ISDA® | Safe, Efficient Markets

September 29, 2017

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

Re: Project KISS; 82 Fed. Reg. 23765

Dear Secretary Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (**"ISDA"**)[1] appreciates the opportunity to provide comments on the U.S. Commodity Futures Trading Commission's (**"CFTC" or "Commission"**) agency-wide review of its operation and oversight program with the goal of identifying areas in which it can simplify and modernize Commission rules, regulations and practices in order to reduce regulatory burdens, remove barriers to the efficient operation of derivatives markets, and foster economic growth.

Our members fully support the Project KISS initiative and remain committed to working with the CFTC and other regulators to complete and refine the implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] ("**Dodd-Frank**") reforms effectively and expeditiously.

Since many aspects of the regulatory reforms are in their final stages, we believe now is the appropriate time not only to simplify the existing regulatory framework in order to make it more efficient and less costly from a compliance and markets perspective, but also to review the entire

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 875 member institutions from 68 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, clearing houses 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.

[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, H.R. 4173 (July 21, 2010).

regulatory framework established following the 2008 financial crisis in order to ensure that it is in line with the objectives of Dodd-Frank and implemented in a safe and efficient manner.

Executive Summary

In this letter we identify a series of rules, practices, and other CFTC interpretations and guidance that the Commission should re-evaluate and either revise or amend to promote economic growth and remove costly and ineffective barriers to the efficient and safe functioning of the derivatives markets. The letter is structured by providing comments on a series of specific subject matter areas, in each instance following two sets of recommendations—recommendations for streamlining the CFTC's rules and related interpretations and guidance, and recommendations for improving the CFTC's oversight responsibilities. The subject matter areas addressed are as follows:

(1) Trading,
(2) Clearing,
(3) Reporting,
(4) Registration, and
(5) A series of other areas, including:[3]
 (a) Margin,
 (b) Capital and Liquidity,
 (c) Cross-Border Swaps Regulation,
 (d) Regulation Automated Trading,
 (e) Position Limits, and
 (f) CFTC Internal Processes and Procedures and Regulatory Structure.

In some cases, this letter will recommend changes to CFTC rules, no-action relief, and guidance to resolve instances where those rules or interpretations are ambiguous or otherwise incomplete and unclear in a way that places an unnecessary element of uncertainty on businesses, transactions and markets without promoting any corresponding regulatory or policy goals. In other instances, we recommend changes to resolve issues that present burdens on or barriers to the efficient functioning of the derivatives markets. We appreciate the Commission's consideration of these recommendations, and we look forward to providing any additional information or assistance that may be helpful to the CFTC's work on Project KISS.

[3] Although not discussed in this letter, we believe the Commission should provide guidance on the treatment of Prime Brokerage transactions under the Commission's regulations. Given the unique and complex nature of these transactions and possible implication of various rules, ISDA will provide a separate submission addressing this issue outside of the KISS initiative.

I. Trading

We appreciate the Commission's decision to revisit the swap execution facility (**"SEF"**) rules to ensure that they reflect the appropriate market structure for swaps trading, allow for flexibility and choice in trade execution, and enable derivatives users to more effectively hedge their business risks. We agree with Chairman Giancarlo that "[a] better way to promote price transparency is through a balanced focus on promoting swaps trading and market liquidity as Congress intended."[4] We look forward to working with the Commission as it continues to consider changes to its trading rules.[5] Below we provide specific recommendations for the Commission to consider as it continues to re-evaluate its swaps trading regulatory regime.

A. Recommendations for Streamlining the Trading Rules

i. Allow Certain Package Transactions to Be Executed Off-SEF.

As a preliminary matter, we request that the Commission remove the time limitations on certain no-action relief for package transactions where persisting issues remain difficult, if not impossible, to remedy under current circumstances. We also ask that the Commission consider outstanding requests for relief that have remained unaddressed.[6]

Currently, there are five categories of package transactions that are subject to time-limited no-action relief related to mandatory SEF execution.[7] These include:

1. MAT/New Issuance Bond Package Transactions,
2. MAT/Futures Package Transactions,
3. MAT/Non-Swap Instruments Package Transactions,
4. MAT/Non-MAT Uncleared Package Transactions, and
5. MAT/Non-CFTC Swap Package Transactions.

---

[4] J. Christopher Giancarlo, Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank (White Paper) (Jan. 29, 2015) at 75.

[5] In this regard, we note that any forthcoming changes to the SEF rules should ensure that only contracts with sufficient trading liquidity should be subject to the trade execution requirement and that the Commission should allow for certain products to continue to be traded off-SEF given these products' unique trading characteristics or frequency of trading. We also note that if the made available to trade (**"MAT"**) requirement remains a precursor to swaps being traded on a SEF via the required methods of execution, the MAT process should be changed to allow all market participants, not just SEFs, to have meaningful input on MAT determinations.

[6] For a more detailed discussion of this issue, please see our joint-letter to the CFTC with the Institute of International Bankers and Securities Industry and Financial Markets Association (**"SIFMA"**), *available at* Appendix A, Attachment 1.

[7] *See* CFTC Letter 16-76 (Nov. 1, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-76.pdf.

ISDA | Safe, Efficient Markets

As we have explained in more detail in our request for no-action relief,[8] requiring these package transactions to be executed on a SEF will decrease liquidity and make it virtually impossible to trade these instruments and/or use them as a hedging tool. Accordingly, we ask that staff remove the time limitations from the existing relief and consider the appropriate treatment of package transactions as part of the Commission's holistic review of trade execution requirements and the SEF framework more generally.

ii. Provide Permanent Relief from the Trade Execution Requirement to Correct Clerical and Operational Errors.

If an error is identified after a swap has cleared, any correction or cancellation must be done by the Derivatives Clearing Organization (**"DCO"**) because only the DCO is able to make corrections or cancellations to swaps carried on its books. In some instances, however, a DCO will decline or is unable to correct or cancel the swaps carried on their books. To correct a cleared erroneous swap, counterparties must arrange and execute a transaction that offsets the swaps carried on the DCO's books as well as a new trade that matches the terms and conditions of the erroneous trade other than any such error and time of execution (new trade, old terms), which is potentially prohibited by the CFTC's SEF rules.[9]

Recognizing this issue, Commission staff provided no-action relief for the correction of erroneous trades.[10] We believe that the solution provided in No-Action Letter 17-27 should be included in any subsequent revisions to the CFTC rules.[11]

For a more detailed discussion of this issue, please see ISDA's Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the CFTC Regulations, available at Appendix A, Attachment 2.

---

[8] Letter from ISDA to the Division of Market Oversight (**"DMO"**), CFTC, Request for Relief from the Requirement to Execute Certain Package Transactions on a SEF Pursuant to § 37.9(a) of the Commission's Regulations (Sept. 20, 2016).

[9] *See, e.g.*, CFTC Rule 37.2013(a), 17 C.F.R. § 37.2013(a) (prohibiting pre-arranged trading). In addition, current CFTC Rule 37.9(a)(2), 17 C.F.R. § 37.9(a)(2), requires that mandatorily traded contracts be executed on SEF through the required methods of execution.

[10] *See* CFTC Letter 17-27 (May 30, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-27.pdf.

[11] *See id.*

iii. Clarify the Applicability of the Trade Execution Requirement to Certain Transaction Types.

In some instances, the applicability of the trade execution requirement to certain transactions remains unclear. ISDA requests clarification that the following three transaction types are not subject to the trade execution requirement.

1. Offset Swaps Used Following the Settlement or Exercise of a Swaption into a Swap

The specific scenario in which such offset swaps are traded is as follows: (1) the parties enter into an option (**"Swaption"**) on a swap (**"Underlying Swap"**); (2) the Swaption is exercised (by either cash settling at present value or entering into the Underlying Swap); and (3) a swap is entered into (**"Offset Swap"**) so as to offset a party's risks in accordance with prudent risk management practice. The pricing of the Offset Swap is set at the same market value (*i.e.*, which can be an ISDAFIX rate) used to value the exercise of the Swaption. The fixed rate of the Offset Swap is unknown at the time of its execution and parties to Offset Swaps agree that the rate will be determined at a future time.

The rationale for entering into the Offset Swap in this manner is that the other existing market exposures or hedges tied to the exercise of the Swaption are not legally terminated (which would require a negotiated termination of those exposures). If the parties used other means to unwind their existing exposures or hedges, they would be exposed to execution risk between the option exercise and any related unwinds.

We do not believe Offset Swaps are subject to the trade execution requirement under Commodity Exchange Act (**"CEA"**) Section 2(h)(8)[12] because these contracts are different from vanilla interest rate swaps (**"IRS"**). In vanilla IRS, the fixed rate and other key terms are known at execution, whereas in Offset Swaps, the fixed rate is unknown at the time of execution. Parties to Offset Swaps execute the swap and agree that the rate will be determined at a future point in time. This rate may not be published for up to 2-3 hours after execution. This is a material difference between Offset Swaps and vanilla IRS contracts that are currently subject to the trade execution requirement.

Furthermore, interest rate contracts currently subject to the trade execution requirement have been certified based on having a "par" rate (*i.e.*, the market rate at the time of execution). The rate used for the Offset Swap is not a par rate. The Offset Swap uses a rate which is published up to several hours after execution, and therefore cannot reasonably be considered a par rate. We believe this to be the case even if, by chance, the Offset Swap's rate happens to match the rate

[12] In our February 7, 2014 letter to DMO, we explained in more detail why Offset Swaps should not be subject to the trade execution mandate. We have not received DMO's response regarding this issue.

that was "market" at time of execution. In our view, a par rate is meant to refer to the known prevailing market rate at time of execution, not to a rate in the future which, unknown to the parties at time of execution, may coincidentally match a rate at an earlier time in the day. Therefore, we request that the CFTC confirm our view that an Offset Swap, as defined above, is not subject to the trade execution requirement under CEA Section 2(h)(8).

2. Swaps Resulting from Multilateral and Bilateral Portfolio Compression Exercises

The CFTC should expressly confirm that made-available-to-trade swaps resulting from portfolio compression exercises are not required to be executed on a SEF. These swaps do not advance price transparency policy objectives as they do not contribute to price discovery and, in fact, may skew pre-trade price discovery on SEFs. Multilateral, risk-constrained compression services perform purely analytical and risk reduction services by eliminating unnecessary line items and notional principal outstanding for both cleared and uncleared derivatives in order to manage counterparty risk, thus reducing costs and lowering operational risk and capital requirements. Bilateral compression exercises perform similar benefits. Additionally, imposing the trade execution requirement undermines important policy objectives promoted by CFTC compression rules.[13]

3. Products Executed Only to Provide CDS Settlement Prices

DCO rules require clearing members to submit price quotes for any cleared CDS product in which the clearing member, or the clearing member's customers, has open interest at the end of each day. The DCO relies on these quotes in setting the end-of-day settlement prices for all cleared CDS positions. In order to ensure that the prices submitted by clearing members as part of the CDS settlement price process are reliable and reflect current market conditions, DCOs require their clearing members, from time to time, to enter into "firm" or "forced" trades at their submitted price quotes, which then result in cleared CDS positions. This process is conducted to ensure compliance with the settlement obligations under DCO Core Principle E[14] and other Commission regulations.[15] The process does not involve submission or acceptance of competitive bids and offers through the clearinghouse. Rather, the swap execution that occurs results from the requisite submissions by CDS clearing members of quotes for certain CDS products to the clearinghouse. Due to the broad interpretation of the definition of a SEF, the execution of those contracts may implicate SEF registration requirements[16] and trade execution requirements.[17]

[13] CFTC Rule 23.503, 17 C.F.R. § 23.503.
[14] CEA Section 5b(c)(2)(E), 7 U.S.C. § 7a-1(c)(2)(E); *see also* CFTC Rule 37.3, 17 C.F.R. § 37.3.
[15] CFTC Rule 39.14, 17 C.F.R. § 39.14.
[16] *See* CEA Section 5h, 7 U.S.C. § 7b-3.
[17] *See* CEA Section 2(h)(8), 7 U.S.C. 2(h)(8); CFTC Rule 37.10, 17 C.F.R. § 37.10.

To preserve this important function, we ask that the Commission issue permanent relief[18] from compliance with the SEF registration and execution requirements for certain cleared CDS products that are executed for the sole purpose of providing end-of-the-day settlement prices.

iv. Exempt Inter-Affiliate Swaps from the Trade Execution Requirement Permanently.

We ask the Commission to establish a permanent exemption for inter-affiliate swaps from the trade execution requirement under CEA Section 2(h)(8), irrespective of whether such swaps are cleared or maintained bilaterally in reliance on CFTC Rule 50.52.[19]

Mandating SEF execution of inter-affiliate trades would not advance the price discovery goals of the trading requirement. As the Commission recognized in adopting the real-time reporting rules, inter-affiliate swap transactions are often not intended to be arm's-length.[20] No purpose would be served by requiring execution on a venue intended to enhance competitive pricing and provide meaningful and informative pre-trade transparency. Inter-affiliate trades are key for managing risk economically within global group structures, many of which are subject to relevant prudential rules and any externalization of the unnecessary costs incurred to comply with a mandatory trading requirement for inter-affiliate flow would make it more expensive to service client flows for global firms.

We note that the Division of Market Oversight provided time-limited no-action relief from CEA Section 2(h)(8) (*i.e.,* the trade execution requirement) for swaps executed between eligible affiliate counterparties.[21] In granting this relief, the Division stated that during the period of the relief, staff will "assess this issue and potentially establish a permanent solution."[22] Accordingly, we ask that the Commission issue permanent relief from the trade execution requirement for inter-affiliate transactions.

---

[18] We note that Commission staff previously provided time-limited no-action relief from compliance with the SEF registration and execution requirements for certain cleared CDS products that are executed for the purpose of providing end-of-the-day settlement prices (*see* CFTC Letter 14-119 (Sept. 29, 2014), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-119.pdf), but such relief expired on September 30, 2015.
[19] In Section II(A)(ii), we similarly request that the CFTC eliminate uncertainty with respect to certain aspects of the Commission's exemption from mandatory clearing for inter-affiliate swaps.
[20] *See* CFTC Rule 43.2, 17 C.F.R. § 43.2 (defining "Publicly Reportable Swap Transaction" to expressly exclude "[i]nternal swaps between one-hundred percent owned subsidiaries of the same parent entity" as swaps that are "not at arm's length").
[21] *See* CFTC Letter 16-80 (Nov. 28, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-80.pdf.
[22] *Id.*

v. Eliminate Footnote 195 from the SEF Rules.

Footnote 195 to the SEF rules requires confirmations of a swap executed on a SEF to contain *all* terms of the counterparties' transaction, including all previously negotiated arrangements and agreements. Since the implementation of the SEF rules, CFTC staff has issued guidance and no-action relief allowing SEFs to comply with this requirement by incorporating previously negotiated terms by reference into SEF confirmations. While we appreciate the Commission's efforts to alleviate the regulatory burdens and costs imposed by Footnote 195 through no-action relief, we believe that Footnote 195 should be eliminated from the SEF rules in its entirety.

Instead, we believe that SEFs should only issue evidence of the key economic terms as agreed by the counterparties on the SEF. The obligation to supplement the key economic terms in order to create a trade confirmation should fall on the counterparties, who are familiar with such terms and have them readily available at their disposal. Requiring counterparties to submit previously negotiated terms to a SEF is unnecessary and costly, especially given that the Commission may achieve the goals of Footnote 195 (*i.e.,* certainty of terms) by simply requiring that, in the event of conflicting terms, the key economic terms issued by the SEF will supersede any previously negotiated terms between the counterparties.

We have submitted a proposal to CFTC staff that, if adopted, would eliminate the regulatory burdens imposed by Footnote 195 while achieving the Commission's goals of legal certainty of terms at execution. A copy of this proposal is available at Appendix A, Attachment 3.

vi. Allow SEFs as Self-Regulatory Organizations to Have More Flexibility in Issuing Warning Letters.

CFTC Rule 27.203(f)(5)[23] states that a SEF may only issue one warning letter to the same individual or entity—for the same potential violation—within a rolling twelve-month period before imposing penalties. There is no analogous restriction for designated contract markets (**"DCMs"**). This requirement is unduly prescriptive and fails to take into consideration important factors that are relevant to a SEF when evaluating potential sanctions in a given disciplinary matter. In essence, this provision prohibits a SEF, a Self-Regulatory Organization, from exercising reasonable discretion and substitutes the Commission's judgment, which typically will not have first-hand knowledge of the facts, for the informed judgment of the SEF staff familiar with the facts of the matter. As frontline investigators, SEFs are in a better position to evaluate the gravity of each violation and determine the appropriate sanction based on the totality of the circumstances. Not allowing SEFs the flexibility to take the unique circumstances of each matter into consideration in order to make an informed decision is ineffective and unfair to SEF members.

[23] 17 C.F.R. § 27.203(f)(5).

vii. Exempt Counterparties from the Trade Execution Requirement in the Case of SEF Outages or Similar Unanticipated Disruptions.

The Commission should issue guidance indicating that counterparties are temporarily excused from the trade execution requirement in the event of a SEF disruption or outage and may execute trades off-SEF for a designated period of time. Such guidance would protect against market disruptions in certain asset classes and products.

B. Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Trading

i. Enable Flexibility in the Execution of Block Trades.

Currently, block trades are allowed to be executed on SEF through a Request For Quote (**"RFQ"**) to 1 pursuant to the Commission staff's no-action relief.[24] We support staff's decision to issue the relief and we ask that the Commission codify this relief in its rules.

This, however, does not solve the issue entirely. Bilateral off-SEF execution is important for block transactions since such trades typically involve complex pricing factors, unique relationship and negotiation elements, or other distinguishing factors. There are likely to be increased costs, decreased efficiency (*i.e.*, less ability to negotiate) and corresponding negative impacts on liquidity if these block transactions are required to be executed on SEF, even via RFQ to 1. Therefore, we believe that block transactions should be permitted to be executed away from a SEF (but pursuant to the rules of a SEF and subject to appropriate pre-trade risk checks).

For a more detailed discussion of these issues, please see ISDA's Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the Commodity Futures Trading Commission Regulations, available at Appendix A, Attachment 2.

ii. Eliminate Footnote 88 of the SEF Rules.

Confusion over Footnote 88 in the current SEF rules and the definition of a "U.S. person" (as described in the CFTC's cross-border guidance)[25] have resulted in market fragmentation and liquidity concerns. Footnote 88 states that "a facility would be required to register as a SEF if it operates in a manner that meets the SEF definition even though it only executes or trades swaps

[24] *See* CFTC Letter No. 16-74 (Oct. 7, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-74.pdf.
[25] Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013).

that are not subject to the trade execution mandate."[26] This means that the SEF registration requirement under the SEF rules could be read to apply to any platform, on a global basis, whether or not the platform executes trades that are subject to the trade execution requirement, provided that it has a single U.S. customer. A consequence of such interpretation is that non-U.S. trading venues deny access to U.S. traders for fear of being required to be registered as SEFs, leading to creation of separate liquidity pools and prices for similar transactions. Accordingly, we believe that footnote 88 should be removed. In addition, the CFTC should create a clear and equitable path for non-U.S. trading venues to make their trading facilities available to U.S. persons without requiring full SEF registration.

II. Clearing

A. Recommendations for Streamlining the Clearing Rules

i. Ensure that Requirements for DCOs Do Not Unfairly Disadvantage U.S. Market Participants.

Under CFTC staff's interpretation of the current rules, a central counterparty ("**CCP**") is required to either register as a DCO or obtain an order of exemption from the CFTC in order to clear over-the-counter (**"OTC"**) derivatives for its clearing members (or their affiliates) that are U.S. persons. U.S. clients that are not themselves members of CCPs, however, are *only* permitted to clear OTC derivatives with CCPs that are registered with the CFTC as DCOs (and not CCPs that are exempt from DCO registration). These inconsistent requirements ultimately prevent U.S. banks from providing liquidity and hedging for clients in non-U.S. markets where local CCPs have obtained a CFTC order of exemption from DCO registration. Accordingly, we believe that the CFTC should permit CCPs that are expressly exempted from DCO registration by the CFTC to clear OTC derivatives for U.S. clients.

We also believe that non-U.S. CCPs should not be required to register as a DCO or obtain an order of exemption from DCO registration solely due to the fact that they permit clearing members (or affiliates of clearing members) that are U.S. persons to clear, for their proprietary accounts, swaps *that are not subject to mandatory clearing under the CFTC's rules*. Such clearing is done on a strictly voluntary basis and U.S. persons should therefore have more flexibility with regard to the CCP they select.

[26] Core Principles and Other Requirements for Swap Execution Facilities; Final Rule, 78 Fed. Reg. 33476 (June 4, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-06-04/pdf/2013-12242.pdf.

ii. *Eliminate Uncertainty Regarding the Inter-Affiliate Swap Exemption from Mandatory Clearing.*[27]

We strongly support the Commission's exemption from its mandatory clearing requirements for inter-affiliate swaps. Requiring affiliated entities to clear transactions executed amongst themselves is burdensome and costly to corporate groups, without offering countervailing benefits or achieving policy goals, given that swaps between affiliates create substantially less risk as compared to swaps between unaffiliated entities.

