



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

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-5977  
Facsimile: (202) 418-5407  
*gbarnett@cftc.gov*

Market Participants Division

Thomas J. Smith  
Acting Director

**Re: No-Action Position for Swap Dealers (“SDs”) and Major Swap Participants (“MSPs” and, together with SDs, “Swap Entities”) Regarding the Obligation to Provide a Pre-Trade Mid-Market Mark (“PTMMM”) under 17 CFR § 23.431(a)(3)(i) (the “PTMMM Requirement”)**

Ladies and Gentlemen:

The Market Participants Division (“MPD”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) is issuing this letter in response to the International Swaps and Derivatives Association, Inc. (“ISDA”), the Institute of International Bankers (“IIB”), and the Securities Industry and Financial Markets Association (“SIFMA”) (collectively, “the Associations”) request for a no-action letter<sup>1</sup> under Commission regulation 140.99.<sup>2</sup> The Associations request that MPD provide a no-action letter stating that it will not recommend enforcement action against Swap Entities<sup>3</sup>, for failure to satisfy the PTMMM Requirement for their swaps with non-Swap Entity counterparties.

**I. Applicable Regulatory Requirements**

Section 4s(h)(3)(B) of the Commodity Exchange Act (“CEA”) directs the Commission to adopt business conduct standards for Swap Entities that:

require disclosure by the swap dealer or major swap participant to any counterparty to the transaction (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of –

---

<sup>1</sup> Letter from the Associations to Thomas Smith, Acting Director MPD, dated March 26, 2025.

<sup>2</sup> 17 CFR 140.99.

<sup>3</sup> Although requested by the Associations on behalf of their members that are Swap Entities, for the avoidance of doubt, the no-action position provided in this letter is available to all Swap Entities.

\* \* \*

(iii) (I) for cleared swaps, upon the request of the counterparty, receipt of the daily mark of the transaction from the appropriate derivatives clearing organization; and (II) for uncleared swaps, receipt of the daily mark of the transaction from the swap dealer or the major swap participant.<sup>4</sup>

In 2012, the Commission issued final rules pursuant to 4s(h) of the CEA prescribing certain business conduct standards for Swap Entities, which included Regulation 23.431.<sup>5</sup> In relevant part, Regulation 23.431 reads as follows:

At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess . . . [t]he material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with a particular swap, which shall include: (i) [w]ith respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap as set forth in paragraph (d)(2) of this section . . . .<sup>6</sup>

In describing the purpose of requiring Swap Entities to disclose a PTMMM to non-Swap Entity counterparties, the Commission stated that “the spread between the quote and mid-market mark is relevant to disclosures regarding material incentives and provides the counterparty with pricing information that facilitates negotiations and balances historical information asymmetry regarding swap pricing.”<sup>7</sup>

Regulation 23.431(c) provides an exception from the requirement for a Swap Entity to provide the PTMMM. It states that the requirement to provide a PTMMM does not apply with respect to a transaction that is “(1) [i]nitiating on a designated contract market or a swap execution facility; and

---

<sup>4</sup> CEA Section 4s(h)(3)(B), 7 U.S.C. § 6s(h)(3)(B).

<sup>5</sup> Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012) (hereinafter “**Final Business Conduct Standards**”). In the proposed business conduct standards rules, the Commission proposed Regulation 23.431 to “provide specificity with respect to certain material information that must be disclosed” by swap dealers and major swap participants. Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 75 Fed. Reg. 80638, 80643 (proposed Dec. 22, 2010).

<sup>6</sup> Final Business Conduct Standards at 9824.

<sup>7</sup> *Id.* at 9766. In the preamble to the proposed rule, the Commission noted that the “mid-market [mark] is a transparent measure that would assist counterparties in calculating valuations for their own internal risk management purposes.” Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 75 Fed. Reg. 80638, 80646 (proposed Dec. 22, 2010).

