

March 9, 2020

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

Re: Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants

Dear Secretary Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”)¹ appreciates the opportunity to provide comments to the U.S. Commodity Futures Trading Commission (“**CFTC**” or “**Commission**”) regarding the Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants (“**Proposal**”)² published in the Federal Register on January 8, 2020.

We commend the Commission’s efforts to recalibrate its cross-border regime through the rulemaking process to better reflect its authority over cross-border transactions and reverse certain negative consequences that resulted from the application of the 2013 Cross-Border Guidance.³ Revisiting the cross-border regime is especially timely given that other nations have made significant progress in implementing the 2009 G-20 derivatives reforms.⁴

We support the Commission’s proposed holistic, outcomes-based approach to issuing comparability determinations. We agree that the CFTC should assess the laws of foreign jurisdictions based on a common set of principles with an understanding that jurisdictions may have implemented the G-20 derivatives reforms from slightly different perspectives, and look to adopt a substituted compliance regime based on comparable, rather than identical, approaches to derivatives regulations.

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

² 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), <https://www.govinfo.gov/content/pkg/FR-2020-01-08/pdf/2019-28075.pdf>.

³ Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-17958a.pdf>. (hereinafter referred to as 2013 Guidance).

⁴ The G-20 Commitments are available at <http://www.g20.utoronto.ca/analysis/commitments-09-pittsburgh.html>.

Changes to the current cross-border regulatory framework are not only timely, but are also necessary. In some instances, the current framework has created regulatory barriers to access global liquidity, increased capital requirements and costs, added operational complexity and risk, and imposed burdensome duplicative compliance obligations, which ultimately diminish their intended regulatory benefit.

To further refine the cross-border regime, we have identified four aspects of the Proposal that warrant the Commission's additional consideration, which are explained in more detail later in the letter. They are as follows:

- A. ANE Transactions: We commend the Commission for: (i) proposing to exclude transactions between non-U.S. swap entities and non-U.S. persons that are arranged, negotiated, or executed by U.S. personnel ("**ANE transactions**") from certain regulations; and (ii) providing relief to foreign branches of U.S. swap entities from certain rules (and permitting substituted compliance in other cases) when trading swaps with non-U.S. persons, regardless of whether U.S. personnel are used to arrange, negotiate, or execute such swaps ("**Foreign Branch ANE transactions**").

In the final rule, however, we respectfully ask that the Commission confirm that other Title VII requirements, including clearing, trading and real-time reporting rules will not apply to ANE transactions and Foreign Branch ANE Transactions.

- B. Cross-Border Application of the Swap Dealer ("**SD**") De Minimis Threshold: Consistent with the current treatment of non-U.S. persons, we request that the Commission, for purposes of registration requirements, exempt Other Non-U.S. Persons⁵ from counting swaps towards their *de minimis* threshold when trading swaps with a Guaranteed Entity⁶ that is an affiliate of an SD.
- C. Application of Category B and C Requirements: As a general matter, Category B requirements should not apply to U.S. branches of non-U.S. swap entities and Guaranteed Entities when they are transacting with Other Non-U.S. Persons. In addition:

⁵ An Other Non-U.S. Person is defined in the Proposal as a non-U.S. person that is neither a Guaranteed Entity nor a Significant Risk Subsidiary. Proposal at 964.

⁶ Guaranteed Entities are defined as entities subject to a "Guarantee." Guarantee is defined in the Proposal as an "arrangement pursuant to which one party to a swap has rights of recourse against a guarantor, with respect to its counterparty's obligations under the swap. For these purposes, a party to a swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the swap. In addition, in the case of any arrangement pursuant to which the guarantor has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from any other guarantor with respect to the counterparty's obligations under the swap, such arrangement will be deemed a guarantee of the counterparty's obligations under the swap by the other guarantor." Proposal at 1002-1003.

