction with such counterparty.<sup>12</sup> Similar to the External BCS, Commission regulation 23.504 contains an exception to the requirement that an SD or MSP execute swap trading relationship documentation with a counterparty prior to or contemporaneously with entering into a swap transaction with such counterparty. The exception in Commission regulation 23.504(a)(1) states that such documentation is not required with respect to swaps executed on a DCM or anonymously on a SEF if such swaps are cleared by a derivatives clearing organization (“**DCO**”)<sup>13</sup> and all terms of the swaps conform to the rules of the DCO and Commission regulation 39.12(b)(6).<sup>14</sup>

## **B. CFTC Letter 13-70**

In 2013, swap market participants submitted requests to the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) (now MPD) to issue a no-action letter with respect to the External BCS and certain documentation requirements under Commission regulation 23.504 as applied to swaps of a type accepted for clearing by a DCO and executed with the intention to be

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<sup>9</sup> “Swap execution facility” is defined in section 1a(50) of the CEA, 7 U.S.C. § 1a(50), and Commission regulation 1.3, 17 CFR 1.3. For purposes of this letter, “SEF” means a swap execution facility as defined in Commission regulation 1.3 and registered with the Commission as such.

<sup>10</sup> Commission regulations 23.402(b) and (c), 17 CFR 23.402(b) and (c) (requiring SDs and MSPs, as applicable, to obtain and retain certain information only about each counterparty whose identity is known to the SD or MSP prior to the execution of the transaction); 23.430(e), 17 CFR 23.430(e) (not requiring SDs and MSPs to verify counterparty eligibility when a transaction is initiated on a DCM, or on a SEF when the SD or MSP does not know the identity of the counterparty prior to execution); 23.431(c), 17 CFR 23.431(c) (not requiring disclosure of material information about a swap if initiated on a DCM or SEF and the SD or MSP does not know the identity of the counterparty prior to execution (*contra* general prohibition of fraudulent, deceptive, or manipulative practices under Commission regulation 23.410)); 23.450(h), 17 CFR 23.450(h) (not requiring SDs and MSPs to have a reasonable basis to believe that a Special Entity has a qualified, independent representative if the transaction with the Special Entity is initiated on a DCM or SEF and the SD or MSP does not know the identity of the Special Entity prior to execution); and 23.451(b)(2)(iii), 17 CFR 23.451(b)(2)(iii) (not applying the prohibition on entering into swaps with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity if the swap is initiated on a DCM or SEF and the SD does not know the identity of the entity prior to execution).

<sup>11</sup> 7 U.S.C. § 6s(i)(1) and (h).

<sup>12</sup> Commission regulation 23.504(a)(2), 17 CFR 23.504(a)(2).

<sup>13</sup> “Derivatives clearing organization” is defined in section 1a(15) of the CEA, 7 U.S.C. § 1a(15), and Commission regulation 1.3, 17 CFR 1.3. For purposes of this letter, “DCO” means a derivatives clearing organization as defined in Commission regulation 1.3 and registered with the Commission as such.

<sup>14</sup> 17 CFR 39.12(b)(6)

## ITBC SWAPS

cleared on a DCO contemporaneously with execution. The market participants argued that for cleared swaps, especially those executed on a SEF or DCM:

- (1) There is no ongoing relationship between the SD and its counterparty so there is no need for the onboarding information or representations under Commission regulation 23.402, nor swap trading relationship documentation, even if the SD knows the identity of its counterparty prior to execution;
- (2) Such swaps are sufficiently standardized, and information about such swaps is available from sources other than an SD, such that there should be no need for the SD to make disclosures of material risks and characteristics, no concerns about institutional suitability determinations, and no concerns about SDs acting as advisors or counterparties to Special Entities;
- (3) Because both parties to the swaps intend the swaps to be cleared and to face the DCO for the life of the swaps, there is no regulatory purpose to be served by the notices required of SDs regarding the right to clear the swaps, the right to receive a daily mark from the DCO, or the right to select the DCO; and
- (4) When such swaps are executed anonymously, there should be no concerns about political contributions by SDs to governmental Special Entities in return for swap business.