(2) [o]ne in which the swap dealer or major swap participant does not know the identity of the counterpart to the transaction prior to execution.”<sup>8</sup>

MPD notes that pursuant to Section 1a(47)(E) of the CEA,<sup>9</sup> the Secretary of the Treasury (“**Secretary**”) is vested with the authority to determine whether foreign exchange swaps and forwards<sup>10</sup> should be regulated as swaps under the CEA, provided that the Secretary makes a written determination satisfying certain criteria specified in CEA Section 1b. On November 16, 2012, the Secretary issued a written determination that physically-settled foreign exchange forwards and swap agreements should not be regulated as swaps under the CEA (“**Treasury Determination**”).<sup>11</sup> Nonetheless, CEA Section 1a(47)(E)(iv) states that, notwithstanding the Secretary’s written determination, “any party to [an Exempt FX Transaction] that is a [Swap Entity] shall conform to the business conduct standards contained in section 4s(h).”<sup>12</sup> Thus, Swap Entities are required to comply with the business conduct standards adopted by the Commission in subpart H of part 23 of the Commission’s regulations, including the requirement under 17 CFR 23.431(a)(3)(i) to disclose a PTMMM to non-Swap Entity counterparties, prior to execution of a swap. Physically-settled foreign exchange forwards and foreign exchange swaps agreements that have been exempted from the definition of swap pursuant to the Treasury Determination are referred to herein as “**Exempt FX Transactions**.”

## II. Previous No-Action Positions

MPD (under its previous name, the Division of Swap Dealer and Intermediary Oversight) has previously provided a number of no-action positions applicable in a wide variety of contexts where market participants have persuasively shown that the PTMMM Requirement has been unnecessary or unworkable. In 2013, MPD provided a no-action position in CFTC Staff Letter 13-12<sup>13</sup> (which was a revision of CFTC Staff Letter 12-42<sup>14</sup>) stating that it would not recommend enforcement action against a Swap Entity for its failure to disclose an otherwise required PTMMM to a counterparty so long as the transaction was a foreign exchange swap, foreign exchange forward, or vanilla foreign exchange option of six-months or less that is physically settled, where: (1) each

---

<sup>8</sup> *Id.* at 9824.

<sup>9</sup> 7 U.S.C. 1a(47)(E).

<sup>10</sup> Foreign exchange swaps and foreign exchange forwards are defined in Sections 1a(24) and 1a(25), respectively, of the Commodity Exchange Act.

<sup>11</sup> U.S. Treasury Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69694 (Nov. 20, 2012).

<sup>12</sup> Additionally, foreign exchange swaps and forwards are subject to trade-reporting (but not real-time reporting) obligations, pursuant to Section 1a(47)(E)(iii) of the CEA, 7 U.S.C. § 1a(47)(E)(iii).

<sup>13</sup> See CFTC Staff Letter 13-12 (May 1, 2013). CFTC Staff Letters are available on the Commission’s website, [www.cftc.gov](http://www.cftc.gov).

<sup>14</sup> See CFTC Staff Letter 12-42 (Dec. 6, 2012).

currency is one of the “BIS 31 Currencies” (i.e., a specified, widely-traded currency);<sup>15</sup> (2) real-time tradeable bid and offer prices for the transaction are available electronically to the counterparty; and (3) the counterparty agrees in advance that the Swap Entity need not disclose the PTMMM.<sup>16</sup> CFTC Staff Letter 13-12 also provided a no-action position regarding the disclosure of a PTMMM for Exempt FX Transactions entered into by Swap Entities anonymously on electronic trading facilities that are not registered with the Commission as swap execution facilities (“SEFs”) or designated contract markets (“DCMs”), reasoning that because Exempt FX Transactions are not swaps per the determination of the U.S. Treasury, such transactions need not be executed on SEFs or DCMs, but should be treated the same as swaps executed on SEFs or DCMs.<sup>17</sup> Swaps executed anonymously on a SEF or DCM are excepted from the requirement to disclose a PTMMM pursuant to 17 CFR 23.431(c).