- (1) The exchange-traded exception should be expanded to cover all swaps of U.S. and non-U.S. swap entities that are executed on a SEF or Exempt SEF and cleared through a DCO, Exempt DCO, or clearinghouse subject to CFTC no-action relief, regardless of whether they are executed anonymously.
 - (2) Existing substituted compliance determinations should be revisited and expanded to reflect the Commission’s proposed outcomes-based approach to comparability determinations.
 - (3) Non-U.S. clients should have the option of receiving certain U.S. customer disclosures, rather than requiring them to comply with U.S.-specific rules that may not be reflective of their local business practices.
- D. Definition of Swap Conducted through a U.S. Branch: The Commission should clarify that making or receiving payments alone would not trigger the definition of a “swap conducted through a U.S. branch.”

We also ask the Commission, in the final rule, to address three issues not included in the Proposal that are intrinsic to the overall cross-border framework. These are:

- A. Cross-Border Application of Real-time Reporting and SEF Execution Requirements: Real-time reporting and SEF execution requirements should be applied to cross-border transactions in the same manners as Group C requirements.
- B. Cross-Border Application of Regulatory Reporting Requirements: The Commission should:
 - (1) Codify the existing no-action letter (“**NAL**”) that relieves non-U.S. counterparties that engage in transactions with other non-U.S. counterparties from swap data repository (“**SDR**”) reporting obligations (and extend the NAL relief in the interim);
 - (2) Consistent with the 2013 Guidance, provide substituted compliance related to SDR reporting obligations for transactions between non-U.S. swap entities that are affiliated with U.S. parent entities and non-U.S. persons; and
 - (3) Eliminate redundant large trader reporting requirements from the CFTC regulations, including its cross-border framework.
- C. Counterparty Representations: To avoid unnecessary compliance costs, allow for a safe harbor that would enable U.S. and non-U.S. swap entities to rely on previously established counterparty representations pertaining to “U.S. person” and “Guaranteed Entity” definitions. With respect to Significant Risk Subsidiary (“**SRS**”), allow U.S. and non-U.S. entities to rely on counterparty representations pertaining to “Conduit Affiliates” as defined in the 2013 Guidance.

Discussion

As the Proposal points out, the current cross-border trading regime was developed at a time when regulators had little or no experience with regulating cross-border swaps trading and at a time when market participants were trying to comply with a new regulatory paradigm. Our comments below reflect the ten-year experience of a cross-section of the market complying with derivatives reforms in major jurisdictions as well as the current CFTC regime.

I. COMMENTS ON SEVERAL ASPECTS OF THE PROPOSAL

A. ANE Transactions

We agree with the Commission that, because the risk associated with ANE transactions lies outside the U.S. financial system, the authorities in home jurisdictions of the non-U.S. persons have the greater supervisory interest in regulating these transactions. We support the Commission's decision to revisit CFTC Staff Letter 13-69, which addresses the regulatory treatment of ANE transactions, and its proposal to exempt the application of swap trading and external business requirements (described as Category B and C requirements in the Proposal) to ANE transactions.

Consistent with the Commission's desire to focus its authority on regulating activities that potentially pose significant risk to the U.S. financial system, the Commission should clarify in the final rule that other Dodd-Frank Title VII transaction-level rules, such as clearing, trading and real-time reporting, should not apply to ANE transactions. As the Commission points out in the Proposal, these transactions take place outside the United States and do not present the possibility of risk coming back to U.S. shores. As the Commission correctly notes, the mere location of personnel in the United States does not have a direct and significant connection to U.S. activities, nor raises evasion concerns, as required to trigger the application of the Commodity Exchange Act.⁷ Importantly, these transactions would continue to be subject to the Commission's anti-fraud and anti-manipulation authority, which is sufficient to address any regulatory concerns.

Notably, two weeks after the CFTC issued Staff Letter 13-69, it provided temporary no-action relief from compliance with certain Title VII requirements for ANE transactions conducted by non-U.S. persons.⁸ Market participants have operated under this relief for almost seven years. During this time, to our knowledge, there have been no regulatory concerns associated with trading these transactions that would warrant a change in course. Thus, should the Commission decide to switch gears and apply clearing, trading and real-time reporting requirements to ANE transactions, market participants would incur significant compliance costs without commensurate benefit to the Commission's regulatory oversight.

