ISDA Safe, Efficient Markets

July 3, 2012

The Honorable Gary Gensler
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: CFTC Reporting Rules - Compliance Challenges

Dear Chairman Gensler:

The International Swaps and Derivatives Association, Inc. ("**ISDA**"), on behalf of its members with reporting obligations under Part 20, Part 43, Part 45 and Part 46 of the Regulations ("**Reporting Rules**")[1] of the Commodity Futures Trading Commission (the "**Commission**") and other similarly situated persons, is writing to identify difficulties related to the implementation of the Reporting Rules that may make initial compliance with such requirements impossible.

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.

ISDA recognizes the importance of the various Reporting Rules and strongly supports initiatives to increase regulatory transparency. We also appreciate the efforts of CFTC staff over the past several months to provide direction and clarification where possible as our members begin preparations for complying with the new Reporting Rules.

ISDA is concerned, however, that, despite their ongoing and extensive compliance efforts, our members will be unable to comply with certain aspects of the Reporting Rules in the near future. We discuss these concerns in greater detail below and provide recommendations for Commission action where appropriate.

[1] See, 17 CFR Part 20 Large Trader Reporting for Physical Commodity Swaps, 17 CFR Part 45 Swap Data Recordkeeping and Reporting Requirements, 17 CFR Part 43 Real-Time Public Reporting of Swap Transaction Data, and 17 CFR Part 46 Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps.

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I. Bespoke & Complex Products

Although the industry has made great strides in recent years to develop the systems and processes to report characteristics of OTC derivatives, in light of limitations at both the market participant and swap data repository ("**SDR**") level, some of the requirements of the Reporting Rules cannot be met for certain bespoke and complex products. This problem was highlighted by the CFTC and SEC in their 2011 *Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives*[2] and by the CFTC's Technology Advisory Committee ("**TAC**"), which recommended that the CFTC consider long-term exemptive relief for such products.[3]

We support the recommendation of the TAC and specifically request that the Commission grant relief from:

- reporting a limited subset of the data required to be reported under Part 43 and Part 45 for bespoke or complex swaps. These fields are highlighted in the attached Annex A; and
- the requirement to provide an electronic representation of the confirmation data for swaps that are bespoke or complex.

We request that such relief remain effective for the period necessary to accommodate the development of a normalized, electronic representation of such swaps. For this purpose, bespoke or complex swaps are those that are (a) not listed for trading on a designated contract market, (b) not available to be traded on a swap execution facility (c) not eligible to be cleared by a derivatives clearing organization (d) not eligible to be confirmed through an electronic matching confirmation system or (e) do not have a representation in a publicly available industry standard.

At this juncture, as a result of the absence of marketplace standard for those products, neither market participants nor the SDRs themselves have systems that are capable of capturing these data fields in a consistent manner. Accordingly, without relief from the Commission, market participants, such as end-users using customized hedging products, will be placed in the difficult position of having to abstain from important risk management transactions or being unable to meet certain of the particular reporting requirements in respect of such transactions. We note that the TAC Subcommittee on Data Standardization reported that the volume of transactions that would be eligible for the requested relief is estimated to be less than 5% of the OTC derivatives population.

During the pendency of the relief period, market participants would report all of the information required to be reported under Parts 43 and 45 other than those highlighted in Annex A. They would also report the confirmation terms in a PDF-type format. This, together with the requirements for market participants to maintain complete records on swap activity, will ensure that the Commission and other regulators have access to the information they need in order to discharge their oversight and supervisory responsibilities.

The industry is committed to working with the Commission to further develop a framework that would facilitate the provision of information in relation to bespoke or complex swaps on an electronic, normalized basis and would be happy to discuss this at your convenience.

II. Unique Product Identifiers

As discussed with Commission staff, market participants will be unable to report the Unique Product

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[2] *Joint Study on the Feasibility of Mandating Algorithmic Descriptions for Derivatives, Commodity Futures Trading Commission and Securities and Exchange Commission,* April 7, 2011.
http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/dfstudy_algo_040711.pdf

[3] See meeting of the CFTC Technology Advisory Council, March 29, 2012.

Identifiers ("**UPI**") as part of the initial implementation. This results from a difference in definition and scope in the Part 43 and Part 45 rules, which prevents the industry from finalizing an approach for a common UPI. We understand that some of the SDRs will be generating their own "proxy UPI", until such time that a more universal solution can be developed.

