



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

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Director

CFTC Letter No. 17-05
No-Action
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Division of Swap Dealer and Intermediary Oversight

Re: Time Limited No-Action Position for Swap Dealers Complying with European Union Uncleared Swap Margin Requirements

Ladies and Gentlemen:

This letter presents a no-action position from the Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) of the Commodity Futures Trading Commission (“**Commission**”) for swap dealers (“**SDs**”) registered with the Commission and subject to the Commission’s rules regarding margin requirements for uncleared swaps¹ regarding compliance with such margin requirements.

Specifically, as detailed below, this letter provides relief for the period from and including February 4, 2017 to and excluding May 8, 2017 from compliance with certain provisions of the Commission’s uncleared swap margin requirements when entering into swaps with counterparties subject to the non-centrally cleared OTC derivative margin requirements applicable in the European Union² (the “**EMIR RTS**”).

¹ The Commission’s margin requirements for uncleared swaps apply only to SDs and major swap participants for which there is not a prudential regulator. See 7 U.S.C. 6s(e)(1)(B). SDs and major swap participants for which there is a prudential regulator must meet the margin requirements for uncleared swaps established by the applicable prudential regulator. 7 U.S.C. 6s(e)(1)(A). See also 7 U.S.C. 1a(39) (defining the term “Prudential Regulator” to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency). The Prudential Regulators published final margin requirements in November 2015. See Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015).

² DSIO understands that the margin requirements for swap activities in the EU are governed by Regulation No. 2016/2251 of October 4, 2016 Supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of July 4, 2012 (“EMIR”) on OTC Derivatives, Central Counterparties and Trade Repositories with Regard to Regulatory Technical Standards for Risk-Mitigation Techniques for OTC Derivative Contracts Not Cleared by a Central Counterparty (“RTS”). As their title indicates, the RTS supplement the requirements of EMIR with a more proscriptive direction with respect to margin requirements.

DSIO notes that the Commission has stated that substituted compliance would be available for certain provisions of the Final Margin Rule (as defined below) upon a determination by the Commission that the EMIR RTS are comparable to the Commission's uncleared swap margin requirements (such provisions, the "**Sub-Comp Eligible Provisions**"),³ but has not yet issued any such determination. Pending a comparability determination by the Commission, pursuant to the relief provided by this letter, SDs subject to the EMIR RTS could comply with the provisions of the EMIR RTS in lieu of complying with the Sub-Comp Eligible Provisions.

I. Regulatory Background

Pursuant to section 4s(e) of the CEA,⁴ the Commission is required to promulgate margin requirements for uncleared swaps applicable to each SD and MSP for which there is no Prudential Regulator (collectively, "**Covered Swap Entities**" or "**CSEs**").⁵ The Commission published final margin requirements for such CSEs in January 2016 (the "**Final Margin Rule**").⁶

Subsequently, on May 31, 2016, the Commission published in the Federal Register its final rule with respect to the cross-border application of the Commission's margin requirements for uncleared swaps applicable to CSEs (hereinafter, the "**Cross-Border Margin Rule**").⁷ The Cross-Border Margin Rule sets out the circumstances under which a CSE is allowed to satisfy the re-

³ The Cross-Border Margin Rule provided a detailed discussion regarding the facts and circumstances under which substituted compliance for the requirements under the Final Margin Rule would be available and such discussion is not repeated here. See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016). The Cross-Border Margin Rule, which became effective August 1, 2016, is codified in part 23 of the Commission's regulations. See § 23.160.

⁴ 7 U.S.C. § 1 et. seq.

⁵ See 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a Prudential Regulator must meet the margin requirements for uncleared swaps established by the applicable Prudential Regulator. 7 U.S.C. 6s(e)(1)(A). See also 7 U.S.C. 1a(39) (defining the term "Prudential Regulator" to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency). The Prudential Regulators published final margin requirements in November 2015. See Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) ("Prudential Regulators' Final Margin Rule").

⁶ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission's regulations. See §§ 23.150-159, 161. The Commission's regulations are found in Chapter 17 of the Code of Federal Regulations, 17 CFR 1 et. seq.

