

April 3, 2014

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

Re: Revised Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Order Aggregation of Certain Permitted Transactions

Dear Mr. McGonagle:

The International Swaps and Derivatives Association, Inc. (“ISDA”) and its members recognize the importance of the 17 CFR Part 43 and 17 CFR Part 37 regulations (the “Rules”) of the Commodity Futures Trading Commission (the “Commission” or “CFTC”) and strongly support initiatives to increase transparency. We also appreciate the efforts of Commission staff over the past several months to provide direction, clarification and no-action relief where possible as our members continue preparations for complying with the Rules. Specifically, our members appreciate CFTC Letter No. 13-48¹ (“NAL 13-48”) issued by staff from the Commission’s Division of Market Oversight (“DMO”) which provides relief from the aggregation prohibition under CFTC regulation 43.6(h)(6)² for certain “large notional off-facility swaps”.³ However, challenges remain with respect to complying with CFTC regulation 43.6(h)(6), and

¹ CFTC Letter No. 13-48, dated July 30, 2013 from the Division of Market Oversight, “No-Action Relief for Certain Commodity Trading Advisors and Investment Advisors From the Prohibition of Aggregation Under Regulation 43.6(h)(6) for Large Notional Off-Facility Swaps”, subsequently amended as of August 6, 2013.

² 17 C.F.R. § 43.6(h)(6). See Final Rule, Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 78 Fed. Reg. 32866 (May 31, 2013) (the “Final Block Trade Rule”). Final CFTC regulation 43.6 provides that: “Except as otherwise stated in this paragraph, the aggregation of orders for different accounts in order to satisfy the minimum block trade size or the cap size requirement is prohibited. Aggregation is permissible on a designated contract market or swap execution facility if done by a person who: (1) (A) Is a commodity trading advisor registered pursuant to Section 4n of the [CEA], or a principal thereof, who has discretionary trading authority or direct client accounts, (B) Is an investment advisor who has discretionary trading authority or directs client accounts and satisfies the criteria of [CFTC regulation 4.7(a)(2)(v)], or (C) Is a foreign person who performs a similar role or function as the persons described in [CFTC regulation 43.6(h)(6)(i)(A) or (h)(6)(i)(B)] and is subject as such to foreign regulation; and (2) Has more than \$25,000,000 in total assets under management.” 78 Fed. Reg. at 32940.

³ 17 C.F.R. § 43.2. See 77 Fed. Reg. 1182 (Jan. 9, 2012). CFTC regulation 43.2 defines “large notional off-facility swap” to mean “an off-facility swap that has a notional or principal amount at or above the appropriate minimum block size applicable to such publicly reportable swap transaction and is not a block trade as defined in § 43.2 of the Commission’s regulations.” 77 Fed. Reg. at 1244.

therefore, ISDA, on behalf of its members that are “reporting parties” under Part 43⁴ (“Reporting Parties”), submitted a request for relief to DMO on September 23, 2013 with respect to Permitted Transactions. DMO have not yet responded to that request, and therefore since the challenges remain, ISDA is renewing our request for relief, as explained below.

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 64 countries. These members include a broad range of OTC 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 including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

I. Discussion

A. Background

Due to condition (i) on page 4⁵ of NAL 13-48 (the “Condition”), beginning on the October 2, 2013 compliance date for Part 37 (the “Compliance Date”), NAL 13-48 does not provide relief from the aggregation prohibition under regulation 43.6(h)(6) for a swap that is listed by a registered swap execution facility (“SEF”) or designated contract market (“DCM”) in accordance with Part 37, but which is not executed on or pursuant to the rules of a SEF or DCM. Since Reporting Parties understand that their clients will wish to avail themselves of the protection provided under the Rules for delays in the public dissemination of swap details and notional capping for a swap that exceeds the minimum block size and cap size, respectively, the parties must be (i) fully and equally aware of all swaps that are approved as Permitted Transactions⁶ listed on a SEF or DCM and (ii) have the ability to immediately execute the swap pursuant to the rules of a SEF or DCM which has listed it.

Reporting Parties are currently complying with the Condition with respect to Required Transactions⁷; however, market participants have identified key operational challenges which make compliance with respect to Permitted Transactions very difficult to achieve. The primary operational challenges are (i) an adequate source for approved Permitted Transactions (ii) block trade indicator determination and (iii) connectivity to a relevant SEF or DCM for both Swap Dealers and clients.

⁴ 17 CFR Part 43 Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012). CFTC regulation 43.2 defines the term “reporting party” to mean “the party to a swap with the duty to report a publicly reportable swap transaction in accordance with this [Part 43] and section 2(a)(13)(F) of the [CEA].”

⁵ The condition states: “(i) The orders being aggregated are orders for swaps that: (1) are not listed or offered for trading on a SEF; and (2) are not listed or offered for trading on a DCM[.]” NAL 13-48 at 4.

