

December 3, 2013
Mr. Vincent McGonagle
Director
Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: SDR Reporting Requirements for Cross-Border Swaps

Dear Mr. McGonagle:

The International Swaps and Derivatives Association, Inc. (“ISDA”) and its members recognize the importance of the Part 45 and Part 46 regulations (the “Reporting Rules”) of the Commodity Futures Trading Commission (the “Commission” or “CFTC”) and strongly support initiatives to increase regulatory transparency. We also appreciate the assistance of Commission staff to date to provide direction and clarification where possible as our members continue efforts to comply with the Reporting Rules. However, challenges remain, and therefore, ISDA, on behalf of its members that are “reporting counterparties” under Part 45¹ and Part 46² (collectively, “Reporting Parties”), hereby request relief from certain requirements under the Reporting Rules, as explained below.

ISDA’s mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products. ISDA has more than 800 members from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers.

On August 8, 2013, ISDA submitted comments and recommendations to the Commission³ regarding the Exemptive Order⁴ and implementation of certain aspects of the Commission’s

¹ 17 CFR Part 45 Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan 13, 2012). CFTC regulation 45.1 defines the term “reporting counterparty” to mean “the counterparty required to report swap data pursuant to this [Part 45], selected as provided in §45.8.”

² 17 CFR Part 46 Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012). CFTC regulation 46.1 defines the term “reporting counterparty” to mean “the counterparty required to report swap data pursuant to this [Part 46], selected as provided in §46.5.”

³ See ISDA’s comment letter on the Exemptive Order (available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59312&SearchText=>)

⁴ Exemptive Order Regarding Compliance with Certain Swap Regulations 78 Fed. Reg. 43785 (July 22, 2013)

cross-border guidance and policy statement (“Cross-Border Guidance”).⁵ Included in the letter was a recommendation that for the reporting of pre-enactment and transition swaps (collectively “historical swaps”) under Part 46 which have become reportable by virtue of the Cross-Border Guidance, a period of relief should be provided. It also highlighted the uncertainty caused by a lack of transparency in the substituted compliance determination process⁶ which leaves Reporting Parties with either insufficient phase-in time to implement the appropriate changes, or preparatory efforts that may be unnecessary and wasted in the event a relevant substituted compliance determination is ultimately issued. As the conditions that prompted these comments persist, for the reasons provided below we are writing in furtherance of these points to the staff of the Commission’s Division of Market Oversight (“DMO”) to request relief pertaining to their obligations under the Reporting Rules (“SDR reporting”).

I. Background

Upon the expiration of relief granted under the Exemptive Order on December 21, 2013 (the “Expiration Date”) many Reporting Parties that do not currently have SDR reporting obligations for swaps involving non-U.S. Persons (“cross-border swaps”) will need to commence reporting under the Commission’s Part 45 regulations and complete reporting for their historical swaps in accordance with the Part 46 regulations.

Substituted compliance considerations

In the Exemptive Order, the Commission advises that it received requests for Substituted Compliance Determinations⁷ from parties located in Australia, Canada, the European Union (“EU”), Hong Kong, Japan and Switzerland (“Enumerated Jurisdiction(s)”). Therefore, it is reasonable for a Reporting Party located in an Enumerated Jurisdiction to assume that a Substituted Compliance Determination will be issued by the Commission that will, in part, confirm whether substituted compliance may be applied with respect to the Reporting Party’s Part 45 and Part 46 reporting obligations. Since Reporting Parties will need to comply with the regulations of their local jurisdictions regardless, it is logical that these parties will look to satisfy their obligations under the Reporting Rules by reporting to a trade repository subject to the requirements of their primary regulator.

Reporting Parties might require a period of time after a relevant determination of Substituted Compliance with respect to the Reporting Rules to phase in compliance with the corresponding requirements of the jurisdiction in which the Reporting Party is established. This need is recognized in footnote 41 of the Exemptive Order⁸. Conversely, in the event a Substituted Compliance Determination with respect to the Reporting Party’s Enumerated Jurisdiction does not provide that its SDR reporting obligations may be met via compliance with the foreign jurisdiction’s local laws and regulations, Reporting Parties located in that Enumerated

⁵ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) (“Cross-Border Guidance”).

⁶ Exemptive Order paragraphs 6, 7 and 11.

⁷ As defined in Section II. *Need for Further Exemptive Relief With Request for Comments*

⁸ “The Commission anticipates that non-U.S. SDs/MSPs may require additional time after a Substituted Compliance Determination in order to phase in compliance with the relevant requirements of the jurisdiction in which the non-U.S. SDs or MSP is established. The Commission and its staff intend to address the need for any further transitional relief in connection with the subject Substituted Compliance Determination...”

