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Your ref: RIN 3038-AE85

16 May 2019

Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW
Washington, DC 20581

Attention: Christopher Kirkpatrick

Dear Mr Kirkpatrick

RIN 3038-AE85 – Interim Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

President Truman once said “if you can’t convince them, confuse them”. When it comes to Brexit there is much confusion. For this reason we welcome the CFTC’s initiative to clarify the margining of uncleared swaps in a no-deal Brexit scenario.

What, if any, additional clarification in the rule as to types of permissible amendments should the Commission provide? What specifically should be added or clarified, and why is it necessary in order to achieve the Commission’s policy objectives in the context of a No-deal Brexit?

We would like to highlight one area where additional clarification would be helpful. As part of the transfer of EEA derivatives business, swap dealers and major swap participants have the opportunity to switch the governing law and jurisdiction of their swap agreements or even to move to a different master agreement entirely. ISDA has published French law and Irish law governed master agreements which provide an alternative to the traditional English and NY law templates. If swaps are transferred from London to an entity in either France or Ireland there may be a preference to adopt that governing law for the ISDA Agreement.

In addition there are other forms of agreement such as the German law governed master agreement (DRV) which parties may prefer to use. This could be the case particularly where swaps are transferred from London with the result that both parties to the swap are in the same jurisdiction. The ISDA Agreement is often favoured for cross border swaps but if the swap ceases to be cross border then local considerations may come to the fore.

The Interim Final Rule requires that amendments do not modify payment amount calculation methods. Even if the economic terms of a specific swap are not amended, a switch of governing law or master agreement type could impact payment amount calculation methods, particularly in a closeout scenario. For example, in the case of the ISDA Master Agreement there is a body of English case law interpreting concepts such as "Market Quotation", "Loss" and "Close-out Amount". There is no certainty that an Irish or French court would necessarily apply precisely the same interpretation. If the parties move to a different type of master agreement such as the DRV then the closeout payment amount calculation method will also be drafted differently to the closeout provisions of the ISDA agreements.

It is not clear whether the Interim Final Rule is referring only to modification of ongoing swap payment amounts, or whether modifications to closeout payment amounts are also restricted. If it is the latter, then parties would be restricted from changing governing law/jurisdiction clauses and underlying master agreement types as part of no-deal Brexit restructuring. Guidance from the CFTC on this point would be welcomed by a number of our clients.

Thank you for your consideration.

Yours sincerely,

Carl Baker
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