The Commission's exemption from clearing for inter-affiliate swaps requires satisfaction of a number of conditions. These include an "outward facing" swap condition, which requires the clearing of swaps between affiliated counterparties claiming the exemption and unaffiliated counterparties. The Commission initially provided two temporary alternative compliance frameworks, which allow entities relying on the exemption to post and collect VM rather than clear all outward facing swaps, to satisfy the "outward facing" swap condition as a way to assist counterparties in transitioning to full compliance with the requirement.

The Commission has since extended these alternative compliance frameworks pursuant to time-limited no-action relief. Given the importance of the inter-affiliate clearing exemption and the uncertainty created by relying on time-limited no-action relief, we ask that the Commission provide regulatory relief that is not time-limited[28] to eligible affiliate counterparties located in the European Union, Japan, Singapore[29] and in the five new clearing law jurisdictions (Australia, Canada, Hong Kong, Mexico, and Switzerland)[30] to allow these counterparties to comply with the alternative compliance framework[31] in lieu of compliance with the clearing mandate until such time when: (1) the applicable clearing requirement takes effect in those jurisdictions, and (2) the CFTC makes a determination that a foreign jurisdiction's clearing mandate is comprehensive and comparable to the U.S. clearing mandate. To be clear, the relief should also

---

[27] Relatedly, we ask that the Commission extend the current exemption to include non-U.S. banks with U.S. affiliates in order to ensure a level playing field.

[28] At the end of last year, the CFTC granted time-limited relief to entities using the alternative compliance framework described in Commission regulation 50.52(b)(4)(ii) or (iii) to meet the mandatory clearing requirements. *See* CFTC Letter 16-81 *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-81.pdf; *see also* CFTC Letter 16-84, *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/16-84.pdf.

[29] CFTC Rule 50.52(b)(4)(ii), 17 C.F.R. § 50.52(b)(4)(ii).

[30] *See* Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps, 81 Fed. Reg. 71,202 (Oct. 14, 2016).

[31] ISDA members currently relying on the alternative compliance framework of CFTC Rule 50.52(b)(4)(ii), 17 C.F.R. § 50.52(b)(4)(ii), typically comply with subparagraph (1) which requires counterparties to exchange variation margin on swaps between eligible affiliate counterparties. This is consistent with both the CFTC and Prudential Regulators' margin rules requiring swap dealers to exchange variation margin between their swap entity and financial end-user affiliates.

recognize and permit comparability when a valid exemption from clearing is relied upon in the non-U.S. jurisdiction.

For a more detailed discussion, please see ISDA's previous No-Action Letter Requests, available at Appendix B, Attachments 1, 2 and 3.

iii. Implement ABA Recommended Revisions to CFTC Part 190.

We urge the CFTC to implement the amendments to Part 190 of the CFTC's Rules submitted by the American Bar Association.[32] The proposed amendments address significant market and regulatory developments in recent years and the lessons to be learned from various FCM bankruptcy proceedings, including MF Global and Peregrine Financial Group. The amendments are necessary to ensure that the Part 190 Rules work as an integrated whole, are clear and unambiguous in setting out objectives and avoid unnecessary complexity that could hinder or delay timely, prudent action by a Bankruptcy trustee. The CFTC should make amending the Part 190 Rules a regulatory and, where necessary, legislative priority.

B. Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Clearing

i. Expand the Clearing Mandate's End-User Exception.

The current end-user exception from the Commission's clearing mandate applies to non-financial institutions and *only certain* types of financial institutions with total assets below a specified level.[33] We believe that this scope is too narrow and unnecessarily burdensome as it fails to cover other types of entities that trade minimally and do not pose risks to the U.S. financial system.

We support a full review of the scope of entities to which the CFTC's clearing mandate applies to determine whether it would be prudent to shift from an asset size-based threshold applicable to only certain financial institutions to a more risk-based threshold. A financial end-user exemption from mandatory clearing based on appropriate risk-based thresholds and risk management practices would right-size the U.S. clearing mandate to capture only those U.S. market participants whose derivatives transactions pose risk to the U.S. and global financial systems.

[32] ISDA understands that the Part 190 Subcommittee of the American Bar Association Business Law Section is submitting model Part 190 Rules to the CFTC in connection with Project KISS. ISDA generally supports the proposed model rules, but reserves the right to comment on specific elements of the proposal during any public comment process.
[33] Specifically, apart from non-financial entities, the exemption applies to banks, savings associations, farm credit system institutions, and credit unions with total assets of $10 billion or less.

ii. Ensure that U.S. Clearing Mandates Are Aligned and Coordinated with Non-U.S. Clearing Mandates.

Harmonization is crucial to effective and efficient implementation of all OTC derivatives reforms, especially centralized clearing. Yet, the CFTC's current clearing mandate differs in entity scope from the clearing mandates in other jurisdictions and is notably broader than clearing mandates in certain Asia-Pacific ("**APAC**") jurisdictions. This disparity unnecessarily impairs U.S. market participants' ability to effectively compete in global financial markets. To address this issue, we believe the CFTC should consider whether it would be appropriate to exempt U.S. swap dealers (**"SDs"**) from mandatory clearing when they transact certain OTC derivatives with non-U.S. market participants that are not subject to mandatory clearing under their local clearing mandates.

A more detailed discussion of these issues is available at Appendix B, Attachment 4.

iii. Continue to Implement Regulations for Global CCP Standards for CCP Resilience, Recovery, and Resolution.

While CCPs reduce systemic risks in the markets they serve, CCPs also warehouse or concentrate risks that, if not properly managed in times of significant market volatility, could inflict major financial damage on clearing members, trading venues and other market participants. For these reasons, the CFTC (together with other regulators and policymakers) must continue to consider issues related to CCP resilience during periods of market stress, the development of robust CCP recovery and risk management frameworks, and CCP resolution in the event that CCP recovery is unsuccessful or would jeopardize financial stability.

We urge the CFTC to implement key guidance on these issues from CPMI-IOSCO and the Financial Stability Board[34] in order to ensure the continued safety and efficiency of U.S. cleared OTC derivatives markets. Implementation of global standards in these areas is also crucial to equivalence determinations for U.S.-based CCPs operating globally and to preventing competitive disadvantages (including treatment of collateral) among CCPs operating in different jurisdictions.

More detailed discussions of these issues are available at Appendix B, Attachments 5, 6 and 7.

---

[34] *See* CMPI-IOSCO, RECOVERY OF FINANCIAL MARKET INFRASTRUCTURES(revised July 5, 2017), *available at* http://www.bis.org/cpmi/publ/d162.htm; CMPI-IOSCO, RESILIENCE OF CENTRAL COUNTERPARTIES (CCPS): FURTHER GUIDANCE ON THE PFMI (July 5, 2017), *available at* http://www.bis.org/cpmi/publ/d163.htm; FSB, GUIDANCE ON CENTRAL COUNTERPARTY RESOLUTION AND RESOLUTION PLANNING (July 5, 2017), *available at* http://www.fsb.org/2017/07/guidance-on-central-counterparty-resolution-and-resolution-planning-2/.

iv. Increase Transparency of CCP Governance and Risk Management Procedures.

It is imperative that clearing participants (*i.e.,* clearing members and their clients) have transparent and predictable information regarding a CCP's governance and risk management procedures so that they can measure, manage and control their exposures to the CCP. Additional transparency is particularly necessary with regard to:

- Each product that a CCP clears, on an ongoing basis:
  - The CCP's analysis of such product's suitability for clearing; and
  - The CCP's ability to risk manage such product, including in times of market stress;
- Governance with regard to how a CCP would exercise discretionary powers in an emergency;
- A CCP's margin methodology;
- Results of capital and liquidity stress testing;
- Coverage calculations (including results of backtesting and sensitivity analysis); and
- Calculation of a CCP's "skin-in-the-game."

A more detailed discussion of these issues is available at Appendix B, Attachment 7 (with respect to a CCP's margin methodology in particular, see "CCP Transparency on Margin Framework").

v. Increase Transparency of CCP Recovery Plans and Resolution Strategies for Individual CCPs.

It is also imperative that clearing participants have transparent and predictable information regarding expected recovery and resolution strategies so that they can measure, manage and control their potential exposures in these circumstances. At an absolute minimum, clearing participants must understand tools that would be utilized by a CCP in recovery or a resolution authority in resolution and any restrictions on the use of such tools, resources available to a CCP in recovery and to a resolution authority in resolution and any restrictions on the use of such resources, triggers for resolution (including whether such triggers are discretionary or automatic) and any separate level of regulatory intervention and/or coordination among regulators and resolution authorities. Clearing participants should also have access to information regarding resolvability assessments for CCPs. We recommend that the CFTC, in conjunction with CCPs, take steps to increase the level of transparency and certainty that is made available to CCP members and market participants regarding these issues.

A more detailed discussion of these issues is available at Appendix B, Attachments 5 and 6.

vi. Revise Governance for CCP Rulemaking.

It is also imperative that clearing members play an active role in CCP rulemaking. CCP rules form the legal agreement between the CCPs and their clearing members and are therefore the basis for many of the clearing members' key protections and rights. We believe that registered DCOs should be required to demonstrate consultation with members prior to submitting any new rules or amendments to existing rules for certification under Part 40 of the Commission's rules.

III. Reporting

ISDA strongly supports the Commission's recent initiative to review its swap data reporting rules in order to streamline reporting requirements, right-size the number of data elements necessary to fulfill the Commission's regulatory oversight function, and improve the overall quality of swap data. ISDA looks forward to working with the Commission as it continues to consider these important issues.[35]

A. Recommendations for Streamlining the Reporting Rules

i. Eliminate Reporting Obligations for Void Ab Initio Swaps.

Void ab initio swaps should not be subject to reporting requirements because these transactions never come into existence. Many market participants have built their reporting logic to only capture swaps that come into existence and are not voided. Thus, eliminating this requirement would improve the overall accuracy of reported data.

ii. Eliminate Conflicting Provisions in Swaps Reporting Rules.

We respectfully request that the Commission eliminate potentially conflicting provisions of swaps reporting and recordkeeping rules in order to allow reporting counterparties to better understand their obligations under the Commission's regulations.

One example relates to recent changes to the recordkeeping and accessibility requirements in CFTC Rule 1.31[36] as compared to the existing swaps recordkeeping rule in CFTC Rule 45.2.[37] CFTC Rule 1.31 requires that electronic records related to swaps be *readily accessible* for the duration of the record retention period, which, in most cases, is not less than five years after the

[35] Please see our joint-response with SIFMA to the request for comments to the Division of Market Oversight's *Roadmap to Achieve High Quality Swaps Data* (**"DMO Roadmap"**), *available at* Appendix C, Attachment 1.
[36] *See* 17 C.F.R. § 1.31.
[37] *See* 17 C.F.R. § 45.2.

termination of the swap transaction. However, under CFTC Rule 45.2,[38] SDs and major swap participants (**"MSPs"**) must have *readily accessible* records via real time electronic access throughout the life of the swap and for two years following the swap's final termination, and records must be retrievable within three business days through the remainder of the five year period following final termination of the swap. Reading these two provisions together, it is unclear to reporting counterparties whether swap records must be *readily accessible* for two years after the termination of the swap transaction or the entire record retention period.

iii. Clarify How Certain Transactions and Events Should be Reported Under the Reporting Rules.

We also recommend that the Commission consider, for purposes of Part 43 and Part 45 reporting, clarifying the appropriate manner in which certain transactions and events must be reported. For example, we recommend that any final rulemaking amending the reporting rules address: (i) packages, bespoke, and complex trades; (ii) the transfer of portfolios (also known as "portfolio take-downs"); (iii) the definitions of Swap Data Repository (**"SDR"**) message types, such as amend, new, and modify; (iv) execution time reporting for lifecycle events;[39] (v) novations, including novation fees; (vi) mixed swaps; (vii) international swaps;[40] (viii) and clear guidance, under Part 45, for reporting of the two primary models for clearing—the "agency model" and the "principal model."[41]

---

[38] *See* 17 C.F.R. § 45.2(e)(1) ("Each record required by this section *or any other section of the CEA* to be kept by a swap execution facility, designated contract market, derivatives clearing organization, swap dealer, or major swap participant shall be readily accessible via real time electronic access by the registrant throughout the life of the swap and for two years following the final termination of the swap, and shall be retrievable by the registrant within three business days through the remainder of the period following final termination of the swap during which it is required to be kept.") (emphasis added).

[39] ISDA supports the inclusion of a separate data field to capture the date and time at which the counterparties agreed to enter into a lifecycle event. We note that ISDA has proposed the data field: "life cycle event timestamp" to the CPMI-IOSCO Harmonisation Group. *See* https://www.iosco.org/library/pubdocs/545/pdf/International%20Swaps%20and%20Derivatives%20Association,%20Inc.%20(ISDA).pdf for more details regarding the proposal.

[40] For a more detailed discussion of the issues related to the reporting of international swaps, please see ISDA's previous requests for no-action relief, *available at* Appendix C, Attachments 2 & 3.

[41] We note that in the CFTC's Technical Specifications Request for Comment issued on December 22, 2015, CFTC staff recognized the issue of reporting principal versus agency model clearing swaps. *See* Draft Technical Specifications for Certain Swap Data Elements (Dec. 22, 2015), *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf.

iv. Extend the Dissemination Delay for the Real-Time Public Reporting of Block Transactions.

We ask that the Commission extend the current dissemination delay for the real-time public reporting of block-size swap transactions in order to allow market participants to appropriately hedge the market risk of block trades during the delay period.

v. Provide Adequate Notice to Market Participants Regarding Changes in a Registrant's Registration Status.

No requirement exists for SDs or MSPs to notify their counterparties of their intent to apply for registration, deregistration or a limited designation determination with the National Futures Association (**"NFA"**) and the CFTC.[42] This is particularly problematic since counterparties may be required to make significant technological changes to their reporting infrastructure within a short period of time following such a change, resulting in added costs and complexities.

Accordingly, we request that the Commission issue a publicly available notice of: (1) a decision to approve an application for registration or deregistration at least 30 days prior to the effective date of registration or deregistration, as applicable; and (2) a decision to approve an application for limited designation at least 60 days prior to the effective date of such designation, especially where the conditions attached to the designation determination are unusually complicated.

Consistent with the comments above, we believe that the NFA SD/MSP registry and the SD/MSP list on the CFTC website should be enhanced to include and identify a change in the designation status and the applicable effective date.

Finally, we ask the Commission to clarify in line with current industry practice[43] that to the extent an entity de-registers or applies for limited designation, it remains the reporting counterparty for life cycle events after its de-registration or limited designation on trades that are live at the time of deregistration or limited designation and for which such entity has acted as the reporting counterparty prior to de-registration or limited designation. Absent such clarity, counterparties will have to temporarily build costly updates to their reporting logic for such live trades. Similarly, if an entity registers, clarification should be provided that the new registration status (including with respect to the reporting party hierarchy) only applies to new trades and events occurring after such registration so that no changes are required for data reports submitted prior to such registration.

---

[42] *See* CFTC Rule 3.33, 17 C.F.R. § 3.33.

[43] *See* ISDA, Dodd-Frank Act – Swap Transaction Reporting Party Requirements, at 10 (Apr. 2, 2015) http://www2.isda.org/attachment/NzUyOA==/CFTC%20Reporting%20Party%20Requirements%20updated%20%20Apr%202%202015_FINALDRAFT_clean.pdf.

vi. Provide Relief from CFTC Rule 43.3(b) for Counterparties Subject to MiFIDII and MiFIR.

CFTC Rule 43.3(b)[44] prohibits the disclosure of swap transaction and pricing data relating to publicly reportable swap transactions prior to the public dissemination of such data by an SDR. Under MiFIDII/MiFIR (effective January 3, 2018), however, investment firms are required to make public, through Approved Publication Arrangements (**"APA"**), post-trade information in relation to financial instruments traded on a trading venue. The timing requirement for such post-trade transparency obligations[45] may require investment firms to report swaps data to an APA prior to the public dissemination of such data by an SDR. Accordingly, we ask that the CFTC issue interpretive guidance clarifying that market participants reporting data under such MiFIDII/MiFIR post-trade transparency obligations would still be deemed compliant with CFTC Rule 43.3(b).

B. Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Reporting

i. Align Data Reporting Elements with CPMI-IOSCO and FSB Recommendations.

Global harmonization should be a key regulatory driver for establishing reporting technical standards, data elements and their definitions. Where appropriate, the CFTC should adopt a framework in which the definition, format, and allowable values of the data elements are consistent with those recommended by CPMI-IOSCO, to promote the harmonization of values that are reportable across multiple jurisdictions. Harmonizing the definition, format and allowable values will reduce compliance costs for global market participants, minimize the complexity of implementation, and facilitate meaningful global aggregation of the data fields that individual authorities deem necessary to meet their obligations.

ii. Streamline Part 45 Creation Data.

We believe that the Commission should have one set of creation data fields, rather than separate Primary Economic Terms (**"PET"**) and confirmation data reporting requirements. Confirmation terms of a swap that are not already part of PET data should not be replicated as part of SDR reporting because such terms generally do not address counterparties' risk exposure and thus do

[44] 17 C.F.R. § 43.3(b).
[45] Specifically, EMIR requires that "post-trade information shall be made available as close to real time as is technically possible and in any case within 15 minutes after execution, for the first three years after go-live, and thereafter, within 5 minutes after execution." The EMIR Requirement is *available at* http://ec.europa.eu/finance/docs/level-2-measures/mifir-rts-02_en.pdf.

not align with the goals of regulatory reporting. A single set of creation data fields would be consistent with regulatory requirements in other jurisdictions (*e.g.*, Canada, the EU, and Singapore) where messaging is simplified by virtue of a single, streamlined set of data fields.

Furthermore, in line with our response to the DMO Roadmap, we believe it would reduce the burden on reporting parties if reporting of Part 45 and Part 43 data could be streamlined, instead of requiring reporting parties to submit three separate messages.

For a more detailed discussion of these issues, please see the ISDA-SIFMA joint response to the DMO Roadmap and ISDA's response to the CFTC's Review of Swap Data Recordkeeping and Reporting Requirements available at Appendix C, Attachments 1 and 4.

iii. Eliminate "Any Other Terms" PET Data Field.

Appendix 1 to Part 45 of the Commission regulations requires counterparties to report "any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap" as a part of their PET reporting obligations. The Commission further directs counterparties to "use as many fields as required" in order to report each potential term.[46] As we have noted in our prior submissions, this reporting requirement poses many challenges for reporting entities primarily because different products result in differences in the set of terms that parties agree on.

This reporting requirement is equally problematic for SDRs since SDRs require specific technical requirements and field specifications to support additional values and, therefore, cannot adequately plan for a catch-all bucket of potential values. Without such SDR build, a reporting counterparty may be unable to report a term that may meet this requirement.

To this end, ISDA supports the Commission's efforts to establish a clearly defined, enumerated set of data fields. We believe that streamlining the number of data elements to meet the Commission's priority use-cases, and providing clear and globally consistent guidance on what is expected to be reported for each data element is fundamental to improving data quality. For a more detailed discussion of these issues, please see ISDA's response to the CFTC's Review of Swap Data Recordkeeping and Reporting Requirements, available at Appendix C, Attachment 4.

iv. Clarify that Post-Priced Swaps Are Reportable Only When All PET Details Are Determined.

Reporting a post-priced swap before the price, size, and/or other characteristics of the swap are determined is a challenge as not all economic details of the trade are known until a later point. Earlier reporting may expose the investment strategy of institutional customers that use swaps to perform global asset allocation strategies to the entire marketplace. Premature disclosure of such

[46] *See* Appendix 1 to Part 45 of the Commission's Regulations.

trades could have a number of adverse impacts. For example, other market participants could trade ahead of the client's order, as well as the SD's related hedging activity. The effect of this would be to add a material cost to trading a swap as compared to cash, listed options or futures. This higher cost would be imposed on long term investor types—money managers, insurance companies, pension plans, among others—and only benefit market participants seeking to trade on what should be confidential information.

Accordingly, we ask that the Commission clarify that post-priced swaps should be deemed "executed" and thus reportable only when all PET details (which include price and size) are finally determined. For a more detailed discussion of these issues please see our letters, available at Appendix C, Attachments 5 and 6.

v. Reconsider the Necessity of SDR Reconciliation.

ISDA respectfully requests that the Commission re-evaluate the requirement to provide verification of swap data sent to an SDR as currently implemented via SDR policies and procedures in light of other CFTC requirements, including confirmation, swap trading relationship documentation, and material economic term reconciliation. These other CFTC requirements are already aimed at identifying and resolving data discrepancies. For example, any discrepancies detected during the confirmation process already place an obligation on the reporting counterparty to correct data reported to the SDR. Reporting counterparties also have controls and best practices in place to help ensure that reporting obligations are satisfied. Moreover, imposing an additional verification requirement is not only unnecessary but is also unduly burdensome, particularly for end-users that may not have SDR connectivity. For these reasons, ISDA believes that the Commission should reconsider the necessity of SDR verification requirements given that other CFTC rules already achieve the same policy goals.

vi. Eliminate Large Trader Reporting Rules.