Market participants argued that SDs' compliance with these External BCS was creating roadblocks to efficient use of cleared swaps, especially for asset managers seeking to execute large trades anonymously with the intention of allocating parts of the trades to multiple accounts post-clearing.

In response to the requests, DSIO issued Letter 13-70. In Letter 13-70, DSIO took a no-action position with respect to a list of External BCS requirements and the swap trading relationship documentation requirement under Commission regulation 23.504, with respect to swaps that were intended to be submitted for clearing contemporaneously with execution, commonly known as "intended-to-be-cleared swaps." The staff's no-action position in Letter 13-70 was subject to certain conditions, contingent on certain aspects of the swap, including whether or not the SD or MSP knows the identity of the counterparty prior to execution of the swap, whether or not the swap is executed on or subject to the rules of a SEF or DCM, and whether or not the swap was, as of the date of issuance of Letter 13-70 (i.e., November 13, 2013), of a type accepted for clearing by a DCO or subject to a mandatory clearing determination by the Commission.

### **C. Exempt SEFs and Exempt DCOs**

Section 5h(g) of the CEA authorizes the Commission to exempt, conditionally or unconditionally, a swap execution facility from registration, if the Commission finds that the facility is "subject to comparable, comprehensive supervision and regulation on a consolidated

basis by ... the appropriate governmental authorities in the home country of the facility.”<sup>15</sup> As of the date of this letter (and following the issuance of Letter 13-70), the Commission has issued exemptions from swap execution facility registration to facilities for the trading or processing of swaps from the European Union,<sup>16</sup> Singapore,<sup>17</sup> and Japan.<sup>18</sup> Further, in response to the withdrawal of the United Kingdom (“UK”) from the EU, commonly referred to as “Brexit,” CFTC staff issued no-action relief to certain UK MTFs and OTFs to maintain the status quo of the EU Exemptive Order while the Commission works on a determination for UK authorized MTFs and OTFs under CEA section 5h(g).<sup>19</sup> Any facilities for the trading or processing of swaps that, as of any date of determination, are exempt from registration as a swap execution facility under CEA section 5h(g), including, without limitation, any Exempt EU Trading Venue, Exempt SG Trading Venue, or Exempt Japan Trading Venue, or is an Eligible UK Trading Venue, is an “**Exempt SEF**” on such date for purposes of this letter.

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<sup>15</sup> 7 U.S.C. § 7b-3(g).

<sup>16</sup> On December 8, 2017, the Commission issued an Order of Exemption with respect to multilateral trading facilities (“MTFs”) and organised trading facilities (“OTFs”) authorized in the European Union (“EU”) (the “**EU Exemptive Order**,” available at <https://www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs>), as most recently amended by the “Third Amendment to Appendix A to Order of Exemption,” dated October 26, 2022 (available at [https://www.cftc.gov/media/7896/EuropeanUnionThirdAmendmentAppendixA\\_CEASection5hgOrder/download](https://www.cftc.gov/media/7896/EuropeanUnionThirdAmendmentAppendixA_CEASection5hgOrder/download)). The EU Exemptive Order exempts each of the MTFs and OTFs listed in Appendix A thereto, as such Appendix A may be amended by the Commission from time to time (the “**Exempt EU Trading Venues**”), from registration with the Commission as a swap execution facility.