⁶ As defined in Section 37.9(c)(1) *Permitted transaction* means any transaction not involving a swap which is subject to the trade execution requirement in section 2(h)(8) of the Act.

⁷ As defined in Section 37.9(a)(1) *Required transaction* means any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act.

B. Source for Permitted Transactions

First, in order to comply with the Condition, parties would need to be informed of which swaps are offered as Permitted Transactions, and thus required to be executed in accordance with the rules of the SEF or DCM in order to be eligible for block trade and notional cap treatment. Therefore, parties need to have a central, reliable source that provides real time information as to which swaps are listed as Permitted Transactions on which SEF(s) or DCM(s).

Regardless of whether individual SEFs or DCMs may provide data for the swaps they list, it is not practical for market participants to check multiple sources in advance of transacting in the event a new swap is offered, especially where the parties are not connected to a particular SEF or DCM that lists such new swap, and therefore the parties may not have a direct line of information.

We acknowledge that a list of Trading Organization Products is available on the Commission's website⁸, and we assume that a list of Permitted Transactions can be ascertained by filtering on either type of "Swap" or "Option" and status of "Certified" or "Approved".

However, the source is inadequate for the purpose of monitoring whether a trade may be subject to the Condition for the following reasons:

- Multiple searches required to obtain full list of products that may be Permitted Transactions;
- No distinction made for which products are Required Transactions vs. Permitted Transactions;
- Product names are inconsistent and contain different levels of granularity, thus requiring review of any associated documents;
- There is no search function by product (i.e. to search whether a particular product is listed/offered for trading by a particular SEF/DCM);
- There is no means to export the list for review or reuse;
- There is no method to download the data for systematic consumption;
- Notifications regarding updates are not available; and
- There is uncertainty as to whether data is maintained in real time.

As a result of the above, regular and repeated review and reconciliation of the data provided on this list would be necessary to ensure the parties executed via a SEF or DCM in all cases where they are seeking to aggregate an order for a Permitted Transaction.

For compliance with the Condition, access to complete and current data on self-certified and approved Permitted Transactions would be essential. The golden source for data on Permitted Transactions is the Commission in its role as gatekeeper of requests from all SEFs and DCMs for products they intend to list. Any data for use by market participants would need to be provided on a real time basis following approval or expiration of the one-business day period (or any stay of such listing) pursuant to Part 40 of the CFTC's regulations,⁹ in a format suitable for

⁸ <http://sirt.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationProducts>

⁹ CFTC regulation 40.2(a)(2) explains that the CFTC must receive the product submission "by the open of business on the business day preceding the product's listing."

programmatic consumption and with sufficient prior notice in case previously published data changes or new data is added, so that relevant systems of relevant market participants can take in and process the new information.

C. Block Trade Indicator determination

For purposes of both the Part 43 and Part 45 regulations, Reporting Counterparties are required to determine and report the “block trade indicator” to identify whether the swap qualifies as a “block trade” as defined in the Part 43. This field is used by SDRs to apply available treatment to the public reporting of swaps, including a delay on dissemination.

The task of determining whether a swap is a Permitted Transaction offered by a SEF adds a great deal of complexity to the technological builds firms need to have in place in order to determine whether the swap is eligible for block treatment and submit the accurate response to the block trade indicator field in their Part 43 and Part 45 reporting.

Many firms rely on an ancillary service from an SDR to determine whether a trade is eligible for block treatment, but the SDRs do not have the ability to determine whether a trade may be prohibited from block treatment under 43.6(h)(6) because the swap is offered as a Permitted Transaction but was not executed pursuant to the rules of a SEF or DCM. Therefore, Reporting Parties must have robust logic to report a block trade indicator value of “No” when sending the swap to an SDR.

The accuracy and effectiveness of that logic is highly dependent on a reliable, real-time central source for data on Permitted Transactions that firms can leverage for their reporting logic. As firms are unable to automate such updates based on the current list of Trading Organization Products, a manual update would be required each time a new Permitted Transaction is certified or approved. Such approach is resource intensive and subject to errors or inconsistencies, especially in cases where the product descriptions are not subject to a consistent standard.

D. Establishing Connectivity

The Condition further imposes on market participants a requirement to connect to all SEFs or DCMs that uniquely offer a Permitted Transaction. Until the party has on-boarded and established connectivity, they would not have access to block trade and notional cap treatment for particular swaps. That is to say that both parties, not just the Reporting Party, would be required to connect to the SEF or DCM offering the unique Permitted Transaction. Though connectivity to multiple SEFs and DCMs will be necessary in order to enter into Required Transactions, such swaps are expected to be offered by multiple SEFs and/or DCMs thus increasing the likelihood that a market participant will have established connectivity to at least one. On the other hand, a Permitted Transaction has a greater likelihood, at least initially, of being offered by a single SEF or DCM, thus limiting the potential for market participants to enter into the transaction in accordance with the requirements of Part 37 and NAL 13-48.

