

February 21, 2020

Mr. Christopher Kirkpatrick  
Secretary  
U.S. Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, D.C. 20581

**Re: Exemption from the Swap Clearing Requirement for Certain Affiliated Entities—  
Alternative Compliance Frameworks for Anti-Evasionary Measures**

Dear Secretary Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”)<sup>1</sup> appreciates the opportunity to provide comments to the U.S. Commodity Futures Trading Commission (“**CFTC**” or “**Commission**”) regarding the Exemption from the Swap Clearing Requirement for Certain Affiliated Entities—Alternative Compliance Frameworks for Anti-Evasionary Measures (“**Proposal**”) published in the Federal Register on December 23, 2019.<sup>2</sup>

We commend the Commission’s efforts to simplify its regulations and remove unnecessary compliance burdens. We appreciate that the Proposal, if finalized, would provide legal certainty to market participants who have been operating under temporary no-action relief<sup>3</sup> since the CFTC first adopted the inter-affiliate clearing exemption<sup>4</sup> in 2013.

Below, we propose two key changes that would further improve the efficiency and usability of the exemption, without compromising systemic risk concerns. Specifically, we request that the Commission:

- (1) Allow counterparties that exchange variation margin (“**VM**”) pursuant to the exemption to comply with the margin requirements of other jurisdictions that have been deemed comparable; and
- (2) Clarify that those who elect to use the exemption are also exempt from the trade execution requirement.

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<sup>1</sup> 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 depositories, as well as law firms, accounting firms and other service providers. Additional information on ISDA is available at <http://www.isda.org>.

<sup>2</sup> Exemption From the Swap Clearing Requirement for Certain Affiliated Entities--Alternative Compliance Frameworks for Anti-Evasionary Measures (hereinafter, Proposal), 84 Fed. Reg. 70446 (Dec. 23, 2019).

<sup>3</sup> See Proposal at 70446 (citing to existing and previous CFTC no-action relief).

<sup>4</sup> Commission Regulation § 50.52.

## Existing Substituted Compliance Determinations.

Following the adoption of the inter-affiliate clearing exemption, the CFTC issued comparability determinations for the non-cleared margin rules of certain non-U.S. jurisdictions.<sup>5</sup> Under these determinations, the Commission found the margin requirements for non-cleared swaps under such laws and regulations comparable in outcome to those under the CFTC regulations.<sup>6</sup> In light of this, we believe that the Commission should permit eligible affiliate counterparties to exchange VM under the inter-affiliate clearing exemption pursuant to the margin requirements of non-U.S. jurisdictions that the Commission determines comparable. Such an approach would be consistent with the Commission’s efforts to defer to foreign regulations and foreign regulatory authorities where such regulations and oversight are deemed comparable.<sup>7</sup>

In contrast, not permitting eligible affiliate counterparties to rely on such comparability determinations in this context would undermine the value of comparability determinations in the first place. In other words, if the Commission has allowed the margin requirements of non-U.S. jurisdictions to be used in lieu of the CFTC margin requirements for a broad scope of cross-border transactions, then it should follow that such requirements should also be sufficiently adequate to be used in lieu of the CFTC margin requirements for a more narrow scope of cross-border transactions, i.e., those made pursuant to the inter-affiliate clearing exemption.

## The Trade Execution Requirement.

We understand that the Commission is not considering any permanent changes with respect to the trade execution requirement<sup>8</sup> in this Proposal because the requirement is subject to the ongoing, separate Swap Execution Facilities (“SEF”) rulemaking (“SEF Proposal”).<sup>9</sup> However, we seek confirmation that affiliates who *elect* to use the inter-affiliate clearing exemption would continue to be automatically exempt from the trade execution requirement per the Commission’s current regulations under Part 37.<sup>10</sup> As we have stated in the past, inter-affiliate transactions are

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<sup>5</sup> Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 63376 (Sept. 15, 2016); Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 82 Fed. Reg. 48394 (Oct. 18, 2017).

<sup>6</sup> In both EU and Japan margin comparability determinations, the CFTC found the scope of entities subject to EU and Japan margin rules comparable to the scope of entities subject to the U.S. margin rules. *See* 82 Fed. Reg. 48394, 48398 (allowing CSEs subject to the EU margin rules to only post and collect variation margin to the classification of counterparties subject to the EU margin rules); *see also* 81 Fed. Reg. 63376, 63381 (allowing CSEs subject to the Japanese margin rules to only post and collect variation margin to the classification of counterparties subject to the Japanese margin rules).

<sup>7</sup> *See* Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 952 (Jan. 8, 2020).

<sup>8</sup> 2(h)(8) of the Commodity Exchange Act

<sup>9</sup> *See* Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (Nov. 30, 2018).

<sup>10</sup> Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 Fed. Reg. 33606 (June 4, 2013). (“[O]n April 11, 2013, the Commission published final rules issued under section 4(c) of the CEA to exempt swaps between certain affiliated entities (“interaffiliates”) within a corporate group from the clearing requirement. The Commission determines that such swaps would not be subject to the trade execution requirement.”)

intended to manage risk between affiliates and are not arms-length transactions. Requiring such transactions to be executed on a SEF or DCM would not promote pre-trade price transparency and price discovery objectives associated with the trade execution requirement because affiliate counterparties are not primarily concerned with obtaining fully competitive pricing. Moreover, the execution of such swaps through an order book or request for quote, as required by the current rules, would not ensure that the affiliates would match with one another, thereby precluding intended inter-affiliate risk transfers and undermining the goal of these transactions.

In addition, with respect to affiliates who *do not elect* to use the inter-affiliate clearing exemption, there is currently temporary CFTC no-action relief allowing affiliates who are eligible for the exemption, but elect not to use it, to continue to be exempted from the trade execution requirement.<sup>11</sup> For the same reasons indicated above, we ask the Commission to extend the Commission's existing temporary no-action relief for affiliates that do not elect to use the exemption until the Commission makes a decision with respect to the applicability of the trade execution requirement to inter-affiliate trades when it finalizes the SEF Proposal.

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We appreciate the opportunity to submit our comments in response to the Proposal. We commend the Commission for its efforts to reduce unnecessary burdens associated with its regulations and codify longstanding market practices. Our members are strongly committed to maintaining the safety and efficiency of the U.S. swaps markets and hope that the Commission will consider our suggestions, as they reflect the extensive knowledge and experience of industry professionals within our membership.

Please contact me at (202)-683-9334 should you have any questions.



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

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<sup>11</sup> CFTC No-Action Letter 17-67,  
<https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/17-67.pdf>.