INVESTMENT COMPANY INSTITUTE

**MEMO# 32878**

October 29, 2020

# SEC and CFTC Jointly Request Comment on Portfolio Margining of Uncleared Swaps and Non-Cleared Security-Based Swaps - ICI Member Call on November 9th

[32878]

October 29, 2020 TO: Derivatives Markets Advisory Committee RE: SEC and CFTC Jointly Request Comment on Portfolio Margining of Uncleared Swaps and Non-Cleared Security-Based Swaps - ICI Member Call on November 9th

On October 22nd, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC; together with the SEC, "Commissions") issued a joint request for comment seeking public feedback on potential ways to implement portfolio margining of uncleared swaps and non-cleared security-based swaps ("Request for Comment").[1] Comments on the Request for Comment are due 30 days after publication in the *Federal Register*.

**ICI will hold a member call on November 9th, from 12:00-1:00 pm ET, to discuss potential comments on the Request for Comment. If you plan to join the call, please be prepared to participate actively and provide detailed feedback on the questions the Commissions raise in the Request for Comment. We are pleased to be joined on the call by our outside counsel, Georgia Bullitt, of Willkie Farr and Gallagher. We will send you an Outlook invitation for the call that will include dial-in information.**

## Background

Portfolio margining generally refers to the cross margining of related positions in a single account, allowing netting of certain offsetting exposures. The Commissions explain that portfolio margining of uncleared swaps, non-cleared security-based swaps, and related positions can offer benefits to customers and the markets, including promoting greater efficiencies in margin calculations with respect to offsetting positions. The SEC and CFTC previously have issued exemptive orders to facilitate the portfolio margining of cleared swaps and security-based swaps.[2]

Portfolio margining, however, raises issues including potential impacts on margin requirements, the segregation and bankruptcy treatment of uncleared swaps and non-cleared security-based swaps in different account types and entities, and potential impact on regulatory capital requirements.[3] The Agencies note that implementation of portfolio margining of uncleared swaps and non-cleared security-based swaps requires careful consideration of the differences in the capital, margin, and segregation requirements of the CFTC and SEC applicable to uncleared swaps and non-cleared security-based swaps, respectively.[4]

## Request for Comment

The Commissions request detailed feedback on all aspects of the portfolio margining of uncleared swaps and non-cleared security-based swaps, including on the merits, benefits, and risks of portfolio margining these types of positions, and on any regulatory and operational issues associated with portfolio margining them. The request for comment takes into account: (1) type of registration (broker-dealer, OTC derivatives dealer, security-based swap dealer, futures commission merchant, and swap dealer) an entity may need in order to engage in portfolio margining of uncleared swaps, non-cleared security-based swaps, and related positions; (2) the account types (securities account, security-based swap account, and swap account) these registrants can maintain; and (3) the margin and segregation requirements that apply to products.

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**endnotes**

[1] *Portfolio Margining of Uncleared Swaps and Non-Cleared Security-Based Swaps*, *available at* https://www.sec.gov/rules/other/2020/34-90246.pdf. The fact sheet summarizing the Request for Comment is *available at* https://www.sec.gov/news/press-release/2020-264.

[2] *See Order Granting Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-based Swaps*, Exchange Act Release No. 68433 (Dec. 12, 2012), 77 Fed. Reg. 75211 (Dec. 19, 2012); CFTC, Order, *Treatment of Funds Held in Connection with Clearing by ICE Clear Credit of Credit Default Swaps* (Jan. 13, 2013), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/icecreditclearorder011413.pdf; CFTC, Order, *Treatment of Funds Held in Connection with Clearing by ICE Clear Europe of Credit Default Swaps* (Apr. 9, 2013), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@requestsandactions/documents/ifdocs/icecleareurope4dfcds040913.pdf.

[3] In comments to the Commissions, ICI previously has discussed issues raised by portfolio margining, including the need for regulatory clarity, and certainty of treatment of customer assets in bankruptcy. *See*, *e.g.*, Letter to Mr. Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, from Sarah A. Bessin, Associate General Counsel, ICI, dated July 13, 2020, *available at* https://www.ici.org/pdf/32595a.pdf; Letter to Mr. Brent J. Fields, Secretary, Securities and Exchange Commission, from Susan M. Olson, General Counsel, ICI, dated Nov. 19, 2018, *available at* https://www.ici.org/pdf/31492a.pdf; Letter to Mr. David A.

Stawick, Secretary, Commodity Futures Trading Commission, and Ms. Elizabeth Murphy, Secretary, Securities and Exchange Commission, from Dorothy Donohue, Deputy General Counsel, ICI, dated April 9, 2012, *available at* https://www.ici.org/pdf/26027.pdf.

[4] The fact sheet summarizing the Request for Comment includes helpful tables comparing the SEC's and CFTC's margin rules and comparing margin and segregation requirements applicable to different instruments organized by account type. *See supra* note 1.