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Considering the time, effort and cost to onboard, establish and test connectivity to a SEF or DCM, not all market participants will immediately have the capability and capacity to do so each time a SEF or DCM is approved to offer a Permitted Transaction which the party was previously able to execute off-facility, thus losing access to the block and cap treatment that may have previously been available. The process of establishing functionality with a SEF or DCM involves a number of required steps which cannot be completed concurrently. These include but are not limited to, review and iterative negotiation of the rulebook, execution of user agreements, building out internal technological infrastructure, establishing connectivity, and testing trade and data flows with the SEF or DCM. These must be completed in a manner that preserves legal certainty and mitigates risk for market participants.

Further, the number of potential SEFs or DCMs that may offer Permitted Transactions magnifies the effort for parties looking to transact with the protection of block trade and notional cap treatment as simultaneous onboarding to multiple SEFs or DCMs creates additional obstacles. As of the date of this letter, nineteen parties have, been granted temporary registration as a SEF, while another five are pending temporary registration. In addition, there are seventeen DCMs which have been designated and three others which are pending. The burden to onboard and connect would be greatly increased for smaller market participants that may not have the same technological capability and resources to connect to multiple SEFs and DCMs. Since use of a relevant SEF or DCM requires both parties to be fully on-boarded and functional, the capabilities of all market participants must be considered.

Similarly, it is not a viable solution for parties to ask a SEF or DCM on which they are both connected to list a Permitted Transaction that is listed on another SEF or DCM to which they are not connected. SEFs and DCMs may be unwilling to list particular products for a number of reasons. Further, SEFs and DCMs will need to self-certify any products with the Commission pursuant to Part 40 of the CFTC's regulations and will not be permitted to list such products until one full business day following such submission for self-certification. The one-business day period for deemed approval for product submissions is an extremely short approval process which makes it difficult for market participants to track which swaps are listed on SEFs or DCMs in real-time.

Although parties are not required to transact Permitted Transactions on a SEF or DCM, the requirement to use a SEF or DCM in order to access block trade and notional cap treatment (as per the Condition) creates a necessity for them to do so. As a practical matter, for any SEF or DCM that uniquely offers a product, parties will have no choice but to connect to that particular facility in order to obtain block trade and notional cap treatment—something many market participants may not be able to do in a timely manner. Thus, this requirement has created a burden for market participants who may not be afforded the same access to block treatment depending on their technological capabilities and whether they have had prior reason to execute via a particular SEF or DCM to warrant onboarding and connectivity.

II. Request for Relief

ISDA respectfully requests that DMO recommend that the Commission make available to market participants via www.CFTC.gov a source for real-time data for approved Permitted Transactions in a format which is suitable for programmatic consumption.

Following the availability of such a source for Permitted Transactions and market participants having sufficient time to connect to such source and to take in the information already available on the source at that time, we request that DMO provide no-action relief for market participants for additions or amendments to the source listing Permitted Transactions, in each case, for a period of time between the listing of an approved or self-certified Permitted Transaction (or amendment thereto) on the relevant source and the applicability of the aggregation prohibition under CFTC regulation 43.6(h)(6) for such a swap that is not executed on or pursuant to the rules of a SEF or DCM. Such period of time should align with the compliance window provided for executing Required Transactions on or pursuant to the rules of a SEF¹⁰ or DCM.¹¹

In addition, to allow time for enhancement of a central source for data on Permitted Transactions and for the establishment of connectivity to SEFs and DCMs which may offer Permitted Transactions, ISDA respectfully requests that DMO provide no-action relief to Reporting Parties and other market participants until and including December 31, 2014¹² with respect to the aggregation prohibition under CFTC regulation 43.6(h)(6) for all Permitted Transactions. Such transactions should be eligible for block trade and notional cap treatment as large notional off-facility swaps until the Commission source for data is established and the reasonable implementation period has expired with respect to a particular Permitted Transaction. The no-action relief requested would not extend to Required Transactions.

¹⁰ See CFTC regulation 37.12(a).

¹¹ See CFTC regulation 38.11(a).

¹² The proposed December 31, 2014 date is premised on the assumption that the enhanced Commission source for relevant data will be established sufficiently prior to such date.

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

Sincerely,

A handwritten signature in black ink that reads "Robert C. Pickel". The signature is written in a cursive style with a large, prominent 'R' and 'P'.

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

cc:

Laurie Gussow, Special Counsel, Division of Market Oversight, CFTC
David Van Wagner, Chief Counsel, Division of Market Oversight, CFTC
Nancy Markowitz, Deputy Director, Division of Market Oversight, CFTC

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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 April 3, 2014 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 that reads "Robert C. Pickel". The signature is written in a cursive style with a large, prominent 'R' and 'P'.

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