<sup>17</sup> On March 13, 2019, the Commission issued an Order of Exemption with respect to approved exchanges (“AEs”) and recognized market operators (“RMOs”) authorized in Singapore (the “**SG Exemptive Order**,” available at <https://www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs>), as most recently amended by the “Second Amendment to Appendix A to Order of Exemption,” dated October 26, 2022 (available at [https://www.cftc.gov/media/7891/SingaporeSecondAmendmentAppendixA\\_CEASection5hgOrder/download](https://www.cftc.gov/media/7891/SingaporeSecondAmendmentAppendixA_CEASection5hgOrder/download)). The SG Exemptive Order exempts each of the AEs and RMOs listed in Appendix A thereto, as such Appendix A may be amended by the Commission from time to time (the “**Exempt SG Trading Venues**”), from registration with the Commission as a swap execution facility.

<sup>18</sup> On July 11, 2019, the Commission issued an Order of Exemption with respect to electronic trading platforms (“ETPs”) registered in Japan (the “**Japan Exemptive Order**” and, together with the EU Exemptive Order and the SG Exemptive Order, the “**SEF Exemptive Orders**,” available at <https://www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs>). The Japan Exemptive Order exempts each ETP listed in Appendix A thereto, as such Appendix A may be amended by the Commission from time to time (the “**Exempt Japan Trading Venues**”), from registration with the Commission as a swap execution facility.

<sup>19</sup> On December 1, 2022, CFTC staff issued Staff Letter 22-16 (“**Letter 22-16**”), which is the most recent no-action letter providing relief to UK entities related to Brexit, including relief for certain UK authorized MTFs and OTFs. See CFTC No-Action Letter No. 22-16 (Dec. 1, 2022), available at <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/index.htm>.

For purposes of this letter, an “**Eligible UK Trading Venue**” means an MTF or OTF that is (i) authorized within the UK and (ii) listed in Appendix A to Letter 22-16; provided, however, to the extent Letter 22-16 is amended or extended, only those MTFs and OTFs included in the most recent amendment or extension of Letter 22-16 (or its successor) shall be an Eligible UK Trading Venue.

Similarly, section 5b(h) of the CEA authorizes the Commission to exempt, conditionally or unconditionally, a derivatives clearing organization from registration, if the Commission finds that the derivatives clearing organization is “subject to comparable, comprehensive supervision and regulation by... the appropriate government authorities in the home country of the organization.”<sup>20</sup> As of the date of this letter, the Commission has issued exemptions from registration to four derivatives clearing organizations: ASX Clear (Futures) Pty Limited (“ASX”);<sup>21</sup> Japan Securities Clearing Corporation (“JSCC”);<sup>22</sup> Korea Exchange, Inc. (“KRX”);<sup>23</sup> and OTC Clearing Hong Kong Limited (“OTC Clear”).<sup>24</sup> Any derivatives clearing organization that, as of any date of determination, is exempt from registration as a derivatives clearing organization under CEA section 5b, including, without limitation, ASX, JSCC, KRX, and OTC Clear, is an “**Exempt DCO**” on such date for purposes of this letter.

#### D. Swaps Clearing

As described in ISDA’s request letter, the cleared swaps market has grown considerably following the issuance of Letter 13-70, both in the number of swaps cleared but also the range of types of swaps that are cleared through DCOs and Exempt DCOs.<sup>25</sup> For example, in connection with the discontinuation of the London Interbank Offered Rate, swaps referencing the Secured Overnight Financing Rate have begun to be cleared.<sup>26</sup>

ISDA argues that applying the full range of business conduct and documentation requirements to all intended-to-be-cleared swaps that are of a type accepted for clearing by a DCO or Exempt DCO at execution is unnecessary. Specifically, according to ISDA, these swaps are sufficiently standardized so as to obviate the need for material risk, characteristics, incentives, and mid-

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<sup>20</sup> 7 U.S.C. § 7a-1(h).

<sup>21</sup> On August 18, 2015, the Commission issued an Order of Exemption with respect to ASX, *available at* <https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations>. The order exempts ASX from registration with the Commission as a derivatives clearing organization, subject to the terms and conditions of the order.