CFTC Rule 20.9 provides in relevant part: "[t]he [Large Trader Reporting Rules] shall become ineffective and unenforceable upon a Commission finding that, through the issuance of an order, operating swap data repositories 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."[47] It is time for the Commission to eliminate its Large Trader Reporting rules, which it intended to do all along, and to focus its resources on improving SDR data. Instead of spending scarce resources on running two swap reporting programs, the Commission should allow Part 20 to sunset (per its terms) and should focus its swap data collection efforts on optimizing the ability of the SDR reporting program to provide the Commission with quality and reliable data.

[47] 17 C.F.R. § 20.9.

vii. Improve Ownership and Control Reporting Rules.

Our general comments on the CFTC's Ownership and Control Reporting (**"OCR"**) rules are in line with the comments and recommendations that have been provided to the CFTC by other trade groups, including the Futures Industry Association (**"FIA"**). The key unresolved issues with the OCR rules relate to the fact that the scope of data required and the timeframes to report under the new OCR rule are unworkable, and ISDA recommends that the Commission adopt amendments to the OCR rules that rationalize both the amount of data that is required to be submitted and the timeframes for submitting that data.

While we appreciate the time-limited no-action relief issued by CFTC staff,[48] we ask the Commission to issue permanent relief through rulemaking. Specifically, we believe the CFTC should adopt the following recommendations:

- Redesign Forms 102A, 102B, and 102S to limit the data that FCMs are required to report about their customers and that swap dealers are required to report about their counterparties.
- Delete the requirement to identify the natural person that is the "Trading Account Controller" for a given account. Requiring this data field fails to recognize the complex nature of trading businesses and trading desks, and it also ignores the efficiencies that the CFTC and firms would gain by providing a single point of contact for CFTC inquiries.
- Increase the volume level for reportable "volume threshold accounts", which is currently set at 50 contracts per day (regardless of end-of-day position) and captures too many traders.

We therefore encourage the Commission to amend the OCR rules to resolve these issues and to create a reporting program that meets the Commission's needs without unduly burdening market participants.

IV. Registration

A. Recommendations for Streamlining the Rules Related to Registration

i. Review and Eliminate, as Necessary, External Business Conduct Standards Applicable to SDs and MSPs.

Some business conduct rules inappropriately transform the nature of the relationship between SDs and their counterparties, create confusion regarding their respective responsibilities, and increase compliance costs. The rules include requirements, not mandated by Dodd-Frank, for an SD to: "know its counterparty"; protect confidential counterparty information; provide pre-trade

[48] CFTC Letter No. 17-45 (Sept. 25, 2017), *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-45.pdf.

mid-market mark; and provide a scenario analysis. In essence, the rules require SDs to act as advisors to their counterparties and impose a full range of retail customer protection requirements, whereas the swap markets are almost entirely institutional. Additionally, in many instances, these requirements, especially the requirements to provide a pre-trade mid-market mark and scenario analysis, are not requested by clients. At a minimum, we believe that SDs should only be required to provide pre-trade mid-market marks upon counterparties' request.

Separately, many standards included in the rules are subjective or unclear, or are adopted from industry best practices. By design, best practices presume flexible compliance. Codified best practices subject counterparties to serious legal consequences, such as enforcement actions, private right of actions or rescission actions based on ambiguous legal standards.

Thus, we ask that the Commission revisit its business conduct 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.

ii. Allow Affiliated SDs to Submit a Consolidated Annual Compliance Report and Maintain a Consolidated Risk-Management Program.

CFTC Rule 3.3[49] requires SDs to submit a compliance report to the CFTC on an annual basis (**"Annual Compliance Report"**), and CFTC Rule 23.600[50] requires SDs to maintain a Risk Management Program (**"RMP"**). In many cases, multiple affiliated entities are registered with the Commission as SDs. These entities oftentimes share common compliance and risk-management programs. As a result, these affiliated entities are required to submit Annual Compliance Reports to the Commission and maintain separate RMPs that, oftentimes, contain the same information.

Submitting multiple reports to the Commission that contain the same information is unnecessary, costly and inefficient. Similarly, requiring affiliated entities to establish separate RMPs that contain the same risk management policies and procedures imposes regulatory burdens without any commensurate risk-reducing benefit. Accordingly, we believe that the Commission should allow affiliated SDs to: (1) submit a single, consolidated Annual Compliance Report that is supplemented by entity-level specific information, where appropriate; and (2) maintain a single RMP for multiple SDs within the same corporate group.

[49] 17 C.F.R. § 3.3.
[50] 17 C.F.R. § 23.600.

iii. Eliminate Duplicative Portfolio Reconciliation and Dispute Resolution Requirements.

We ask the Commission to eliminate CFTC Rule 23.502[51] because the Commission's uncleared margin rules already provide a framework for portfolio reconciliation and dispute resolution. There is no policy reason to retain a separate duplicative requirement in CFTC Rule 23.502. Duplication increases regulatory burdens and operational and compliance costs, without achieving any risk-reducing benefits. If the Commission wishes to retain portions of CFTC Rule 23.502, the Commission should only retain the portions of the rule related to valuation reporting (*i.e.*, CFTC Rule 23.502(c)) and should adopt a more principles-based approach in setting out those requirements.

iv. Streamline Daily Trading Recordkeeping Requirements.

CFTC Rule 23.202 requires SDs and MSPs, among other things, to maintain daily trading records of all swaps and related transactions that include all necessary information that would allow for a comprehensive and accurate trade reconstruction of each swap. ISDA believes that the current requirements are overly broad, prescriptive, and costly as they require firms to filter through thousands of emails, chats, instant messages, text messages, and voice files in order to associate relevant records with a particular transaction. Accordingly, ISDA asks the Commission to issue clear guidance for trade reconstruction requirements that would require firms to only maintain the following records: (1) the Master Agreement; (2) the acknowledgement; (3) the confirmation; and (4) any amendments, terminations, or novations of the relevant transaction. ISDA believes that only the aforementioned records are necessary and relevant to trade reconstruction.

v. Reconsider the Necessity of Risk Exposure Reports and Monthly Risk Metric Reporting.

CFTC Rule 23.600(c)(2) requires SDs and MSPs to submit risk exposure reports to the Commission on a quarterly basis and upon detection of a material change in the SD's or MSP's risk exposure. The NFA has also recently adopted a separate set of monthly risk metric reporting requirements for SDs and MSPs.[52] Many SDs, however, already report extensive information regarding risk exposures to their prudential regulators. Thus, we ask the Commission to reconsider the necessity of both the CFTC's risk exposure report requirements and NFA's monthly risk metric reporting requirements in light of prudential requirements.

---

[51] 17 C.F.R. § 23.502.

[52] *See Monthly Risk Data Reporting Requirements for Swap Dealers,* NFA Notice I-17-19 (May 30, 2017), *available at* https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4817. We note that the first Monthly Risk Data Report will be due on January 31, 2018.

B. Recommendations for Improving the CFTC's Oversight Responsibilities with Respect to Rules Related to Registration

i. *Eliminate the Requirement that Chief Compliance Officers Must Sign Off on Volcker Compliance.*

The Commission's Volcker rule requires SDs to incorporate their Volcker compliance program requirements[53] into the Commission's Chief Compliance Officer (**"CCO"**) duties and Annual Compliance Report requirements under CFTC Rule 3.3.[54] Further, CFTC staff has issued a staff advisory[55] expanding this requirement to include futures commission merchants (**"FCMs"**) that are banking entities. The practical effect of this requirement is that firms are now expected to establish policies and procedures related to compliance with the Volcker rule under both the CCO compliance regime (CFTC Rule 3.3)[56] and the Volcker compliance regime (CFTC Rule 75.20).[57] Duplicative Volcker compliance obligations imposed at the firm-wide level and the registrant level (which is only a part of the firm) lead to increased compliance costs and decreased efficiencies. Accordingly, we request that the Commission issue guidance stating that the Annual Compliance Report need not include or address a registrant's compliance with respect to the Volcker rule.

For a more detailed discussion of these issues, please see our CCO Comment Letter, available at Appendix D, Attachment 1.

ii. *Permit Substituted Compliance with Prudential Regulators for Risk Management Requirements.*

Currently, many firms are subject to both the CFTC and the prudential regulators' risk-management requirements. To be effective, risk management rules should be implemented on an integrated basis by a consistent set of supervisory standards. Inconsistencies in supervisory standards create inefficiency, confusion, and opportunities for control failures. To avoid duplicity and minimize compliance costs, the CFTC should permit U.S. and non-U.S. SDs that are subjected to consolidated risk management supervision and regulation to comply with the CFTC's risk management practices on a substituted compliance basis through compliance with the risk management requirements of their prudential regulator.

---

[53] *See* Subpart D of Part 75 of the Commission's Regulations.
[54] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Final Rule, 79 Fed. Reg. 5808, 6020 n. 2521 (Jan. 31, 2014).
[55] DSIO Staff Advisory (not available on the CFTC website, but *available at* https://www.bridgingtheweek.com/ckfinder/userfiles/files/DSIO%20CCO%20Volcker%20Advisory.pdf).
[56] 17 C.F.R. § 3.3.
[57] 17 C.F.R. § 75.20.

iii. Treat Compo Equity Swaps as Security-Based Swaps.

ISDA respectfully requests that the Commission treat compo equity swaps as security-based swaps rather than mixed swaps. Treating these transactions as security-based swaps is appropriate because many market participants view the business of transacting in foreign equity total return swaps principally as an equity business, regardless of the method by which the foreign currency is translated into U.S. dollars for purposes of making payments under such swaps. Additionally, such treatment would avoid duplicative regulation, thereby decreasing costs.

V. Other Areas (Miscellaneous)

A. Margin[58]

i. Amend T+1 Settlement Requirements to Ensure that U.S. Firms Are Not Competitively Disadvantaged.

The U.S. margin rules require the calculation and settlement of both initial margin (**"IM"**) and variation margin (**"VM"**) within one business day (**"T+1"**).[59] This requirement is more stringent than in other jurisdictions and puts U.S. entities at a disadvantage with: (i) parties in different time zones; and (ii) smaller counterparties (including U.S. counterparties) that lack the capability to settle on T+1. The T+1 settlement requirement is particularly punitive to U.S. entities (*e.g.*, pension funds and other asset managers) that may not have the operational means to transfer certain eligible collateral within that timeframe, placing them at a competitive disadvantage as compared to both non-U.S. entities and to larger entities that have capabilities to meet the T+1 requirement. For parties in foreign jurisdictions or those intending to settle collateral denominated in certain foreign currencies (*e.g.,* AUD, Japanese Government Bonds), settlement may be impossible within T+1, thus limiting the scope of eligible collateral that can actually be used.

ISDA submits that in the near term, some flexibility should be afforded to U.S. Covered Swap Entities (**"CSEs"**) to alleviate both cases where the collateral is foreign and where the counterparty is foreign while the industry continues to seek solutions to facilitate timely settlement. Such flexibility would ease the challenge of settling between international time zones – in particular between the U.S. and Asia – and address limitations on the ability to settle some non-USD collateral.

[58] Should the Commission decide to revise its margin rules, we ask that the Commission coordinate with the prudential regulators in order to ensure that any improvements to the margin rules are implemented concurrently by both regulators. Absent such coordination, U.S. banks would be disadvantaged.
[59] 12 C.F.R. §§ 237.3(c), 237.4(b); 17 C.F.R. §§ 23.152(a), 23.153(a).

While we would appreciate any flexibility afforded by the Commission with respect to T+1 settlement timing, we also observe that certain types of collateral and certain counterparties will not be able to settle even within a less restrictive interpretation of the T+1 timeframe. Setting these artificial timeframes will limit the scope of eligible collateral for some party pairings, making it virtually impossible to trade with U.S. counterparties, which in turn will cause market fragmentation. Moreover, this challenge will be exacerbated in the coming years as more small counterparties come into scope for IM requirements.

We therefore request that the CFTC and prudential regulators harmonize their settlement timeframe with other jurisdictions by requiring settlement by T+1, where practicable, and otherwise allowing settlement by T+2. In the meantime, we ask that the Commission allow for a flexible approach to compliance with the T+1 settlement deadline which takes into consideration the legitimate challenges associated with settlement with foreign counterparties and foreign-denominated collateral.

ii. Allow for the Use of a Broad Product Set for Portfolio Margining.

In order to harmonize the product scope for non-cleared margin requirements within the U.S. and globally, the CFTC should allow use of a "broad product set" that permits portfolio margining of IM with other non-cleared derivatives that are either excluded from the CFTC's oversight (*i.e.,* security-based swaps) or which are subject to margin requirements in other jurisdictions (*i.e.,* equity options).

IM calculations are determined based on a specific product set defined by each relevant U.S. financial regulator and each foreign regulator. The use of these jurisdiction-specific product sets for IM calculations forces parties subject to the margin rules of multiple jurisdictions to perform separate calculations in order to use the highest calculation for their margin call to ensure compliance with all applicable regulations. A broad product set approach allows all trades under a netting agreement to be included in the portfolio on which margin is calculated and reduces the number of calculations that must be made among jurisdictions. The ability to perform a single, global calculation would reduce operational complexity, as well as the cost of implementation and disputes that may arise from disparate treatment of product sets.

While we appreciate No-Action Letter No. 16-71 issued by Commission staff, which allows for the inclusion of security-based swaps in the product set used for IM calculations, we request that CFTC staff expand such relief to include a broad product set comprised of all transactions allowed for inclusion in the netting sets of the applicable margin regulations for both parties. We note that certain jurisdictions, such as Japan and the EU, allow for the inclusion of OTC derivatives products that are out-of-scope or exempt under their regulations for purposes of margin calculation. We ask that the CFTC align its requirements with these jurisdictions.

For a more detailed discussion on these issues, please see ISDA letters to the U.S. regulators on February 12, 2016 and May 15, 2015, available at Appendix E, Attachments 1 and 2.

iii. Exempt Inter-Affiliate Swaps from Initial Margin.

Inter-affiliate swaps should be exempt from IM, so long as they are part of a centralized risk management program and remain subject to variation margin requirements. Under the CFTC margin rules, a swap dealer is relieved from collection of IM except when, among other things, an affiliate is located in a jurisdiction that the CFTC has not found eligible for substituted compliance with regard to its margin requirements. However, firms are unable to rely on the exemption since substituted compliance determinations have not yet been issued by the Commission.

In a recent survey of G14 firms conducted by ISDA, 11 of the firms are posting inter-affiliate IM under U.S. margin rules at a combined total of over $29 billion. This hinders the ability of firms to provide liquidity to clients as the infrastructure build for an affiliate to post IM is substantial for some dealers, and the amount of inter-affiliate IM they must collect and segregate exceeds what they collect from third parties. Removing this condition will ameliorate these concerns. Separately, we note that in its final rules, the Commission did not consider these costs in its cost-benefit analysis.

iv. Eliminate the Disparate Treatment of Liquidation Periods for Margin Calculations.

One of the key determinants in the calculation of margin for futures and swaps is the "minimum liquidation period." The CFTC's margin rules require a one-day liquidation period for all futures contracts, a five-day liquidation period for cleared financial swaps,[60] and a 10-day liquidation time for all uncleared swaps.[61]

The minimum liquidation periods should be revised to accurately reflect the liquidity profile of the underlying instruments and should not be arbitrarily based on the type of transaction (*i.e.*, futures contract, cleared swap, or uncleared swap). While the type of transaction certainly affects the liquidity profile, other factors, including the underlying instrument and the specific terms of the product (*e.g.*, optionality and tenor) should also be considered when setting margin period of

---

[60] *See* Derivatives Clearing Organization General Provisions and Core Principles, 76 Fed. Reg. 69334, 69438 (Nov. 8, 2011) *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2011-27536a.pdf.
[61] *See* U.S. Commodity Futures Trading Commission, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants: Final Rule, 81 Fed. Reg. 636, 656-657 (Jan. 6, 2016) *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2015-32320a.pdf.

risk (**"MPOR"**) for a particular product. This means that the MPOR for transactions based on the same underlying instruments should be less divergent than under the current CFTC rules.

Relatedly, the CFTC should analyze the appropriateness of divergent margin requirements for cleared versus uncleared swaps. In particular, the CFTC, along with the SEC and U.S. prudential regulators, should reexamine the IM regime for uncleared swaps to ensure that it is appropriately risk-sensitive. The CFTC should review historical market data, including pre-Dodd-Frank data, to determine the appropriate and accurate level of risk-sensitive IM. ISDA believes that tailoring IM requirements for uncleared swaps to risk strikes the proper balance between reducing regulatory burdens and safeguarding against systemic risk.

v. Change Certain Thresholds in the Margin Rules.

Certain thresholds established under the margin requirements are too low and therefore place an unnecessary burden on smaller market participants who do not pose the type of systemic risk contemplated by the margin rules. To reduce the unnecessary regulatory burden on smaller firms, we recommend the following changes to certain margin rule thresholds:

- Increase the $8 billion material swap exposure threshold for IM that is scheduled to take effect in 2020 to $100 billion;
- Exclude deliverable FX forwards/swaps from the material swap exposure calculation; and
- Increase the threshold for posting of IM from $50M to $100M.

By adjusting these thresholds, the margin rules will strike the proper balance between reducing regulatory burdens and safeguarding against systemic risk.

vi. Provide a Grace Period for Custodial Onboarding.

In order to comply with the obligation to segregate collateral collected to satisfy IM requirements, entities which exceed the aggregate average notional amount threshold in a given year must on-board the custodian used by each of their counterparties. The process for a client to establish a custodial account for each of the dealers it transacts with is both costly and time-consuming. Such investment of resources will be wasted if the IM calculated between a pair of parties never exceeds the $50 million threshold. This is expected to be the case for a significant number of parties that come into scope for the IM requirements on September 1, 2020.

To prevent this unnecessary burden and diversion of resources during a period for which a relatively large number of parties are expected to come into scope for IM, we request that the Commission provide for a grace period of 6 months to fully achieve the bilateral exchange of IM

from the first day on which the $50 million threshold is breached. This would allow counterparties to focus on completing the documentation necessary for exchanging IM.

vii. Align the Scope of Eligible Collateral Across Jurisdictions.

CFTC Rule 23.156 provides that equity securities that are in an index of liquid and readily marketable equities as determined by the Commission may be used as eligible collateral.[62] We suggest that the Commission should determine that any main index approved as eligible collateral under the EMIR Regulatory Technical Standards[63] (**"RTS"**) is a similar index of liquidity and readily marketable equity securities for purposes of the CFTC margin rule, and thus can be used as eligible collateral. This would reduce compliance burdens and avoid the need for maintaining a list of additional securities approved by the CFTC. Alternatively, the Commission should consider issuing a set of general criteria for trading volume which market participants can use to determine the eligibility of a particular index and the equities in that index. This would promote harmonization of eligible equity securities across regimes.

viii. Clarify that the Margin Requirements Do Not Apply to Legacy Swaps that are Amended Due to Regulatory Requirements.

We seek clarification from the Commission that legacy swaps that are amended on the basis of a regulatory action or global reform agenda would not be considered new swaps for purposes of the CFTC margin rules and any other rules promulgated under Title VII. For example, if market participants were to amend swaps referencing LIBOR and other IBORs to add fallbacks or transition to alternative rates in response to global benchmark reform efforts led by the Financial Stability Board, the amended LIBOR-linked swaps should not transform into new swaps. These contracts would have been amended pursuant to a regulatory agenda, and not due to counterparties' voluntary assumption of risk. Bringing these contracts within the scope of the margin rules would create significant funding costs for market participants.

ix. Support an Evidence-Based Approach to the Oversight of SIMM.

The CFTC, in coordination with the NFA, has granted approval to dealers which became subject to its regulatory IM requirements as of September 1, 2016 to utilize the ISDA Standard Initial Margin Model (**"SIMM"**). These Phase 1 entities are using SIMM globally to calculate their IM. In accordance with the CFTC's margin requirements, ISDA maintains SIMM in compliance with the requirements for an IM model, including annual recalibration, backtesting and benchmarking, as well as quarterly industry monitoring to ensure SIMM levels adequately cover risk and otherwise address substantive shortfalls through model changes. The ongoing monitoring of

---

[62] CFTC Rule 23.156(a)(viii)(A), 17 C.F.R. § 23.156(a)(viii)(A).
[63] The EMIR RTS is *available at* https://www.esma.europa.eu/press-news/esma-news/esma-updates-crr-standard-main-indices-and-recognised-exchanges.

SIMM by its users and the collection, analysis and redress of such data by ISDA is an efficient, evidence-based approach to determining whether any changes are necessary to maintain a regulatory-compliant SIMM.

As SIMM is designed and maintained as a global model, any changes to SIMM by regulators in a single jurisdiction must eventually be approved by global regulators. As such, any changes to SIMM should be based on an analysis which demonstrates that the relevant risk is materially inadequate based on the overall SIMM calculation for a diversified portfolio among SIMM users (*i.e.,* an evidence-based approach), in accordance with the principles behind SIMM. Backtesting and monitoring of the SIMM, both in coordination with ISDA and at an individual firm level, provides opportunities to continually reassess SIMM and make necessary changes to ensure the IM calculation produced by SIMM is appropriate. Therefore, we encourage the CFTC to support this evidence-based approach to its oversight of SIMM and collaborate with global regulators to establish a coordinated approach to regulatory monitoring of SIMM to ensure its continued acceptance on a global scale, while mitigating the burdens placed on its users.

x. Provide for Additional Exemptions to the Margin Rules.

