



Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
USA

8 July 2020

Re: Swap Clearing Requirement Exemptions, RIN 3038-AE33

Dear Mr. Kirkpatrick:

The Bank for International Settlements (the "BIS")¹ appreciates the opportunity to provide the Commodity Futures Trading Commission (the "Commission" or "CFTC") with comments on the Commission's proposed rules regarding exemptions from the swap clearing requirement (the "Proposed Exemption").² We welcome the Commission's decision to codify in rule text the exemption from the clearing requirement for swaps entered into with central banks (including, for this purpose, the BIS), foreign governments and international financial institutions set out in the preamble to the end-user exception final rule (the "2012 End-User Exception").³

We note, however, that the Proposed Exemption is conditioned on the swaps having been reported to a swap data repository (an "SDR") pursuant to CFTC Rules §§ 45.3 and 45.4 (the "Reporting Condition"). The addition of the Reporting Condition, which does not appear in the exemption in the preamble to the 2012 End-User Exception,⁴ would leave the BIS at risk of unknowingly violating the clearing

¹ The BIS is an international organisation established under the *Hague Convention respecting the Bank for International Settlements (20 January 1930)*. The mandate of the BIS is to foster international monetary and financial cooperation and to serve as a bank for central banks and international public institutions. The BIS currently has 62 member central banks located worldwide, including all G20 members.

² Swap Clearing Requirement Exemptions, 85 Fed. Reg. 27955 (May 12, 2020).

³ End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42560 (Jul. 19, 2012).

⁴ The exemption in the preamble to 2012 End-User Exception referred to the reporting requirement but did not condition the exemption on compliance with the requirement: "The Commission notes, however, that if a foreign government, foreign central bank, or international financial institution enters into a non-cleared swap with a counterparty who is subject to the [Commodity Exchange Act ("CEA")] and Commission regulations with regard to that transaction, then the counterparty still must comply with the CEA and Commission regulations as they pertain to non-cleared swaps. For example, the party must comply with the recordkeeping and

requirement due to its counterparty's failure to report a swap, thus undermining the Commission's stated reasons for providing the Proposed Exemption. The Reporting Condition would also not substantially contribute to ensuring that the swaps are reported to an SDR, as CFTC Rules §§ 45.3 and 45.4 already require the reporting counterparty to report the swaps.

I. Only the BIS's counterparty can satisfy the Reporting Condition, but the BIS will suffer the consequences of unavailability of the Proposed Exemption if the Reporting Condition is not satisfied

The BIS is a non-U.S. person under the Commission's July 2013 cross-border guidance⁵ and is not a swap dealer or major swap participant.⁶ We believe the BIS would accordingly not be the party required to report a swap under CFTC Rules §§ 45.3 and 45.4,⁷ nor would it be able to satisfy the Reporting Condition.⁸ Instead, the BIS's counterparty would be the "reporting counterparty" required to report a swap to an SDR under CFTC Rules §§ 45.3 and 45.4 and, as such, would have the ability to satisfy the Reporting Condition.

If the BIS's counterparty fails to report a swap to an SDR in accordance with CFTC Rules §§ 45.3 and 45.4, the Reporting Condition would not be satisfied and the Proposed Exemption would not be available to the BIS. Assuming the Proposed Exemption is not available for this reason and the swap was not cleared, the BIS could be subject to a CFTC enforcement action for failure to comply with the clearing requirement. Consequently, each time the BIS wished to rely on the Proposed Exemption, it would face the risk of unknowingly becoming exposed to a violation of CFTC rules due to a failure by its counterparty to report the swap.⁹

reporting requirements under Parts 23 and 45 of the Commission's regulations." 2012 End-User Exception at 42562.

⁵ Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (Jul. 26, 2013). The BIS does not appear to meet any of the prongs of "U.S. person" set out in the Commission's July 2013 cross-border guidance.

⁶ The Commission stated in its 2012 Final Entities Rulemaking that central banks (including, for this purpose, the BIS) should not be required to register as swap dealers or major swap participants. See Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 77 Fed. Reg. 30596 (May 23, 2012) at 30693.

⁷ CFTC Rules §§ 45.3 and 45.4 rules impose regulatory reporting requirements on (a) swap execution facilities ("SEFs") or designated contract markets ("DCMs") for swaps executed on or pursuant to the rules of a SEF or DCM, and (b) on the reporting counterparty, as determined pursuant to CFTC Rules § 45.8 for off-facility swaps. Under CFTC Rules §45.8, where a counterparty is a non-U.S. person that is not a swap dealer or major swap participant, the reporting counterparty will be the other counterparty if it is a swap dealer, major swap participant or U.S. person. If the other counterparty is a non-U.S. person that is not a swap dealer or major swap participant, under the CFTC's cross-border guidance the swap would not be subject to the regulatory reporting requirements (or the swap clearing requirement).

We expect the analysis above would also apply to foreign governments, foreign central banks and most international financial institutions.

⁸ It does not appear that the BIS would be able fulfil the Reporting Condition by reporting the swap itself as that would not cause the swap to be reported "under CFTC Rules §§ 45.3 and 45.4".

⁹ Whether a swap has been reported under CFTC Rules §§ 45.3 and 45.4 is not made public, so the BIS would not be able to verify whether a swap had been reported in satisfaction of the Reporting Condition.