In addition, we support the Commission's proposal to extend a similar regulatory treatment to Foreign Branch ANE transactions. We agree that these transactions should not be subject to Category C requirements (and Category B requirements, where substituted compliance is

⁷ Commodity Exchange Act Section 2(i).

⁸ CFTC Letter No. 13-71 (Nov. 26, 2013).

available). As with ANE transactions, we believe that other transaction-level requirements (clearing, trading and real-time reporting) should not apply to Foreign Branch ANE. This would be consistent with the Commission’s view that foreign regulators have a stronger supervisory interest in regulating these transactions⁹ (and already do regulate such transactions).¹⁰

For these reasons, we ask the Commission to fully withdraw its position in Staff letter 13-69 and refrain from imposing clearing, trading, and real-time reporting requirements on ANE Transactions and Foreign Branch ANE Transactions.

B. Cross-Border Application of the De Minimis Threshold

The Proposal requires an Other Non-U.S. Person to count towards its *de minimis* threshold transactions with a Guaranteed Entity that is also an affiliate of a swap dealer (“SD”) for purposes of registration requirements. This is in contrast to the 2013 Guidance that does not require a non-U.S. person that is not a guaranteed or conduit affiliate to count swaps with such an entity.

In the 2013 Guidance, the Commission explained that “where the counterparty to a swap is a guaranteed affiliate and is not a registered [SD], the Commission’s regulatory concerns are addressed because the guaranteed affiliate engages in a level of swap dealing below the *de minimis* threshold and is part of an affiliated group with a swap dealer.”¹¹ We agree with this view. There is no regulatory reason for requiring the Other Non-U.S. Person to count these swaps to their *de minimis* threshold as these swaps will already be counted by the Guaranteed Entity and will be included in the overall regulatory oversight of transactions entered into by Guaranteed Entities.

Invalidating the approach in the 2013 Guidance will discourage clients from trading swaps with Guaranteed Entities, creating competitive disadvantages without commensurate benefit to regulatory oversight. We therefore ask the Commission to re-instate the exception in the final rule.

C. Application of Category B and C Requirements to Cross-Border Transactions

We support the Commission’s intent to place non-U.S. swap entities (that are Other Non-U.S. Persons) and foreign branches of U.S. swap entities on equal footing with respect to the cross-border application of certain CFTC requirements. As we have stated in the past, foreign branches of U.S. swap entities are subject to the laws of the foreign jurisdictions in which they operate, thus, imposing U.S. requirements on these entities results in duplicative regulation—increasing compliance costs, complexity, and inefficiencies.

In line with the Proposal’s intent to give deference to home country regulators when there is presence of applicable foreign regulatory requirements, the Commission should not apply the proposed category B requirements to transactions between: (i) U.S. branches of non-U.S. swap

⁹ Proposal at 983.

¹⁰ Proposal at 978.

¹¹ 2013 Guidance at 45324.

entities and Other Non-U.S. Persons; and (ii) Guaranteed Entities and Other Non-U.S. Persons. In this regard, we support the position and related rationale in the SIFMA/IIB comment letter on this topic.¹² Importantly, the Commission has set a precedent for taking this approach by providing exemption in the 2013 Guidance to Guaranteed Entities from compliance with Category B requirements when transacting with Other Non-U.S. Persons.

Below, we make several additional suggestions on how to further improve the cross-border framework in order to reduce unnecessary burdens and complexity without compromising systemic risk concerns.

(1) Expand the Applicability of the Exchange-Traded Exception

The Proposal provides an exception for non-U.S. swap entities and foreign branches of U.S. swap entities from complying with Category B and C requirements (except for certain requirements related to the obligation to keep daily trading records)¹³ where these transactions are executed anonymously on a SEF or Exempt SEF and cleared through a DCO or Exempt DCO (“**Exchange-Traded Exception**”).

