



U.S. COMMODITY FUTURES TRADING COMMISSION

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**Division of
Market Oversight**

**Re: Extension of No-Action Position Related to Certain Reporting Obligations for
Counterparties Clearing Swaps through Derivatives Clearing Organizations
Acting Consistent with Exemptive Orders or No-Action Letters**

Dear Mr. Young:

This letter responds to a request received by the Division of Market Oversight (“DMO”) of the Commodity Futures Trading Commission (the “Commission” or “CFTC”) from the International Swaps and Derivatives Association, Inc. (“ISDA”), pursuant to Commission Regulation 140.99.¹

ISDA has requested, on behalf of its members with swap data reporting obligations and other similarly situated persons, that DMO renew the no-action position provided in CFTC Letter No. 22-05² regarding certain reporting obligations under Part 45 of the Commission’s regulations in connection with the clearing of swaps with derivatives clearing organizations (“DCOs”) operating pursuant to (a) exemptive orders issued by the Commission,³ or (b) a no-action letter granted by the Commission’s Division of Clearing and Risk (“DCR”).⁴

¹ Letter from Christopher Young, Head of U.S. Public Policy, ISDA, to Vincent McGonagle, Director, CFTC Division of Market Oversight, dated November 17, 2022 (the “ISDA Letter”), to be available at <https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm> soon after the issuance of this letter.

² CFTC Letter No. 22-05 (May 25, 2022), available at <https://www.cftc.gov/csl/22-05/download>, renewed a no-action position taken in CFTC Letter No. 21-12 (Apr. 28, 2021), available at <https://www.cftc.gov/csl/21-12/download>. CFTC Letter No. 21-12 renewed a no-action position extended in CFTC Letter No. 18-03 (Feb. 20, 2018), available at <https://www.cftc.gov/csl/18-03/download>. CFTC Letter No. 18-03 renewed a no-action position originally taken in CFTC Letter No. 16-85 (Dec. 19, 2016), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/16-85.pdf>. The no-action position taken in CFTC Letter No. 22-05 will expire on December 5, 2022.

³ The Commission adopted regulations for exempt DCOs in 2021. *See* Exemption From Derivatives Clearing Organization Registration, 86 FR 949 (Jan. 7, 2021). However, exempt DCOs still operate pursuant to the exemptive orders issued by the Commission.

⁴ *See, e.g.*, CFTC Letter No. 16-56 (May 31, 2016), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/16-56.pdf>.

I. Definitions for No-Action Position

Exclusively for the purposes of this letter, DMO will define the following terms:

- (a) Relief DCO: Any DCO or central counterparty acting pursuant to a current and valid exemptive order issued by the Commission, or a current and valid no-action letter issued by DCR. As of the date of this letter, there are four DCOs acting pursuant to exemptive orders: ASX Clear (Futures) Pty Limited, Japan Securities Clearing Corporation, Korea Exchange, Inc., and OTC Clearing Hong Kong Limited. Additionally, there are two DCOs acting pursuant to a DCR no-action letter: Shanghai Clearing House and Taiwan Futures Exchange.
- (b) Relief DCO Counterparty: Any market participant, not acting as a DCO or central counterparty, that is a counterparty to a swap cleared by a Relief DCO.
- (c) Relief DCO Original Swap: A swap reported or required to be reported pursuant to Part 45 of the Commission's regulations that is subsequently accepted for clearing by a Relief DCO.
- (d) Relief DCO Clearing Swap: Any swaps created pursuant to the rules of a Relief DCO between a Relief DCO and Relief DCO Counterparty.
- (e) Relief ITBC Swap: Any swap which, at the time it is executed, is intended by the counterparties to be cleared by a Relief DCO.

II. Background

A. *Certain Reporting Obligations*

On June 27, 2016, the Commission published its final rule on Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps (the "Cleared Swap Rule").⁵ The Cleared Swap Rule amended Part 45 of the Commission's regulations⁶ to clarify or address certain reporting obligations, including the obligations for DCOs to (a) report the termination of swaps accepted for clearing by the DCO (defined as "original swaps" and known in the industry as "alpha swaps");⁷ (b) report creation data and continuation data for swaps to which the DCO is a counterparty (defined as "clearing swaps")⁸; and (c) generate the unique swap identifier ("USI") for each clearing swap and transmit that USI to the DCO's counterparty.⁹

The Cleared Swap Rule defined "derivatives clearing organization" exclusively as a DCO registered with the Commission.¹⁰ Because a Relief DCO would not be a "derivatives clearing

⁵ 81 FR 41736 (June 27, 2016). The compliance date for the Cleared Swap Rule was December 27, 2016.

⁶ 17 CFR part 45.

⁷ 17 CFR 45.4(c).

⁸ 17 CFR 45.3(e) (creation data for clearing swaps); 17 CFR 45.4(b) (continuation data for clearing swaps).

⁹ 17 CFR 45.5(d).