<sup>22</sup> On October 26, 2015, the Commission issued an Order of Exemption with respect to JSCC, *available at* <https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations>. The order exempts JSCC from registration with the Commission as a derivatives clearing organization, subject to the terms and conditions of the order.

<sup>23</sup> On October 26, 2015, the Commission issued an Order of Exemption with respect to KRX, *available at* <https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations>. The order exempts KRX from registration with the Commission as a derivatives clearing organization, subject to the terms and conditions of the order.

<sup>24</sup> On December 21, 2015, the Commission issued an Order of Exemption with respect to OTC Clear, *available at* <https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ClearingOrganizations>. The order exempts OTC Clear from registration with the Commission as a derivatives clearing organization, subject to the terms and conditions of the order.

<sup>25</sup> ISDA Letter, at 4.

<sup>26</sup> Certain of such SOFR swaps are now required to be cleared. See Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps To Account for the Transition From LIBOR and Other IBORs to Alternative Reference Rates, 87 FR 52182, 52207 (Aug. 24, 2022) (“The Commission is adopting a clearing requirement for USD SOFR . . . that will be implemented on October 31, 2022 . . .”)

market mark disclosures, as well as obligations related to institutional suitability.<sup>27</sup> Finally, ISDA argues that once the swap is immediately cleared through a DCO or Exempt DCO, there is no ongoing relationship between the counterparties, and imposing the requirements subject to this relief on SDs would not be meaningful given that the swap at issue is immediately replaced with two DCO- or Exempt DCO-facing swaps after execution.<sup>28</sup>

## II. MPD No-Action Position

In light of the foregoing, particularly the Commission's exemption of certain swap execution facilities and derivatives clearing organizations from registration with the Commission, and the development of the cleared swaps market following the issuance of Letter 13-70, MPD believes an expanded no-action position is warranted. Therefore, MPD is issuing this letter, subject to certain conditions and as more fully described below, to expand the scope of the swaps covered to all swaps of a type accepted for clearing by a DCO or an Exempt DCO (each, an "**Eligible DCO**") on the date of execution and intended to be cleared contemporaneously with execution (an "**ITBC Swap**"); and swaps that are executed on or pursuant to the rules of a DCM, a SEF, or an Exempt SEF (each, an "**Eligible Trading Venue**").<sup>29</sup>

MPD has also determined that any swap of a type accepted for clearing by an Eligible DCO will be sufficiently standardized to warrant similar treatment with respect to External BCS as those swaps of a type required to be cleared pursuant to section 2(h)(1) of the CEA and part 50 of the Commission's regulations or that were accepted for clearing as of the date of Letter 13-70. Therefore, the no-action positions provided in this letter no longer distinguish between swaps of a type accepted for clearing as of the date of Letter 13-70 and those of a type accepted for clearing after that date, nor between swaps of a type accepted for clearing and swaps that are required to be cleared.

However, MPD is making certain additional changes to the no-action positions provided in Letter 13-70:

First, with respect to the no-action position where an SD or MSP does not know the identity of the counterparty prior to execution, Letter 13-70 contained a condition that the swap must not be executed on or subject to the rules of a SEF or DCM. MPD did not include a similar condition in this letter because it generally intends to put such swaps on the same footing under the External

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<sup>27</sup> ISDA Letter, at 4.

<sup>28</sup> *Id.*

<sup>29</sup> For the avoidance of doubt, these no-action positions apply with respect to existing Exempt DCOs and Exempt SEFs, as well as any Exempt DCOs and Exempt SEFs that the Commission may recognize prior to the expiration of this letter.

