



U.S. COMMODITY FUTURES TRADING COMMISSION

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**Re: Brexit-Related Time Limited No-Action Position with Respect to
Certain Swap Dealer Transaction-Level Requirements¹**

I. Introduction

This letter is in response to a request for a no-action position received by the Market Participants Division (“MPD”), the Division of Clearing and Risk (“DCR”), the Division of Data (“DOD”), and the Division of Market Oversight (“DMO” and together with MPD, DCR, and DOD, the “Divisions”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) from the International Swaps and Derivatives Association, Inc. (“ISDA”) on behalf of its members that are registered with the Commission as swap dealers (“SDs”).² Specifically, ISDA requests that the Divisions provide a no-action position to SDs for certain Commission regulatory requirements (the “Category A TLRs” (as defined below)) in order to maintain the regulatory status quo for SDs following the withdrawal of the United Kingdom (“UK”) from the European Union (“EU”).³

¹This letter contains one or more collections of information under Office of Management and Budget (“OMB”) number 3038-0049. No person is required to respond to a request for information unless a valid OMB number is displayed.

²Although the regulatory relief provided by this letter was requested by ISDA on behalf of its members that are SDs, the relief provided by this letter is available to all SDs registered with the Commission.

³See ISDA Letter, dated March 3, 2021 (“ISDA Letter”).

This letter is also being provided consistent with the Joint Statement by UK and US Authorities on Continuity of Derivatives Trading and Clearing Post-Brexit of February 25, 2019.⁴

II. CFTC Cross-Border Regulatory Background

(1) 2013 Interpretive Guidance and Policy Statement

In July 2013, the Commission published interpretive guidance and a policy statement regarding the cross-border application of certain swap provisions of the Commodity Exchange Act (“CEA”) (the “**Guidance**”).⁵ The Guidance established a general, non-binding framework for the cross-border application of many substantive Dodd-Frank Act⁶ requirements, including certain regulatory requirements applicable to SDs. The Guidance classified certain of these regulatory requirements that apply on a transaction-by-transaction or trading relationship basis as “Transaction-Level Requirements” (“**TLRs**”).⁷ It further classified certain TLRs addressing risk mitigation techniques and market transparency as Category A TLRs.⁸

Generally, under the Guidance, whether a Category A TLR applies to a particular swap, and whether substituted compliance is available, depends upon the status of the SD as a U.S. or non-U.S. person (a U.S. person that is an SD, a “**U.S. SD**”), and, in certain cases, the type of counterparty to the swap. For example, in the case of a swap between a foreign branch of a U.S. SD, on the one hand, and a non-U.S. person (that is not guaranteed by, or a conduit affiliate of, a U.S. person), on the other, the Guidance provides that where a swap takes place in a foreign jurisdiction other than Australia, Canada, the European Union, Hong Kong, Japan, or Switzerland (the “**Six Jurisdictions**”), counterparties may generally comply with the transaction-level requirements applicable where the foreign branch is located, rather than the Category A TLRs, subject to two conditions. First, the aggregate notional value of the swaps of all the U.S. SD’s foreign branches in foreign jurisdictions other than the Six Jurisdictions

⁴ Available at <https://www.cftc.gov/PressRoom/PressReleases/7876-19>. Pursuant to the Joint Statement, the Commission committed to extending existing regulatory relief granted by the CFTC to EU firms, including UK firms, to UK firms at the point of the UK’s withdrawal from the EU.

⁵ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292, 45358-59 (July 26, 2013).

⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank Act**”), Public Law 111–203, 124 Stat. 1376 (2010).

⁷ 78 FR at 45331.

⁸ 78 FR at 45339. For purposes of this letter, the term “**Category A TLRs**” refers to the requirements set forth in Commission regulations 23.202, 23.205, 23.501, 23.502, 23.503, 23.504, 23.505, 23.506, 23.610, 23.700 to 23.704, and applicable regulations in parts 37, 38, 43, and 50 and CEA section 2(h)(8). As used herein, the Divisions note that the term Category A TLRs does not include the Commission regulations on margin requirements for uncleared swaps, Commission regulations 23.150 to 23.161.

may not exceed 5% of the aggregate notional value, measured quarterly, of all of the swaps of the U.S. SD (the “**5% Condition**”). Second, the U.S. SD must maintain records with supporting information to verify that the first condition is present, as well as to identify, define, and address any significant risk that may arise from the non-application of the Category A TLRs. This letter refers to this portion of the Guidance as the “**Guidance Foreign Branch Treatment**”.