We believe that the CFTC should provide for more exemptions to the margin rules in the cases of: (1) Securitization Special Purpose Vehicles (**"SPVs"**); (2) Seeded Funds; and (3) Trading Entities:

(1) Securitization SPVs

Since these entities are not regulated financial institutions, securitization SPVs should be afforded special treatment under the margin rules which would allow them to margin swaps based on the credit terms and collateral pools that are in place for the securitization. These entities typically enter into swaps to hedge actual and realized risks related to an underlying commercial business or investment. There is no rationale or policy basis to treat these entities as financial entities for margin purposes, and other jurisdictions do not generally require securitization SPVs to post margin.

(2) Seeded Funds

The IM threshold for financial end-users captures funds that are affiliates of dealers solely because the dealer has participated in the seeding of the fund. These funds are legally and operationally segregated from the dealer and, therefore, should not fall within the definition of a financial end-user. Additionally, these funds should not be subject to the IM rules.

(3) Trading Entities

As drafted, the definition of financial end-user potentially covers any entity that invests in loans or securities which could include, for example, holding companies of industrial companies. We believe that entities that are long-term holders of specific assets, such as industrial holding companies, should not be treated as financial end-users. In addition, the CFTC should consider whether other entities, such as various governmental entities and sovereign wealth funds, regional development banks, and municipalities, should also be treated as financial entities and we encourage the Commission to seek public comment on this issue.

xi. Harmonize Margin Rules for Non-Netting Jurisdictions.

The requirement under the margin rules for a non-netting counterparty to post gross variation margin has created significant challenges for the execution of VM Credit Support Annexes and the implementation of settlement of collateral. Many other jurisdictions have either adopted *de minimis* exemptions from posting margin for counterparties located in a non-netting jurisdiction (*e.g.*, the EU provides an overall cap of 2.5 percent of OTC derivatives business) or have exempted such transactions entirely from IM and VM requirements (*e.g.,* Japan, South Korea, Hong Kong, Singapore and Australia). U.S. regulators should harmonize their requirements with global requirements by either exempting transactions against non-netting counterparties from the non-cleared margin requirements or adopting a similar *de minimis* exemption for such transactions.

xii. Ensure No-Action Relief is Coordinated with Other Agencies.

ISDA appreciates CFTC no-action relief to apply a “minimum transfer amount” to the IM and VM amounts entered into with “separately managed accounts” subject to certain conditions. However, to fully maximize the value of the relief, it would be helpful if the CFTC – to the extent possible – coordinated with other regulators to issue similar relief for those swap dealers that are subject to the margin requirements adopted by the prudential regulators and/or the European Supervisory Authorities. Absence of the similar relief from other regulators limits the utility of the CFTC no-action relief.

B. Capital and Liquidity

We support the Commission’s commitment to finding the right balance between regulatory capital and liquidity, and firms’ ability to provide liquidity in derivatives markets—especially in instances where those regulations stand in contradiction with G-20 commitments to promote centralized clearing of standardized derivatives. We agree with Chairman Giancarlo that the Supplementary Leverage Ratio (**“SLR”**):

> *"...was designed to reduce the risk of bank balance sheet activity (namely lending).Yet it is being applied to an entirely different activity—swaps clearing—designed itself to steer risk away from bank balance sheets. Applying the SLR to clearing customer margin reflects a flawed understanding of central counterparty clearing ... Applying a capital charge against that customer margin continues to treat FCMs as having retained the exposure."*[64]

We look forward to working with the Commission as it finalizes its proposed capital requirements[65] for swap dealers and major swap participants. Below we provide specific recommendations for the Commission to consider:

i. *Harmonize Model-Approval Decisions.*

We ask the CFTC to undertake a streamlined process for model approval that leverages approval by other regulators. Models approved by the U.S. prudential regulators, the SEC, and foreign regulators in Basel Committee on Banking Supervision (**"BCBS"**) jurisdictions should be recognized, provided that the relevant regulator has the authority to undertake periodic assessments and informs other regulators of such assessments.

For a more detailed discussion of these issues, please see our comment letter available at Appendix E, Attachment 3.

ii. *Harmonize with SEC Security-Based Swap Dealer Capital Rules, Prudential Regulators' Capital and Liquidity Rules and Related Recordkeeping and Reporting Requirements.*

In order to reduce regulatory burdens and to ensure that SDs and SBSDs are not subject to competing requirements, the CFTC and SEC should harmonize their capital requirements. We also recommend that the SEC and CFTC coordinate in addressing industry comments in their final capital rules to avoid duplicative regulation of covered entities that are dually registered with both agencies. At a minimum, the CFTC should re-propose the Net Liquid Assets Approach in line with the final SEC requirements. In addition, for SDs not subject to the capital and liquidity requirements of the U.S. prudential regulators but who nonetheless elect to be governed by these standards (*i.e.*, the proposed Bank-Based Capital Approach), the CFTC should allow SDs to use U.S. prudential regulators' risk-weighted assets methodologies without any

---

[64] Remarks of Acting Chairman J. Christopher Giancarlo before International Swaps and Derivatives Association 32nd Annual Meeting, Lisbon, Portugal, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-22

[65] *Capital Requirements of Swap Dealers and Major Swap Participants; Notice of Proposed Rulemaking*, 81 Fed. Reg. 91252 (Dec. 16, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-29368a.pdf.

additional modification. Moreover, the CFTC should conform its proposed recordkeeping and reporting requirements under Part 23.105 to those required under existing regulations, whether of the U.S. prudential regulators, foreign prudential regulators, the SEC or the CFTC itself.

For a more detailed discussion of these issues, please see our comment letter available at Appendix E, Attachment 3.

iii. Reconsider Treatment of Initial Margin.

We believe that the proposed requirement for a covered entity to hold capital against 8% of aggregate IM is inconsistent with principles of prudential regulation. Aggregate IM does not account for the offset in market risk between different counterparties. Requiring covered entities to hold capital based on such a calculation may limit the number of counterparties with whom they transact, which could in turn result in significant exposure concentrations among a few large counterparties (and also decreases in liquidity to certain segments of market participants). In addition, the hypothetical IM calculation for this purpose would result in considerable additional operational burden and should be reconsidered. The CFTC should collaborate with prudential regulators to remediate this inequitable outcome.

If the CFTC and the prudential regulators decide to retain these capital requirements, we ask that the Commission exempt its application to cleared swaps. Applying the same capital requirements to both cleared and uncleared swaps ignores the risk mitigation aspects of derivatives clearing and does not advance the 2009 G-20 commitment to central clearing.

For a more detailed discussion of these issues, please see our comment letter available at Appendix E, Attachment 3.

iv. Separate Capital and Liquidity Measurements.

We believe that each SD, regardless of the approach it uses to calculate capital (either the Risk Weighted Assets approach or the Liquid Assets Capital approach) should be able to elect either of the two proposed methods to compute and meet its liquidity requirement. Both measures of liquidity are intended to obtain the same objective, and there is no inherent tie between the method by which a firm calculates its liquidity requirement and the method by which it calculates its minimum capital requirement.

C. Cross-Border Swaps Regulation

i. Limit the Application of the CFTC Rules to Only Cross-Border Swap Activities that Truly Have a Direct and Significant Effect on U.S. Commerce.

Section 2(i) of the Commodity Exchange Act stipulates that Title VII of Dodd-Frank should only apply to activities outside the United States if those activities have a "direct and significant connection with activities in, or effect on," U.S. commerce.[66] However, the CFTC's current approach to regulating cross-border transactions and activities goes well beyond the statutory provision to capture the overseas business of U.S.-based entities. Accordingly, we ask the Commission to provide clarity around the cross-border scope of its regulations and ensure that such scope is appropriately balanced within the statutory limitations of Section 2(i). At a minimum, the Commission should codify its No-Action Relief[67] by withdrawing CFTC staff advisory 13-69 and by clarifying that swap transactions between non-U.S. SDs and non-U.S. person counterparties (that are neither guaranteed affiliates nor conduit affiliates of U.S. persons) do *not* have a direct and significant connection with activities in, or effect on, commerce of the United States merely because such swaps were negotiated by an employee that happened to be physically located in the United States (**"ANE Transactions"**) and that therefore the provisions of Title VII of the Dodd-Frank Act and regulations promulgated thereunder do not apply to such swaps.

To ensure deep, robust global markets, the Commission should allow for the recognition of similar regulatory regimes through so-called "substituted compliance", "comparability", or "equivalence" determinations, which holistically focus on the outcomes achieved through foreign regulatory regimes and foreign regulators' market supervision capabilities. ISDA believes that, in light of MiFID II trading obligations, the CFTC should prioritize substituted compliance discussions.

A lack of recognition of foreign regulatory regimes requires U.S. and U.S.-affiliated firms to build-out duplicative (and occasionally conflicting) compliance systems for trading, reporting, recordkeeping and other requirements in overlapping jurisdictions. Needless to say, a duplicative compliance regime considerably increases operational costs, decreases the competitiveness of U.S. entities in relation to other foreign entities and leads to market fragmentation and diminished liquidity as foreign entities are trying to avoid trading with U.S. counterparties for fear of being captured by the U.S. regulatory regime.

---

[66] 7 U.S.C. § 2(i).
[67] CFTC Letter No. 17-36, *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-36.pdf .

ISDA recently published a White Paper that proposes a framework for regulators to issue substituted compliance determinations utilizing a set of risk-based principles. A copy of the White Paper is available at Appendix E, Attachment 4.

ii. Continue to Allow Market Participants to Comply with EMIR RTS.

We note that the EU's margin rule is materially consistent with CFTC's margin rule and request that the CFTC grant substituted compliance with respect to all elements of the European margin rule, including the scope of entities subject to the requirements.

Pending a comparability determination, the Commission should continue the relief under CFTC Letter No. 17-22 (**"NAL 17-22"**), allowing SDs subject to the European margin regime to comply with those provisions in lieu of complying with CFTC regulations (as outlined in NAL 17-22). Should the parameters of a comparability determination change, firms will need sufficient time and notice in order to implement operational and compliance changes. Therefore, we request that the Commission extend the relief under NAL 17-22 for a period of time that is sufficient for the Commission to complete and issue its comparability determination and for market participants to come into compliance with such determination.

In addition, we encourage the Commission to complete its comparability determinations for all major jurisdictions with the presumption that substituted compliance should be granted for jurisdictions that have implemented margin rules in a manner that is consistent with the BCBS-IOSCO margin framework.

iii. Streamline the Cross-Border Margin Requirements.

Given that some provisions of the Commission's cross-border requirements for uncleared margin[68] create duplicative and potentially burdensome obligations for many SDs, we recommend that the CFTC amend the regulation to address the following points:

- OTC derivatives transactions between a non-U.S. CSE (whether or not the CSE is a Foreign Consolidated Subsidiary (**"FCS"**)) and a non-U.S. counterparty (which is not guaranteed by a U.S. person) should not be subject to U.S. margin rules for non-cleared OTC derivatives because these transactions have a remote connection to U.S. markets and thus do not directly pose risks to U.S. entities.
- At a minimum, full substituted compliance for both VM and IM should be made available for non-U.S. CSEs (whether or not the CSE is an FCS) which engage in swaps with non-U.S. counterparties.

[68] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants--Cross-Border Application of the Margin Requirements, 81 Fed. Reg. 34,818 (May 31, 2016).

- The availability of substituted compliance should not differ depending on whether a firm is exchanging VM, collecting IM, or posting IM. We encourage the CFTC to work with prudential and non-U.S. regulators to ensure a level playing field for U.S. firms.

iv. Harmonize SD Capital and Liquidity Requirements with Global Standards.

Capital and liquidity requirements for swap dealers and major swap participants should be based on a presumption of substituted compliance for BCBS jurisdictions. A rule-by-rule analysis approach for determining substituted compliance would prove redundant and subject CSEs to unnecessary additional compliance costs and regulatory uncertainty. The primary purpose of negotiating capital and liquidity requirements at the BCBS level is to ensure consistent objectives, outcomes, and enforcement. Importing additional compliance requirements, including related reporting, disclosures and recordkeeping, on entities subject to BCBS capital and liquidity standards contravenes these principles.

v. Recognize Non-U.S. Platforms.

In order to reduce the risk of market fragmentation and to enhance trading liquidity between U.S. and non-U.S. markets, we ask that the Commission, in consultation with non-U.S. supervisory authorities, establish clear and comprehensive regimes to facilitate mutual recognition of execution platforms and trading requirements. The Commission has long had a policy of recognizing various non-U.S. market infrastructure providers in connection with cross-border trading activities in futures and other CFTC-regulated products, and the CFTC has experience in considering the comparability of a non-U.S. jurisdiction's regulatory requirements in a number of contexts. In the spirit of the CFTC's continued legacy of international cooperation, we ask that that the Commission make comparability determinations for non-U.S. trading venues.

D. Regulation Automated Trading

i. Take a Principles-Based Approach to the Regulation of Automated Trading.

While we fully support the Commission's goal to reduce risk and prevent market abuses, we ask the Commission to reconsider its approach under both the Regulation Automated Trading Proposal and the Supplemental Notice.[69] We believe that the Commission should take a principles-based approach toward the regulation of automated trading, rather than implementing a set of impracticable and prescriptive rules.

[69] *Regulation Automated Trading; Proposed Rule*, 80 Fed. Reg. 78824 (Dec. 17, 2015); *Regulation Automated Trading; Supplemental Notice of Proposed Rulemaking*, 81 Fed. Reg. 85334 (Nov. 25, 2016).

The Proposal in its current format is unworkable and places unduly burdensome requirements on firms, with no associated risk-reducing benefits. Specifically, we take issue with three major areas of the current Proposal:

- The scope of the Direct Electronic Access definition should be revised to only include pre-programmed algorithmic orders with no human involvement and that are transmitted directly to the DCM without passing through the FCM's risk controls.
- The proposed testing requirements are unworkable because AT Persons remain liable for the testing requirements, even though they do not have the authority to require an independent third party to turn over their proprietary source code for testing.
- The CFTC continues to insist on making the source code available for inspection by the Commission without a subpoena. The internal procedural safeguards offered by the Commission do not remedy the problem.

For a more detailed discussion of these issues, please see Appendix E, Attachments 5 and 6.

E. Position Limits

i. Re-Write Position Limits Proposal.

We believe that significant flaws remain in the position limits structure that the Commission has proposed, and we encourage the Commission to address and resolve each of the issues highlighted in our February 2017 submission to the CFTC before proceeding to adopt a final position limits rule. Specifically, and most importantly, ISDA continues to believe that there is no statutory authority for the imposition of position limits as currently proposed. The implementation of the position limits as proposed could significantly harm market liquidity and reduce the ability of commercial market participants to engage in hedging and risk management activities, without any commensurate market protection or benefits. For that reason, the current proposal structure should be abandoned in favor of a principles-based and incremental approach.

Beyond this foundational point, we also continue to encourage the Commission to resolve the key substantive issues that we have identified with the proposal. Specifically, and repeating the arguments we have made before, we do not believe that the Commission can or should attempt to adopt a rule that is overly broad—position limits should not apply to derivatives held outside of the spot month, financially settled futures contracts, or swap positions, and any final rule should include a risk management exemption. Further, and as set forth in greater detail in our comment letter, multiple technical changes to the proposed rules are required in order to mitigate the risk of significant market dislocation and disruption in the event the CFTC does adopt the Proposal as

a final rule. Additionally, as discussed in more detail in our letter, we believe that DCMs should be responsible for the oversight and administration of federal limits.

ISDA remains supportive of the Commission's efforts that have resulted in incremental revisions and changes to the position limits proposal over the past few years, and we encourage the Commission to continue to be thoughtful in reviewing and responding to the comments provided prior to moving to finalize a positon limits rule. For a more detailed discussion of these issues, please see our comment letter on Position Limits, available at Appendix E, Attachment 7.

F. CFTC Internal Processes and Procedures and Regulatory Structure

i. Improve CFTC Policies and Procedures.

We have identified a number of areas where the Commission's policy approaches may have had an adverse impact on the markets and outlined suggestions for achieving the Commission's mission in a more cost-effective manner. Good policy outcomes, however, are premised on establishment of sound processes for achieving such outcomes. In the past years, due to the implementation of a large number of Dodd-Frank rulemakings, the Commission, occasionally, has sidestepped its internal policies and procedures. While we appreciate the Commission's effort to provide immediate relief from compliance with certain Dodd-Frank related rules through no-action letters and guidance, these staff actions do not provide for public comment and while requested by some market participants, may bind the entire market. In some instances, these staff actions may impose conditions not anticipated by the requester, without providing sufficient time for review, comment and compliance. Accordingly, we ask that the Commission revisit all no-action letters and guidance issued in connection with the implementation of the Dodd-Frank rules, determine whether they still offer a workable solution, incorporate relief into the current rules, make necessary adjustments, and consistently and fairly use no-action relief in the future, where necessary.

ii. Create a CFTC-SEC Rule Safe Harbor or Substituted Compliance Regime.

While we have addressed CFTC-SEC harmonization with respect to specific areas above, we note that generally, in areas where the CFTC and SEC have both adopted and implemented Dodd-Frank Title VII rules the agencies should recognize substituted compliance and equivalency among finalized rulesets in order to remove redundancies and duplicative compliance requirements.

VI. Conclusion

We appreciate the opportunity to submit our comments in response to Project KISS. We commend the Commission for its efforts to simplify and harmonize its rules and look forward to working with the Commission as it continues to consider these important issues. Our members are strongly committed to maintaining the safety and efficiency of the U.S. derivatives markets and hope that the Commission will consider our suggestions, as they reflect the extensive knowledge and experience of market professionals within our membership.

Please feel free to contact me or Bella Rozenberg (202-683-9334) or Chris Young (202-683-9339) should you have any questions or seek any further clarifications.

