



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street NW, Washington, DC 20581
Telephone: (202) 418-5000

Division of Swap Dealer and
Intermediary Oversight

Eileen T. Flaherty
Director

CFTC Letter No. 17-22
No-Action
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Division of Swap Dealer and Intermediary Oversight

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

Ladies and Gentlemen:

This letter extends the relief provided in Commodity Futures Trading Commission (“**Commission**”) Staff Letter No. 17-05, which presented a no-action position from the Commission’s Division of Swap Dealer and Intermediary Oversight (“**DSIO**”) 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.²

As detailed below, Commission Staff Letter No. 17-05 provided 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 Union³ (the “**EMIR RTS**”). This no-

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 See Commission Staff Letter No. 17-05, available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/17-05.pdf>.

³ 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

action letter provides an extension of the relief in Commission Staff Letter No. 17-05 for the period from and including May 8, 2017 to and excluding November 7, 2017.

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**"),⁴ 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,⁵ 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**").⁶ The Commission published final margin requirements for such CSEs in January 2016 (the "**Final Margin Rule**").⁷

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.

⁴ 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. SDs seeking to rely on the relief contained in this letter are responsible for determining whether substituted compliance is available under the Cross-Border Margin Rule with respect to the SD's particular status and circumstances.

⁵ 7 U.S.C. § 1 et. seq.

⁶ 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").

⁷ 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.

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**").⁸ The Cross-Border Margin Rule sets out the circumstances under which a CSE is allowed to satisfy the requirements 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.⁹ The EMIR RTS entered into force on January 4, 2017 and, starting February 4, 2017, a first phase of counterparties was required to begin complying with both the initial and variation margin requirements of the EMIR RTS.

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. Leading up to the issuance of Commission Staff Letter No. 17-05, Commission staff had been addressing the EC's request by diligently analyzing and comparing the EMIR RTS to the Final Margin Rule, but would not have completed its work in this regard in time to meet the February 4, 2017 compliance date for the EMIR RTS. Through close cooperation with the EC, it was also the understanding of DSIO that the EC had likewise been diligently pursuing an equivalence determination with respect to the Commission's Final Margin Rule, but also would not have completed its work in this regard in time for the February 4, 2017 compliance date.¹⁰

⁸ 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.

⁹ See Commission Regulation 23.161(a)(1)(ii), 17 CFR § 23.161(a)(1)(ii).

¹⁰ 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

As DSIO stated in Commission Staff Letter No. 17-05, 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 would have been required to comply with both the Final Margin Rule and the EMIR RTS. The majority of the affected SDs 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).¹¹ In addition, DSIO understood that compliance with both sets of rules would be operationally burdensome, potentially requiring recoding of trading systems only to have to again recode when the Commission and/or the EU regulatory authorities issue comparability/equivalence determinations.

Given that background, on February 1, 2017, DSIO issued Commission Staff Letter No. 17-05 providing relief for the period from and including February 4, 2017 to and excluding May 8, 2017 from compliance with the Final Margin Rule for SDs that are subject to and in compliance with the EMIR RTS. It was anticipated that this time period would have allowed Commission staff and the EC to complete their work with respect to substituted compliance/equivalence determinations.

However, while Commission staff continues to diligently analyze and compare the EMIR RTS to the Final Margin Rule, it has not yet completed its work in this regard. In addition, through ongoing, close cooperation with the EC, it continues to be 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.

II. DSIO No-Action Position

Based on the foregoing, DSIO believes that an extension of the time limited no-action position in Commission Staff Letter No. 17-05 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 May 8, 2017 to and excluding November 7, 2017.

which the implementing act has been adopted, and with respect to the requirements to which the implementing act applies. See EMIR, Article 13(3).

¹¹ 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.

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,

Eileen T. Flaherty
Director
Division of Swap Dealer and Intermediary Oversight

Cc: Regina Thoele, Compliance
National Futures Association, Chicago

Jamila A. Piracci, OTC Derivatives
National Futures Association, New York