II. The BIS's counterparty is required to comply with CFTC Rules §§ 45.3 and 45.4 regardless of whether such compliance is a condition to the Proposed Exemption

We support the Commission's interest in ensuring that swaps are reported to an SDR, however we do not believe conditioning the Proposed Exemption on such reporting would substantially contribute to achieving this outcome. As the Commission itself noted in the preamble to the 2012 End-User Exception, although a swap with a foreign government, foreign central bank (including, for this purpose, the BIS) or international financial institution is not subject to the clearing requirement, the counterparty still must comply with the CEA and Commission regulations as they pertain to non-cleared swaps, which include the reporting requirements in CFTC Rules §§ 45.3 and 45.4.¹⁰ The Commission stated this in the preamble to the Proposed Exemption as well,¹¹ making it clear that the reporting counterparty is already required to report the swap to an SDR pursuant to CFTC Rules §§ 45.3 and 45.4.

The Reporting Condition is unlikely to serve as significant additional motivation for the reporting counterparty to comply with reporting rules to which it clearly is already subject.¹² Although the condition could provide an incentive for the non-reporting counterparty (e.g., the BIS) to seek to incentivize the reporting counterparty to report the swap, the non-reporting counterparty has only limited ability to accomplish this. The already-existing reporting requirement and possibility of an enforcement action by the CFTC, as well as the sanctions and reputational harm that would accompany such an action, in the event the reporting counterparty failed to report the swap would seem to be far greater motivation for the reporting counterparty to report the swap than, for example, a contractual undertaking to the non-reporting counterparty replicating the pre-existing reporting requirement.

In explaining why it would include the Reporting Condition in the preamble to the Proposed Exemption, the Commission refers to the inclusion of similar conditions in the exemptions in CFTC Rules §§ 50.5(a) and (b).¹³ We note that CFTC Rules §§ 50.5(a) and (b) implement related provisions of the CEA which already include these conditions.¹⁴ However, the Proposed Exemption is not related to these CEA provisions (or any other CEA provisions or CFTC rules which include this condition). In addition, the Commission did not incorporate such conditions in its other exemptions from the clearing requirement, including the 2012 End-User Exception,

¹⁰ See 2012 End-User Exception at 42562.

¹¹ See Proposed Exemption at 27959.

¹² Conditioning the Proposed Exemption on compliance with the reporting requirements could also conflict with the no-action relief provided in CFTC Letter 17-16 which allows for masking of counterparty identity information under limited circumstances. Although CFTC staff have stated they would not take action for a failure to report counterparty identity information under these circumstances, that failure could be considered a violation of the Reporting Condition. While theoretically this could motivate the reporting counterparty to report counterparty identity information that otherwise could be masked, we think this is unlikely as we understand that the reason for the masking is that reporting counterparty identifying information would violate local privacy laws applicable to the reporting counterparty. The more likely outcome is that swaps benefiting from the Proposed Exemption would not be transacted by entities relying on this no-action relief.

¹³ See Proposed Exemption at 27961.

¹⁴ CEA §§ 2(h)(6)(A) and (B).

the inter-affiliate exemption,¹⁵ and the cooperative exemption,¹⁶ even where these exemptions require supplemental information to be reported to an SDR.¹⁷

III. The Reporting Condition would undermine the CFTC's stated reasons for providing the Proposed Exemption

We welcomed the Commission's statement in the preamble to the 2012 End-User Exception rulemaking that an exemption from the clearing requirement should be granted to foreign governments, foreign central banks (including the BIS), and international financial institutions given considerations of comity and in keeping with the traditions of the international system. We also appreciate the Commission confirming in the preamble to the Proposed Exemption that its position in this regard has not changed.

The Proposed Exemption might undermine, however, these considerations by subjecting these entities to the clearing requirement in the event their counterparty failed to report the swap. As the Commission further noted in the preamble to the 2012 End-User Exception, subjecting these entities to the clearing requirement would depart from the traditions of the international system. We do not believe that the failure by the counterparty to report these swaps, which is already a violation of CFTC rules, would justify such a departure.

IV. Conclusion

We appreciate the Commission's proposal to codify exemptions for foreign governments, foreign central banks (including the BIS), and international financial institutions from the clearing requirement in a rulemaking. However, conditioning those exemptions on the Reporting Condition would create significant regulatory risk for these entities and undermine the Commission's stated reasons for providing the exemptions. At the same time, the Reporting Condition would have limited benefit in additionally incentivizing reporting counterparties to report the swaps in compliance with reporting rules to which they are already subject. Accordingly, we would respectfully request that the Commission remove the Reporting Condition when finalizing the Proposed Exemption.¹⁸

¹⁵ Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 Fed. Reg. 21750 (Apr. 11, 2013).

¹⁶ Clearing Exemption for Certain Swaps Entered Into by Cooperatives, 78 Fed. Reg. 52286 (Aug. 22, 2013).

¹⁷ Each of these exemptions requires that the reporting counterparty report supplemental information relating to the use of the exemption to an SDR, but does not condition the exemption on this requirement. If the reporting counterparty failed to report this information it would be in violation of this supplemental reporting requirement, but the exemption should still be available to the non-reporting counterparty. We also note that none of these exemptions include a reference to the general reporting requirements under CFTC Rules §§ 45.3 and 45.4.

¹⁸ Alternatively, the Commission could consider changing the Reporting Condition into a requirement that applies solely to the reporting counterparty. We believe this may not be necessary because compliance with the reporting requirements is already required under CFTC Rules §§ 45.3 and 45.4 and the Proposed Exemption does not provide for any supplemental reporting that is not already covered under the reporting rules.

Yours sincerely

BANK FOR INTERNATIONAL SETTLEMENTS



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