MPD provided a substantially similar no-action position in CFTC Staff Letter 12-58, stating that it would not recommend enforcement action against a Swap Entity for failure to disclose a PTMMM for certain widely-traded interest rate swap or index credit default swaps,<sup>18</sup> provided that real-time tradeable bid and offer prices for the relevant swap are available electronically to the counterparty on a DCM or SEF, and the counterparty agrees in advance that the Swap Entity need not disclose the PTMMM.<sup>19</sup>

MPD provided additional no-action positions for swaps intended to be cleared contemporaneously with execution (“**ITBC swaps**”) where the Swap Entities do not know the identity of their counterparty prior to execution,<sup>20</sup> and for disclosure of PTMMMs in the context of the LIBOR transition (swaps needing amendment to switch reference rates away from LIBOR) where the PTMMM Requirement applies, but is not relevant to the subject matter of the swap amendment.<sup>21</sup>

---

<sup>15</sup> Specifically, CFTC Staff Letter 13-12 defined the “BIS 31 Currencies” to be the U.S. dollar, Euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Korean won, Singapore dollar, Norwegian krona, Mexican peso, Indian rupee, Russian rouble, Chinese renminbi, Polish zloty, Turkish lira, South African rand, Brazilian real, Danish krone, New Taiwan dollar, Hungarian forint, Malaysian ringgit, Thai baht, Czech koruna, Philippine peso, Chilean peso, Indonesian rupiah, and Israeli new shekel. *Id.* at 5, n. 16.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 6–7.

<sup>18</sup> Specifically, CFTC Staff Letter 12-58 (Dec. 18, 2012) covered: (1) untranching credit default swaps referencing the on-the-run and most recent off-the-run series of the following indices: CDX.NA.IG 5Y, CDX.NA.HY 5Y, iTraxx Europe 5Y and iTraxx Europe Crossover 5yr; and (2) interest rate swaps (A) in the “fixed-for-floating swap class” (as such term is used in § 50.4(a), 17 CFR 50.4(a)) denominated in USD or EUR, (B) for which the remaining term to the scheduled termination date is no more than 30 years, and (C) that have the specifications set out in § 50.4, 17 CFR 50.4. *Id.* at 1.

<sup>19</sup> CFTC Staff Letter 12-58 at 4.

<sup>20</sup> See CFTC Staff Letters 13-70 (Nov. 15, 2013) and 23-01 (Feb 1, 2023).

<sup>21</sup> See CFTC Staff Letter 20-23 (Aug. 31, 2020), Re: Revised No-Action Positions to Facilitate an Orderly Transition of Swaps from Inter-Bank Offered Rates to Alternative Benchmarks; CFTC Staff Letter 24-02 (February 22, 2024)

In 2013, MPD also recognized that execution of swaps pursuant to long-standing conditions present in swap prime broker arrangements prevalent in the swap market made compliance with certain requirements under the Commission's business conduct standards by SDs operating as prime brokers ("**PBs**"), including the disclosure of a PTMMM, impossible due to the structure and information flows of these arrangements.<sup>22</sup> Recognizing these structural and informational hurdles to compliance with the External Business Conduct Standards, MPD issued a no-action position in CFTC Staff Letter 13-11 with respect to enumerated business conduct standards as they relate to certain covered transactions<sup>23</sup> executed under PB arrangements.<sup>24</sup>

Finally, in 2019 MPD recognized that certain PB transactions executed anonymously on SEFs raised additional structural and informational hurdles to compliance with the disclosure requirements of 17 CFR 23.431(a) and (b) in the context of PB arrangements. 17 CFR 23.431(c) provides that 17 CFR 23.431(a) and (b), which includes the PTMMM disclosure requirement, do not apply to swaps executed by an SD on a SEF where the SD does not know the identity of its counterparty prior to execution. In the PB context, this exception from the disclosure requirements of 17 CFR 23.431(a) and (b) would apply to the trigger swap between the SD acting as a PB (a "**PB/SD**") and the trigger swap counterparty that is executed anonymously on a SEF, but the mirror swap between the PB/SD and its PB customer would not be executed anonymously or on a SEF, and thus would not qualify for the exemption. However, the price of the mirror swap is determined based on the price at which the trigger swap is executed on the SEF, and therefore, it would be impossible for the PB/SD to provide the disclosures required by 17 CFR 23.431(a) and (b) to its PB customer prior to being obligated to enter into the mirror swap. Recognizing this structural obstacle to compliance with 17 CFR 23.431(a) and (b), MPD provided a no-action position in CFTC Staff Letter 19-06 stating that it would not recommend an enforcement action against a PB/SD for failure to make the disclosures required by 17 CFR 23.431(a) and (b) (which includes the PTMMM disclosure requirement) to its customer in relation to the mirror swap where the trigger swap is executed anonymously on a SEF.<sup>25</sup>

---

(Re: Request for No-Action Position for Swap Dealers and Major Swap Participants Regarding the Obligation to Provide a Pre-Trade Mid-Market Mark for Certain Transactions Referencing the Secured Overnight Financing Rate).