(2) 2020 Cross-Border Final Rule

In September 2020, the Commission published a final rule (“**Final Rule**”) that addressed the cross-border application of the registration thresholds for SDs and other requirements applicable to SDs.⁹ As part of the Final Rule, the Commission defined certain of the Category A TLRs as group B requirements (“**Group B Requirements**”) and provided exceptions from the applicability of such requirements under specified circumstances.¹⁰ Among these, the Final Rule provides limited exceptions from the application of the Group B Requirements for foreign branches of registered U.S. SDs and for certain registered non-U.S. SDs (the “**Limited Foreign Branch Group B Exception**” and “**Limited Swap Entity SRS/Guaranteed Entity Group B Exception**”, respectively, and together, the “**Limited Group B Exceptions**”)¹¹ for certain of their foreign swaps. However, these exceptions do not apply where a Group B Requirement, as applicable to the swap, is eligible for substituted compliance pursuant to a comparability determination issued by the Commission prior to the execution of the swap. Further, the Limited Group B Exceptions are each capped at a specified aggregate notional amount of the SD’s swaps, measured quarterly.¹² In the absence of a comparability determination issued by the Commission, therefore, an SD is required to comply with the applicable Group B Requirements for a swap or rely on the relevant Limited Group B Exception and count that swap toward the exception’s cap.

Although SDs are not required to comply with the Final Rule until September 14, 2021 (the “**Final Rule Compliance Date**”), the Limited Group B Exceptions are available to registered SDs now, subject to specified recordkeeping requirements.¹³

⁹ Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (September 14, 2020). The Commission stated that the Final Rule supersedes the Commission's policy views as set forth in the Guidance with respect to its interpretation and application of section 2(i) of the CEA and the swap provisions addressed in the Final Rule. *Id.* at 56931.

¹⁰ See 17 CFR 23.23(a)(7). The Group B Requirements are set forth in §§23.202 and 23.501 through 23.504.

¹¹ 17 CFR 23.23(e)(4) and (e)(5).

¹² *Id.*

¹³ See 17 CFR 23.23(h)(3)(ii) and (iii).

III. Brexit Background

In June 2016, the people of the UK voted by referendum to leave the EU (“**Brexit**”). 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.¹⁴

On October 19, 2019, the UK and the EU entered into the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the “**Withdrawal Agreement**”).¹⁵ Pursuant to the Withdrawal Agreement, the UK ceased to be a member of the EU on January 31, 2020, and a transition period began. During the transition period EU law and EU regulatory, budgetary, supervisory, judiciary, and enforcement instruments and structures continued to apply in the UK as if it were a member of the EU.

To prepare for the expiration of the transition period, the UK government took actions to provide regulatory certainty, including passing the European Union (Withdrawal) Act 2018 (“**EU(W)A**”), which, at the expiration of the transition period on December 31, 2020, transposed relevant EU law and regulations into UK law and regulations, and granted 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.

In response to Brexit, among other actions, MPD and DMO issued staff letter 20-39 on November 24, 2020 (staff letter 20-39, as it may be extended or otherwise amended by any subsequent staff letter, the “**UK Bridge Letter**”).¹⁶ As relevant here, the UK Bridge Letter provides that, until expiration of the relief provided in the letter, MPD will not recommend that the Commission take enforcement action against an SD 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 comparability determinations issued by the Commission for the EU with respect to the corresponding EU laws and regulations.¹⁷

¹⁴ 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>.

¹⁵ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Nov. 12, 2019), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1580206007232&uri=CELEX%3A12019W/TXT%2802%29>.

¹⁶ Available at <https://www.cftc.gov/csl/20-39/download>. This letter superseded staff letter 19-08 (April 5, 2019), available at <https://www.cftc.gov/csl/19-08/download>.

¹⁷ 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->

IV. Request for Relief

ISDA explains that, in light of Brexit and the significant amount of swaps activity conducted in the UK, if the UK is not treated as one of the Six Jurisdictions, U.S. SDs would no longer be able to rely on the Guidance Foreign Branch Treatment because the UK swaps activity would have to be counted towards the 5% Condition. ISDA asserts that continuing to treat the UK as one of the Six Jurisdictions under the Guidance Foreign Branch Treatment would allow foreign branches of U.S. SDs to continue to rely on that treatment. ISDA states that it believes that treating the UK as one of the Six Jurisdictions is appropriate given that the UK transposed EU laws and regulations pertaining to swap transactions into its legislation pursuant to the EU(W)A. Further, ISDA states that not treating the UK as included in the Six Jurisdictions would significantly disrupt the operations of foreign branches of U.S. SDs worldwide and place them at a competitive disadvantage.