While we are supportive of the proposed exception, we believe it should be extended to cover (1) all relevant Category B and C requirements;¹⁴ and (2) U.S. and non-U.S. entities’ transactions that are SEF- (or Exempt SEF-) executed and cleared at a DCO, Exempt DCO, or clearinghouse subject to CFTC no-action relief,¹⁵ regardless of whether they are anonymously executed.

One of the regulatory benefits of SEF trading is that market participants receive the necessary regulatory compliance protections associated with centralized trading. As self-regulatory organizations, SEFs (and Exempt SEFs) are expected to keep daily trading records and audit trails of each transaction executed on their platforms. Therefore, it makes sense to allow counterparties not to comply with Category B requirements when executing trades on SEFs (or Exempt SEFs). Restricting this exemption to a particular method of execution on a SEF does not serve any regulatory purpose.

Further, imposing CFTC external business conduct (“**EBC**”) standards to centrally-executed and cleared trades also creates redundancies. Counterparties that trade on SEFs (or Exempt SEFs) receive necessary disclosures as part of the onboarding process. Regulatory required pre-trade credit checks also ensure that counterparties have sufficient credit to execute transactions, thus creating a legally binding transaction.

¹² Separately, we also support the position and related rationale in the SIFMA/IIB letter that requests CFTC clearing requirements apply in the same manner as Category B requirements.

¹³ 17 CFR §§ 23.202(a)-(a)(1).

¹⁴ As the Commission notes in the Proposal certain Category B requirements already do not apply to SEF-executed and cleared trades under the current CFTC rules. Specifically, trade confirmation rules do not apply to SDs where the SEFs or DCOs have rules in place to execute confirmations (17 CFR § 23.501(a)(4)). Swap trading relationship documentation, portfolio reconciliation, and portfolio compression rules do not apply to cleared trades (17 CFR §§ 23.502(d), 23.503(c), 23.504(a)(1)(iii)).

¹⁵ We presume that these entities would include those subject to the DCO Alternative Compliance Framework, if finalized. *See* Registration with Alternative Compliance for Non-U.S. Derivatives Clearing Organizations, 84 Fed. Reg. 34819 (July 19, 2019).

For these reasons, the Commission should allow for a broader exception in the final rule.

(2) *Extend and Expand Existing Substituted Compliance Determinations*

ISDA fully supports the Commission’s proposed approach to issuing holistic, outcomes-based comparability determinations. We agree that the proposed approach would increase cross-border derivatives trading, reduce market fragmentation, and improve liquidity without compromising the Commission’s interests in reducing systemic risk. In this regard, the proposed requirement of reciprocity may undermine the Commission’s goals. Reciprocity should not be a determinative factor because some foreign jurisdictions may not have formal substituted compliance frameworks embedded into their derivatives regulations, but may be able to offer substituted compliance on an ad hoc basis.¹⁶

In addition, we believe that existing substituted compliance determinations that are based on or reference the Commission’s 2013 Guidance may not fully align with the proposed regime. We note that existing substituted compliance determinations have been issued on a rule-by-rule or piecemeal basis.

For example, the current comparability determination for EU transaction-level requirements finds EU rules comparable with respect to certain swap trading relationship documentation (“STRD”) requirements, particularly confirmation and valuation requirements,¹⁷ but not in regards to the other STRD requirements, including requirements to establish policies and procedures that are approved by senior management.¹⁸ This type of piecemeal approach to substituted compliance often puts market participants in the position of running duplicative and in many cases, conflicting compliance programs in order to meet various U.S. and non-U.S. requirements. As the Commission recognizes in the Proposal, a holistic, flexible approach toward substituted compliance is necessary to enable comparability determinations to be tailored toward a broad range of foreign regulatory approaches.¹⁹

Moreover, certain CFTC substituted compliance determinations were issued at a time when some jurisdictions were still implementing their respective regulatory frameworks. Many jurisdictions have since adopted their regulatory regimes and are now ripe for a comparability review by the Commission.