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BCS specified in Appendix A regardless of whether they are executed on or pursuant to the rules of an Eligible Trading Venue.<sup>30</sup>

Second, MPD has determined that the no-action position included in Letter 13-70 relating to Commission regulation 23.451 where the SD knows the identity of the counterparty prior to execution is no longer warranted. DSIO established this no-action position in Letter 13-70 with the understanding that required execution of intended-to-be-cleared swaps on or subject to the rules of a SEF or DCM would adequately safeguard against the risk that a political contribution by an SD's covered associates might color the decision of an official of a governmental Special Entity to enter into a swap with the SD. Upon further review, MPD has concluded that only those ITBC Swaps in which the SD does not know the identity of the counterparty prior to execution adequately safeguard against this risk. SDs have long been aware that using political contributions to induce swap transactions with governmental Special Entities is not in compliance with Commission regulation 23.451. Based on its experience with exemption requests related to Commission regulation 23.451 since the issuance of Letter 13-70, MPD has observed that SDs have gained more experience with Commission regulation 23.451 and that SDs have made progress to establish policies and procedures, including the implementation of "no-trade" lists and other internal requirements, that are designed to prevent or mitigate violations of the regulation where the SD knows the identity of its counterparty prior to execution.<sup>31</sup> Thus, MPD does not believe that elimination of its no-action position with respect to Commission regulation 23.451 where the SD knows the identity of the counterparty prior to execution should result in any significant decrease in the ability of governmental Special Entities to enter into ITBC Swaps with SD counterparties.

Based on the foregoing, until December 31, 2025, MPD will not recommend that the Commission commence an enforcement action against an SD or an MSP for:

1. Failure to comply with the requirements of the External BCS specified in Appendix A attached hereto or the requirements of Commission regulation 23.504 (swap trading relationship documentation) with respect to an ITBC Swap where:

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<sup>30</sup> Note 43 of Letter 13-70 stated "Commission regulation 23.504 and many of the External BCS do not apply to swaps executed on or subject to the rules of a SEF or DCM and cleared on a DCO where the SD or MSP does not know the identity of the counterparty prior to execution of the swap." However, as implied by that statement, certain of the External BCS do apply to such swaps and, therefore, the no-action position is relevant for such swaps. *E.g.*, Commission regulations 23.431(d)(1), 17 CFR 23.431(d)(1); 23.432, 17 CFR 23.432; 23.434, 17 CFR 23.434; and 23.440, 17 CFR 23.440.

<sup>31</sup> SDs may request an exemption from the prohibition against swaps or trading strategies with governmental Special Entities pursuant to Commission regulation 23.451(d), 17 CFR 23.451(d), at which point the Commission can address the relevant facts and circumstances of a specific contribution. *E.g.*, TD Bank Application for Exemptive Letter Under 23.451(d) and Commission Order, *available at* <https://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankFinalRules/index.htm>. Additionally, SDs still may rely on the no-action position related to Commission regulation 23.451 outlined below provided the SD does not know the identity of the counterparty prior to execution of the swap.



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- (a) The SD or MSP does not know the identity of the counterparty prior to execution of the swap; and
  - (b) If the ITBC Swap is not executed on or pursuant to the rules of an Eligible Trading Venue, the SD or MSP ensures that both parties submit the ITBC Swap for clearing on an Eligible DCO as quickly after execution as would be technologically practicable if fully automated systems were used;<sup>32</sup> or
- 2. Failure to comply with the requirements of the External BCS specified in Appendix A attached hereto (**excluding Commission regulation 23.451**) or the requirements of Commission regulation 23.504 with respect to an ITBC Swap where:
  - (a) The SD or MSP knows the identity of the counterparty prior to execution of the swap; and
  - (b) The ITBC Swap is executed on or pursuant to the rules of an Eligible Trading Venue; or
- 3. Failure to comply with the requirements of Commission regulation 23.504 with respect to an ITBC Swap where:
  - (a) The SD or MSP knows the identity of the counterparty prior to the execution of the swap; and
  - (b) The ITBC Swap is not executed on or pursuant to the rules of an Eligible Trading Venue; and
  - (c) The SD or MSP ensures that both parties submit the ITBC Swap for clearing on an Eligible DCO as quickly after execution as would be technologically practicable if fully automated systems were used.

