



September 24, 2020

Commission Regulations Parts 45 and 46

Dorothy DeWitt
Director, Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Request for Extension of No-Action Letter 17-64

Dear Ms. DeWitt:

The Institute of International Bankers (“IIB”), the International Swaps and Derivatives Association (“ISDA”) and the Securities Industry and Financial Markets Association (“SIFMA”) and, together with IIB and ISDA, the “Associations”¹ are writing on behalf of their member organizations to respectfully request that the Division of Market Oversight (the “Division”) extend the no-action relief contained in Commodity Futures Trading Commission (the “CFTC” or “Commission”) Letter No. 17-64 (“Letter 17-64”),² which is currently scheduled to expire on December 1, 2020. Specifically, Letter 17-64 extended certain no-action relief from the requirements of Parts 45³ and 46⁴ of the Commission’s regulations (the “Reporting Rules”) to

¹ Information regarding the Associations is set forth in Appendix A.

² CFTC Letter No. 17-64, dated November 30, 2017, *available at* <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/17-64.pdf>.

³ 17 C.F.R. Part 45; Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012).

⁴ 17 C.F.R. Part 46; Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35,200 (June 12, 2012).

non-U.S. swap dealers (“SDs”) and major swap participants (“MSPs”) established in Australia, Canada, the European Union, Japan or Switzerland (the “Enumerated Jurisdictions”) that are not part of an affiliated group in which the ultimate parent entity is a U.S. SD, U.S. MSP, U.S. bank, U.S. financial holding company or U.S. bank holding company (such non-U.S. SDs and MSPs, “Covered Registrants”), with respect to swaps with non-U.S. counterparties that are not guaranteed affiliates, or conduit affiliates, of a U.S. person (as those terms are defined in the Commission’s cross-border guidance (the “Cross-Border Guidance”)).⁵ On April 5, 2019, Commission Letter No. 19-09 extended the relief to cover non-U.S. SDs and MSPs established under the laws of the United Kingdom post-Brexit.⁶

To date, the Commission has not issued any comparability determinations with respect to the Reporting Rules in the Enumerated Jurisdictions. Further, the Commission recently amended the Reporting Rules⁷ and modified and codified its Cross-Border Guidance,⁸ which may also affect the cross-border application of the Reporting Rules. We believe that the Commission should extend Letter 17-64 until such ongoing efforts are complete. Specifically, we believe that such extension is warranted in light of the following:

- If Letter 17-64 expires without codification or comparability determinations, the difference between the Reporting Rules and reporting rules in the Enumerated Jurisdictions are likely to cause market fragmentation. Such differences can include different required data fields, reporting deadlines, or reporting mechanics. Even though the Commission has recently adopted changes to Part 45 that will narrow these differences,⁹ reporting rules will not be fully harmonized internationally. Such differences would also potentially cause confusion and disruption in the local markets if Covered Registrants were required to collect additional information from local counterparties (e.g., LEI information, where local rules do not yet require LEIs) or needed to change their booking structure to address technology issues (e.g., if a local branch is not set up for trade reporting in conformance with the Reporting Rules).
- Further, applying the Reporting Rules to a Covered Registrant’s swaps with non-U.S. persons can cause the Covered Registrant to violate local blocking, privacy or secrecy laws.

⁵ See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013).

⁶ In light of this relief, for purposes of this letter, the United Kingdom is also an Enumerated Jurisdiction.

⁷ See Swap Data Recordkeeping and Reporting Requirements (Sept. 17, 2020) (“Revised Reporting Rules”), available at <https://www.cftc.gov/media/4701/votingdraft091720Part45/download>.

⁸ See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56924, 56963 n.354 (Sept. 14, 2020) (noting that the Commission intends to address the cross-border application of the Reporting Rules).

⁹ See *id.*

- Such concerns are especially heightened as they relate to the expiration of Letter 17-64's relief from Part 46 requirements. Covered Registrants would face difficulties in obtaining the counterparty consents needed in order to report swaps without violating local privacy laws. For example, there may no longer be an open position with certain counterparties, some counterparties may have ceased to exist, and contact details on file for counterparties may no longer be correct. The masking relief provided by Commission Letter No. 17-16 does not address this issue because it only covers jurisdictions where counterparty consent is not sufficient to override the local privacy restrictions.
- There are additional concerns that are specific to the expiration of the relief from Part 46's requirements, some of which are also applicable to the expiration of the relief with respect to Part 45, including the following:
 - Commission Regulation 46.2 provides required retention periods for records of pre-enactment and transition swaps for the life of the swap and for a period of five years from the final termination of the swap. A question arises regarding whether the reporting requirements in Commission Regulation 46.3 should apply to such a swap to the extent that the retention period in Commission Regulation 46.2 has ended for that swap. The same question arises under Commission Regulations 45.2 and 45.3 for swaps that are not pre-enactment or transition swaps.
 - The definition of "transition swap" in Commission Regulation 46.1 references "any swap entered into on or after the enactment of the Dodd-Frank Act of 2010 (July 21, 2010) and prior to the applicable compliance date on which a registered entity or swap counterparty subject to the jurisdiction of the Commission is required to commence full compliance with all provisions of this part, as set forth in the preamble to this part." A question arises regarding whether this reference to the "applicable compliance date" should take into account the functional delay in compliance with Part 46 resulting from Letter 17-64 and its predecessors.
 - Unlike some of the Commission's other no-action letters relating to Part 45, Letter 17-64 does not set forth a timeframe in which Covered Registrants are required to report pre-existing swap transactions once Letter 17-64 expires. Due to the volume of affected transactions and likely bandwidth issues at the DTCC Data Repository LLC ("DTCC"), such back-loading would likely require Commission involvement to help stagger schedules among Covered Registrants.
 - In addition, Covered Registrants would face several practical issues:
 - Covered Registrants would need to gather and format data from over an almost 10-year period (since the Dodd-Frank Act's enactment in 2010), with the extent and format for the required data differing depending on whether the swap was executed before or after July 21, 2010 and in existence on or after April 25, 2011 as well as what information relating to the terms of the swap was in the Covered Registrant's possession on or after October 14, 2010 or December 17, 2010.