Importantly, while the Commission re-visits its prior comparability determinations, it should clarify in its final rule that existing substituted compliance determinations remain in effect under the new framework.

¹⁶ Japan, for example, does not have a comprehensive substituted compliance framework for their derivatives regulations, but provided on ad hoc basis substituted compliance with respect to the CFTC’s non-cleared margin rules. *See* Press Release, The CFTC and the Japan Financial Services Agency Issued a Joint Statement Regarding the Comparability of Certain Derivatives Trading Venues in the U.S. and Japan, <https://cftc.gov/PressRoom/PressReleases/7968-19>.

¹⁷ 17 CFR § 23.504(b)(2) and (4).

¹⁸ 78 Fed. Reg. 78878 (Dec. 27, 2013).

¹⁹ Proposal at 986.

For these reasons, in the final rule, we ask the Commission to: (1) recalibrate existing substituted compliance determinations with the aim of issuing holistic, outcomes-based substituted compliance, consistent with the principles outlined in the Proposal; (2) eliminate the reciprocity requirement as a condition to finding foreign regulatory regimes comparable; and (3) clarify that, in the meantime, existing determinations would continue to be valid under the Commission’s new cross-border framework.

(3) *Allow Non-U.S. Clients to “Opt In” to Receiving U.S. Business Conduct Disclosures*

In the Proposal, the Commission acknowledges that its EBC rules were implemented to advance customer protection goals.²⁰ Consistent with this intent, the Proposal takes a more territorial-based approach towards applying these rules on a cross-border basis, recognizing that foreign regulators (and not the CFTC) have an interest in overseeing the sales practices for swaps in their jurisdictions.²¹

ISDA fully agrees with the Commission that there is no policy benefit in subjecting non-U.S. market participants to the CFTC’s extensive customer protection regime, and therefore, these rules should be left within the remit of home country regulators. In light of these considerations, we believe that certain EBC disclosures should not apply to the trades of U.S. swap entities and U.S. branches of non-U.S. swaps entities when they are facing non-U.S. clients, unless such non-U.S. clients elect to receive EBC disclosures. Specifically, unless a non-U.S. client chooses to “opt-in” into the full spectrum of the CFTC requirements, U.S. swap entities and U.S. branches of non-U.S. swap entities would only have the obligation to provide disclosures related to: (1) prohibition on fraud, manipulation, and other abusive practices;²² (2) verification of eligible contract participant status;²³ (3) material risks, excluding requirements to provide daily mark and scenario analysis;²⁴ (4) fair dealing communications;²⁵ and (5) brief descriptions of other EBC disclosures, including the option to opt-in to receiving such disclosures.

In sum, allowing an opt-in would provide clients with the *option* to receive U.S. customer disclosures, rather than *requiring* them to comply with U.S.-specific rules that may not be reflective of their local business practices.²⁶

D. Definition of Swap Conducted Through a U.S. Branch

The Proposal defines the term *swap conducted through a U.S. branch* as a swap “entered into by a U.S. branch where: (1) the U.S. branch is the office through which the non-U.S. person makes

²⁰ Proposal at 984.

²¹ *Id.*

²² 17 CFR § 23.410.

²³ 17 CFR § 23.430.

²⁴ 17 CFR § 23.431, excluding § 23.432(b) and § 23.431(d).

²⁵ 17 CFR § 23.433.

²⁶ As a general matter, as we have stated in the past, the Commission should revisit its EBC rules in their entirety, with a fresh perspective, in order to determine which requirements remain relevant or appropriate given the sophisticated nature of SDs’ counterparties and arm’s-length nature of such transactions. See ISDA KISS Response, https://www.isda.org/a/nVKDE/ISDA-KISS-Response_29-September-2017_Appendix_Links_version_FINAL.pdf.

and receives payments and deliveries under the swap pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the non-U.S. person is such U.S. branch; or (2) the swap is reflected in the local accounts of the U.S. branch.”²⁷ Similar to the definition of *swap conducted through a foreign branch*, we believe that both of the above conditions should be met before a swap is considered to be conducted through a U.S. branch. Making or receiving payments alone should not trigger the definition and any associated requirements. Only when a swap is booked at a particular entity can it be considered a swap transaction that is attributed to such an entity.