⁷ See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016). The Cross-Border Margin Rule, which became effective August 1, 2016, is codified in part 23 of the Commission's regulations. See § 23.160.

quirements under the Margin Rule by complying with comparable foreign margin requirements (“**substituted compliance**”); offers certain CSEs a limited exclusion from the Commission’s margin requirements; and outlined a framework for assessing whether a foreign jurisdiction’s margin requirements are comparable to the Final Margin Rule (“**comparability determinations**”).

September 1, 2016 was the first compliance date for the Final Margin Rule. As of that date, an SD was required to comply with the Final Margin Rule when entering into swaps with counterparties where the SD (combined with all of its affiliates) and its counterparty (combined with all of its affiliates) had an average daily notional amount of covered swaps for March, April, and May of 2016 that exceeds \$3 trillion.⁸

In November of 2016, the European Commission (“**EC**”) submitted a request that the Commission determine that the EMIR RTS provide a sufficient basis for an affirmative finding of comparability with respect to the Final Margin Rule. Commission staff has been diligently analyzing and comparing the EMIR RTS to the Final Margin Rule, but has not yet completed its work in this regard. Through close cooperation with the EC, it is the understanding of DSIO that the EC has likewise been diligently pursuing an equivalence determination with respect to the Commission’s Final Margin Rule, but has not yet completed its work in this regard.⁹

However, the EMIR RTS entered into force on January 4, 2017 and starting February 4, 2017 a first phase of counterparties will have to begin complying with both the initial and variation margin requirements of the EMIR RTS.

Without a comparability determination by the Commission with respect to the EMIR RTS (or an equivalence determination from the EU regulatory authorities with respect to the Final Margin Rule), starting February 4, 2017 many SDs operating in the EU will be required to comply with both the Final Margin Rule and the EMIR RTS.

⁸ See Commission Regulation 23.161(a)(1)(ii), 17 CFR § 23.161(a)(1)(ii).

⁹ With respect to cross-border transactions, the EU’s margin requirements generally provide that the EC may, in order to avoid duplicative and conflicting requirements in respect of derivatives transactions, adopt implementing acts declaring that the legal, supervisory, and enforcement arrangements of a non-EU country are equivalent to the margin requirements for non-centrally cleared OTC derivatives in Article 11 or EMIR. See EMIR, Article 13(2). An implementing act determining equivalence shall imply that counterparties entering into a transaction within the scope of EMIR will be deemed to have fulfilled their requirements where at least one of the counterparties is established in the third country in respect of which the implementing act has been adopted, and with respect to the requirements to which the implementing act applies. See EMIR, Article 13(3).

The majority of the affected SDs will be those that have connections to the United States (e.g., U.S. incorporated SDs and foreign SDs that are guaranteed by or consolidated subsidiaries of U.S. entities).¹⁰

II. DSIO No-Action Position

Based on the foregoing, DSIO believes that a time limited no-action position is warranted. Accordingly, DSIO will not recommend an enforcement action against an SD that is subject to, and in compliance with, the EMIR RTS but fails to comply with the Sub-Comp Eligible Provisions of the Final Margin Rule during the period from and including February 4, 2017 to and excluding May 8, 2017. However, SDs should not presume that the Commission's ultimate determination on substituted compliance for the European Union will be comparable to the relief provided for under this letter.

This letter and positions taken herein represent the views of DSIO and do not necessarily represent the positions or views of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in the Regulations issued thereunder. This letter does not create or confer any rights or obligations on any person or persons subject to compliance with the CEA that bind the Commission or any of its other offices or division. As with all no-action letters, DSIO retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, at its discretion.

Should you have any questions, please contact me at (202) 418-5326 or Frank Fisanich, Chief Counsel, at (202) 418-5949.

Very truly yours,

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¹⁰ DSIO notes that, pursuant to the Cross-Border Margin Rule, foreign SDs that are not guaranteed by a U.S. person and are not consolidated subsidiaries of a U.S. ultimate parent entity are generally not required to comply with the Final Margin Rule when entering into swaps with non-U.S. persons that also are not guaranteed by or the consolidated subsidiary of a U.S. ultimate parent entity. See Commission Regulation 23.160(b)(2)(ii) and Cross-Border Margin Rule, 81 FR at 34830.