



International Swaps and Derivatives Association, Inc.
360 Madison Avenue, 16th Floor
New York, NY 10017
United States of America
Telephone: 1 (212) 901-6000
Facsimile: 1 (212) 901-6001
email: isda@isda.org
website: www.isda.org



Futures Industry Association
2001 Pennsylvania Ave, NW, Suite 600
Washington, DC 20006
202.466.5460 / 202.296.3184 fax
info@futuresindustry.org
www.futuresindustry.org

November 12, 2010

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW.
Washington, DC 20581

**Re: Interim Final Rule for Reporting Pre-Enactment Swap Transactions
(75 Fed. Reg. 63080)**

Dear Mr. Stawick:

The International Swaps and Derivatives Association, Inc. (“ISDA”) and the Futures Industry Association (“FIA”) hereinafter “the Associations” are writing in response to the Interim Final Rule for Reporting Pre-Enactment Swap Transactions issued by the Commodity Futures Trading Commission (the “Commission”) to implement provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).

The International Swaps and Derivatives Association, or ISDA, was chartered in 1985 and has over 830 member institutions from 57 countries on six continents. Our members include most of the world’s major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities.

Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business through documentation that is the recognized standard throughout the global market, legal opinions that facilitate enforceability of agreements, the development of sound risk management practices, and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

The FIA is a principal spokesman for the commodity futures and options industry. The FIA's regular membership is comprised of approximately 30 of the largest futures commission merchants in the U.S. FIA's associate members include representatives from virtually all other segments of the futures industry, both national and international.

The Associations respectfully submit the following comments regarding the Interim Final Rule for Reporting Pre-Enactment Swap Transactions. We recognize the substantial technical challenges involved in this aspect of the regulatory process and appreciate the Commission's attention.

I. Reporting Obligations

Rule 44.02 of the Interim Final Rule for Reporting Pre-Enactment Swap Transactions ("Rule 44.02") requires that the designated counterparty to a pre-enactment unexpired swap transaction ("pre-enactment swap") submit, with respect to such transaction, the following information to a registered swap data repository (a "SDR") or to the Commission: (i) a copy of the transaction confirmation in electronic form, if available, or in written form if there is no electronic copy, and (ii) the time, if available, that the transaction was executed. Rule 44.02(b) also requires that counterparties to pre-enactment swaps report to the Commission on request, in a form and manner prescribed by the Commission, any information relating to the swap transaction.

This letter proposes alternatives to some of the requirements of Rule 44.02 to reflect certain realities of pre-enactment swaps. Some of our comments and suggestions are also aimed at using promulgation of Rule 44.02 as an opportunity to enhance operational and regulatory efficiency in the swaps market.

Electronic Confirmations

Electronic confirmations will be unavailable for a large number of pre-enactment swaps. This may be because firms presently do not maintain electronic versions of all their confirmations or because trades are entered into electronically in reliance upon the Electronic Signatures Act and never are the subject of "confirmations" in the technical sense of the term. In the case of transactions only confirmed in writing, given the size of the derivatives market, the volume of written swap confirmations that would be required to be submitted to the Commission or an SDR in lieu of electronic confirmations may overwhelm the clerical and document-storage resources of the Commission and SDRs. Such an outpouring of paper will therefore be of little analytical use. As for transactions entered into purely electronically but without discrete confirmation, the terms of these transactions are available electronically though in a variety of different systems. We propose certain practical alternatives to the provision of electronic (or written) confirmations below that would provide SDRs and the Commission with the market data that they need in order to perform effectively and in accordance with

their statutory mandate, but in an efficient fashion that will facilitate and improve recordkeeping across the markets.