II. ADDITIONAL ISSUES TO ADDRESS IN THE FINAL RULE

A. Cross-Border Application of Real-time Reporting and SEF Requirements

The Proposal does not address the cross-border application of the Commission’s trade execution and real-time reporting requirements;²⁸ thus, if finalized as drafted, the 2013 Guidance will continue to govern the cross-border application of these rules. Similar to the non-risk related rules discussed above, these rules are not intended to address or mitigate systemic risk. Instead, they aim to foster price discovery and transparency. Accordingly, we believe that such requirements should be applied to U.S. and non-U.S. swap entities in the same manner as Category C requirements.

Regulators in various jurisdictions have taken different approaches with respect to the application market transparency and price discovery regulations to tailor their requirements to the specific characteristics of their local markets. Jurisdictions with smaller markets tend to impose more limited public dissemination requirements, while larger jurisdictions with more liquid markets tend to have expansive public reporting regimes.²⁹ Not requiring market participants to adhere to local transparency regulations would undermine the intended goal of such rules in the first place.

For these reasons, we believe that these rules should be categorized as Group C requirements and applied solely territorially so that swap entities and their branches should comply with trade execution and public reporting requirements of the jurisdiction in which these entities operate.³⁰

²⁷ Proposal at 968 (emphasis added).

²⁸ We note that there are certain, more nuanced issues that need to be addressed prior to finalizing the Proposal. One example is determining “U.S. person status” for transactions between a non-U.S. swap dealer and an investment advisor trading on behalf of multiple entities (some of which could be U.S. persons or not) for real-time reporting purposes. Specifically, the Commission should decide whether the non-U.S. swap dealer should look to the investment advisor or underlying accounts to determine “U.S. person status.” Another example is the application of the Commission’s external business conduct rules to certain trading relationships, such as cross-border prime brokerage arrangements. We look forward to separately engaging with the CFTC on these topics.

²⁹ E.g., ISDA White Papers related to trading venue recognition, available at <https://www.isda.org/2019/09/19/a-practical-guide-to-executing-trades-on-us-japanese-recognized-venues/>; <https://www.isda.org/a/V30TE/A-Practical-Guide-to-Executing-Trades-on-US-Singapore-Recognized-Venues.pdf>. These papers discuss the public reporting requirements of Japan and Singapore.

³⁰ In addition, we ask the Commission to also provide corresponding relief from the CFTC’s trading rules for ANE transactions where U.S. intermediaries or platforms are operating in an execution capacity for non-U.S. swap entities. Not doing so would result in inequity that may add to the uncertainty around the implementation of rules

B. Regulatory Reporting Requirements

The Proposal does not address the cross-border application of its regulatory reporting requirements; therefore, if finalized, the 2013 Guidance will continue to be in effect with respect to these rules.

We note that the Commission has proposed changes to its reporting rules in order to increase the completeness and accuracy of swaps data reported to the Commission, but has not addressed cross-border issues in those proposals.³¹

Prior to finalizing the Proposal, the Commission should address the following issues to provide legal certainty and reduce unnecessary overreach. We ask that the Commission:

- (1) *Codify existing staff NAL related to the reporting of swaps between non-U.S. persons (or at a minimum, extend the NAL, which is due to expire December 31, 2020, until further Commission action to address cross-border reporting issues).*