Steven Kennedy
Global Head of Public Policy
ISDA

* * * *

Table of Contents

Appendix A – Trading

Attachment Number	*Letter Subject*	*Date*	*Link*	*Page Numbers*
1	Commodity Futures Trading Commission Request for Public Input on Simplifying Rules (Project KISS); Extension of Certain Time-Limited No-Action Relief	July 24, 2017	http://www2.isda.org/attachment/OTYxOA==/IIB-ISDA-SIFMA%20Joint%20NAR%20extension%20request%20with%20removal%20of%20time%20limitations.pdf	2-7
2	Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the Commodity Futures Trading Commission Regulations	June 15, 2015	http://www2.isda.org/attachment/NzY2Mg==/ISDA%20CFTC%20Petition.pdf	9-19
3	Proposal Amending CFTC Regulation § 37.6	July 5, 2017	http://www2.isda.org/attachment/OTY0Mw==/OTE-RIC-Updated%20Proposal%20(07-05-17)%20(Final).pdf	21-22

Appendix B - Clearing

Attachment Number	*Letter Subject*	*Date*	*Link*	*Page Numbers*
1	Request for Commission Action – Part 50	October 11, 2016	http://www2.isda.org/attachment/OTY0Mg==/ISDA-request%20(inter-affiliate%20clearing%20exemption-Part%2050)(October%2011-201....pdf	24-28
2	Supplemental Request for Commission Action – Part 50	November 16, 2016	http://www2.isda.org/attachment/OTY0MQ==/Inter-affiliate-trades-supplemental%20request.pdf	30-33
3	ISDA Responses to CFTC Questions on Inter-Affiliate Clearing Exemption	December 6, 2016	http://www2.isda.org/attachment/OTYzOQ==/ISDA-responses-inter-affiliate-	35-37

			clearing-exemption%20(suppelemental%20respons....pdf	
4	Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps	July 18, 2016	http://www2.isda.org/attachment/OTAwNQ==/ISDA%20Comment%20Letter%20-%20CFTC%202016%20IRS%20Clearing%20Mandate.pdf	39-46
5	Discussion Note: *Essential Aspects of CCP Resolution Planning*	October 21, 2016	http://www2.isda.org/attachment/ODgwMw==/FIA-GFMA-IIF-ISDA-TCH-Response-to-FSB-Discussion-Note-CCP-Resolution.pdf	48-81
6	Consultative Document: *Guidance on Central Counterparty Resolution and Resolution Planning*	March 13, 2017	http://www2.isda.org/attachment/OTIzOQ==/FSB%20Consultative%20Document%20-%20CCP%20Resolution%20-%20Final%20FIA-GFMA-IIF-ISDA%20Response.pdf	83-100
7	Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI*	October 18, 2016	http://www2.isda.org/attachment/ODc5OQ==/FIA-GFMA-IIF-ISDA-TCH%20Response%20to%20CPMI-IOSCO%20Consultative%20Report%20(Resilience%20and%20Recovery%20of%20CCPs).pdf	102-140

Appendix C - Reporting

Attachment Number	*Letter Subject*	*Date*	*Link*	*Page Numbers*
1	Request for Comments from the Division of Market Oversight of the U.S. Commodity Futures Trading Commission Regarding Staff's Comprehensive Review of the Commission's Swaps Reporting Rules and Staff's *Roadmap to Achieve High Quality Swaps Data*	August 21, 2017	http://www2.isda.org/attachment/OTYxNw==/ISDA-SIFMA_comments_CFTC_DMO_Roadmap_Swap_Data_Reporting_21%20Aug%202017_FINAL.pdf	142-151

2	Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))	June 15, 2015	http://www2.isda.org/attachment/ODQ0Ng==/Request%20to%20DMO%20for%20No-Action%20Relief%20for%20International%20Swaps%20(Part%2045%203(h))_15Jun15_FINAL.pdf	153-158
3	Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))	February 11, 2014	http://www2.isda.org/attachment/NjY4Mg==/Request%20for%20NAR%20for%20International%20Swaps%20(Part%2045%203(h))_11Feb14_FINAL.pdf	160-165
4	Review of Swap Data Recordkeeping and Reporting Requirements (79 Fed. Reg. 16689)	May 23, 2014	http://www2.isda.org/attachment/NjY1NQ==/2014%20May%2023%20CFTC%20RFC-%20ISDA%20Response_FINAL.pdf	167-279
5	Request for Interpretative Letter for Post-priced Swaps	December 3, 2012	http://www2.isda.org/attachment/NjcwMQ==/IL%20-%20PPS%20Dec%203%202012.pdf	281-286
6	Request for No-action Relief for Post-priced Swaps	March 26, 2013	http://www2.isda.org/attachment/NjY5OQ==/2013%20Mar%2026%20Request%20for%20NAR%20Equity%20PPS_FINAL.pdf	288-292

Appendix D – Registration

Attachment Number	*Letter Subject*	*Date*	*Link*	*Page Numbers*
1	Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments	July 7, 2017	http://www2.isda.org/attachment/OTYzOA==/ISDA%20CCO%20Comment%20Letter%20(Final).pdf	294-304

Appendix E – Other Areas (Miscellaneous)

Attachment Number	*Letter Subject*	*Date*	*Link*	*Page Numbers*
1	Product Set for Variation Margin Under Margin Requirements for Non-Cleared Swaps	February 12, 2016	http://www2.isda.org/attachment/ODM1NQ==/ISDA%20-%20Margin%20(Broad%20Product)%20-%20Letter%20to%20PRs_CFTC.pdf	306-311
2	Broad Product Set for Swap Margin Calculation	May 15, 2015	http://www2.isda.org/attachment/ODAwNg==/ISDABroadProdSet051515.pdf	313-319
3	Capital Requirements for Swap Dealers and Major Swap Participants (RIN 3038-AD54)	May 15, 2017	http://www2.isda.org/attachment/OTYzNw==/ISDA%20Comment%20Letter%20-%20CFTC%20Proposed%20SD%20and%20MSP%20Capital%20Requirements%20(2017)%20-%20Final%20(002).pdf	321-328
4	Cross-Border Harmonization of Derivatives Regulatory Regimes: A risk-based framework for substituted compliance via cross-border principles	September 2017	http://assets.isda.org/media/85260f13-47/8a2bfb70-pdf/	330-375
5	Regulation Automated Trading; Proposed Rule: 17 CFR Parts 1, 38, 40 et al.	March 16, 2016	http://www2.isda.org/attachment/ODI0MQ==/Regulation%20AT-comment-03-16-16%20(002).pdf	377-384
6	Regulation Automated Trading; Proposed Rule: 17 CFR Parts 1, 38, 40 et al Supplemental Notice of Proposed Rulemaking, RIN 3038-AD52	May 1, 2017	http://www2.isda.org/attachment/OTM2Ng==/Supplemental%20Reg%20AT-Comment%20Letter%20-%20ISDA%20(05.01.17)(filed).pdf	386-391
7	Position Limits for Derivatives: Re-Proposal (RIN 3038-AD99)	February 23, 2017	http://www2.isda.org/attachment/OTYzNg==/61096StevenKennedy.pdf	393-404

Appendix A
Attachment 1

July 24, 2017

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Commodity Futures Trading Commission Request for Public Input on Simplifying Rules (Project KISS); Extension of Certain Time-Limited No-Action Relief

Dear Mr. Kirkpatrick:

The Institute of International Banking, International Swaps and Derivatives Association, Inc. and Securities Industry and Financial Markets Association (together, the "Associations")[1] greatly appreciate the continuing efforts of the Commodity Futures Trading Commission ("CFTC" or "Commission") and its staff to review rules, regulations and practices to identify those areas that can be simplified and made less burdensome and costly, including as part of the Commission's Project KISS initiative.[2] As the Commission has implemented many important and significant requirements under the Dodd Frank Act's Title VII, such a review is timely as both the Commission and market participants have a better understanding of the resulting impacts of such efforts, helping to inform where changes are necessary and appropriate. It is our intention to provide helpful feedback to the Commission throughout this process, identifying areas for review and offering recommendations on how to apply them in ways that are simpler, less burdensome and less of a drag on the American economy.

As the Commission is aware, due to the rapid pace of finalizing and implementing its Title VII regime, staff routinely issued guidance and no-action relief to address difficulties presented by new rules, including unachievable compliance dates and problematic requirements. Over the years, many of these welcome and necessary no-action letters have been extended (in some cases, several times) because the underlying practical or market issues that required the relief remain unresolved. This has resulted in a continuous cycle of market participants submitting extension requests, dialogue between Commission staff and industry participants

[1] For a description of each Association, please see page 3 of this letter.

[2] See Press Release, available at: http://www.cftc.gov/PressRoom/PressReleases/pr7555-17.

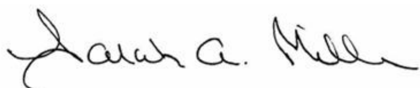
regarding the necessity for such extensions and deliberation and resource allocation by the Commission - leading to Commission staff granting the requested extensions as a temporary, but necessary, fix. Ultimately, however, the underlying issues that many no-action letters intend to address require Commission action to resolve.

The Associations and their members appreciate the Commission and staff's continued attention to these issues. Nevertheless, the cycle of requesting, discussing and granting extensions of relief results in unnecessary uncertainty and resource consumption for both market participants and staff. These negative impacts can be avoided by removing the time limitations on certain no-action relief where persisting issues remain difficult, if not impossible, to remedy under current circumstances. This approach was taken in the recent extension of two no-action letters[3], which the Associations support and hope to see expanded in other areas. Extending relief until the effective date of related changes in regulation will have a positive impact, providing certainty for markets and market participants alike. The CFTC will also benefit, as it will not need to dedicate resources to rolling relief, and will provide the Commission with further time to develop workable, permanent solutions to address the underlying issues necessitating relief in ways which meet its regulatory goals.

* * *

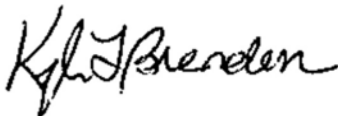
The Associations believe the extension of the relief provided by no-action letters referenced in the attachment would be a beneficial early step as part of the Commission's Project KISS initiative. Please feel free to reach out to the undersigned should you have any questions.

Sincerely,



Sarah A. Miller
Chief Executive Officer
Institute of International Bankers

Steven Kennedy
Global Head of Public Policy
ISDA



Kyle Brandon
Managing Director, Head of Derivatives
SIFMA

[3] See CFTC Letter 17-27 ("The relief shall expire on the effective date of any changes in the regulations."), available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-27.pdf; also see CFTC Letter 17-17 ("The relief shall expire on the effective date of any changes in the regulation), available at: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-17.pdf.

Description of the Associations

The Institute of International Bankers (**IIB**) is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from over 35 countries around the world doing business in the United States.

The IIB's mission is to help resolve the many special legislative, regulatory, tax and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions. Further information is available at www.iib.org.

Since 1985, **ISDA** has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 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, clearing houses 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.

The Securities and Financial Markets Association (**SIFMA**) is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

APPENDIX

No-Action Letter ("NAL") #	Previous NAL(s)	Division(s)	NAL Title	Relevant Rule / CEA Reference	Current NAL Expiry Date
16-64	13-71 14-01 14-74 14-140 15-48	DSIO; DCR; DMO	Extension of No-Action Relief: Transaction-Level Requirements for Non-U.S. Swap Dealers	17 CFR 23.202, 23.205, 23.400 to 23.451, 23.501 to 23.506, 23.610, 23.701 to 23.704, and parts 37, 38, 43, and 50	Earlier of September 30, 2017 or the effective date of any Commission action with respect to issues that are the subject of the NAL.
16-79	13-75 14-141 15-61	DMO	Extension of time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland	17CFR Parts 45 and 46	Earlier of December 1, 2017 or 30 days following the issuance of a comparability determination by the Commission with respect to the SDR Reporting Rules for the jurisdiction in which the non-U.S. SD or non-U.S. MSP is established.
16-76	14-12 14-62 14-137 15-55	DMO	Extension of No-Action Relief from the Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 and Additional No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions.	CEA sec 2(h)(8), 5(d)(9), and 17 CFR 37.9 and 37.3(a)(2)	11:59 p.m. EST November 15, 2017

No-Action Letter ("NAL") #	Previous NAL(s)	Division(s)	NAL Title	Relevant Rule / CEA Reference	Current NAL Expiry Date
16-74	14-118 15-60	DMO	Extension of No-Action Relief for Swap Execution Facilities from Certain "Block Trade" Requirements in Commission Regulation 43.2	17 CFR 43.2	Earlier of November 15, 2017 at 11:59 pm EST or the effective date of any Commission action with respect to issues covered by the NAL
15-68	No previous NAL, but issue seems to require Commission action for permanent resolution	DMO	No-Action Relief for Swap Execution Facilities from Certain Audit Trail Requirements in Commission Regulation 37.205 Related to Post-Trade Allocation Information	17 CFR 37.205	11:59 p.m. (EST) on November 15, 2017
16-80	14-26 14-136 15-62	DMO	Extension of Time-Limited No-Action Relief from the Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that are Not exempt from clearing under Commission Regulation § 50.52	17 CFR 50.52, CEA 2(h)(8)	11:59 p.m. EST, December 31, 2017

No-Action Letter ("NAL") #	Previous NAL(s)	Division(s)	NAL Title	Relevant Rule / CEA Reference	Current NAL Expiry Date
16-81	14-25 14-135 15-63	DCR	Time-Limited No-Action Relief from Certain Provisions of the Treatment of Outward-Facing Swaps Condition in the Inter-Affiliate Exemption	17 CFR 50.52	Earlier of 11:59 p.m. EST, December 31, 2017 or 60 days after the date on which the Commission announces that it has made a comparability determination described in regulation 50.52(b)(4)(i)
16-84	This NAL is similar to 16-81, but for additional jurisdictions	DCR	No-Action Relief from Regulation 50.52(b)(4)(ii) for Swaps with Eligible Affiliate Counterparties Located in Australia or Mexico	17 CFR 50.52(b)(4)(ii)	11:59 pm (eastern), December 31, 2017
16-85	No previous NAL, but issue seems to require Commission action for permanent resolution	DMO	No-Action Relief from Certain Reporting Obligations for Counterparties Clearing Swaps through Derivatives Clearing Organizations Acting under Exemptive Orders or No-Action Relief	17 CFR 45	Earlier of January 31, 2018 or effective date of Commission action addressing the issues covered by the NAL or the revocation or expiration of the exemptive order or NAL issued to the Relief DCO

Appendix A
Attachment 2

ISDA® Safe, Efficient Markets

June 15, 2015

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st, N.W.
Washington, DC 20581

Re: Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the Commodity Futures Trading Commission Regulations

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association (ISDA) respectfully petitions the Commodity Futures Trading Commission (the Commission or CFTC) under Commission regulation 13.2 to amend certain provisions in Parts 1, 37 and 43 of the Commission's regulations.

For the reasons set forth below, we request that the Commission amend certain provisions of the Commission's regulations to more closely adhere to Congressional intent to establish a swaps trading platform regime that allows for flexible execution of swaps, to reduce undesirable regulatory outcomes that threaten the efficient functioning of markets, and to achieve cross-border harmonization of execution rules. The information required by Commission regulation 13.2 follows:

I. Text of Proposed Rule Amendments

Part 37—Swap Execution Facilities

Add new § 37.6(c):

> *Confirmation of the transactions not intended to be cleared*. (1) In satisfaction of the obligations imposed on a swap execution facility under paragraph (b) of this section: (i) Each confirmation of the transaction shall incorporate by reference the previously-negotiated documents and agreements (including, without limitation, ISDA master agreements,

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 **F** 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

other master agreements, terms supplements, master confirmation agreements, and incorporated industry definitions) governing such transaction existing at the time of execution between the counterparties. (ii) In the event of any inconsistency between a swap execution facility confirmation and the underlying previously-negotiated freestanding agreements, the terms of the swap execution facility confirmation shall legally supersede any conflicting terms. (iii) A swap execution facility shall incorporate by reference terms from previously-negotiated agreements between the counterparties, without obligating participants to provide copies of referenced agreements or documents; provided that:

(A) Upon request by a swap execution facility, counterparties to a transaction shall provide such swap execution facility with any underlying freestanding documents or agreements governing such transaction existing at the time of the execution between the counterparties; and
(B) Upon request from the Commission, the swap execution facility shall request from counterparties the underlying freestanding documents or agreements governing such transaction existing at the time of execution between the counterparties and the swap execution facility shall furnish such documents or agreements to the Commission as soon as they are available.

Add new § 37.9(a)(2)(C)

Other Methods of Execution as approved by the Commission under new paragraph (d) of this section.

Add new § 37.9(a)(4)

Exception for correction of errors or omissions. (i) A swap execution facility may, with consent of the counterparties, permit: (A) execution of a new transaction, with terms and conditions that match the terms and conditions of an intended to be cleared transaction rejected for clearing or (B) execution of one or more cleared transactions to offset and replace a transaction to correctly reflect the terms to which the parties mutually assented. Such transactions need not be executed pursuant to the methods set forth in paragraph (a)(2) of this section when executed for the correction of an operational or clerical error or omission made by the swap execution facility, either or both of the counterparties, or an agent of either or both of the counterparties. Such transactions shall not violate the requirements contained in § 37.203 of this chapter. (ii) This

paragraph shall apply to the leg of a package transaction as defined in new § 1.3(www) of this chapter if the leg is either rejected from clearing due to an operational or clerical error or omission made by the swap execution facility, either or both of the counterparties, or an agent of either or both of the counterparties or requires correction or replacement due to errors or omissions for operational or clerical reasons. (iii) A swap execution facility shall adopt rules describing the conditions, if any, under which it will determine that an error or omission has occurred and the procedures it will follow to execute a transaction. The requirements contained in §§ 1.74, 23.610, 39.12(b)(7), 43.3(e) and 45.14 of this chapter apply to these transactions.

Add new § 37.9(d):

A swap execution facility may submit a request to the Commission to approve additional execution methods to execute Required Transactions as defined in § 37.9(a)(1), pursuant to the procedures under § 40.5 of this chapter.

Revise § 37.10(a)(1) to read as follows:

(a)(1) *Required submission*. A swap execution facility that intends to make a swap available to trade shall submit to the Commission its initial determination with respect to such swap as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under § 40.5 of this chapter.

(i) The Commission shall issue an order that a swap is made available to trade.

(ii) The requirements contained in §§ 40.1, 40.7, 40.8, 40.11 and 40.12 shall apply to all submissions made pursuant to this section.

(iii) *Public Comment*. The Commission shall provide a 30-day public comment period. The Commission shall publish a notice of the public comment period on the Commission website. Comments from the public shall be submitted as specified in that notice.

Revise § 37.10(b) to read as follows:

(b) *Criteria to consider*. In making its initial determination under paragraph (a) of this section, a swap execution facility shall consider with sufficient particularity each of the following criteria:

(1) Whether there are ready and willing buyers and sellers;

(2) Frequency and size of the transactions;

(3) The trading volume;

(4) The number and types of counterparties executing trades in each swap listed in (a)(2), including the presence of consistent liquidity providers and market makers that are actively involved in making markets considered in (b)(2)of this section;

(5) The bid/ask spread;

(6) The usual number of resting firm bids and offers; and

(7) Whether such swap has a high degree of standardization.

Revise 37.10(c) to read as follows:

(c) *Applicability*. Upon a Commission order that a swap is made available to trade, all swap execution facilities and designated contract markets shall comply with the requirements of section 2(h)(8) of the Act in listing such swap for trading.

Revise § 37.10 (d)(1) to read as follows:

(d) *Removal* - (1) Determination. The Commission shall issue an order that a swap is no longer required to be traded pursuant to the requirements of § 37.9(a)(2) upon a request made by either a swap execution facility or a swap execution facility's participant. In making such a request, the swap execution facility or the swap execution facility's participant shall consider each of the criterions described in paragraph (b) of this section.

Add new § 37.10(d)(1)(i) to read as follows:

Public Comment. The Commission shall provide a 30-day public comment period. The Commission shall publish a notice of the public comment period on the Commission website. Comments from the public shall be submitted as specified in that notice.

Add new § 37.10(f) to read as follows:

Prior to offering a package transaction as defined in new § 1.3(www) of this chapter, a swap execution facility shall certify to the Commission that: (1) the swap execution facility has the technological ability to arrange for the execution of such package transaction through the execution methods described in § 37.9(a)(2) and (2) the settlement of

any non-swap leg is not adversely affected by execution of such package transaction through the execution methods described in § 37.9(a)(2). Such certification shall be submitted as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under § 40.6 of this chapter.

Revise § 37.12 to read as follows:

(a) A swap transaction shall be subject to the trade execution requirements of section 2(h)(8) of the Act upon the later of:
(1) Sixty days after the applicable deadline established under the clearing requirement compliance schedule provided under § 50.25(b) of this chapter; or
(2) Thirty days after the Commission issues an order pursuant to § 37.10(a)(1)(ii).
(3) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 2(h)(8) of the Act sooner than as provided in paragraph (a) of this section.

Revise § 37.1301(c) to read as follows:

§ 37.1301 (c) General requirements

Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the swap execution facility to conduct an orderly wind down of its operations. Financial resources shall not include any compensation or benefits of swap execution facility employees that receive commission-based compensation.

Revise § 37.1305 to read as follows:

§ 37.1305 Liquidity of financial resources

The financial resources allocated by the swap execution facility to meet the requirements of § 37.1301 shall include unencumbered, liquid financial assets (i.e., cash and/or highly liquid securities) equal to at least three months' operating costs. If any portion of such financial resources is not sufficiently liquid, the swap execution facility may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

Part 43 — Real Time Public Reporting

Revise § 43.2 to read as follows:

Block trade means a publicly reportable swap transaction that:

(1) Involves a swap that is listed on a registered swap execution facility or designated contract market and that is either:

(i) Executed away from the designated contract market's trading system or platform and is executed pursuant to the designate contract market's rules and procedures; or

(ii) Executed on or away from the swap execution facility's trading system or platform and is executed pursuant to the swap execution facility's rules and procedures. Such transaction may be executed by any means of interstate commerce in accordance with the requirements described in § 37.9(c)(2) for Permitted Transactions as they are defined in § 37.9(c)(1) .

**(3) and (4) remain unchanged

Part 1 General Regulations under the Commodity Exchange Act

§ 1.3 Definitions

**(nnn)—(vvv)

Add new § 1.3(www):

A "package transaction" is a transaction involving two or more components: (1) that is executed between two or more counterparties; (2) that is priced or quoted as one economic transaction with simultaneous or near simultaneous execution of all components; (3) that has at least one component that is a swap that is made available to trade and therefore is subject to the CEA section 2(h)(8) trade execution requirement; and (4) where the execution of each component is contingent upon the execution of all other components.

II. Nature of ISDA's Interest

ISDA has over 800 member institutions from 67 countries. These members include a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities end-users, 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. Our members rely on derivatives to manage efficiently the risks inherent in their core economic activities. ISDA advocates for stable, competitive and sustainable financial markets that support economic growth and benefit society.

ISDA has previously highlighted in its comment letters to the Commission the importance of maintaining a flexible approach in adopting and implementing a new regulatory framework, focusing on overall risk reduction and increased transparency and market integrity - rather than imposing stringent requirements - to allow for a smoother transition toward effective cross-border regulation of derivatives trading.

The Commission faces some challenges in implementing the Swap Execution Facilities (SEF) rules. In his testimony before the U.S. Senate Committee on Agriculture, Nutrition and Forestry, Chairman Massad recognized that the Commission should "fine-tune the rules or make other changes as appropriate." Chairman Massad also noted that "there is substantial work to be done to harmonize rules across national borders."[1] We appreciate the Commission's intent to engage with market participants and to make appropriate changes to the SEF rules "based on participant feedback and observing the new rules in practice."[2]

ISDA members would like to provide their feedback by offering specific solutions to some trading challenges that have been observed by our members. We believe that utilizing a petition process is an effective way of proposing concrete fixes, while keeping the regulatory structure intact.

