



U.S. COMMODITY FUTURES TRADING COMMISSION

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April 5, 2019

Re: No-Action Relief in Connection With Certain Previously Granted Commission Determinations and Exemptions, in Order to Account for the Anticipated Withdrawal of the United Kingdom From the European Union

I. Introduction

The Division of Market Oversight (“DMO”) and the Division of Swap Dealer and Intermediary Oversight (“DSIO”) (together, the “Divisions”) are issuing this letter jointly to provide time-limited no-action relief in connection with the following actions (collectively, the “Existing Commission Actions”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”), in order to account for the anticipated withdrawal of the United Kingdom (“UK”) from the European Union (“EU”), commonly referred to as “Brexit:”

1. Comparability Determination for the European Union: Certain Entity-Level Requirements;¹
2. Comparability Determination for the European Union: Certain Transaction-Level Requirements;²
3. Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (together with items 1 and 2 above, the “EU Comparability Determinations”);³ and

¹ See Comparability Determination for the European Union: Certain Entity-Level Requirements (December 27, 2013), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-30980a.pdf>.

² See Comparability Determination for the European Union: Certain Transaction-Level Requirements (December 27, 2013), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-30981a.pdf>.

³ See Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (October 18, 2017), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2017-22616a.pdf>.

4. In the Matter of the Exemption of Multilateral Trading Facilities and Organised Trading Facilities Authorized Within the European Union from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities (the “Exemptive Order”).⁴

This time-limited relief will become effective if and when the UK withdraws from the EU. As of the date of this letter, it is anticipated that such withdrawal may occur on April 12, 2019.

II. Background

In June 2016, the people of the UK voted by referendum to leave the EU. On March 29, 2017, the UK submitted notification of its intention to withdraw from the EU at the conclusion of a two year period pursuant to Article 50 of the Treaty on European Union.⁵

The Divisions understand that, unless a withdrawal agreement between the UK and the EU is ratified, all relevant EU law will cease to apply in the UK upon the UK’s withdrawal from the EU. This scenario is commonly referred to as a “No Deal Brexit.”

The Divisions further understand that, in the event that a withdrawal agreement is ratified, the UK will cease to be a member of the EU, although for some transition period EU law and EU regulatory, budgetary, supervisory, judiciary, and enforcement instruments and structures will continue to apply in the UK as if it were a member of the EU. This scenario is commonly referred to as a “Soft Brexit.”

To prepare for the possibility of a No Deal Brexit, the Divisions note that the UK government has taken actions to provide regulatory certainty, including passing the European Union (Withdrawal) Act 2018 (“EU(W)A”), which in the event of a No Deal Brexit will transpose relevant EU law and regulations into UK law and regulations, and grant existing authority vested in certain EU institutions to the Financial Conduct Authority, the Bank of England including the Prudential Regulation Authority, and Her Majesty’s Treasury. Commission staff has been engaged with staff of the relevant UK authorities to learn about the regulatory and supervisory framework that will apply in the UK upon its withdrawal from the EU in a No Deal Brexit.

Whether as a result of a withdrawal agreement in a Soft Brexit or as a result of the foregoing actions by the UK government pursuant to the EU(W)A in a No Deal Brexit, the Divisions recognize that the UK authorities, and in a Soft Brexit also the EU authorities, intend that the

⁴ See In the Matter of the Exemption of Multilateral Trading Facilities and Organised Trading Facilities Authorized Within the *European Union* from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities (December 8, 2017), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/mtf_otforder12-08-17.pdf. See also In the Matter of the Exemption of Multilateral Trading Facilities and Organised Trading Facilities Authorized Within the European Union from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities: Amendment To Appendix A To Order Of Exemption (December 3, 2018), available at https://www.cftc.gov/sites/default/files/2018-12/MTF_OTF_AmendmentOrderExemption120318.pdf.

⁵ See Article 50 of the *Treaty on European Union*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M050&from=EN>.

regulatory environment affecting UK entities relevant to the Existing Commission Actions will not change in any material respect. Accordingly, in order to provide regulatory certainty, the Divisions have determined to provide time-limited no-action relief in connection with the Existing Commission Actions, as described below.