1. Reporting Protocols

As an alternative to the provision of electronic confirmations, we propose that the Commission require swap transactions to be recorded (by the parties or a third-party data service) and reported pursuant to clear and established market protocols. This will benefit the Commission and the industry by promoting standardization and ready access to aggregate swap data. Our proposals offer a three-pronged approach to having the right data in the right place and time:

- *Leveraging existing reporting standards:* current market practice for credit default swap transactions¹ is for a so-called *copper record* to be submitted to the existing trade information warehouse. This is a formatted report that is prepared on a weekly basis that contains a list of transactions that were not electronically confirmed. The formatted report contains standard fields that would otherwise be found in the confirmations themselves, including the notional amount of the transaction, the trade date, the effective date, the scheduled termination date, the fixed rate and the reference entity. The name of the counterparty, and potentially other information, is not disclosed for the reasons that are discussed in Section II below. Rates products are also reported to a repository. The reporting requirements of that repository should be considered as the basis for mandated reporting of these products. In other words, although required data fields may need to be varied by products (and in view of confidentiality requirements), common features may be established within product types that will facilitate reporting and provide the Commission and SDRs with all of the information that they need, but in an easily digestible format that is free from any confidentiality concerns.² Well defined data fields will benefit market participants as well. Swap products vary, and therefore reporting conventions should vary. No reporting convention is “one-size-fits-all” and therefore, we request that the Commission adopt a reporting regime based upon market convention for different product types. In particular, a reporting convention should not have the unintended consequence of disclosing to the public commercial information that risks jeopardizing the commercial interests of any

¹ The term “copper records” is peculiar to the credit derivatives market. Other derivatives markets either have or can construct similar standards.

² This would require a common set of reportable fields to be specified for each class of derivatives. Having a single SDR for each class of derivatives would help ensure consistency.

market participant, whether acting for its own account, or for the account of its customers.

- *Established electronic data protocols:* we believe that the Commission should consider providing that swap transaction data should be recorded and reported pursuant to a single electronic data standard. This will enable transactions to be reported in an efficient and timely manner in a form readily accessible to all concerned parties. As the Commission is no doubt aware, eXtensible Business Reporting Language (XBRL) has been established by the SEC as the standard for reporting company financial statements. Using an XML-based standard, such as XBRL, facilitates subsequent analysis of the data. Financial Products Markup Language (FpML) is an existing XML-based standard managed by ISDA that is used between participating companies for communicating OTC transaction details, within a company for the purpose of sharing OTC transaction information, and between a participating company and an outside firm offering a service related to the OTC transaction. FpML is an open standard, free of charge and, because it is independent of the software or hardware used by participating companies, ensures interoperability. We expect that FpML will eventually be used for all aspects of OTC transactions. Most firms offering services related to OTC transactions are able to accept information in FpML format. We believe that compliance with Rule 44.02 is likely to be less costly if the Commission adopts FpML as the protocol for reporting swap transactions to an SDR or the Commission. As for products that are not covered by FpML, alternative systems should be explored and adopted to meet the unique characteristics of these products, at least until such time as these products are adaptable to FpML.
- *A single SDR per asset class:* the designation of a single SDR per class of swap (i.e. credit derivatives, interest rate derivatives, equity derivatives, foreign exchange derivatives and commodity derivatives) would provide the Commission and market participants with valuable efficiencies. In particular, there would be no redundancy of platforms, no need for additional levels of data aggregation for each asset class and reduced risk of errors and greater transparency (because a single SDR per asset class would avoid the risk of errors associated with transmitting, aggregating and analyzing multiple sources of potentially incompatible and duplicative trade data).

2. Risk of Presentation of Distorted Information

A blanket requirement to report all pre-enactment swaps risks double-counting and presenting a distorted view of certain markets. For example,

in the credit default swap market trades are often created by dealers as a result of compression exercises: the original swaps are netted down on a daily or weekly basis into a smaller portfolio. Reporting both the original swaps and the compression swaps would result in double-counting. We request clarification that only the trades embodying the end result of netting or compression need be reported. Similarly, inter-affiliate swaps should not be subject to reporting. Safeguards should also be put in place to ensure that the reporting of tri-party novations does not lead to double counting.