¹⁰ 17 CFR 45.1 (definition of "derivatives clearing organization"); Cleared Swap Rule, 81 FR at 41739 (declining to extend the definition of "derivatives clearing organization" to include exempt DCOs). Although the Commission

organization” for purposes of the Cleared Swap Rule, a swap accepted for clearing by a Relief DCO would not be an “original swap” under § 45.4 of the Commission’s regulations.¹¹ Therefore, the obligation to terminate the Relief DCO Original Swap did not fall to the Relief DCO. Further, it meant Relief DCO Clearing Swaps were not considered “clearing swaps” for purposes of the Cleared Swap Rule. As a result, reporting obligations for Relief DCO Clearing Swaps fell to the Relief DCO Counterparty (either a swap dealer (“SD”), major swap participant (“MSP”), or non-SD/MSP counterparty) by operation of the reporting hierarchy under § 45.8.¹²

Although not subject to reporting obligations imposed on registered DCOs under the Cleared Swap Rule, Relief DCOs are required pursuant to both regulation 39.6(d)¹³ and as a term of an exemptive order or as condition to no-action letters to fulfill many of the same obligations. As noted above, there are currently four DCOs acting consistent with exemptive orders issued by the Commission¹⁴ and an additional two DCOs, Shanghai Clearing House and Taiwan Futures Exchange, acting pursuant to no-action letters from DCR (“Relief DCO NALs”).¹⁵ Each of the exemptive orders includes the following requirement:

(10) Swap Data Recordkeeping and Reporting Requirements. If a clearing member clears through [Relief DCO] a swap that has been reported to a Commission-registered swap data repository (“SDR”) pursuant to Part 45 of the Commission's regulations, then [Relief DCO] must report to an SDR, pursuant to this Order, data regarding the two swaps resulting from the novation of the original swap that had been submitted to [Relief DCO] for clearing. [Relief DCO] must also report the termination of the swap accepted for clearing by [Relief DCO], to the SDR to which the swap was originally reported. In order to avoid duplicative reporting for such transactions, [Relief DCO] shall have rules that prohibit the Part 45 reporting of the two new swaps by the original counterparties to the original swap.¹⁶

Although the exemptive orders and Relief DCO NALs place certain reporting obligations on the Relief DCOs, neither the exemptive orders nor Relief DCO NALs provide any relief or no-action position to the Relief DCO Counterparty for any reporting obligations.

recently amended certain Part 45 regulations, Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020), the definition of “derivatives clearing organization” remains a DCO registered with the Commission. Therefore, Relief DCO counterparties would still need the relief described below from their reporting obligations.

¹¹ 17 CFR 45.4.

¹² 17 CFR 45.8.

¹³ 17 CFR 39.6(d).

¹⁴ ASX Clear (Futures) Pty Limited, Japan Securities Clearing Corporation, Korea Exchange, Inc., and OTC Clearing Hong Kong Limited.

¹⁵ See CFTC Letter No. 16-56 (May 31, 2016) (Shanghai Clearing House), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/16-56.pdf>, renewed by CFTC Letter No. 22-07 (July 25, 2022), available at <https://www.cftc.gov/csl/22-07/download>; CFTC Letter No. 22-12 (Sept. 15, 2022) (Taiwan Futures Exchanges), available at <https://www.cftc.gov/csl/22-12/download>.

¹⁶ See, e.g., <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/asxclearamrdorderdcoexemption.pdf> (ASX exemptive order). The Relief DCO NALs include similar language.

B. Certain Reporting Data Fields in Part 45

The Cleared Swap Rule’s definition of “derivatives clearing organization” implicates certain data elements historically required to be reported for Relief ITBC Swaps. Specifically, at the time the Cleared Swap Rule was promulgated in 2016, Part 45 required certain primary economic terms data (“PET data”) be reported for each swap, including “Clearing indicator” data and “Clearing venue” data, which referenced DCOs.¹⁷ Because Relief DCOs would not be “derivatives clearing organizations” for purposes of those data fields, absent a no-action position, the Cleared Swap Rule would require any entity reporting a Relief ITBC Swap to indicate that such swap was not intended to be cleared.

On November 25, 2020, the Commission published amendments to Part 45.¹⁸ As part of these amendments, the Commission replaced the old concept of PET data with new appendices specifying the data elements to be reported.¹⁹ The Commission has published updated technical specifications that provide the form and manner for reporting those data elements to SDRs.²⁰ Whereas Part 45 PET data incorporated the Cleared Swap Rule’s definition of “derivatives clearing organization” for purposes of identifying swaps that were intended to be cleared, the newer technical specifications instead use the term “central counterparty,” which is defined to include both a “derivatives clearing organization” and an “exempt derivatives clearing organization.”²¹ The current version of the technical specifications do not, however, explicitly state that the term “central counterparty” also includes central counterparties acting pursuant to Relief DCO NALs.

The compliance date for regulations subject to those amendments was May 25, 2022. On January 31, 2022, however, the Division of Data issued CFTC Letter No. 22-03, stating that the Division of Data will not recommend that the Commission take an enforcement action against an entity for failure to comply with the regulations amending Part 45 before December 5, 2022.²² Accordingly, DMO expects that market participants will implement swap data reporting in the form and manner provided in the technical specifications by December 5, 2022.