III. Staff Positions

(A) DSIO No-Action Positions

(1) No Deal Brexit

Pursuant to the EU Comparability Determinations and related Commission rules and guidance, the Commission has recognized that compliance by certain registered swap dealers with certain requirements under EU laws and regulations will constitute compliance with corresponding requirements under certain Commission regulations. Based on DSIO's understanding that in the event of a No Deal Brexit, the EU laws and regulations relevant for the EU Comparability Determinations will be transposed into UK laws and regulations pursuant to the EU(W)(A), DSIO believes that temporary no-action relief is warranted. Accordingly, DSIO will not recommend that the Commission take enforcement action against a swap dealer registered with the Commission if, in lieu of complying with the corresponding Commission regulations, it complies with the UK laws and regulations transposed pursuant to the EU(W)A in the same manner and subject to the same conditions contained in the EU Comparability Determinations with respect to the corresponding EU laws and regulations. This DSIO relief in the event of a No Deal Brexit will expire upon the earlier of (i) the effective date of any comparability determination issued by the Commission for the UK to the extent such determination encompasses the subject matter of the EU Comparability Determinations; or (ii) the date that is six months from the date of the UK's withdrawal from the EU.

(2) Soft Brexit

Based upon DSIO's understanding that in the event of a Soft Brexit, the EU laws and regulations relevant for the EU Comparability Determinations will for some transition period continue to apply in the UK as if it were a member of the EU, DSIO believes that temporary no-action relief is warranted. Accordingly, DSIO will not recommend that the Commission take enforcement action against a swap dealer registered with the Commission if it relies on the EU Comparability Determinations during such transition period despite the fact that the UK is no longer a member of the EU.

In the event of a Soft Brexit, DSIO staff will review whether any technical amendments to the EU Comparability Determinations should be recommended to the Commission, in order to clarify the precise manner in which the EU Comparability Determinations apply after the UK is no longer a member of the EU.

This DSIO relief in the event of a Soft Brexit will expire upon the earlier of (i) the effective date of any such technical amendments to the EU Comparability Determinations, or (ii) the expiration of the transition period during which the EU laws and regulations relevant to the EU Comparability Determinations continue to apply in the UK as if it were a member of the EU.

(B) DMO No-Action Positions

In the Exemptive Order, the Commission determined that the EU’s regulatory frameworks for multilateral trading facilities (“MTFs”) and organised trading facilities (“OTFs”), respectively, satisfy the standard set forth in section 5h(g) of the Commodity Exchange Act (“CEA”)⁶ for granting an exemption from the requirement to register with the Commission as a swap execution facility (“SEF”) pursuant to CEA section 5h(a)(1).⁷ Based on this determination, the Commission granted an exemption from SEF registration to each of the MTFs and OTFs listed in Appendix A to the Exemptive Order, as such Appendix A may be amended by the Commission from time to time. Facilities that are granted an exemption from SEF registration pursuant to CEA section 5h(g) are also eligible facilities upon which counterparties may satisfy the trade execution requirement of CEA section 2(h)(8).⁸

Based upon DMO’s understanding that in the event of a No Deal Brexit, the EU laws and regulations relevant to the Exemptive Order will be transposed into UK laws and regulations pursuant to the EU(W)A, and that in the event of a Soft Brexit, the EU laws and regulations relevant to the Exemptive Order will for some transition period continue to apply in the UK as if it were a member of the EU, DMO believes that temporary no-action relief is warranted. Accordingly, upon the occurrence of either a No Deal Brexit or a Soft Brexit, DMO will not recommend that the Commission take an enforcement action against:

- (a) An MTF or OTF that is authorized within the UK and listed in Appendix A to the Exemptive Order, as amended (each, an “Eligible UK Facility”), for failure to register as a SEF pursuant to CEA section 5h(a)(1) and Commission Regulation 37.3(a)(1); or
- (b) A counterparty that is subject to the trade execution requirement pursuant to CEA section 2(h)(8), if such counterparty executes a swap that is subject to such trade execution requirement on an Eligible UK Facility.⁹

⁶ CEA section 5h(g) authorizes the Commission to grant an exemption from SEF registration if the Commission finds that a “swap execution 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.”