Jurisdiction will need time to (i) implement the necessary technological changes to begin Part 45 reporting for cross-border swaps and (ii) complete Part 46 reporting for their impacted population of historical swaps.

As an example of the timing considerations that are relevant to Reporting Parties in this respect, it is useful to consider reporting under the European Market Infrastructure Regulation (“EMIR”). On November 11, 2013, the European Securities and Markets Authority (“ESMA”) approved the registrations of the first trade repositories for reporting under EMIR⁹ and as a result reporting in the EU will begin February 12, 2014. In this case, it is important that any Substituted Compliance Determination made by the Commission with respect to the Reporting Rules acknowledges the relevant reporting start dates for EMIR to avoid duplicative reporting under each regime. In the event a Substituted Compliance Determination for the EU does not cover either the Part 45 and/or Part 46 requirements, Reporting Parties will need a phase-in period to comply with their SDR reporting obligations for the reasons provided below.

Operational considerations

1. Part 45 reporting

In order report cross-border swaps, Reporting Parties need to enhance their reporting infrastructures to accurately capture the nuances of the Cross-Border Guidance based on complex combinations of their own U.S. Person status, applicable branch and cross-border representations¹⁰ versus those of each non-reporting party¹¹. These scenarios may be further altered and complicated by applicable Substituted Compliance Determinations which may vary based on the jurisdiction of the parties.

These complex changes to reporting logic will take considerable time to develop and test. The challenges for cross-border swaps are, in part, notably different from the ones Reporting Parties faced prior to the commencement of Part 45 reporting for credit and rates (“Compliance Date 1”) and equity, foreign exchange and other commodity swaps (“Compliance Date 2”). With respect to Compliance Dates 1 and 2, Reporting Parties had certainty with respect to which swaps were reportable, so they could finalize requirements and begin development. Whereas with cross-border swaps, the precise requirements cannot be determined and implemented without certainty as to whether substituted compliance is available to the Reporting Party. Dedicating resources to preparing technological changes that would prove unnecessary in the event substituted compliance is available for Part 45 reporting would result in costs and inefficiencies the substituted compliance process was intended to prevent.

To further demonstrate, following are some examples of the challenges unique to cross-border swaps that Reporting Parties face:

⁹ <http://www.esma.europa.eu/news/PRESS-RELEASE-ESMA-registers-DDRL-KDPW-Regis-TR-and-UnaVista-trade-repositories?t=326&o=home>

¹⁰ See ISDA Cross-Border Representation Letter:
http://www2.isda.org/attachment/NTgyNA==/Cross_Border_Rep_Letter_Final.doc

¹¹ See ISDA CFTC Cross-Border Reporting Matrix available here:
http://www2.isda.org/attachment/NjE0NQ==/CrossBorderMatrix_DRAFT_ForDiscussionOnlyv1.5_21Nov13.xls

First, Reporting Parties are currently preparing to report cross-border swaps to a trade repository in accordance with the requirements and timing of their local law and regulations. To the extent either the fields or values required by their Enumerated Jurisdiction do not align with the requirements of Part 45 and/or the timing differential means certain data elements will not yet be available at the Expiration Date, Reporting Parties will need to undertake additional efforts to obtain or create these values for Part 45 reporting. An example is the financial entity value for the non-reporting counterparty. The Reporting Party may, for instance, need to know whether their counterparty is a “Financial Counterparty” or “Non-Financial Counterparty” in accordance with the definitions provided by EMIR, but they may not also know whether their counterparty qualifies as a financial entity based on the definition set forth in CEA 2(h)(7)(c) for purposes of Part 45 reporting.

Second, for the sake of efficiency many Reporting Parties send combined messaging for Part 43 and Part 45 reporting to the Swap Data Repository (“SDR”). Because the Cross-Border Guidance divides Entity-Level Requirements and Transaction-Level Requirements, in some cases only Part 43 *or* Part 45 reporting may be required and therefore, Reporting Parties will need to reengineer their messaging to split the reporting. This work may be unnecessary in certain scenarios depending on whether substituted compliance is available. For instance, if two non-U.S. Swap Dealers not guaranteed by a U.S. Person face each other, Part 43 reporting does not apply. If substituted compliance is granted for Part 45, then there will be no need to split this messaging to comply with Part 45.