III. **Requested No-Action Position with Respect to Certain Reporting Obligations Under Part 45**

ISDA requests the renewal of the no-action position in CFTC Letters Nos. 16-85, 18-03, 21-12, and 22-05 regarding reporting obligations for counterparties facing Relief DCOs. Specifically, ISDA requested that reporting counterparties that are neither DCOs nor central counterparties be relieved of the following reporting obligations:

¹⁷ See Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012), Appendix 1.

¹⁸ See Final Rule, Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020).

¹⁹ See *id.* at 75507.

²⁰ See, e.g., Parts 43 and 45 Technical Specifications – August 2022, at https://www.cftc.gov/media/7626/Part43_45TechnicalSpecification083022CLEAN/download.

²¹ See *id.* at 1 n.12.

²² CFTC Letter No. 22-03 (Jan. 31, 2022), available at <https://www.cftc.gov/csl/22-03/download>.

1. Reporting swap continuation data for alpha swaps that have been accepted for clearing by a Relief DCO;²³
2. Reporting any creation data and continuation data for swaps resulting from novation of an alpha swap accepted for clearing by a Relief DCO, as well as any related swaps which may be entered into as part of post-trade activities including netting or compression exercises or novations; and
3. Generating Unique Transaction Identifiers (“UTIs”) for swaps created through the process of clearing a swap with a Relief DCO.

DMO will renew the no-action position originally provided in CFTC Letters Nos. 16-85, 18-03, 21-12, and 22-05 as follows.

IV. **Time Limited No-Action Position**

Based on the facts presented and the representations that ISDA has made, DMO will not recommend enforcement action to the Commission against Relief DCO Counterparties, solely for failure to comply with the following reporting obligations:

- a. Reporting continuation data pursuant to regulation 45.4 on Relief DCO Original Swaps after the acceptance of such Relief DCO Original Swaps for clearing by the Relief DCO, including reporting the termination of the Relief DCO Original Swap;
- b. Reporting creation data pursuant to regulation 45.3 and continuation data pursuant to regulation 45.4 on Relief DCO Clearing Swaps; and
- c. Generating UTIs for Relief DCO Clearing Swaps pursuant to regulation 45.5.²⁴

This no-action position is subject to the condition that the Relief DCO Counterparty must provide to the Relief DCO all information on the Relief DCO Original Swap required by the Relief DCO in its clearing agreement.

For Relief DCO Original Swaps and Relief DCO Clearing Swaps, the no-action position taken in this section will continue until the earlier of: (a) December 5, 2025; (b) the revocation or expiration of the exemptive order or no-action letter issued to the relevant Relief DCO; or (c) Commission action that renders the no-action position inapplicable. Relief DCO Counterparties retain all other reporting obligations for which they are responsible under the Commission’s regulations, and would be relieved of no obligations if the Relief DCO rejects the swap for clearing.

In the ISDA Letter, ISDA requests clarification that reporting counterparties should report a value of “Yes” in the cleared field for swaps intended to be submitted for clearing to a

²³ ISDA requested certain relief relating to swaps intended to be cleared with central counterparties exempted by the Commission and central counterparties that received no-action letters from DCR. DMO has combined these two types of central counterparties as “Relief DCOs” for purposes of CFTC Letters Nos. 16-85, 18-03, 21-12, 22-05, and this letter.

²⁴ CFTC Letter No. 22-05 provided a no-action position with respect to generating Unique Swap Identifiers (“USIs”) rather than UTIs. The 2020 amendments to Part 45 require the creation of UTIs in place of USIs. Because staff expect that, as of December 5, 2022, market participants will generate UTIs rather than USIs, this no-action letter addresses UTIs.

No-Action DCO and report the LEI of the No-Action DCO in the central counterparty field for swaps intended to be cleared at a No-Action DCO. Staff notes that under the no-action position taken here, Relief DCO Original Swaps and Relief DCO Clearing Swaps are treated as original swaps and cleared swaps for purposes of the Part 45 reporting requirements. Accordingly, it would be consistent with the no-action position herein to treat the swaps cleared by a Relief DCO as cleared by a central counterparty for purposes of the technical specifications.

* * *

The positions taken herein do not excuse affected persons from compliance with any other applicable CEA requirements or the Commission's regulations (in particular, the applicable swap reporting requirements and clearing requirements).²⁵ This letter and the positions taken herein represent the views of DMO only, and do not necessarily represent the positions or views of the Commission or of any other division or office. 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 positions provided herein, at its discretion.

If you have any questions concerning this correspondence, please contact Isabella Bergstein, Assistant Chief Counsel, Division of Market Oversight, at (202) 993-1384 or ibergstein@cftc.gov, or Paul Chaffin, Assistant Chief Counsel, Division of Market Oversight, at (202) 418-5185 or pchaffin@cftc.gov.

Sincerely,

Vincent McGonagle
Director
Division of Market Oversight

²⁵ The applicable swap reporting requirements are set forth under Parts 43, 45, 46, and 50 of the Commission's regulations, 17 CFR parts 43, 45, 46 and 50, respectively. The applicable clearing requirements are set forth under CEA section 2(h)(1), 7 U.S.C. § 2(h)(1), and Part 50 of the Commission's regulations.