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S&C memo

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CFTC Staff Issues Pre-Trade Mid-Market Mark Relief

No-Action Position Relieves Swap Dealers from the Requirement to Provide PTMMMs

On April 4, 2025, in response to a request from three industry associations (the "Associations"),[1] the Market Participants Division ("MPD") of the Commodity Futures Trading Commission ("CFTC") issued CFTC Letter No. 25-09.[2] CFTC Letter No. 25-09 provides that MPD will not recommend that the CFTC commence an enforcement action against a swap dealer or major swap participant (a "Swap Entity") for failure to provide pre-trade mid-market marks ("PTMMMs") to its non-Swap Entity counterparties (the "PTMMM Requirement").[3] The no-action position will remain in effect until the CFTC, following "a reconsideration of the usefulness and effectiveness of the PTMMM Requirements," adopts revised regulations—the CFTC has not yet proposed any rule changes in this regard. The relief does not affect a Swap Entity's obligation to provide daily marks[4] or to comply with the CFTC's transaction reporting requirements.[5]

The Commodity Exchange Act directs the CFTC to adopt business conduct standards for Swap Entities, including a requirement to disclose daily marks.[6] The statute does not impose a PTMMM Requirement. In 2012, as part of its broader business conduct rulemaking, the CFTC exercised its discretionary rulemaking authority to adopt the PTMMM Requirement, based on its view that disclosure of PTMMMs would "facilitate[] negotiations and balance[] historical information asymmetry regarding swap pricing."[7] In the years following the adoption of the PTMMM Requirement, MPD[8] had provided no-action relief in a wide variety of contexts where market participants had demonstrated that the PTMMM Requirement was "unnecessary or unworkable."[9] Despite this relief and consistent industry advocacy that the PTMMM Requirement was burdensome, unnecessary and imposed costs both on swap dealers and their counterparties,[10] it remained generally in effect and the CFTC continued to bring enforcement actions against swap dealers for PTMMM-related deficiencies.[11]

MPD ultimately was persuaded by the Associations' arguments that: (1) there is no empirical evidence demonstrating that the PTMMM Requirement has meaningfully reduced any perceived information asymmetry or facilitated negotiations between swap dealers and counterparties; (2) the swaps market has significantly evolved since the adoption of the PTMMM Requirement in 2012, including the existence of a substantial amount of publicly available information that has contributed to transparency in swaps pricing; (3) counterparties frequently request that swap dealers not provide PTMMMs and otherwise do not use them; (4) the PTMMM Requirement imposes significant compliance challenges and operational burdens on swap dealers, the costs of which outweigh any perceived transparency benefits of PTMMM disclosure; (5) the PTMMM Requirement may delay trade time and impede the prompt execution of transactions; (6) the prior grants of no-action relief did not result in detrimental impacts to price transparency; and (7) granting relief would align the CFTC's requirements with the business conduct requirements for security-based swaps adopted by the Securities and Exchange Commission, which do not include a PTMMM requirement.

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ENDNOTES

1 The three industry associations are the International Swaps and Derivatives Association, Inc., the Institute of International Bankers, and the Securities Industry and Financial Markets Association. Sullivan & Cromwell represented the Associations in this request for no-action relief.

2 CFTC Letter No.25-09, No-Action Position for Swap Entities Regarding the Obligation to Provide a PTMMM under 17 CFR § 23.431(a)(3)(i) (Apr. 4, 2025), available at https://www.cftc.gov/csl/25-09/download.

3 *See* 17 C.F.R. § 23.431(a)(3)(i). For these purposes, "Swap Entity" includes security-based swap dealers and major security-based swap participants.

4 17 C.F.R. § 23.431(d).

5 17 C.F.R. Parts 43 and 45.

6 7 U.S.C. § 6s(h)(3)(B).

7 Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734, 9824 (Feb. 17, 2012). The PTMMM Requirement specifically requires a swap dealer, "[f]or uncleared swaps, [to] provide the [non-Swap Entity] counterparty . . . with a daily mark, which shall be the mid-market mark of the swap" and such mid-market mark "shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments." 17 C.F.R. § 23.431(d)(2). In adopting the PTMMM Requirement, the CFTC also noted that "the spread between the quote and mid-market mark is relevant to disclosures regarding material incentives and provides the counterparty with pricing information." 77 Fed. Reg. at 9824.

8 MPD previously was called the Division of Swap Dealer and Intermediary Oversight and adopted some of this relief under that prior name.

9 *See* CFTC Letter No.25-09 at 3-5.

10 *See, e.g.*, SIFMA Asset Management Group Letter in Response to CFTC Project KISS (Sept. 29, 2017) at 2, available at https://www.sifma.org/wp-content/uploads/2017/10/SIFMA-AMG-Comments-on-CFTCs-Project-KISS.pdf (stating that: (1) the CFTC should "revise external business conduct standards to target market needs more efficiently"; and (2) the PTMMM Requirement "create[s] unnecessary burden upon dealers" and "costs imposed upon dealers translate into higher costs for investors utilizing swaps for investment strategies.").

11 *See, e.g.*, In the Matter of Société Générale S.A., CFTC Docket No. 21-36 (Sept. 29, 2021), available at https://www.cftc.gov/media/6521/enfsocieteorder092921/download (imposing a $1.5 million fine); In the Matter of Goldman Sachs & Co. LLC, CFTC Docket No. 23-09 (Apr. 10, 2023), available at https://www.cftc.gov/media/8376/enfgoldmanorder041023/download (imposing a $15 million fine); In the Matter of StoneX Markets LLC, CFTC Docket No. 23-44 (Sept. 20, 2023), available at https://www.cftc.gov/media/9261/enfstonexmarketsorder092023/download (imposing at $650,000 fine).

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