In ISDA's Path Forward for Centralized Execution of Swaps published in April,[3] we pointed out that due to the restrictive nature of the Commission's execution rules, a clear split in trading liquidity has emerged. For instance, European dealers have opted to trade euro interest rate swaps with other European dealers rather than be subjected to U.S. rules. By December last year, 85% of euro IRS transactions were traded between European entities, up from 71% in September 2013 before the SEF rules came into force.

---

[1] Chairman Timothy Massad's Testimony before the U.S. Senate Committee on Agriculture, Nutrition and Forestry (May 14, 2015) is available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-10

[2] Remarks of Chairman Timothy Massad before the FIA International Derivatives Conference (June 9, 2015) available at: www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-25

[3] Path Forward For Centralized Execution of Swaps (April 1, 2015) available at: http://www2.isda.org/functional-areas/public-policy/united-states/

In that document, we also suggested ways to reduce the undesirable regulatory outcomes that threaten the efficient functioning of the derivatives markets, reduce barriers to market access, and minimize roadblocks to an effective cross-border regulatory regime, while preserving increased transparency and market integrity.

We believe that the targeted amendments outlined in this Petition will allow SEFs to offer trading flexibility, as intended under the Dodd-Frank Act, and will ensure that SEFs can successfully compete in the global execution space. In sum, we hope that our suggestions may help the Commission achieve its goal of "creat[ing] a framework that not only promotes transparency and integrity but also enables markets to thrive."[4]

III. Supporting Arguments

Confirmation Requirements for Uncleared Swaps

The requirement imposed on SEFs to obtain, prior to the time of execution, paper copies of the privately negotiated ISDA master agreements between counterparties to a trade in uncleared swaps does not have any legal basis, does not meet any regulatory objectives and carries high compliance costs as SEFs will have to request, store, manage and consult numerous complex bilateral agreements.

This requirement is in direct contravention of normal market practice in which the vast majority of swaps are confirmed electronically. In addition, this requirement discourages trading of swaps on SEFs. The Commission seems to acknowledge this issue by continuing to extend no-action relief from compliance with this requirement. However, uncertainty regarding whether the relief is going to be extended in the future requires SEFs to continue to spend resources in search of a compliance solution. We urge the Commission to make targeted amendments to its rules to relieve SEFs from this unnecessary obligation.

Void ab Initio

ISDA believes that an appropriate balance should be struck between the Commission's policy objectives of encouraging certainty of clearing while allowing counterparties to resubmit trades that were rejected from clearing because of operational or clerical errors. ISDA welcomes the issuance of recent no-action relief allowing a SEF, after a trade has been cleared and an error is discovered, to resubmit the original terms of the trade, without the trade having been executed pursuant to the execution methods set out in § 37.9(a)(2).

ISDA notes, however, that the relief is a temporary solution to resolving this issue. ISDA would like to offer a permanent fix in the SEF rules.

[4] Supra fn.2, Remarks of Timothy Massad before the FIA International Derivatives Conference.

Allowing Flexible Execution Methods on a SEF

Despite a broad definition of a SEF in the Dodd-Frank Act, the SEF rules contain unnecessary restrictions on swap execution mechanisms. The Dodd-Frank Act does not require that SEFs only execute transactions by means of an Order Book or an RFQ to 3. Such a restrictive interpretation contradicts Congressional intent to allow swaps to be traded by "any means of interstate commerce,"[5] discourages trading of swaps on SEFs and hurts pre-trade price transparency. We agree with Commissioner Giancarlo that "[a] better way to promote price transparency is through a balanced focus on promoting swaps trading and market liquidity as Congress intended."[6]

Moreover, such a restrictive interpretation makes it difficult to achieve the broad goal of global swaps trading envisioned by the G-20 member countries. As we noted in the Path Forward document, ESMA intends to allow derivative contracts that are subject to the trading obligation to be traded on a number of centralized venues, including Regulated Markets (RMs), Multilateral Trading Facilities (MTFs), and Organized Trading Facilities (OTFs). OTFs offer the least restrictive methods of execution and are designed to include much of the inter-dealer market and offer voice brokering services. Thus, to avoid further market fragmentation and maintain robust liquidity in swaps contracts, it is advisable to provide flexibility in execution methods on a SEF platform.

In this regard, we suggest that the Commission amend its rules to allow the Commission, under certain circumstances, to approve additional methods of execution for swaps that are made available to trade. Adjusting SEFs' execution models could clear a path toward achieving a substituted compliance regime for derivatives trading.[7]

Made Available to Trade Determination

We believe that the made available to trade (MAT) process should require SEFs to provide a more granular explanation as to why a particular swap contains the requisite trading liquidity for mandatory trading. We also believe the Commission and not SEFs should make the final decision as to when a swap should be considered to be "MATed."

In addition, the Commission should view a swap's availability for mandatory trading as a fluid determination. The SEF rules do not provide sufficient flexibility to both SEFs and SEF users to remove a certain swap from a MAT determination if the trading characteristics of the swap change such that it is no longer suited for trading on an Order Book or an RFQ to 3. We believe our proposed fixes address the above mentioned concerns.

---

[5] CEA section 1a(50).

[6] J. Christopher Giancarlo, Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank (White Paper) (Jan. 29, 2015) at 75.

[7] Supra fn. 3.

Package Transactions

As stated in the Path Forward document, unreasonably restrictive regulations have decreased the ability of market participants to execute package transactions that contain a "MATed" swap.[8] There have been two principal concerns expressed with respect to executing package trades on a SEF. First, if one leg of a package trade is subject to a mandatory trade execution requirement, then all legs of the package trade must be executed on a SEF by means of an Order Book or an RFQ to 3. While this may be possible for some package trades, not all package trades have the liquidity to be executed on a SEF via these restrictive execution methods. [9]

In addition to ensuring that the pricing and execution of these packages can be handled on a SEF, it is important to ensure that derivatives clearing organizations (DCOs) are able to net the risk of both legs of these packages at the time of execution. Because package transactions are currently cleared on a leg-by-leg basis, a DCO may reject an individual leg due to its risk exceeding its credit limit even though the net risk of the package may not exceed the limit.

Our proposed targeted fixes to the SEF rules address these concerns and ensure that SEFs, Futures Commission Merchants (FCMs) and DCOs have structural workflows to execute and clear these trades in a straight through processing regime.[10]

SEFs' Financial Resources

We note that one SEF's failure will not lead to a liquidity crisis because swaps trade on various trading platforms with various liquidity pools. Therefore, SEFs should only be required to hold adequate resources to be able to wind down their operations in one year. We note that some SEFs have their brokers inside the SEF, while others have their brokers outside the SEF. We believe that the financial resources requirements should exclude the compensation and benefits for brokers inside the SEF to even the playing field between the two different business models. Our proposed amendments reflect our views.

Execution of Block Trades

The Commission's regulatory objective behind requiring block trades to be executed away from the SEF's trading platform is unclear.[11] As Commissioner Giancarlo points out "[t]he "occurs

[8] Separately, ISDA continues to believe that if a price determined leg of a package trade is not made available to trade, then the entire package trade should not be made available to trade.

[9] Currently, these transactions are subject to phased-in no-action relief, CFTC NAL 14-137, Extension of No-Action Relief from Commodity Exchange Act Sections 2(h)(8) and 5(d)(9) and from Commission Regulation § 37.9 and Additional No-Action Relief for Swap Execution Facilities from Commission Regulation § 37.3(a)(2) for Swaps Executed as Part of Certain Package Transactions (Nov. 10, 2014).

[10] Although not addressed in this petition, we would like the Commission to amend the regulations to set forth with the requisite degree of particularity the appropriate execution methodology for package transactions that include at least one component leg that is a security and not within the jurisdiction of the Commission so that SEFs executing such packages are able to do so without running afoul of other regulatory requirements with respect to the execution of the security.

away" requirement creates an arbitrary and confusing segmentation between non-block trades "on-SEF" and block trades "off-SEF," especially given that a SEF may offer any method of execution for *Permitted Transactions*. The "off-SEF" requirement also undermines the legislative goal of encouraging swaps trading on SEFs."[12]

To complicate things further, in its clearing member risk management regulations,[13] the Commission requires, among other things, an FCM that is a clearing member (Clearing FCM) of a registered DCO to establish risk-based limits and to screen orders for compliance with those limits.[14] Commission § 37.702(b) requires a SEF to coordinate with each DCO to which it submits transactions for clearing and have rules and procedures to facilitate prompt and efficient processing by DCOs in accordance with § 39.12(b)(7).[15] Staff guidance on straight through processing[16] specifies that this requirement applies to orders for execution on or subject to the rules of a SEF or DCM, regardless of the method of execution (i.e., this requirement applies to block trades).

Market participants have expressed numerous concerns that adherence to the "occurs away" requirement under the current definition of a block trade in § 43.2 makes it very difficult to perform pre-execution credit screening against FCM risk-based limits. This is due to the fact that an FCM may have no involvement in a block transaction occurring away from a SEF's trading system or platform; thus, it is unable to implement a credit screening of the trade prior to the counterparties' execution of the block.

We believe, our proposed fixes allow blocks to be executed on a SEF, while preserving the Commission's straight through processing requirements.

ISDA respectfully petitions the Commission to amend Parts, 1, 37 and 43 as described above.

Sincerely,

David Geen
General Counsel

---

[11] Currently, these transactions are subject to no-action relief that expires on December 15, 2015, CFTC NAL 14-118, No-Action Relief for Swap Execution Facilities from Certain "Block Trade" Requirements in Commission Regulation 43.2 (Sept. 19, 2014).
[12] Supra fn. 6, White Paper at 27.
[13] Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 Fed. Reg. 21,278 (Apr. 9, 2012).
[14] 17. C.F.R. § 1.73.
[15] 17 C.F.R. § 39.12(b)(7) (DCOs must accept or reject all trades executed on a SEF or DCM as quickly as technologically practicable after execution).
[16] CFCT Staff Guidance on Swaps Straight Through Processing (Sept. 26, 2013).

Appendix A
Attachment 3

ISDA® Safe, Efficient Markets

MEMO

TO: CFTC Staff
FROM: ISDA
DATE: July 5, 2017
RE: Proposal Amending CFTC Regulation §37.6

1. **Updated Proposal**

Proposed Revisions to Current §37.6(b) Swaps Submitted for Clearing

For a transaction executed on or pursuant to the rules of a swap execution facility that is required or intended to be cleared, the swap execution facility shall provide each counterparty to a transaction with a Trade Evidence. The Trade Evidence shall be provided by the swap execution facility to the counterparties upon execution of the transaction.

Note: We will also suggest that conforming changes be made to Part 23.501 clarifying that for trades covered by Part 37.6(b), counterparties have no obligation to issue a confirmation under Part 23.501 without any reliance on SEF rulebook provisions.[1]

Add new § 37.6(c) Swaps Not Submitted for Clearing

For a transaction executed on or pursuant to the rules of a swap execution facility that is not required or intended to be cleared, the swap execution facility shall provide each counterparty, or its agent, as applicable, with a Trade Evidence which shall be provided upon execution of the transaction. The confirmation for the transaction shall be executed by the counterparties to the transaction pursuant to § 23.501 (1)-(3) provided however that such confirmation must incorporate the terms of the Trade Evidence.

Add new §37.6(d)(1) Definition of Trade Evidence

"Trade Evidence" shall mean a written communication provided by the swap execution facility to each counterparty to the trade executed on or pursuant to the rules of the swap execution facility that legally supersedes any previously negotiated agreement between the counterparties to a transaction for the terms contained in the Trade Evidence. Trade Evidence must contain: (i) the economic terms of the trade agreed to by the counterparties on the swap execution facility (or

[1] 17 C.F.R. § 23.501(a)(4) currently provides that if the swap is executed on a SEF, counterparties will be deemed compliant with 17 C.F.R. § 23.501(a)(1)-(3) as long as the SEF's rulebook provides that a confirmation of all terms of the transaction shall take place at the same time as execution.

International Swaps and Derivatives Association, Inc.
600 13th Street, NW
Suite 320
Washington, DC 20004
P 202 638 9330 **F** 202 683 9329
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

provided by the counterparties to the swap execution facility in case of a block trade, as defined in § 43.1); (ii) the legal entity identifier of each of the counterparties to the swap as required by § 45.6, including any agent, as applicable, unless the swap is executed anonymously; (iii) the unique product identifier as required by § 45.7 (when the Commission designates a unique product identifier and product classification system pursuant to § 45.7(b)); and (iv) the unique swap identifier issued by the swap execution facility for the transaction as required under § 45.5(a).

Add new §37.6(d)(2) Trade Evidence for Package Trades

In the case of package trades, the counterparties shall provide to the swap execution facility the economic terms of the trade, as described in § 37.6(d)(1)(i), with respect to the leg of the transaction that is not executed on the swap execution facility to the extent that there is a legal requirement, or the counterparties request, that the swap execution facility processes parts of the package which have not been executed on the swap execution facility.

CONFIDENTIAL: DRAFT DOCUMENTS (For use in connection with Working Group deliberations - not for public dissemination) Should your firm disagree with any of the points raised within this document, please contact the chair and the lead ISDA representative brozenberg@isda.org immediately.

Appendix B
Attachment 1

October 11, 2016

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

Re: Request for Commission Action – Part 50

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("**ISDA**"),[1] on behalf of its members and other market participants that engage in inter-affiliate swaps, is writing to request that the Commodity Futures Trading Commission (the "**Commission**") exercise its authority pursuant to section 4(c) and other applicable provisions of the Commodity Exchange Act ("**CEA**") to extend existing relief from certain conditions of the exemption from clearing for certain inter-affiliate swaps pursuant to Commission Regulation 50.52 (the "**Inter-affiliate Clearing Exemption**").

Specifically, we request that the Commission allow market participants relying on the Inter-affiliate Clearing Exemption to comply with the conditions set forth in paragraph (b)(4)(ii) or (iii) of Regulation 50.52 for an additional period of time, beyond the December 31, 2016 expiration date of relief provided pursuant to CFTC Letter No.15-63, in lieu of complying with the "outward-facing clearing" condition set forth in paragraph (b)(4)(i) of regulation 50.52. The relief provided under CFTC Letter No. 15-63 should be extended by further no-action relief in order to allow time for the Commission to evaluate whether mandatory clearing obligations implemented in other jurisdictions are comparable and comprehensive to CFTC clearing requirements.

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 68 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, clearing houses 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.

Background

In April 2013, the Commission exercised its Section 4(c) authority to promulgate the Inter-affiliate Clearing Exemption based on the Commission's findings that the exemption is appropriate for the transactions at issue, promotes responsible financial innovation and fair competition, and is consistent with the public interest.[2] As one of the conditions of the exemption, each "eligible affiliate counterparty" that enters into a swap that is subject to the Commission's clearing mandate under section 2(h) of the CEA with an unaffiliated counterparty must (i) comply with the mandate or with an exception under section 2(h)(7) of the CEA, (ii) comply with a foreign jurisdiction's clearing mandate that the Commission has determined is comparable to, and as comprehensive as, the Commission's mandate, or with an exception from such mandate that the Commission has determined is comparable to the exceptions under section 2(h)(7) of the CEA, or (iii) clear the swap through a registered derivatives clearing organization or a clearing organization that is subject to supervision by appropriate government authorities in its home country and has been assessed to be in compliance with the Principles for Financial Market Infrastructures.

In response to concerns that the outward-facing clearing condition should have a transition period to allow other jurisdictions to implement their own G-20 clearing mandates and that adverse competitive effects on U.S.-based groups would result if the condition were imposed before other jurisdictions' mandates were implemented,[3] the Commission made available, until March 11, 2014, alternative compliance mechanisms under paragraphs (b)(4)(ii) and (iii) of Regulation 50.52.[4]

The March 11, 2014 sunset date for the alternative compliance mechanisms was subsequently extended through a number of no-action letters to December 31, 2016.[5] In granting this relief, DCR took note of the difficulties cited by market participants in meeting the requirements of the outward-facing clearing condition because the Commission had not yet announced that any non-U.S. jurisdiction had promulgated a comparable and comprehensive clearing requirement. Further, DCR recognized the

---

[2] 78 Fed. Reg. 21750, 21754 (April 11, 2013).
[3] 78 Fed. Reg. 21778.
[4] These alternatives require the payment and collection of daily variation margin, either within the affiliated group or from unaffiliated counterparties, except as provided in paragraph (b)(4)(ii)(B) in the case of certain non-financial groups. The alternative under paragraph (b)(4)(ii) applies, without quantitative limitations, with respect to eligible affiliate counterparties in the EU, Japan or Singapore. The alternative under paragraph (b)(4)(iii) applies, subject to a quantitative limit based on aggregate notional value, with respect to swaps between an eligible affiliate counterparty located in the United States and other eligible affiliate counterparties located in jurisdictions other than the United States, EU, Japan or Singapore. Adjustments to this aggregate notional limitation may be appropriate in light of future extensions of the clearing mandate to new product classes. ISDA is considering this issue and may raise it with Commission staff in future discussions.
[5] CFTC NAL No. 14-135, http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-135.pdf, and CFTC NAL 15-63, http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-63.pdf.

benefits of additional time for an orderly transition period with regard to the timing and sequencing issues associated with the implementation of mandatory clearing regimes in non-U.S. jurisdictions, some of which are already in effect or are about to come into effect, as outlined by the Commission in the final rules recently issued to expand the Commission's interest rate swap clearing mandate.

Discussion

As a general matter, ISDA strongly supports the Commission's efforts to harmonize derivatives regulations across jurisdictions. In particular, we appreciate the Commission's engagement with European regulators to formulate a common approach for transatlantic CCPs. However, ISDA submits that as other jurisdictions now begin to implement their own mandatory clearing obligations, it's important to extend the relief for inter-affiliate trades until such time when the Commission makes a comparability determination for these jurisdictions. Continued relief is essential in ensuring that counterparties efficiently and effectively mitigate credit risk, a primary purpose behind inter-affiliate swaps.

Extending the period of availability of the alternative compliance mechanisms would also help forestall market uncertainty as the expiration of the current no-action relief is fast approaching. As it is not possible to predict the precise timing of when the Commission will be able to make the requisite comparability determinations or when access to clearing will be widespread enough to enable an orderly transition to the application of the outward-facing clearing condition in non-U.S. jurisdictions, ISDA suggests that the end of calendar year 2017 is an appropriate expiration date for the extended relief, subject to any earlier announcement by the Commission that it has made the requisite comparability determinations.

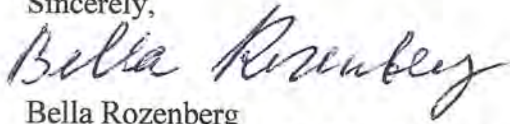
This date presents a prospect that the implementation timing for market-wide mandatory clearing can be judged with greater certainty, especially in significant non-U.S. markets. This expiration date, of course, may need to be reassessed in the future, and further extensions may be warranted, in particular to accommodate phase-in schedules for non-financial counterparties.[6]

Accordingly, ISDA requests that the Commission extend the availability of the alternative compliance mechanisms contained in paragraphs (b)(4)(ii) and (iii) of Regulation 50.52 until the earlier of (i) December 31, 2017 or (ii) with respect to a particular jurisdiction, 90 days after the date on which the Commission announces that it has made the comparability determinations contemplated in paragraph (b)(4)(i). In addition, the relief provided under CFTC Letter No. 15-63 should be extended by further no-action relief in order to allow time for Commission action and to forestall market uncertainty as the letter's currently scheduled expiration date nears.

[6] See, e.g., id. at 54 (proposed three-year phase-in period for certain non-financial counterparties).

Thank you for your consideration of these concerns. Please do not hesitate to contact me or ISDA staff if you have any questions.

Sincerely,



Bella Rozenberg
Senior Counsel/Head of Regulatory and Legal Practice Group

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 October 11, 2016 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,

Bella Rozenberg
Senior Counsel/Head of Regulatory and Legal Practice Group

Appendix B
Attachment 2

November 16, 2016

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

Re: Supplemental Request for Commission Action – Part 50

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("**ISDA**"),[1] on behalf of its members and other market participants that engage in inter-affiliate swaps, is submitting its Supplemental Request to the Commodity Futures Trading Commission (the "**Commission**") under Part 50 of the Commission regulations.

On October 11, 2016, ISDA filed a request with the Commission to exercise its authority pursuant to section 4(c) and other applicable provisions of the Commodity Exchange Act ("**CEA**") to extend existing relief from certain conditions of the exemption from clearing for certain inter-affiliate swaps pursuant to Commission Regulation 50.52 (the "**Inter-affiliate Clearing Exemption**"). As of today, we have not received the requested relief.

In our October 11 submission, we requested that the Commission allow market participants relying on the Inter-affiliate Clearing Exemption to comply with the conditions set forth in paragraph (b)(4)(ii) or (iii) of Regulation 50.52 for an additional period of time, beyond the December 31, 2016 expiration date of relief provided pursuant to CFTC Letter No.15-63, in lieu of complying with the "outward-facing clearing" condition set forth in paragraph (b)(4)(i) of regulation 50.52. CFTC Letter 15-63 provides relief from compliance with the outward-facing swaps condition to the extent that swaps are required to be cleared according to Commission regulation 50.4.

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 68 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, clearing houses 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.

