



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Market Oversight

[Contact Person]
[“A”]
[“A’s” address]

Re: No-Action Relief for [“B”] to act as the Reporting Counterparty for Certain Swaps with its U.S. Person Swap Counterparties

Dear [Contact Person]:

This letter is in response to your request dated March 26, 2019 (“Letter”), to the Division of Market Oversight (“DMO”) of the Commodity Futures Trading Commission (the “Commission”). In the Letter, [“A”] requested time-limited no-action relief permitting its Irish bank subsidiary, [“B”], to act as reporting counterparty for [“B’s”] swaps with U.S. persons that are not swap dealers (“SDs”) or major swap participants (“MSPs”), notwithstanding the allocation of reporting responsibility set forth in Commission Regulation 45.8(e).

I. Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Commodity Exchange Act (the “CEA”) to, among other things, establish requirements regarding the retention and reporting of data regarding swap transactions. To implement these requirements, the Commission adopted, among other regulations, its Part 45 regulations¹ (“Part 45”), which set forth swap data recordkeeping and reporting requirements. Commission Regulation 45.8(e) states that, if both counterparties to a swap are non-SD/MSP counterparties

¹ Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012) (codified at 17 C.F.R. pt. 45).

and only one counterparty is a U.S. person,² that U.S. person counterparty shall be the reporting counterparty.

II. Statement of Facts

Based on the representations made by [“A”] in the Letter, DMO understands the relevant facts to be as follows:

[“A”] conducts its swap dealing activities with U.S. persons through [“C”], an SD provisionally registered with the Commission, which is organized in the United Kingdom. [“C”] provides swap dealing services to EU counterparties pursuant to a “passport” under the revised EU Markets in Financial Instruments Directive (“MiFID II”). Following the United Kingdom’s withdrawal from the European Union (“Brexit”), it is possible that [“C”] will no longer be able to rely on a MiFID II passport.³ Accordingly, [“A”] plans to transfer several of its businesses involving EU customers and counterparties from [“C”] to [“B”]. Many of these customers or counterparties are U.S. persons who are not SDs or MSPs.⁴

Projecting based on prior business conducted by [“C”] with these customers and counterparties, [“A”] does not expect [“B”] to enter into new transactions exceeding the \$8 billion aggregate gross notional amount threshold for the *de minimis* exception from the SD definition.⁵ [“B”] accordingly does not plan to register as an SD in the very near term. However, in anticipation of potential expansion of its business with U.S. persons, [“A”] has stated that [“B”] is preparing to register as an SD within 18 months following Brexit.

During the period before it registers as an SD, when [“B”] enters into swaps with U.S. persons that are not SDs or MSPs, those U.S. persons will be the reporting counterparties for those swaps under Commission Regulation 45.8(e). According to [“A”], these hundreds of U.S. person non-SD/MSP counterparties typically do not possess the technology or operations infrastructure necessary to report their swap transactions with [“B”]. [“A”] explains that [“B”], in contrast, is well-positioned to report these transactions by using the same reporting infrastructure currently used by [“C”]. [“A”] also asserts that it is likely not feasible for [“B”]

² As used herein, the term “U.S. person” has the meaning set forth in the Commission’s Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292, 45,316-17 (July 26, 2013).

³ Brexit is currently scheduled to occur on April 12, 2019.

⁴ [“A”] has stated that some of these U.S. persons are organized in the European Union (such as collective investment vehicles organized in the European Union that have a principal place of business in the United States) and some of them are U.S. persons who transact through agents located in the European Union.

⁵ 17 CFR 1.3, Swap dealer.

and all of ["B's"] U.S. person non-SD/MSP counterparties to contractually agree prior to Brexit that ["B"] shall facilitate reporting on behalf of ["B's"] U.S. person non-SD/MSP counterparties.

III. Discussion of Request for No-Action Relief

DMO accepts, without independent analysis, ["A's"] representations that its U.S. person non-SD/MSP counterparties typically do not possess the technology or operations infrastructure necessary to report swap transactions with ["B"] and that it is likely not feasible for ["B"] and all of ["B's"] U.S. person non-SD/MSP counterparties to contractually agree prior to Brexit that ["B"] shall facilitate reporting on behalf of ["B's"] U.S. person non-SD/MSP counterparties. Granting relief permitting ["B"] to report these transactions is appropriate in order to maintain the ability of the affected counterparties to access liquidity from ["A"] after Brexit. DMO notes that, while this no-action letter grants ["B's"] U.S. person non-SD/MSP counterparties relief from certain Part 45 reporting requirements during the no-action period, such relief is conditioned upon the counterparties selecting ["B"] to report their swaps with ["B"], notwithstanding the terms of Commission Regulation 45.8(e). In addition, DMO notes that, in the request for relief, ["B"] represents that it has waived any defense to any action regarding an alleged breach of Commission Regulations 45.3, 45.4, 45.5, 45.8, 45.10, or 45.14 in connection with its reporting of swaps pursuant to this letter on the basis that ["B"] was not the reporting counterparty for those swaps pursuant to Commission Regulation 45.8.

IV. Grant of No-Action Relief

Based on the facts presented and representations of ["A"], DMO will not recommend that the Commission take enforcement action against a U.S. person non-SD/MSP swap counterparty to ["B"] for not performing duties required of a reporting counterparty under Commission Regulations 45.3, 45.4, 45.5, 45.8, 45.10, or 45.14 if, notwithstanding Commission Regulation 45.8, ["B"] performs those duties as the reporting counterparty, subject to the following conditions:

- 1) The counterparties select ["B"] to be the reporting counterparty. To accomplish this, ["A"] shall inform affected U.S. person non-SD/MSP counterparties that, notwithstanding the terms of Commission Regulation 45.8(e), ["B"] will be the reporting counterparty for their swaps unless the counterparty requests otherwise.
- 2) This relief shall expire on the earlier of: (1) ["B's"] registration as an SD with the Commission; or (2) **18 months** following Brexit.

This letter, and the no-action positions taken herein, represent the views of DMO only, and do not necessarily represent the position or views of the Commission or of any other division or office of the Commission's staff. Further, this letter, and the relief contained herein, is based upon the representations made to DMO in the Letter. Any different, changed, or omitted material facts or circumstances might render this letter void. The no-action position taken herein does not excuse affected persons from compliance with any other applicable requirements of the CEA or Commission regulations thereunder. As with all no-action letters, DMO retains the

authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

Should you have any questions concerning the content of this staff no-action letter, please contact David E. Aron, Special Counsel, at (202) 418-6621 or daron@cftc.gov, or Tom Guerin, Special Counsel, at (202) 734-4194 or tguerin@cftc.gov.

Sincerely,

Amir Zaidi,
Director
Division of Market Oversight