<sup>22</sup> Such compliance difficulties were not wholly unanticipated. *See* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 FR 30596, 30610 n. 201 (May 23, 2012) (where the Commission stated "[b]y contrast, it may be appropriate, over time, to tailor the specific requirements imposed on swap dealers depending on the facility on which the swap dealer executes swaps. For example, the application of certain business conduct requirements may vary depending on how the swap is executed, and it may be appropriate, as the swap markets evolve, to consider adjusting certain of those requirements for swaps that are executed on an exchange or through particular modes of execution.").

<sup>23</sup> The term "**covered transaction**" means a swap, as defined in section 1(a)(47) of the CEA and § 1.3, other than swaps subject to the clearing requirement of section 2(h)(1)(A) of the CEA and part 50 of the Commission's regulations, and Exempt FX Transactions. *See* CFTC Staff Letter 13-11 (Apr. 30, 2013) and Treasury Determination.

<sup>24</sup> *See* CFTC Staff Letter 13-11.

<sup>25</sup> CFTC Staff Letter 19-06 (Mar. 22, 2019) at 3.

## **II. Request for No-Action Position**

The Associations state that while well-intentioned, the PTMMM Requirement has not achieved its intended purpose. They state that there is no empirical evidence demonstrating that the PTMMM Requirement has meaningfully reduced any perceived information asymmetry or facilitated negotiations. They argue that counterparties to Swap Entities are generally sophisticated market participants and already have access to a wide range of pricing data and extremely advanced modeling tools, making the PTMMM disclosure of little value to them<sup>26</sup>—so much so that buy-side market participants have advocated for its removal.<sup>27</sup> Further, the Associations point out that the swaps market has significantly evolved since 2012, and there is a substantial amount of publicly available information that has contributed to transparency in swaps pricing, including, but not limited to, real-time reporting data.<sup>28</sup> As a result, they state that counterparties frequently request that Swap Entities either refrain from providing a PTMMM or ask Swap Entities to send them to a rarely monitored e-mail address due to the limited benefits of receiving such disclosure.<sup>29</sup> In short, the Associations argue that the PTMMM Requirement presumes an information imbalance between Swap Entities and their counterparties that simply does not exist in practice.

In addition, the Associations state that the PTMMM Requirement continues to impose significant compliance challenges and operational burdens on Swap Entities. They note that Swap Entities utilize complex infrastructure to calculate and deliver the mid-market marks in real-time, which requires a combination of sophisticated pricing models, real-time market data access, and legal risk assessment mechanisms. The Associations argue that the compliance costs and operational burdens associated with maintaining such an infrastructure far outweigh any perceived transparency benefits of the PTMMM disclosure. The Associations further note that in certain cases, determining the PTMMM of a particular transaction may take additional time, stating that this can adversely affect counterparties to Swap Entities by delaying trade time and serving as an impediment to the prompt execution of transactions.

---

<sup>26</sup> See ISDA KISS Letter (Sept. 29, 2017) at 22, available at <https://www.isda.org/2017/10/19/isda-response-to-cftc-project-kiss/> (noting that PTMMMs are not requested by clients); see also SIFMA KISS Letter (Sept. 29, 2017) at 2, available at <https://www.sifma.org/resources/submissions/letters/response-to-cftcs-kiss-initiative-regarding-external-business-conduct-requirements/>.

<sup>27</sup> See SIFMA Asset Management Group Letter in Response to CFTC Project KISS (Sept. 29, 2017) at 2, available at: <https://www.sifma.org/wp-content/uploads/2017/10/SIFMA-AMG-Comments-on-CFTCs-Project-KISS.pdf> (stating that: (1) the CFTC should “revise external business conduct standards to target market needs more efficiently”; and (2) the PTMMM Requirement “create[s] unnecessary burden upon dealers” and “costs imposed upon dealers translate into higher costs for investors utilizing swaps for investment strategies.”).