The current no-action relief applies to the four classes of interest rate swaps and two classes of credit default swaps that the Commission determined to be subject to the mandatory clearing requirement in its December 13, 2012 Mandatory Clearing Determination.[2]

On October 14, 2016, the Commission issued its Mandatory Clearing Determination to expand the existing clearing requirement to an additional four classes of interest rate swaps. The expanded interest rate swap classes include:

- fixed-to-floating interest rate swaps denominated in Australian dollar (AUD), Canadian dollar (CAD), Hong Kong dollar (HKD), Mexican peso (MXN), Norwegian krone (NOK), Polish zloty (PLN), Singapore dollar (SGD), Swedish krona (SEK), and Swiss franc (CHF);
- basis swaps denominated in AUD;
- forward rate agreements (FRAs) denominated in NOK, PLN, and SEK; and
- overnight index swaps (OIS) denominated in AUD and CAD, as well as U.S. dollar-, euro-, and sterling-denominated OIS with termination dates up to three years.[3]

In support of expanding the Mandatory Clearing Determination, the Commission noted in the October 14, 2016 final rule that interest rate swaps subject to the expanded Mandatory Clearing Determination were either currently subject, or likely to be subject to a clearing requirement in another jurisdiction.

The purpose of this Supplemental Request is to then request that the jurisdictions set forth in paragraph (b)(4)(ii) of Regulation 50.52 include, either through formal rulemaking, and if necessary, interim no-action relief, those jurisdictions that since the publication date of the Inter-Affiliate Clearing Exemption in 2013 have taken action towards implementing clearing mandates for interest rates swaps ("**New Clearing Law Jurisdictions**"). Enumerating New Clearing Law Jurisdictions in paragraph (b)(4)(ii) would be consistent with the Commission's original comments in the Inter-Affiliate Clearing Exemption[4]. It is anticipated that any inclusion of New Clearing Law Jurisdictions in paragraph (b)(4)(ii) would be phased-in based on when the applicable interest rate swap clearing requirement takes effect. For example, Mexico and Australia would first be enumerated as jurisdictions under paragraph (b)(4)(ii) when the Commission's clearing requirement for OIS denominated in AUD, basis swaps denominated in AUD, and fixed-to-floating interest rates swaps denominated in AUD and MXN take effect on December 13, 2016.

[2] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284 (Dec. 13, 2012) (codified at 17 C.F.R. § 50).
[3] Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps, 81 Fed. Reg. 71202 (Oct. 14, 2016) (codified at 17 C.F.R. § 50).
[4] The Commission noted in support of drawing a distinction between affiliates in Japan, Singapore, and the European Union (together "**Clearing Law Jurisdictions**") and affiliates not in Clearing Law Jurisdictions, the significant steps taken by Japan, Singapore, and the European Union to implement mandatory clearing.

Thank you for your consideration of these concerns. Please do not hesitate to contact me if you have any questions.

Sincerely,

Bella Rozenberg
Senior Counsel/Head of Regulatory and Legal Practice Group

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 November 16, 2016 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,

Bella Rozenberg
Senior Counsel/Head of Regulatory and Legal Practice Group

Appendix B
Attachment 3

ISDA Safe, Efficient Markets

December 6, 2016

ISDA Responses to CFTC Questions on Inter-Affiliate Clearing Exemption

1. Do ISDA members currently relying on the alternative compliance framework of regulation 50.52(b)(4)(ii) typically comply with subparagraph (1) (pay and collect variation margin on swaps with unaffiliated counterparties), or do they typically comply with subparagraph (2) (pay and collect variation margin on all swaps with other eligible affiliate counterparties)? We note that the no-action letter issued yesterday (CFTC Letter 16-81), consistent with the prior no-action letters, requires eligible affiliate counterparties to maintain documentation regarding compliance with the conditions of the no-action letter. Referring to such documentation may be useful in better understanding how market participants have relied on the alternative compliance framework and plan to rely on the existing no-action letter relief.

Generally, variation margin is exchanged on swaps between eligible affiliate counterparties. This is also the case due to both the CFTC and Prudential Regulators' margin rules requiring swap dealers to exchange variation margin with their swap entity and financial end user affiliates. The compliance dates for variation margin was September 1, 2016 for some large swap dealers and is March 1, 2017, for all other swap dealers. Additionally certain transactions between swap dealers that are banks and their affiliates are subject to the Federal Reserve's Regulation W, which has collateralization requirements. .

2. Have eligible affiliate counterparties located in the five new clearing law jurisdictions (Australia, Canada, Hong Kong, Mexico, and Switzerland) previously relied on regulation 50.52 in connection with swaps that were covered by the CFTC's first clearing requirement issued in 2012? Please provide any relevant explanatory information regarding the use of the inter-affiliate exemption by eligible affiliate counterparties.

Yes. Eligible affiliate counterparties located in these jurisdictions previously relied on CFTC Rule 50.52 in connection with swaps covered by the first clearing requirement determination. However, given that the second clearing requirement determination applies to currency used in the jurisdictions listed above, a higher proportion of swaps transactions with the underlying currency of eligible affiliate counterparties located in these new clearing law jurisdictions will be subject to the clearing requirement. Eligible affiliate counterparties should be able rely on the s first alternative compliance framework.

3. To what extent have eligible affiliate counterparties relied upon the second alternative compliance framework of (i.e., the five percent test) under regulation 50.52(b)(4)(iii)? Please provide any relevant explanatory information regarding the use of this alternative compliance framework by eligible affiliate counterparties.

Eligible affiliate counterparties not located in the United States, the European Union, Japan, or Singapore have relied on the second alternative compliance framework for swaps subject to the first clearing requirement determination. As noted in our response to Question 2 above, the number of eligible affiliate counterparties not located in the United States, the European Union, Japan, or Singapore, as well as the number of swaps

transactions, that will need to rely on the second alternative compliance framework will increase under the second clearing requirement determination.

4. What is the scope of the swaps covered by ISDA's supplemental request? Would the swaps covered by possible supplemental staff-level action be limited to the interest rate swaps included in the CFTC's expanded clearing requirement issued in September 2016? Would the swaps covered by supplemental staff-level action include swaps that were covered by the CFTC's first clearing requirement issued in 2012?

The purpose of ISDAs supplemental request is to expand the scope of jurisdictions that would not count toward the 5% test calculation under regulation 50.52(b)(4)(iii). The choice of alternative compliance framework is dependent on the location of the eligible affiliate counterparty and not the product type, and thus we believe that providing relief based on counterparty location is generally consistent with the current regulatory framework and achieves a more practical result.

5. Would the swaps covered by ISDA's supplemental request be eligible for any exemption to an applicable non-U.S. clearing requirement for intragroup swaps? Please provide CFTC staff with any useful information about analogous non-U.S. intragroup exemptions from mandatory clearing.

The response to this question requires extensive analysis of the clearing requirements in different foreign jurisdictions. Given the forthcoming December 13, 2016 deadline for the first compliance date under the second clearing requirement determination, we ask that Commission staff issue no-action relief based on the information provided in this response. If necessary, we e will submit additional information at a later time.

6. Would the swaps covered by ISDA's supplemental request be subject to the CFTC's uncleared margin requirement or to the uncleared margin requirements issued by one or more non-U.S. jurisdictions? Please provide any useful information regarding the interplay between the global implementation of margin for uncleared swaps and intragroup exemptions from mandatory clearing around the globe.

As discussed in our response to Question 4, the availability of the alternative compliance frameworks is dependent on the location of the eligible affiliate counterparty and not product type.

The specific requirements with respect to initial and variation margin for uncleared swaps will depend on whether the relevant U.S. eligible affiliate counterparty is subject to the CFTC or Prudential Regulators' margin rules. As noted in our response to Question 1 above, both rules require counterparties to exchange variation margin on uncleared swaps. In addition to being subject to U.S. margin rules, these swaps would likely also be subject to the margin rules of the jurisdiction in which the non-U.S. eligible affiliate counterparty is located.

7. How many ISDA members and how many members' affiliates are seeking to use the regulation 50.52(b)(4)(ii)'s alternative compliance framework for an eligible affiliate counterparty located in each of the five new clearing law jurisdictions? How many in each of the European Union, Japan, and Singapore? If possible, please identify the firms by legal entity identifier.

The response to this question requires extensive data research and analysis. Given the forthcoming December 13, 2016 deadline for the first compliance date under the second clearing requirement determination, we ask that Commission staff issue no-action relief based on the information provided in this response. If necessary, we will submit additional information at a later time.

8. Are there any eligible affiliate counterparties located in each of these eight jurisdictions that would be interested in staff-level no-action relief?

Yes. Eligible affiliate counterparties that transact in any swaps required to be cleared under either the first or second clearing requirement determination are interested in staff-level no-action relief. Some of these eligible affiliate counterparties transact in swaps covered by both the first and second clearing requirement determinations, and some only transact in swaps covered by the second clearing requirement determination.

9. By what date or dates would staff-level no-action relief need to be issued for the benefit of specified firms with regard to specific swaps?

The relief is necessary in light of the forthcoming December 13, 2016 deadline.

Appendix B

Attachment 4

ISDA® Safe, Efficient Markets

July 18, 2016

Submitted Electronically

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 201581

Re: Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps (RIN 3038-AE20)

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to comment on the above-referenced notice of proposed rulemaking (the "**Proposal**") published by the Commodity Futures Trading Commission (the "**CFTC**"), which would expand upon the CFTC's existing clearing mandate to cover additional interest rate products that are, or are expected to be, subject to clearing mandates implemented by non-U.S. regulators. In the Proposal, the CFTC states its desire to harmonize its clearing mandate with those of its counterparts in other jurisdictions.

As a core part of its work to make derivatives markets safer and more efficient, ISDA and its members strongly support derivatives clearing to reduce systemic risk and promote market liquidity, both in the United States and globally. Clearing of swaps such as those covered by the Proposal is consistent with the 2009 G20 commitment to clear all standardized over-the-counter ("**OTC**") derivatives. It is also consistent with the intent of U.S. Congress in Section 723 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. ISDA and its members also strongly support efforts to harmonize derivatives regulation across jurisdictions. Such

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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, clearing houses and depositories, as well as law firms, accounting firms and other service providers. Additional information on ISDA is available at www.isda.org.

International Swaps and Derivatives Association, Inc.
360 Madison Avenue, 16th Floor
New York, NY 10017
P 212 901 6000 **F** 212 901 6001
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

harmonization is crucial to effective and efficient implementation of all of the G20 derivatives reforms.

ISDA commends the CFTC for its efforts in the areas of derivatives clearing and global harmonization of derivatives regulation, both of which are advanced by the Proposal. In order to ensure that the Proposal is implemented in a manner that enhances market liquidity, reduces risk and fosters financial stability, ISDA urges the CFTC to consider the following in any final rulemakings, each of which is discussed in greater detail below:

- In response to the Proposal's request for feedback regarding implementation timing, ISDA and its members strongly support an implementation schedule that follows the effective date of corresponding non-U.S. clearing mandates. Such implementation should also provide an additional phase-in period based on the implementation schedule in CFTC Reg. §50.25.

- Given the low threshold for mandatory trading determinations once a product is subject to mandatory clearing under the CFTC's regulatory framework and the broad application of the CFTC's cross-border guidance, ISDA urges the CFTC to consider issues that ISDA has separately raised in connection with certain aspects of the CFTC's mandatory trading determinations.

- The CFTC should ensure that it has appropriate and adequate data regarding the impact that any expansion of its clearing mandate would have on market participants on both a global and regional basis in order to inform its analysis of the factors in Section 2(h) of the Commodity Exchange Act ("**CEA**").

- As it works to harmonize its clearing mandate with those of its counterparts in other jurisdictions, we urge the CFTC to consider all aspects of clearing mandates, which include both product scope *and* entity scope.

Implementation Timing

The Proposal provides two alternatives for implementation timing and asks for industry input regarding which alternative should apply if the Proposal is finalized. Under the first alternative, the extended mandate would take effect for market participants subject to the CFTC's clearing mandate 60 days after a final CFTC rule is published in the Federal Register, regardless of whether analogous clearing mandates have taken effect in non-US jurisdictions (this is the so-called "simultaneous effective date"). Under the second alternative, for each product covered by the extended mandate, clearing would be required on the earlier of: (a) 60 days after the effective date of an analogous clearing mandate in the corresponding non-U.S. jurisdiction (*provided that*, in no event would such date be earlier than 60 days after a final CFTC rule is published in the Federal Register); and (b) two years after a final CFTC rule is published in the Federal Register (so-called "alternative compliance dates to coordinate implementation with non-U.S. jurisdictions").

ISDA strongly prefers compliance dates that correspond with the effectiveness of clearing mandates in non-U.S. jurisdictions. This alternative is consistent with the CFTC's objective of global harmonization and also consistent with maximizing liquidity and reducing risk associated with cleared OTC derivatives.

To further promote harmonization, ISDA urges the CFTC to phase-in implementation by counterparty type after the initial 60-day period if the corresponding non-U.S. clearing mandate either (i) applies to a materially narrower set of entities than the CFTC's clearing mandate or (ii) is subject to phased-in implementation based on entity type. Specifically, after the initial 60-day period, a CFTC clearing mandate should be phased in based on the 270-day implementation schedule in CFTC Reg. §50.25, which was used to implement the CFTC's existing clearing mandate. Market participants subject to the CFTC's clearing mandate are familiar with these entity classifications. A longer phase-in is appropriate in these situations to allow entities that are not currently subject to, or preparing to be subject to, a corresponding clearing mandate to address legal, documentation, operational and other considerations prior to a move to clearing.

Annex A to this letter sets forth the entity scope (or expected entity scope) of applicable non-U.S. clearing mandates and any applicable phase-in periods. Based on this information, ISDA believes that the additional phase-in time would be appropriate for products subject to clearing mandates in all of the jurisdictions covered by the Proposal (*i.e.,* Australia, Canada, the European Union, Hong Kong, Mexico, Singapore and Switzerland).

Link with CFTC's Mandatory Trading Determinations

ISDA and its members are concerned that the expanded clearing mandate could lead to more mandatory trading determinations for products that may not have the necessary trading liquidity to be executed on a swap execution facility. Under the CFTC's current framework, once a product is subject to the CFTC's clearing mandate, the threshold for whether it is "made available to trade," and therefore subject to mandatory trading requirements, is very low.

The Proposal covers products that are transacted in relatively high volumes outside of the United States. The CFTC should consider the impact that a clearing mandate for these products and any subsequent "made available to trade" determination could have on market liquidity in relevant non-U.S. markets. ISDA believes that as a result of the broad definition of "U.S. person" under the CFTC's cross-border guidance, combined with the current lack of a substituted compliance framework for trade execution platforms, a mandatory trading determination for products covered by the Proposal would have a detrimental impact on trading liquidity and could result in potentially irreversible market fragmentation.

ISDA urges the CFTC to be mindful of the link between a clearing mandate and a mandatory trading determination in any final rules expanding upon its existing clearing mandate. ISDA has separately suggested modifications to the CFTC's mandatory trading requirements, including with respect to the cross-border impacts of such requirements and determinations of when a

product is "made available to trade" under the requirements.[2] In light of these issues, ISDA urges the CFTC to take any available steps (e.g., suspension of self-certification of the "made available to trade" determination under CFTC Reg. §40.6 or no-action relief) in connection with an expansion of its clearing mandate to ensure that only contracts that have sufficient trading liquidity are subject to the mandatory trading requirements.

Relevant Data and Analysis

The data in *Table 17* in the Proposal sets forth percentages of interest rate swap products covered by the Proposal that were cleared in the second quarter of 2015 based on the CFTC's Part 45 data. However, it is difficult to determine the impact that the Proposal would have on market participants based on this data (*i.e.,* it is difficult to extract and analyze the volume of transactions entered into by entities subject to the CFTC's clearing mandate that currently enter into transactions covered by the Proposal on an uncleared basis).

It is particularly difficult to determine the impact that the Proposal would have on market participants in an individual jurisdiction. To facilitate a better understanding of such impact, ISDA urges the CFTC to publish the data in *Table 17* on a jurisdiction-by-jurisdiction basis for each of the jurisdictions covered by the Proposal. Additionally, ISDA would welcome the opportunity to work with the CFTC to gather additional data, which could enhance the CFTC's analysis of the factors in Section 2(h) of the CEA and better inform both the CFTC and the market regarding whether the products covered by the Proposal are suitable for *mandatory* clearing.

ISDA believes that a fulsome understanding of the impact that the Proposal would have on market participants, and of whether the Proposal would have a disparate impact in any of the covered jurisdictions, is necessary to fully analyze whether the CFTC's clearing mandate should apply to each of the products covered by the Proposal. Such data would also inform the analysis of the effect that mandatory clearing for a product would have on competition under Section 2(h)(2)(D)(ii)(IV).

Exempt DCOs

Several of the products covered by the Proposal are cleared in relatively high volumes on derivatives clearing organizations ("**DCOs**") that are exempt from registration instead of registered with the CFTC. By CFTC order, these DCOs may clear for US proprietary accounts but not for US customers. ISDA urges the CFTC to consider the effect that the Proposal's requirements for certain interest rate swaps denominated in Hong Kong dollars and Australia

[2] *See* ISDA Research Note *Cross-Border Fragmentation of Global Interest Rate Derivatives; Second Half 2015 Update* (May 2016), *available at* https://www2.isda.org/functional-areas/research/research-notes/; ISDA *Principles for US/EU Trading Platform Recognition* (February 2016), *available at* http://www2.isda.org/functional-areas/public-policy/united-states/; *Petition for Rulemaking to Amend Parts 1 (General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the Commodity Futures Trading Commission Regulations* from ISDA to the CFTC, dated June 15, 2015, *available at http://www2.isda.org/functional-areas/public-policy/united-states/.*

dollars could have on clearing such products at OTC Clearing Hong Kong Ltd. and ASX Clear (Futures) Pty Ltd. ISDA also urges the CFTC to further consider the effect that mandatory clearing for products that clear in relatively high volumes on these exempt DCOs would have on competition in the relevant jurisdictions.

In the preamble to the Proposal, the CFTC notes that it considered and was informed by the work of its non-U.S. counterparts. However, ISDA notes that the determinations by regulators in Hong Kong and Australia to require clearing for certain interest rate products denominated in Hong Kong dollars and Australian dollars were likely based in part on an assumption that entities subject to the relevant clearing mandates would be able to clear such products on OTC Clearing Hong Kong Ltd. and ASX Clear (Futures) Pty Ltd., respectively. ISDA urges the CFTC to consider this potential discrepancy.

Harmonization Generally

As noted above, ISDA supports the CFTC's efforts to harmonize its clearing mandate with non-U.S. clearing mandates. Additionally, subject to the modifications discussed above, ISDA supports the extension of the CFTC's clearing mandate in accordance with the Proposal as a step towards achieving such harmonization.

Notwithstanding the foregoing, ISDA would also like to stress the importance of conducting independent analysis regarding whether a particular product is appropriate for mandatory clearing within the CFTC's framework. As discussed above, the CFTC's clearing mandate applies to a different set of entities than the clearing mandates of its non-U.S. counterparts. Perhaps even more importantly, the CFTC is subject to statutory requirements in Section 2(h) of the Commodity Exchange Act when determining whether a swap should be subject to mandatory clearing, which may differ from requirements that apply to regulators in non-U.S. jurisdictions.

ISDA commends the CFTC for conducting an independent analysis in the preamble to the Proposal, subject to the comments above regarding additional issues that the CFTC may want to consider in advance of issuing any final rules. ISDA nonetheless cautions the CFTC from prioritizing harmonization of clearing mandates over a thorough analysis of the impacts that a CFTC clearing mandate may have on liquidity and risk management for a particular product, as well as on the safety and soundness of the U.S. and global derivatives markets.

Instances, including those raised above for certain of the products covered by the Proposal, could arise in which it would not be appropriate for the CFTC's clearing mandate to apply to products covered by non-U.S. clearing mandates due to differences in the framework for the CFTC's clearing mandate or for other reasons particular to the U.S. derivatives markets.[3] Separately, the CFTC does not have any control over the clearing mandates of its counterparts in non-U.S. jurisdictions and therefore should continue to conduct full and robust independent analysis prior to implementing any clearing mandates.

[3] ISDA notes that if finalized the Proposal would be the first clearing mandate to cover interest rate products settled in currencies other than G4 currencies or the applicable local currency.

*   *   *

ISDA appreciates the opportunity to provide these comments. If we may provide further information, please do not hesitate to contact the undersigned or other ISDA staff.