The NAL provides relief from U.S. reporting requirements for transactions between non-U.S. SDs established in certain jurisdictions that are not affiliated with U.S. entities and non-U.S. counterparties that are not guaranteed affiliates, or conduit affiliates, of a U.S. person.³² This has been in effect for almost seven years. We are not aware that this relief has impeded the Commission's oversight authority over U.S. markets that would warrant a change in course at this time. Moreover, these transactions are already subject to the regulatory reporting requirements of their home jurisdictions, which would allow the Commission to access information, in case of any compliance or enforcement challenges.³³

- (2) *Codify the position in the 2013 Guidance, permitting substituted compliance for SDR reporting obligations applicable to transactions between non-U.S. swap entities (that are affiliated with U.S. parent entities) and non-U.S. persons.* The Commission does not have a strong regulatory interest receiving trade information regarding transactions that have an attenuated connection to U.S. markets. Allowing for substituted compliance under these circumstances would be consistent with the Proposal's intent to promote international comity and provide deference to the oversight of foreign authorities in matters where relevant authorities have a stronger supervisory interest than the CFTC.

and/or dislocations of liquidity. In the interest of stability, and to avoid unnecessary contradictions with unintended consequences, we believe that the Commission's trading rules should also not apply to ANE transactions performed by intermediaries and platforms where applicable.

³¹ See Press Release, CFTC Unanimously Approves Proposed Rules to Improve Data Quality, Streamline Regulations at February 20 Open Meeting, <https://cftc.gov/PressRoom/PressReleases/8121-20>.

³² CFTC Letter No. 17-64 (Nov. 30, 2017).

³³ See ISDA Whitepaper Cross-Border Harmonization of Derivatives Regulatory Regimes: A risk-based framework for substituted compliance via cross-border principles <https://www.isda.org/a/DGiDE/isda-cross-border-harmonization-final2.pdf> (describing other jurisdictions' regulatory reporting requirements).

- (3) *Eliminate the Commission’s large trader reporting rules*, including in the context of cross-border transactions. The Commission did not intend these rules be permanent. In fact, the Commission expressly states that these rules “shall become ineffective and unenforceable upon a Commission finding that . . . operating [SDRs] are processing positional data and that such processing will enable the Commission to effectively surveil trading in paired swaps and swaptions and paired swap and swaption markets.”³⁴ SDRs have had these capabilities for a number of years. Not only is it now appropriate for the Commission to withdraw these rules in general, but they certainly should not apply in the cross-border context.³⁵

C. Counterparty Representations

We appreciate that the Commission has proposed to revise its cross-border regulations with an eye towards recalibrating what constitutes a “direct and significant impact”³⁶ on U.S. markets and suggested certain definitional changes to reflect this intent. However, as a practical matter, the revision of these definitions may require U.S. and non-U.S. swap entities to re-acquire an entirely new set of client representations based on these new definitions. Such an undertaking would be extremely costly and time- and resource-consuming. To avoid this outcome, we ask the Commission to allow for a safe harbor that would enable U.S. and non-U.S. swap entities to rely on established counterparty representations pertaining to the “U.S. person” and “Guaranteed Entity” definitions under the 2013 Guidance. Similarly, with respect to SRSs, we ask the Commission to allow U.S. and non-U.S. entities to rely on counterparty representations pertaining to “Conduit Affiliates” as defined in the 2013 Guidance.

³⁴ 17 CFR § 20.9.

³⁵ Under the 2013 Guidance, large trader reporting rules are listed as entity-level requirements.

³⁶ Commodity Exchange Act Section 2(i).

We appreciate the opportunity to submit our comments in response to the Proposal. We commend the Commission for its efforts to recalibrate its cross-border regulatory framework and its intent to provide deference to foreign regulations that are comparable in outcome to the CFTC rules. 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.

Should you have any questions, please reach out to me or Bella Rozenberg, Senior Counsel and Head of Regulatory and Legal Practice Group, (202)-683-9334.

Sincerely,

A handwritten signature in black ink, appearing to read "S. O'Malia". The signature is fluid and cursive, with a large initial "S" and "O".

Scott O'Malia
Chief Executive Officer
International Swaps and Derivatives Association, Inc.