The no-action position specified above is, in each case, subject to the following conditions:

- (i) If clearing on a DCO, the SD or MSP is either a clearing member of the DCO to which the ITBC Swap will be submitted, or has entered into an agreement with a clearing member of such DCO for clearing of swaps of the same type as the ITBC Swap;
- (ii) If clearing on an Exempt DCO, the SD or MSP is a clearing member of the Exempt DCO to which the ITBC Swap will be submitted or an affiliate of a clearing member of the Exempt DCO;

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<sup>32</sup> This condition sets forth a standard for *submission* of the ITBC Swap for clearing to an Eligible DCO. It is in addition to the obligations in Commission regulations 23.506, 17 CFR 23.506 (which requires the SD or MSP to coordinate prompt and efficient swap transaction processing with the DCO), and 23.610, 17 CFR 23.610 (which requires the SD or MSP to accept or reject each trade submitted to the DCO for clearing as quickly as would be technologically practicable if fully automated systems were used).

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- (iii) The SD or MSP does not require the counterparty or its clearing FCM (if any) to enter into a breakage agreement or similar agreement as a condition to executing the ITBC Swap; and
- (iv) If the ITBC Swap is rejected from clearing, the ITBC Swap is void *ab initio*.

Similar to Letter 13-70, MPD is imposing these conditions because it believes SDs and MSPs should only be able to rely on the no-action position taken herein for their *bona fide* ITBC Swaps. MPD believes where any of these conditions are not satisfied for a swap, there are sufficient indicia that the swap is not an ITBC Swap and should not be treated as an ITBC Swap under this letter.<sup>33</sup>

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<sup>33</sup> MPD recognizes that SEFs and DCMs already have rules requiring ITBC Swaps to be void *ab initio* if not cleared. *See generally*, Staff Guidance on Swaps Straight-Through-Processing, CFTC Guidance Letter, at 6 (Sept. 26, 2013) (stating the Division of Market Oversight and Division of Clearing and Risk expect DCMs and SEFs to have rules stating that trades that are rejected from clearing are void *ab initio*.)

## ITBC SWAPS

This letter, and the positions taken herein, represent the views of MPD only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The no-action position taken in this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in Commission regulations. Further, this letter, and the positions taken herein, are based upon the representations made to MPD. Any different, changed, or omitted material facts or circumstances might render this no-action position void.

Questions concerning the relief provided by MPD in this letter may be directed to Frank Fisanich, Chief Counsel, at (202) 418-5949 or [ffisanich@cftc.gov](mailto:ffisanich@cftc.gov); or Jacob Chachkin, Associate Chief Counsel, at 202-418-5496 or [jchachkin@cftc.gov](mailto:jchachkin@cftc.gov).

Sincerely,

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Amanda L. Olear  
Director  
Market Participants Division

cc: Regina Thoele, Compliance  
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Michael Otten, OTC Derivatives  
National Futures Association, New York

**APPENDIX A**  
**Specified External BCS Requirements**

<b>Commission Regulation</b>	<b>Subject Matter</b>
§ 23.402(b)-(f)	Know your counterparty, True name and owner, Reasonable reliance on representations, Manner of disclosure, and Disclosures in a standard format
§ 23.430	Verification of counterparty eligibility
§ 23.431(a)	Material risks, characteristics, incentives, and conflicts of interest
§ 23.431(b)	Scenario analysis
§ 23.431(d)(1)	Notice of right to receive daily mark from DCO for cleared swaps
§ 23.432(a)	Notice of right to select DCO
§ 23.432(b)	Notice of right to clearing
§ 23.434	Recommendations to counterparties—institutional suitability
§ 23.440	Requirements for SDs acting as advisors to Special Entities
§ 23.450	Requirements for SDs and MSPs acting as counterparties to Special Entities
§ 23.451	Political contributions by certain SDs