

MEMO# 32988

December 16, 2020

Staff of the CFTC and US Prudential Regulators Provide Brexit Transition Relief for Legacy Swaps

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December 16, 2020 TO: ICI Members

ICI Global Members

Derivatives Markets Advisory Committee

ICI Global Regulated Funds Committee

ICI Global Trading & Markets Committee SUBJECTS: Compliance

Derivatives

International/Global

Investment Advisers

Trading and Markets RE: Staff of the CFTC and US Prudential Regulators Provide Brexit Transition Relief for Legacy Swaps

The staff of the Commodity Futures Trading Commission (CFTC), along with the staff of the Board of Governors of the Federal Reserve System (“Federal Reserve”) and the Office of the Comptroller of the Currency (OCC), recently provided relief from their margin rules for, respectively, uncleared swaps and non-cleared swaps and security-based swaps, in connection with the Brexit transition.[\[1\]](#) The relief, which is summarized below, preserves the legacy treatment of certain swaps and security-based swaps that are transferred to affiliates in anticipation of the end of the Brexit transition period. While both the CFTC and the US prudential regulators previously had issued interim final rules amending their swap margin rules to address the Brexit transition, those rules did not contemplate the existence of a UK-EU withdrawal agreement that fails to preserve “passporting rights” along with the current uncertainty about whether a UK-EU free trade agreement will be reached prior to the end of the Brexit transition period.[\[2\]](#)

CFTC Staff Letter

The CFTC staff no-action letter addresses the treatment of margin legacy swaps[\[3\]](#) after the end of the Brexit transition period following the UK-EU withdrawal agreement. The no-action letter provides that the CFTC’s Market Participants Division (MPD) will not recommend enforcement action against a swap dealer for failure to comply with the CFTC’s margin rule with respect to a margin legacy swap solely to the extent that compliance would be required as a result of an amendment to the swap entered into under the following conditions:

1. Solely in connection with a party to a margin legacy swap's planning for or response to the expiration of the Brexit transition period specified in the Brexit withdrawal agreement (the "Brexit Transition Period Expiration," and the date of such expiration, as such may be extended or modified from time to time, the "Brexit Transition Period Expiration Date"), one or both parties to the swap transfers the swap to its margin affiliate, or a branch or other authorized form of establishment of the transferor, and the parties make no other transfers of the swap;
2. (a) A CSE is a transferee from a party to the swap; or (b) A CSE is a remaining party to the swap, and the transferor represents to the CSE that the transferee is a margin affiliate, or a branch or other authorized form of establishment of the transferor, and that the transfer was made solely in connection with the transferor's planning for or response to the Brexit Transition Period Expiration;
3. The amendment does not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap;
4. The amendment takes effect no earlier than the date of the no-action letter (i.e., December 4, 2020); and
5. The amendment is entered into and takes effect no later than the date that is one year after the Brexit Transition Period Expiration Date.

The letter also includes no-action relief by the CFTC's Division of Clearing and Risk (DCR) for "clearing legacy swaps" that are amended solely to transfer ownership of those swaps in response to the Brexit Transition Period Expiration.[\[4\]](#) That relief is subject to the following conditions:

1. Solely in connection with a party to a clearing legacy swap's planning for or response to the Brexit Transition Period Expiration, one or both parties to the swap transfers the swap to its affiliate, or a branch or other authorized form of establishment of the transferor, and the parties make no other transfers of the swap;
2. Each transferor represents to the transferee that the transfer was made solely in connection with the transferor's planning for or response to the Brexit Transition Period Expiration;
3. The amendment does not modify any of the following: the payment amount calculation methods, the maturity date, or the notional amount of the swap;
4. The amendment takes effect no earlier than the date of the no-action letter (i.e., December 4, 2020); and
5. The amendment is entered into and takes effect no later than the date that is one year after the Brexit Transition Period Expiration Date.

The letter recognizes that amendments to margin legacy swaps and clearing legacy swaps may be carried out using any of the methods typically employed for effecting uncleared swap transfers, including industry protocols, contractual amendments, or contractual tear-up and replacement.[\[5\]](#)

Statement by Federal Reserve and OCC

The Federal Reserve and OCC explain that, consistent with the intent of their interim final rule on swap margin, they wish to provide certainty to industry participants regarding the

treatment of legacy swaps in connection with the Brexit transition. Accordingly, the Federal Reserve and OCC staff would not recommend enforcement action if a CSE is a party to a legacy swap that was amended under the following conditions:

1. One or both parties booked the legacy swap at, or otherwise held the legacy swap at, an entity (including a branch or other authorized form of establishment) located in the UK;
2. An entity in the UK amends the swap solely for the purpose of transferring it to an affiliate, or a branch, or other authorized form of establishment located in any EU member state or the United States;
3. The covered swap entity continues to treat the swap as a legacy swap after the swap is amended;
4. The transfer of the legacy swap is complete by the later of January 1, 2022, or one year after the expiration of EU passporting rights; and
5. The amendments do not modify the payment amount calculation methods, extend the maturity date, or increase the total effective notional amount of the swap.

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endnotes

[1] See CFTC Letter No. 20-42 (Dec. 4, 2020), *available at* <https://cftc.gov/csl/20-42/download>; Board of Governors of the Federal Reserve System and Office of the Comptroller of the Currency, Statement Regarding Treatment of Certain Legacy Swaps Affected by Brexit and the Swap Margin Rule (Dec. 11, 2020), *available at* <https://www.federalreserve.gov/supervisionreg/srletters/SR2029a1.pdf>.

[2] The CFTC's interim final rule, which was adopted in April 2019, allows swap dealers, in the event of a no-deal Brexit, to enter into certain amendments to facilitate legal transfers of legacy swaps between affiliates without subjecting such swaps to the CFTC's margin requirements. See *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 84 Fed. Reg. 12065 (Apr. 1, 2019). Similarly, the interim final rule issued in 2019 by the prudential regulators (the Federal Reserve, the OCC, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency) amended the prudential regulators' swap margin rules to provide that a legacy swap would not become subject to the swap margin rules as a result of certain amendments to facilitate legal transfer of the swap for purposes of the Brexit transition. The relief in the prudential regulators' interim final rule, however, does not apply if the UK and EU enter into a withdrawal agreement, as they have. See *Margin and Capital Requirements for Covered Swap Entities*, 84 Fed. Reg. 9940 (Mar. 19, 2019).

[3] The letter defines a margin legacy swap as "an uncleared swap entered into prior to [a

covered swap entity's (CSE)] applicable compliance date for a particular counterparty [which] is generally not subject to the margin requirements in the CFTC Margin Rule."

[4] "Clearing legacy swaps" are defined in the letter as "swaps entered into before July 21, 2010, or the application of the [the CFTC's clearing requirement] for a particular class of swaps are not subject to the [clearing requirement] so long as such swaps are reported to a swap data repository."

[5] The relief also would cover judicially-supervised changes that result in an uncleared swap being booked at or held by a related entity, to the extent they would otherwise trigger margin or clearing requirements.

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