An alternative means of avoiding redundancies and confused last-minute reporting of changing positions would be the establishment of a “record” or “as of date” for the reporting of pre-enactment transactions. This would create a fixed snapshot of the pre-enactment markets.

Time Stamping

Another important reality is that time stamping is not currently prevalent in the OTC derivatives market and many market participants do not have systems that record trade execution times. Some dealers may have information regarding trade booking times, but this information may differ from trade execution times because it would rely on manual entries. Some market participants may have no readily-available relevant information. Accordingly, this second category of information requested in Rule 44.02 is for all intents and purposes presently unavailable or available in an inconsistent and unusable form. We request that the Commission clarify that participants are not required to provide trade execution time information for pre-enactment swaps and that going-forward, such information need only be provided when industry-wide time stamping practices are implemented.³ As an alternative, please note that market participants do record trade dates: the “trade date” of a pre-enactment swap could be used instead of execution time, at least until market participants are able to “time-stamp” trades.⁴

Additional Delivery Requirement

For the same fundamental reasons that it is appropriate for the Commission to seek comment on Rule 44.02, the open-ended Rule 44.02(b) delivery requirement should be defined or refined. We believe that as part of the regulatory comment process, and in addition to the discussion of Rule 44.02(b) in the Release, it would be beneficial for the Commission to specifically articulate the kinds of information that it may want or that it may request and appropriately expect a market participant to deliver under Rule 44.02(b).

³ This is not an insignificant undertaking, but it is likely that such practices will be implemented as part of the move to trading on exchanges and swap execution facilities.

⁴ It may be possible to institutionalize the recording of trade booking times as another interim step. We are, of course, available to discuss this with the Commission.

No Impact on Legal Certainty

It is important that Rule 44.02 does not negatively impact the legal certainty of pre-enactment swaps. The Commission should make clear that Rule 44.02 does not give rise to a private cause of action: a reporting entity should have no liability to its counterparty for not reporting a swap or for incorrectly reporting a swap. Also, the Commission should clarify that reported information does not bind the parties to a trade; that is, it is not a definitive statement of trade facts and is not to be used to amend the terms of a trade.

II. Confidentiality

Rule 44.02 does not distinguish between domestic and cross-border swap transactions and may conflict with the confidentiality restrictions placed on counterparties by the laws of foreign jurisdictions. A final trade confirmation will contain the name of the counterparty and other sensitive information, redaction of which is impractical. In many cases, counterparties to cross-border swap transactions will face significant legal and reputational obstacles to the reporting of such information. Indeed, disclosure of such information may lead to civil penalties in some jurisdictions and even criminal sanctions in other jurisdictions.⁵

Some clients may also have signed confidentiality agreements with dealers. While those confidentiality agreements will generally allow for disclosure of confidential information pursuant to applicable laws and regulations, in many cases, the client must be given advance notice of the disclosure and afforded the ability to dispute disclosure. Compliance with the terms of what could amount to thousands of confidentiality agreements will be challenging and time-consuming.

Pursuant to Section 8(a)(1) of the Commodity Exchange Act, which provides that “the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers,” the Commission has historically disclosed only aggregate trade and position information that cannot be used to discern the identity of individual market participants.⁶ In keeping with this standard, the Commission should make clear that the requirements of Rule 44.02 will protect the confidentiality of trade, position and counterparty identifying information.

⁵ ISDA has been involved in discussions with various regulators on this topic over the past year.

⁶ See also Section 727 of the Dodd-Frank Act, which provides that the Commission shall require real-time public reporting of swap transaction data, in a manner that does not disclose the business transactions and market positions of any person.