- This would be a burdensome exercise due to the length of time that has passed since these dates, especially considering that Covered Registrants may have de-commissioned the trade capture systems that contained some of the relevant dates and would therefore need to retrieve data from archival systems.
 - Additionally, given the age of the affected transactions, many of them were confirmed on paper, and back-loading these confirmations will result in a significant resource drain.
- Further, some of the relevant non-U.S. trading desks would need to build, test and maintain new connections with DTCC in order to report in a manner compliant with the Reporting Rules.
 - Covered Registrants will also need to consider how reporting utilities (*e.g.*, MarkitWire) would need to get involved and any operational steps such reporting utilities would need to take to facilitate reporting these transactions.
- More generally, it would be highly inefficient for Covered Registrants that currently rely on Letter 17-64 to develop systems to report swaps that are currently covered by that letter if there is a reasonable possibility that the Commission may later codify Letter 17-64 as a part of its ongoing efforts to modify and codify its Cross-Border Guidance. This is especially the case considering the need for firms to prioritize IT efforts relating to business continuity during the ongoing COVID-19 pandemic. As it stands, few if any Covered Registrants would be in a position to meet the December 1, 2020 deadline if the Division does not extend it.
- Further, the Division would be justified to grant an extension in light of the recent revisions the Reporting Rules.
 - Letter 17-64 expressly stated that the Division expected revisions to the Reporting Rules as contemplated by the Roadmap to Achieve High Quality Swaps Data¹⁰ to be completed before the no-action relief expired. However, as things stand, the recently adopted reporting rulemakings will not take effect until early 2022 at the earliest given that they contemplate an 18-month transition period.¹¹
 - Further, although Covered Registrants are potentially eligible for substituted compliance with comparable home country reporting rules under the Commission's current Cross-Border Guidance—which, if granted, would also obviate the need to come into compliance with the Reporting Rules for the swaps covered by Letter 17-64—Covered Registrants could not have reasonably requested substituted

¹⁰ https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf

¹¹ Revised Reporting Rules at p.172.

compliance until they knew what the finalized revisions to the Reporting Rules would look like. Therefore, there needs to be some period of time now that the proposed reporting rules have been finalized for Covered Registrants to apply for substituted compliance. Covered Registrants should not have to implement the Reporting Rules until they know whether or not they will be able to rely on substituted compliance.

In light of the foregoing, we request that the Division extend the no-action relief contained in Letter 17-64. In order to allow time for the Commission to complete its ongoing efforts to address the cross-border application of the Reporting Rules, the Associations respectfully request that the Division extend the no-action relief in Letter 17-64 until the earlier of (a) 30 days following the issuance of a comparability determination by the Commission with respect to the Reporting Rules for the jurisdiction in which the Covered Registrant is established and (b) December 1, 2023.

* * *

Thank you for your consideration of this request. Please do not hesitate to contact the undersigned with any questions you may have. Pursuant to Commission Regulation 140.99(c)(3)(ii), the Associations hereby undertake that, if at any time prior to the issuance of a no-action letter, any material representation made in this letter ceases to be true and complete, they will promptly inform Commission staff in writing of all materially changed facts and circumstances.

Respectfully submitted,



Briget Polichene
Chief Executive Officer
IIB



Bella Rozenberg
Senior Counsel and Head of Legal and Regulatory
Practice Group
ISDA



Kyle Brandon
Managing Director, Head of Derivatives Policy
SIFMA

cc: The Honorable Heath P. Tarbert, Chairman
The Honorable Brian D. Quintenz, Commissioner
The Honorable Rostin Behnam, Commissioner
The Honorable Dawn DeBerry Stump, Commissioner
The Honorable Dan M. Berkovitz, Commissioner

Appendix A: Information Regarding the Associations

IIB is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States. The IIB's mission is to help resolve the many special legislative, regulatory, tax, and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. Further information is available at www.iib.org.

Since 1985, **ISDA** has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 73 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on ISDA's website: www.isda.org. Follow us on Twitter @ISDA.

SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets, and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

Certification
(Pursuant to Commission Regulation 140.99(c)(3)(i))

The undersigned hereby certify that the material facts set forth in the attached letter, dated September 24, 2020, are true and complete to the best of their knowledge.



By: _____
Name: Briget Polichene
Title: Chief Executive Officer
IIB



By: _____
Name: Bella Rozenberg
Title: Senior Counsel and Head of Legal and Regulatory Practice Group
ISDA



By: _____
Name: Kyle Brandon
Title: Managing Director, Head of Derivatives Policy
SIFMA