2. Part 46 reporting

For certain Reporting Parties, there is an extremely large volume of historical swap data covering both live and expired trades that must be backloaded into an SDR in accordance with the Part 46 regulations. The backloading exercise itself is a fairly involved operational process with trade data needing to be sourced from firms’ own internal infrastructure in addition to multiple third-party financial market infrastructure providers. Given the sheer volume of data, coupled with the complexity of the end-to-end process, it is simply impractical from both a technological, and an operational standpoint, to complete this exercise within a single business day at the point of compliance in conjunction with commencement of daily reporting obligations under the Parts 43 and 45 regulations. It should further be noted that the backloading exercise for asset classes such as FX will be more challenging again as the significantly larger data volumes, and more diverse nature of the financial markets infrastructure amplify the complexity.

In addition, issues with respect to availability of data explained above impact Part 46 reporting on a greater scale. Besides data specific to the non-reporting party, availability of a Unique Swap Identifier (“USI”) will also pose a challenge. Referred to as a Unique Trade Identifier (“UTI”) for global reporting, the industry is committed to having a single USI/UTI for global reporting, which for purposes of reporting to the CFTC will align with the USI standards. Taking EMIR as an example, since this is a dual reporting jurisdiction, parties are required to match historical swaps to agree and exchange a UTI in advance of reporting. Reporting Parties are currently engaged in industry efforts to exchange UTIs in time for historical swap reporting

to EMIR. Requiring an earlier availability of USI than on EMIR timelines would seriously disrupt preparations for EMIR historical swap reporting and undermine the goal of one unique identifier per trade.

Consistent with the message that ISDA delivered to DMO prior to the start of reporting to the Commission for Compliance Date 1 and Compliance Date 2, we contend that upon the Expiration Date there are significant practical challenges with respect to commencing reporting of cross-border swaps to an SDR on a single date for both new trades, and also for the ‘backload’ of historical swaps into SDRs, without compromising normal business activity, or the integrity of the swaps data. Granting relief to Reporting Parties with respect to Part 46 reporting of cross-border swaps would be consistent with the treatment afforded to other Reporting Parties in respect of Compliance Date 1 and Compliance Date 2 pursuant to the No Action relief granted by DMO under CFTC Letter No. 12-32¹² and CFTC Letter No. 12-41¹³ (the “NALs”). Such relief was greatly appreciated by Reporting Parties and was instrumental to orderly and accurate reporting of the relevant historical swap data. With respect to cross-border swaps, additional time beyond what was extended to Reporting Parties under the NALs is necessary due to the uncertainty with respect to the population subject to Part 46 reporting.

II. Relief Request

In consideration of the above referenced challenges, ISDA respectfully requests that DMO recommend that enforcement action not be taken against a Reporting Party in an Enumerated Jurisdiction for which a Substituted Compliance Determination with respect to the Reporting Party’s Enumerated Jurisdiction does not grant substituted compliance for (i) Part 45 reporting, provided the Reporting Party commences reporting for their relevant cross-border swaps no later than 90 days after such determination and (ii) Part 46 reporting, provided the Reporting Party completes reporting of their relevant cross-border historical swaps pursuant to Part 46 no later than 120 days after such determination.

Thank you for your consideration of these concerns. Please contact me or my staff if you have any questions.

Sincerely,



Robert Pickel
Chief Executive Officer
International Swaps and Derivatives Association, Inc.

¹² <http://www.cftc.gov/ucm/groups/public/@lrlattergeneral/documents/letter/12-32.pdf>

¹³ <http://www.cftc.gov/ucm/groups/public/@lrlattergeneral/documents/letter/12-41.pdf>

Request for No-Action Relief for SDR Reporting for Cross-Border Swaps

cc: David Van Wagner, Chief Counsel, Division of Market Oversight, CFTC
Nancy Markowitz, Deputy Director, Division of Market Oversight, CFTC
Laurie Gussow, Special Counsel, Division of Market Oversight, CFTC
Sebastian Pujol Schott, Associate Director, Division of Market Oversight, CFTC
Stuart Armstrong, Attorney-Advisor, Division of Market Oversight, CFTC

Certification Pursuant to Commission Regulation 140.99(c)(3)

As required by Commission Regulation 140.99(c)(3), I hereby (i) certify that the material facts set forth in the attached letter dated December 3, 2013 are true and complete to the best of my knowledge; and (ii) undertake to advise the Commission, prior to the issuance of a response thereto, if any material representation contained therein ceases to be true and complete.

Sincerely,

A handwritten signature in black ink, reading "Robert G. Pickel". The signature is written in a cursive, flowing style.

Robert Pickel
Chief Executive Office
International Swaps and Derivatives Association, Inc.