III. Record Retention

The Note to Rule 44.02 requires that each counterparty to a pre-enactment swap that may be required to report such swap retain, in its existing format, all information and documents, to the extent and in such form as they presently exist, relating to the terms of the swap transaction, including but not limited to (i) any information necessary to identify and value the transaction; (ii) the date and time of execution of the transaction; (iii) information relevant to the price of the transaction; (iv) whether the transaction was accepted for clearing and if so, the identity of such clearing organization; (v) any modification(s) to the terms of the transaction; and (vi) the final confirmation of the transaction.⁷

With respect to the requirement to retain “all information and documents... relating to the terms of the swap transaction”, we request that the Commission clarify that such information should be kept in accordance with each firm’s normal internal record retention policies. Anything else would be unduly burdensome for market participants, straining their data-storage resources, but with little incremental contribution to the Commission’s understanding of the market. For example, much of this information may consist of emails and phone records; it would be hugely costly to retain that information for an indefinite period for millions of trades, or to work efficiently with that body of information. In any event, market participants are likely to already have comprehensive data retention policies, in keeping with existing legal and/or regulatory standards. Therefore, we request clarification that the data retention period is not indefinite, but rather is to occur in accordance with data retention standards that are applicable to each counterparty.

We also request the ability to delete information redundancies that may occur as a transaction progresses through multiple systems and records. Further comments on certain of the record retention requirements are set-out below:

- *Information necessary to identify and value the transaction:* the Commission should clarify that this information should be limited to the economic details of a transaction, which should be limited to the types of information as would appear in trade confirmations. Without this clarification a trader would be subject to an overly burdensome requirement to retain a variety of information irrelevant to the purposes of the Rule. Such information could include yield curve, trading models and other trade and market data. The extent of such information would not be consistent either across institutions or in application to individual trades. Much of this information is not retained now and any requirement to retain this type of data will likely be unworkable. In addition, much of this data is proprietary.
- *The date and time of execution of the transaction:* as mentioned above, in the existing infrastructure for OTC derivative transactions, the time of execution is

⁷ We believe, and would ask the Commission to confirm, that the record retention requirements of Rule 44.02 should only apply to the reporting party under Rule 44.02.

generally not recorded or is recorded in an inconsistent manner. There should be no requirement to preserve such information with respect to pre-enactment swaps. A workable alternative would be for the Commission to deem the “trade date” information to be all that is required.

- *Information relevant to the price of the transaction:* We request clarification that only information within the first bullet above and necessary to evidence price upon execution be retained, such as would be in a final confirmation, as opposed to information pertinent to subsequent valuations.
- *Modification(s) to the terms of the transaction:* Formal modifications in the form of amendments may be retained in the normal course of business, although, in some instances in practice, only the most recent modifications are retained. We request confirmation that lifecycle events, such as disruption events, credit events, successor indices, succession events, and other corporate actions, and options exercises would not be deemed “modification(s) to the terms of the transaction.” Similarly, we request that modifications that are required to be retained are those that relate only to modifications of a specific transaction, and not a broader subset of modifications that would include protocols and industry-standard amendments. We also request confirmation that modifications which have been superseded by other modifications need not be retained.

IV. Protocol for Security-Based Swaps

Many market participants will be subject to parallel recordkeeping and reporting requirements imposed by both the Commission and the Securities and Exchange Commission (the “SEC”). To remove inefficiencies, simplify the compliance obligations of market participants, and enhance their own regulatory capabilities, the Commission, the SEC, and to the extent possible, overseas regulators, should consider the adoption of consistent recordkeeping and reporting requirements. We note that at present there are small inconsistencies between Rule 44.02 and the SEC’s Interim Final Rule.⁸ It would lighten the compliance burden if these differences could be eased.

V. Swaps and Security-Based Swaps

The Commission and the SEC have sought comment on which types of transactions are actually within the jurisdictional mandates of the Dodd-Frank Act. Clarification of this point is appropriate before imposing reporting of transactions that may be outside of the regulatory scope.

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⁸ 75 Fed. Reg. 64643 (October 20, 2010).

The Associations appreciate the ability to provide comments on the Interim Final Rule for Reporting Pre-Enactment Swap Transactions and look forward to working with the Commission as you continue the rulemaking process. Please feel free to contact us or our staff at your convenience.

Sincerely,



Robert Pickel
Executive Vice Chairman
International Swaps and Derivatives Association



John Damgard
President
Futures Industry Association