In addition, ISDA states that staff letter 20-39 extended previously granted relief aimed at ensuring regulatory continuity after Brexit. ISDA notes that, the relief, among other things, stated that because the EU laws and regulations relevant for EU comparability determinations are transposed into UK laws and regulations pursuant to the EU(W)A, CFTC-registered SDs operating in the UK may continue to rely on EU comparability determinations issued by the Commission in the same manner and subject to the same conditions contained in the EU comparability determinations in lieu of complying with the corresponding Commission regulations. Thus, ISDA believes staff should clarify that market participants can continue to rely on the EU comparability determinations for purposes of the Limited Group B Exceptions, until such time as the Commission is able to conduct and publish a comparability determination for the UK.¹⁸

Therefore, ISDA requests that the Divisions maintain the status quo prior to Brexit by (i) allowing U.S. SDs to continue to treat the UK as one of the Six Jurisdictions for purposes of the Guidance Foreign Branch Treatment, and (ii) allowing registered SDs to rely on the staff letter 20-39 in lieu of the required comparability determination under the Limited Group B Exceptions.

[30980a.pdf](#); 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>; and 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>.

¹⁸ Currently, notwithstanding staff letter 20-39, because the Group B Requirements are not eligible for substituted compliance for the UK pursuant to a comparability determination issued by the Commission, any swap entered into by a UK branch of a registered U.S. SD or by a registered SD located in the UK and eligible for a Limited Group B Exception must either comply with the applicable Group B Requirements in full or must be counted towards the relevant cap under the Limited Group B Exceptions.

V. Divisions Staff Positions

After considering the request for relief and the related facts and circumstances, the Divisions believe no-action positions are warranted. Accordingly, the Divisions will not recommend that the Commission take an enforcement action against a U.S. person registered with the Commission as an SD for failure to comply with any Category A TLR in respect of a swap between a foreign branch of that SD and a non-U.S. person (that is not a guaranteed or conduit affiliate) subject to the following conditions:

- (1) The swap takes place in a foreign jurisdiction other than Australia, Canada, the EU, the UK, Hong Kong, Japan, or Switzerland (the “**Seven Jurisdictions**”);
- (2) The aggregate notional value (expressed in U.S. dollars and measured on a quarterly basis) of all the swaps of all the SD’s foreign branches that take place in foreign jurisdictions other than the Seven Jurisdictions does not exceed 5% of the aggregate notional value (expressed in U.S. dollars and measured on a quarterly basis), of all of the swaps of the SD;
- (3) With respect to the swap, the SD complies with the corresponding requirements applicable to entities domiciled or doing business in the foreign jurisdiction where the foreign branch is located; and
- (4) The SD maintains records with supporting information to verify that the condition in (2) is present, as well as to identify, define, and address any significant risk that may arise from the non-application of the Category A TLRs (with the terms U.S. person,¹⁹ foreign branch,²⁰ swap with a foreign branch,²¹ and guaranteed or conduit affiliate²² each used as described in the Guidance).

This relief will expire (i) with respect to the Group B Requirements, on the Final Rule Compliance Date, and (ii) with respect to each other Category A TLR, on the effective date of any future Commission action addressing the cross-border applicability of such Category A TLR.²³

Further, MPD will not recommend that the Commission take an enforcement action against a person registered with the Commission as an SD for failure to comply with any Group B Requirement for a swap solely as a result of the SD relying on the UK Bridge

¹⁹ See, e.g., Guidance, 78 FR at 45308–17.

²⁰ See, e.g., *id.* at 45328–29.

²¹ See, e.g., *id.* at 45330.

²² See, e.g., *id.* at 45307, n.161 (affiliate), 45318 (guaranteed affiliate), 45320 (guarantee) and 45359 (conduit affiliate).

²³ As discussed above, the Guidance provides a general, non-binding framework; nothing in this letter should be read to suggest the Guidance is binding.

Letter (subject to all of the conditions imposed therein) as if it were a comparability determination issued by the Commission for the UK for purposes of determining whether the requirement, as applicable to the swap, is eligible for substituted compliance pursuant to a comparability determination issued by the Commission under the applicable Limited Group B Exception. This relief will expire (i) with respect to any Group B Requirement, upon the effective date of any comparability determination issued by the Commission for the UK in relation to that Group B Requirement, and (ii) with respect to each Group B Requirement not addressed in such a comparability determination, upon expiration of the UK Bridge Letter.

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 provided in 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.

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.

If you have any questions concerning this correspondence, please contact Frank Fisanich, Chief Counsel, MPD, at (202) 418-5949 or ffisanich@cftc.gov; Sarah Josephson, Deputy Director, DCR, at (202) 418-5864 or sjosephson@cftc.gov; David Aron, Special Counsel, DOD, at (202) 418-6621 or daron@cftc.gov; or Roger Smith, Associate Chief Counsel, DMO, at (202) 418-5344 or rsmith@cftc.gov.

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