III. Price Notation / Additional Price Notation

Part 43 specifies that the swap price information needs to be reported via two fields, the Price Notation and the Additional Price Notation. Since publication of the final rule, ISDA's product-specific working groups have been assessing how to best meet the Commission's requirements related to this information.

While a majority of swaps are transacted via a single price notation, some asset classes have price information that is expressed via multiple values and units. For example, in some instances, interest rate swaps may combine a fixed rate, a spread, an upfront fee and a credit valuation adjustment fee.

As Price Notation and Additional Price Notation each allows the reporting of a single value, reporting counterparties would either need to introduce a very complex methodology to map multiple values into a single field, or work with the Commission to provide for the ability to report such price information through multiple data points. As either of those approaches would not be compatible with the initial compliance date, ISDA's Rates and Credit product groups have engaged Commission staff to propose interim proposals that can be consistently adopted until such time that more appropriate solutions can be developed that will satisfy the various use cases.

IV. Pre-Enactment & Transition Swaps

Part 46 introduces the same compliance timeframe as the Part 43 and Part 45 reporting rules. This will provide very limited time for market participants to engage into pre-compliance initiatives to match their respective trades ahead of reporting time.

As a result, a significant number of reporting-related problems are expected to arise once Part 46 reporting becomes effective. For example, there are likely to be many instances where the status of the counterparty (i.e., whether it is a swap dealer or MSP) is unknown until right before the start of reporting and, potentially, at the time the trade was executed. This will lead to cases where both parties to a trade determine that they are the Reporting Counterparty - resulting in over-reporting - and cases where neither party determines that it is the Reporting Counterparty - resulting in under-reporting. Clearing up those exceptions will likely require a significant period of time for products other than Credit Default Swaps, which might in turn adversely impact the ability for the Commission and other regulators to make use of the Pre-Enactment and Transition Swap data as part of their prudential supervisory role until such cleanup exercise is complete.

V. Potential Conflict between CFTC Reporting Rules and Client Secrecy Laws

In order to report the range of transaction information required to be reported and disclosed under Part 20, Part 45 and Part 46, Swap Dealers must be assured that mandatory reporting to CFTC-registered SDRs is permissible under data privacy and protection laws, confidentiality terms and blocking statutes in various non-US jurisdictions.[4][5]

[4] For example, entities that will be required to comply with the Large Trader Reporting for Physical Commodity Swaps requirements under Part 20 have expressed concern that reporting the relevant data required by the rule will conflict with certain banking secrecy laws and client confidentiality provisions in a number of offshore jurisdictions (e.g., France).

[5] We note that this issue has been recognized in Europe, with the European Markets and Infrastructure Regulation ("**EMIR**") providing that any requirement to report to a "recognized trade repository" will override any conflicting provision of a Member

ISDA raised the client secrecy issue with the OTC Derivatives Supervisors Group ("**ODSG**") prior to passage of the Dodd-Frank Act.[6] We also have provided the ODSG and Commission with a summary of local counsel's advice regarding any restrictions on the disclosure of information to SDRs in their respective jurisdictions.[7] We understand certain market participants are currently undertaking an updated multi-jurisdictional legal review and planning to provide supplemental information, including specific scenarios that will illustrate these concerns in greater detail.

As noted above, ISDA understands the importance of the various Reporting Rules and supports regulatory initiatives that increase transparency. Compliance with these Rules, however, will put market participants directly into conflict with the laws and regulations of its home state and/or those of its clients.

The Commission and other regulators in the US and abroad should work together to develop a solution that allows for the effective regulatory oversight of global derivatives markets while respecting the privacy and confidentiality laws of other jurisdictions and that does not give rise to conflicting legal obligations and potential penalties or sanctions for global firms.[8]

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

Sincerely,

Robert Pickel
Chief Executive Officer
ISDA

cc: The Honorable Bart Chilton
The Honorable Scott D. O'Malia
The Honorable Jill E. Sommers
The Honorable Mark P. Wetjen

State's legislation. This provision, however, will not remedy concerns related to Part 20, which requires reporting to the CFTC directly. Nor will this provision cover Part 45 and Part 46 reporting done prior to implementation of EMIR.

[6] See attached July 1, 2010 letter from ISDA General Counsel David Geen.

[7] See attached summary.

[8] The CFTC may want to use the OTC Derivatives Regulators Forum ("**ODRF**") to highlight and work to resolve problems posed by such conflicts of law.