<sup>28</sup> 17 CFR Part 43.

<sup>29</sup> See SIFMA SEC Comment Letter (Aug. 7, 2015) at A-10-11, available at <https://www.sec.gov/comments/s7-25-11/s72511-55.pdf> (arguing that the SEC should not impose a PTMMM requirement given SDs’ experience with the CFTC’s requirement). Notably, the SEC declined to adopt a PTMMM requirement.

The Associations also note, as discussed above in Section II, that there are a number of instances where Commission staff have provided no-action positions with respect to a failure to disclose the PTMMM for different types of swap transactions, citing to the widespread availability of reliable pricing information as a key driver for such positions.<sup>30</sup> In each of those cases, the Associations are not aware of any resulting detrimental impacts to price transparency.

Finally, the Associations note that removing the PTMMM would better align the Commission's requirements with the U.S. Securities and Exchange Commission ("SEC") rules applicable to security-based swaps ("SBS"), which do not require PTMMM disclosure. Thus, they argue, providing the requested no-action position would further CFTC-SEC harmonization and associated efficiencies. Additionally, the Associations state that there has been no indication that the lack of a required PTMMM has led to meaningfully less customer protection or price transparency in the SBS market in the three years since the SBS rules have been in place.

The Associations conclude that, overall, the PTMMM does not provide any significant informational value to a Swap Entity's counterparties, and the PTMMM Requirement imposes significant operational burdens on Swap Entities and, at worst, impedes the prompt execution of swaps transactions. They argue that eliminating the PTMMM Requirement would create efficiencies in swaps trading without detriment to a Swap Entity's counterparties. For the foregoing reasons, the Associations request a no-action position that MPD will not recommend an enforcement action against a Swap Entity that does not provide its non-Swap Entity counterparty with a PTMMM. They further request that this position continue in effect until such time when the Commission has the opportunity to review the PTMMM Requirement holistically with an aim toward removing the requirement altogether.

### **III. MPD No-Action Position**

Based on the foregoing, the representations of the Associations, and informed by discussions with other market participants, MPD believes that a reconsideration of the usefulness and effectiveness of the PTMMM Requirement should be undertaken and thus believes that a no-action position is warranted until such time that such reconsideration is completed. Accordingly, MPD will not recommend that the Commission commence an enforcement action against a Swap Entity for failure to satisfy the PTMMM Requirement for its non-Swap Entity counterparties. This no-action position will continue until the adoption by the Commission of a regulation addressing the PTMMM Requirement.

MPD notes that this no-action position is applicable only to the PTMMM Requirement and does not affect any obligation to provide a daily mark pursuant to Regulation 23.431(d),<sup>31</sup> nor any

---

<sup>30</sup> See CFTC Letters 12-42, 12-58; and 24-02.

<sup>31</sup> 17 CFR 23.431(d).

obligation to report a transaction or information concerning a transaction under part 43 or part 45 of the Commission's regulations.<sup>32</sup>

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. This letter and the no-action position taken herein are not binding on the Commission.<sup>33</sup> Further, this letter, and the positions taken herein, are based upon the facts and circumstances presented to MPD staff. Any different, changed or omitted material facts or circumstances might render the position taken in this letter void. Finally, as with all staff letters, MPD retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the position taken herein, in its discretion.

For any questions regarding this letter, please contact Thomas J. Smith, MPD Acting Director, [tsmith@cftc.gov](mailto:tsmith@cftc.gov), Frank Fisanich, MPD Chief Counsel, [ffisanich@cftc.gov](mailto:ffisanich@cftc.gov), or Jacob Chachkin, MPD Associate Chief Counsel, [jchachkin@cftc.gov](mailto:jchachkin@cftc.gov).

Sincerely,

Thomas J. Smith  
Acting Director  
Market Participants Division

cc: Kathleen Clapper, Compliance  
National Futures Association, Chicago

Michael Otten, OTC Derivatives  
National Futures Association, New York

---

<sup>32</sup> 17 CFR parts 43 and 45.

<sup>33</sup> See § 140.99(a)(2), 17 CFR 140.99(a)(2) ("A no-action letter binds only the issuing Division . . . and not the Commission or other Commission staff.").