⁷ Pursuant to CEA section 5h(a)(1), no person may operate a facility for the trading or processing of swaps unless the facility *is* registered by the Commission as a SEF or as a designated contract market. CEA section 5h(a)(1) is implemented in the Commission’s regulations through Commission Regulation 37.3(a)(1).

⁸ Facilities that are granted an exemption from SEF registration pursuant to CEA section 5h(g) may also offer trading in swaps that are not subject to the trade execution requirement to U.S. person counterparties.

⁹ Commission *staff* notes that this no-action relief does not affect any other requirements under the CEA or the Commission’s regulations. Commission staff particularly emphasizes that the following requirements are not affected, with respect to swap transactions executed on Eligible UK Facilities:

- (1) The reporting requirements of Parts 43 and 45 of the Commission’s regulations;
- (2) The swap trading eligibility requirement of CEA section 2(e); and
- (3) The following clearing-related requirements:

In the event of a No Deal Brexit, the DMO relief provided herein will expire upon the earlier of (i) the effective date of any exemptive order issued by the Commission pursuant to CEA section 5h(g), for MTFs and OTFs authorized within the UK; or (ii) the date that is six months from the date of the UK's withdrawal from the EU.

In the event of a Soft Brexit, DMO staff will review whether any technical amendments to the Exemptive Order should be recommended to the Commission, in order to clarify the precise manner in which the Exemptive Order applies to UK-authorized MTFs and OTFs after the UK is no longer a member of the EU. In the event of a Soft Brexit, the DMO relief provided herein will expire upon the earlier of (i) the effective date of any such amendment to the Exemptive Order, or (ii) the expiration of the transition period during which the EU laws and regulations relevant to the Exemptive Order continue to apply in the UK as if it were a member of the EU.

IV. Conclusion

This letter, and the positions taken herein, represent the views of the Divisions only, and do not necessarily represent the position or view 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 Commission regulations. Further, this letter, and the positions taken herein, are based upon the facts and circumstances presented to the Divisions. Any different, changed, or omitted material facts or circumstances might render the relief provided by this letter void.

Finally, as with all staff letters, the Divisions retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of relief provided herein, in their discretion.

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- i. When a swap transaction executed by a U.S. person on an Eligible UK Facility is a "customer" position subject to CEA section 4d, the transaction, if intended to be cleared, must be cleared through a Commission-registered futures commission merchant ("FCM") at a Commission-registered derivatives clearing organization ("DCO");
 - ii. When a swap transaction executed by a U.S. person on an Eligible UK Facility is a "proprietary" position under Commission Regulation 1.3(y), the transaction, if intended to be cleared, must be cleared either through a Commission-registered DCO or a clearing organization that has been exempted from DCO registration by the Commission pursuant to CEA section 5b(h) (an "Exempt DCO"); and
 - iii. When a swap transaction is subject to the Commission's clearing requirement under Part 50 of the Commission's regulations, and is entered into by a person that, pursuant to CEA section 2(h)(1), is subject to such clearing requirement, the transaction must be cleared either through a Commission-registered DCO or an Exempt DCO; provided that, consistent with (i) above, if the transaction is a "customer" position subject to CEA section 4d, it must be cleared through a Commission-registered FCM at a Commission-registered DCO, and cannot be cleared through an Exempt DCO.

If, as a result of the clearing arrangements that an Eligible UK Facility has in place, some swap transactions executed on the Eligible UK Facility are cleared by a clearing organization that is not a Commission-registered DCO, the Eligible UK Facility must, as a condition of receiving the above relief from the SEF registration requirement, have a rule in its rulebook that requires the types of swap transactions described in clauses (i), (ii) and (iii) above, if intended to be cleared, to be cleared in a manner consistent with the requirements described in clauses (i), (ii) and (iii), respectively.

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Very truly yours,

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