Sincerely,

Steven Kennedy
Global Head of Public Policy

Annex A

Entity Scope of Relevant Non-U.S. Clearing Mandates

	European Union[4]	Switzerland	Canada[5]	Mexico[6]
Entity Scope	Financial counterparties (FC); Non-financial counterparties that exceed the clearing threshold (NFC+); and Third country entities (TCE) that would be an FC or NFC+ if established in EU where (i) dealing with an FC or NFC+ or (ii) dealing with another TCE that would be an FC or NFC+ in certain circumstances.	Financial counterparties that exceed a CHF 8 billion notional-based threshold (FC+); and Non-financial counterparties that exceed the clearing threshold (NFC+).	**PROPOSAL:** A local counterparty to a transaction in a mandatory clearable derivative if it itself, and the other counterparty, are one or more of the following: (i) a participant subscribing to the services of a regulated clearing agency for a mandatory clearable derivative; (ii) an affiliated entity of a participant described in (i); (iii) a local counterparty that, together with its local affiliated entities, has an aggregate gross notional amount of more than CAD 500 billion in outstanding derivatives as specified under the applicable regulations, after excluding intragroup transactions.	All banks and brokerage firms that trade (i) among themselves or with domestic institutional investors and (ii) with foreign financial institutions or foreign institutional investors (for example, hedge funds); plus any market participants trading non-cleared OTC derivatives now subject to the mandate.
Effectiveness and Phase-In	Expected to enter into force for products covered by the Proposal in August, 2016. Category 1 (Clearing Members) – six months after entry into force. Category 2 (FCs whose group's aggregate month-end average notional of uncleared derivatives for January, February and March 2016 is above €8billion) – 12 months after entry into force. Category 3 – (all other FCs) – 18 months after entry into force. Category 4 – (NFC+s not in Cat 1, 2, 3) – 36 months after entry into force.	**EXPECTED:** Phase-in by entity type.	**PROPOSAL:** No phase-in.	Currently in effect. Phase-in by entity type.

[4] See http://ec.europa.eu/finance/financial-markets/docs/derivatives/160610-delegated-regulation_en.pdf.
[5] See **PROPOSAL** at http://www.osc.gov.on.ca/documents/en/Securities-Category9/csa_20160224_94-101_roc-derivatives.pdf.
[6] See http://www.banxico.org.mx/disposiciones/circulares/%7b9EA848A6-2376-3AB8-A8D8-45943278029C%7d.pdf.

	Hong Kong[7]	Singapore[8]	Australia[9]
Entity Scope	Authorized Financial Institutions (AFIs), Approved Money Brokers (AMBs) and Licensed Corporations (LCs), both local and foreign-incorporated (together, "prescribed persons"), with average local total positions of USD 20 B or more over a 3-month calculation period. Both counterparties must fall within these categories and thresholds for the trade to be required to be cleared. HKMA/SFC has designated a specific list of "Financial Services Providers" (FSPs). A trade between a prescribed person and an FSP is required to be cleared.	**PROPOSAL:** Banks in Singapore licensed under the Banking Act with aggregate outstanding notional amount of derivatives booked in Singapore exceeding SGD 20 billion on the last day of each of the last 4 quarters. Both counterparties must fall within the above category and threshold for the trade to be required to be cleared.	Australian or foreign financial entities which are Australian Authorized Deposit-Taking Entities (ADIs), Australian financial services licensees (AFS licensees) or exempt foreign licensees (as applicable) with gross notional outstanding positions of AUD 100 billion or more on two consecutive quarterly calculation dates and any other entities which wish to opt-in (Clearing Entities) are subject to mandatory clearing when trading with (i) another Clearing Entity or (ii) a Foreign Internationally Active Dealer (*e.g.*, CFTC SDs, SEC SBSDs) (subject to certain conditions when the Clearing Entity is a Foreign Clearing Entity). For trades involving two Clearing Entities, both counterparties must fall within those categories and thresholds for the trade to be required to be cleared.
Effectiveness and Phase-In	Will take effect July 1, 2017. No phase-in.	**PROPOSAL:** No phase-in.	Currently in effect (*except for* AUD FRAs and AUD OIS). AUD FRAs in effect from April 2018. AUD OIS in effect from October 2016.

[7] See http://www.gld.gov.hk/egazette/pdf/20162005/es22016200528.pdf.
[8] See **PROPOSAL** at http://www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/Consultation%20Paper%20on%20Draft%20Regulations%20for%20Mandatory%20Clearing%20of%20Derivatives%20Contracts.pdf.
[9] See https://www.legislation.gov.au/Details/F2015L01960.

Appendix B
Attachment 5

October 21, 2016

Submitted Electronically

Financial Stability Board
fsb@fsb.org

Re: Discussion Note: *Essential Aspects of CCP Resolution Planning*

The Futures Industry Association (FIA), the Global Financial Markets Association (GFMA), the Institute of International Finance (IIF), the International Swaps and Derivatives Association, Inc. (ISDA) and the Clearing House (TCH; and together with FIA, GFMA, IIF and ISDA, the Associations) welcome the Discussion Note on *Essential Aspects of CCP Resolution Planning* recently published by the Financial Stability Board (FSB). The role and significance of central counterparties (CCPs) has increased in recent years as over-the-counter (OTC) derivatives have moved to clearing. Effective resilience, recovery and resolution mechanisms for CCPs are now more than ever critical to the efficient operation, stability and sustainability of the global financial markets. The Associations support the Discussion Note as an important step towards addressing the financial disruption that could occur in the unlikely event that a CCP fails and welcome the opportunity to provide the following comments.

In many instances, if a CCP experiences distress, the Associations support a CCP-led recovery in accordance with a clear and transparent CCP rulebook.[1] However, we recognize that a CCP-led recovery should not continue if recovery measures would cause contagion in the market, negatively impact financial stability, increase moral hazard (*e.g.*, by promising to "bail out" owners of for-profit CCPs), irreversibly erode confidence in a CCP's management or erode resources beyond the point at which a resolution authority could successfully intervene. Some

[1] *See* the "Recovery" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/.

members also believe that resolution authorities should consider commencing resolution proceedings before use of any loss allocation tools beyond the CCP's funded resources.

The Associations believe that CCP resolution regimes supplemented by viable strategies for a CCP's resolution are crucial and view the following as key principles to consider in developing CCP resolution regimes and strategies:

- Authorities should establish and clearly define, on an *ex ante* basis, objective conditions and considerations for when to commence a resolution of a CCP, as well as the strategies that they would use in such a resolution, to allow clearing participants[2] to risk manage their cleared portfolios.
- Commencement of resolution should not be automatic or presumed, allowing the possibility for a CCP-led recovery to continue in certain situations (provided that implementation of recovery measures is subject to regulatory supervision and oversight).[3]
- A careful consideration of all facts and circumstances at the time of a potential resolution is critical.
- Aside from statutory powers available to resolution authorities, the sequence of tools set forth in CCP rulebooks and publicly-disclosed resolution strategies should guide how loss allocation and position rebalancing proceeds in a CCP's resolution. Resolution strategies should also disclose how resolution authorities expect to use their applicable statutory power together with their enforcement of CCP rulebooks.
- CCP rulebooks should provide for senior debt claims to clearing participants who suffer losses from the exercise of variation margin gains haircutting (VMGH) or partial tear-ups (PTUs)[4] in CCP recovery and/or resolution.
- CCPs are more than a market infrastructure or utility and they do themselves bring risk to the financial system. CCPs make decisions on a daily basis that impact their risk profiles, including introducing new products, setting membership criteria and establishing requirements for margin and default fund contributions. Accordingly, CCPs must contribute appropriate amounts of "skin-in-the-game" (SITG)[5] to their default "waterfall," provide claims to clearing participants who suffer losses from the use of certain tools in recovery and/or resolution and ensure that their equity is not shielded from losses in resolution.

---

[2] As used herein, "clearing participants" refers to clearing members and their direct and indirect clients.
[3] As an example that we discuss in greater detail herein, if it remains likely that a CCP could re-establish a matched book for all but a subset of illiquid, highly concentrated and/or outsized positions in the defaulting clearing member's (or clearing members') portfolio(s), it may be preferable for the CCP to exercise PTUs (under regulatory oversight and supervision, including to the extent possible under relevant law, oversight by a resolution authority) for such subset, without entering a resolution that would apply to a broader set of products.
[4] We refer to VMGH and PTU because these are the tools that the Associations recommend if funded and unfunded resources are inadequate (in the case of VMGH) or if the CCP cannot return to a matched book through its default management process (in the case of PTU). However, in the event that different tools are utilized for these purposes, we believe that clearing participants suffering losses from the use of such other tools should also receive senior debt claims. We also note that, as discussed below, while some members support a limited amount of VMGH in recovery, other members do not support any VMGH outside of resolution.
[5] *See* the "CCP Contribution to Losses" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/.

Separately, CCPs and their shareholders must be fully responsible for bearing non-default losses.[6]

- Relevant authorities should have the power to relax clearing mandates and capital requirements for cleared derivatives as necessary to facilitate orderly resolution of a CCP.

We elaborate on these principles below and make reference to them in our responses to the specific questions in the Discussion Note.

1. Default Losses – Tools Available Prior to and During Resolution

CCPs have the ability to apply funded resources to allocate losses in accordance with default "waterfalls" and, upon exhaustion of funded resources, also have capabilities to assess members for additional contributions, in each case, in accordance with their rulebooks.[7] These funded and unfunded resources should be sized and stress-tested to cover losses during the default management process set forth in the CCP's rulebook and clearing participants should have full transparency into the results of such sizing and stress testing.[8] As part of these resources, the Associations maintain that CCPs should provide at least two tranches of SITG. The first tranche of SITG should be applied to cover losses before the CCP uses any funded or unfunded mutualized resources (other than those of the defaulting clearing member) and the second tranche should be applied to cover losses after assessments on clearing members.[9] CCP SITG ensures that the CCP and its shareholders share in losses and therefore incentivizes them to engage in prudent risk management both prior to, and during, a stress event. A second tranche of CCP SITG further aligns the motivations of clearing participants on the one hand and the CCP and its shareholders on the other. Adequate resources at the CCP to cover the default management process and transparency into those resources would also incentivize meaningful clearing member participation in the default management process because clearing members would have confidence that the CCP could return to viability.

In the event that a CCP's default management process, supported by funded and unfunded CCP resources, fails to return a CCP to a matched book and cover losses, the Associations support

---

[6] One exception would be if a clearing member has an active right to direct specific investments of funds held by the CCP and the CCP does not profit from such investments. Under these circumstances, it would be appropriate for the clearing member to bear losses from such investments. For clarity, the right to allocate investments of assets generally is not an active right to direct specific investments and therefore would not trigger this exception.

[7] We strongly support transparency and clarity in CCP rulebooks regarding the procedures CCPs would follow to effectuate these capabilities, both to allow clearing participants to manage their risks to CCPs and to incentivize meaningful participation in CCP default management processes.

[8] *See* the "Stress Testing" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/.

[9] *See* the "CCP Contribution to Losses" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/. For clarification, we do not envision that the second tranche of CCP SITG would result in the CCP exceeding appropriately-established "coverage" requirements. *See* the "Coverage" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/ for additional explanation of this point.

utilization of the following tools in CCP resolution (as opposed to other tools contemplated by Appendix II-Annex 1 (the FMI Annex) to the FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions*).[10]

- *Variation Margin Gains Haircutting*: If the CCP's auction or similar mechanism to return it to a matched book continues to function but losses exceed funded and unfunded mutualized resources, VMGH is a loss allocation tool that can be applied to all clearing participants of the CCP. Some members believe VMGH is an effective and efficient loss allocation tool, as it distributes losses, and therefore risk, widely. These same members also believe that VMGH creates the right incentives by encouraging the subset of clearing participants with positions opposite the defaulting clearing member's (or clearing members') positions to close-out this risk. Other members believe that the use of VMGH could have knock-on effects in an already distressed market.[11] Many of these members support VMGH only after exhaustion of funded and unfunded mutualized resources, provided that it is administered by a resolution authority in resolution. Other members support a "modest"[12] use of VMGH in recovery and believe that a more significant use of VMGH would be more appropriate in resolution than recovery. Some members also maintain that VMGH should not be used until the CCP's own resources have been exhausted, including any funding obligations or guarantees from the CCP's parent.[13] One member does not support any use of VMGH prior to, or in, resolution.

- *Partial Tear-Ups*: PTUs should be a last resort position allocation tool to re-establish a matched book upon failure of the CCP's auction or similar mechanism to rebalance its book. We believe that PTUs should apply to the smallest portion of illiquid contracts possible but recognize that the scope of contracts may need to expand in certain circumstances and/or may be affected by concerns regarding financial stability. Any decisions regarding the scope of contracts to be torn up should be subject to strict governance procedures that are established and disclosed to clearing participants on an *ex ante* basis and account for the views of clearing participants whose positions could be torn up. The price for torn-up contracts should be as close to the fair market value of the contracts as possible so as not to negatively affect accounting or capital treatment for cleared transactions. We note that appropriate pricing may differ across product classes and urge the FSB and national regulators to work with CCPs and their clearing participants to establish appropriately consistent procedures and methodologies for pricing torn-up positions.

---

[10] Please see our responses to questions 7 and 9 below for a discussion of tools that the Associations believe should not be utilized to allocate losses or rebalance a CCP's book.

[11] These members believe that potential knock-on effects are particularly an issue if clearing members causing the four largest losses (assuming "Cover 2" plus one assessment), have already defaulted. *See* the "Coverage" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/ for additional explanation of this point.

[12] These members support additional work to determine appropriate thresholders for what constitutes a "modest" use of VMGH.

[13] We recognize that such obligations do not universally exist today but recommend that CCPs consider them as a further means to allocate losses.

- *Liquidity from Central Banks*: The Associations strongly support access to liquidity from central banks on standard market terms (including the requirement for high quality liquid collateral) as necessary to support CCP recovery and resolution.[14] CCPs should be required to hold sufficient high quality liquid, central-bank eligible collateral to ensure that they would be able to access liquidity from central banks on these terms. We believe that requirements for the provision of high quality liquid collateral should mitigate any concerns about central bank access with respect to liquidity in resolution.[15] Central bank access on standard market terms significantly enhances CCP resolution strategies without threatening financial stability or utilizing public money for recapitalization (which we agree should be explicitly prohibited).

As discussed in greater detail elsewhere in this letter, any clearing participants that suffer losses from VMGH or PTUs should receive compensation in the form of senior debt claims (either against the CCP or a parent company of the CCP).

It is crucial that CCP rulebooks provide clearing participants and the market with transparency and clarity regarding how VMGH and PTUs would be utilized from a technical perspective both to allow clearing participants to manage their risks to CCPs and to incentivize meaningful participation in the CCP default management processes. It is equally as important that resolution authorities publicly disclose CCP resolution strategies to provide transparency regarding expected application and sequencing of such tools in resolution. Without clarity regarding how tools would be utilized under various potential resolution scenarios, clearing participants may be incentivized to exercise "self-help" by entering transactions that minimize their exposures to the CCP. In doing so, clearing participants may enter into transactions that impede the ability of the CCP to return to a matched book.

It is also critical to note that VMGH and PTU serve two different purposes and are, therefore, not interchangeable. VMGH is a tool to source additional resources by allocating losses whereas PTU is a tool to return a CCP to a matched book upon failure of an auction or similar mechanism to return a CCP to a matched book. As discussed below, PTUs should be priced as close to fair market value as possible and, therefore, do not allocate losses. Similarly, VMGH would not return a CCP to a matched book if the CCP's default management process fails. To the contrary, if the CCP's auction process (or similar mechanism to rebalance its book) fails, the CCP may still have funded or unfunded mutualized resources that could be used alongside a limited amount of PTUs. On the other hand, the auction or similar mechanism may function beyond exhaustion of the CCP's funded and unfunded mutualized resources. If this happens, either additional resources from the CCP or a parent of the CCP, or some form of further loss allocation among clearing participants, would be necessary to avoid using public money.

The Associations do not support initial margin haircutting (IMH) at any point in either recovery or resolution. We believe that IMH would have knock-on effects in an already distressed market,

[14] To clarify, CCP access to central banks should be direct and should not require intermediation by clearing members or other banks with central bank access. Requiring intermediation by clearing members and other banks in a time of market stress would be procyclical, as such banks may be under liquidity strains as well.

[15] *See* ISDA and TCH "Considerations for CCP Resolution" (May 2016) *available at* http://www2.isda.org/news/clearing-members-analyze-the-resolution-of-central-counterparties-in-new-white-paper.

is procyclical and could incentivize clearing members to close out of positions in order to reduce their initial margin requirements at the first sign of distress. This would likely cause further disruption in the market and could impede the CCP's recovery. IMH could also dis-incentivize participation in an auction, as clearing members may not want to bid on positions that would increase their initial margin requirements. Finally, the potential for IMH could incentivize clearing members to post non-cash collateral, which could cause undue liquidity constraints in a CCP's day-to-day operations and therefore require larger liquidity facilities and additional sources of liquidity in the ordinary course. Moreover, in the event of a clearing member default, non-defaulting clearing participants would likely substitute their cash collateral immediately, which would further exacerbate liquidity constraints during a period of stress. Additionally, if IMH is permitted in some jurisdictions, it could drive clearing participants to clear only through CCPs in jurisdictions that prohibit IMH. Finally, in many jurisdictions initial margin for uncleared derivatives must now be held with a third-party custodian to shield it from the insolvency of the receiving counterparty. Not providing the same degree of protection to initial margin for cleared derivatives could dis-incentivize central clearing, which would be contrary to stated objectives of the G-20. For these reasons, we strongly believe that clearing participants should always maintain a claim for the return of the full amount of their initial margin posted, without any haircuts or other risk of such claim being reduced.[16]

2. Default Losses – Commencement of CCP Resolution

The Associations fully concur with the conditions for CCP resolution set forth in Section 4.3 of the FMI Annex to the FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions*, which are:

- Recovery measures available to the [CCP], including the use of its available assets and default resources and the application of any loss allocation rules, are exhausted and have failed to return the [CCP] to viability and continuing compliance with applicable legal and regulatory requirements, or are not being implemented in a timely manner; or

- The relevant oversight, supervisory or resolution authority determines that the recovery measures available to the [CCP] are not reasonably likely to return the [CCP] to viability within the timeframe required to enable continued compliance with applicable legal and regulatory requirements, or that they are otherwise likely to compromise financial stability.

Resolution regimes and strategies for CCP resolution should clearly define the point at which resolution could commence under various scenarios in order to provide market participants with clarity and certainty. If the resolution regime applicable to CCPs in a particular jurisdiction applies to entities other than CCPs, we urge resolution authorities in that jurisdiction to make publicly available more granular resolution strategies specifically for CCPs. These strategies should address, *inter alia*, specific criteria and considerations for triggering CCP resolution (within the confines of the applicable statutes) and the manner in which resolution tools would

[16] We note that this is required by law in some jurisdictions.

be applied under various potential scenarios. We think it would be useful for these strategies to be in the form of resolution "playbooks" for particular CCPs.

The Discussion Note indicates that resolution authorities may decide to commence resolution before a CCP has utilized all tools in its rulebook because, for a resolution to be credible, it requires a quantum of resources sufficient to absorb losses as well as replenish the CCP's financial resources. While some members support the foregoing, the Associations urge resolution authorities to carefully consider all the facts and circumstances at the relevant time and weigh potential benefits of intervening prior to the point at which financial stability could be threatened with the potential costs of such an intervention, including uncertainty for all market participants.

The Associations recommend that resolution regimes and/or publicly disclosed resolution strategies, as applicable, provide for a time at which a resolution authority may consider commencing resolution and the factors that the resolution authority would consider at that time. However, we believe that the resolution authority should have a significant amount of flexibility for recovery to continue if the resolution authority deems it appropriate from a systemic risk perspective and within applicable regulatory and resolution frameworks. More specifically, we believe that resolution authorities should have the authority to intervene once a CCP's funded mutualized resources are exhausted but we do not think that resolution should be automatic at that point (or any time after that) if recovery could proceed within pre-determined limitations. For example, if it remains likely that a CCP could re-establish a matched book for all but a subset of illiquid, highly concentrated and/or outsized positions in the defaulting clearing member's (or clearing members') portfolio(s), it may be preferable for the CCP to exercise PTUs (subject to limitations) for such subset, without entering a resolution that would apply to a broader set of products.[17] If recovery proceeds beyond utilization of funded resources and/or beyond the CCP's auction or similar mechanism to rebalance its book, we believe that oversight by relevant authorities, including resolution authorities to the extent possible under relevant law, should be required.

If resolution commences prior to exhaustion of all tools in a CCP's rulebook, we strongly recommend that the resolution authority apply the remaining default management processes and steps set forth in the CCP's rulebook,[18] as this would be consistent with the *ex ante* risk management decisions made by clearing participants prior to resolution. By applying this known framework, clearing participants would be better able to participate in the resolution process, as they would have planned for the steps to be taken and processes to be effectuated. Such certainty and predictability would go a long way in promoting financial stability in resolution. To further these objectives and therefore minimize market disruption, any potential deviations from the CCP's rulebook should be clearly articulated in a publicly disclosed resolution "playbook."

We anticipate that resolution authorities will need to act very expeditiously and may not have time to evaluate different potential courses of action. Therefore, we strongly support resolution

[17] See response to questions 7 and 8 below regarding additional restrictions that we believe should apply to the exercise of PTUs.
[18] We assume in this statement that the CCP rulebooks are amended consistent with our recommendations, including our recommendations with regard to senior claims for those who are affected by the exercise of VMGH and/or PTU.

regimes that give resolution authorities the power to step in immediately upon commencement of resolution and begin enforcing provisions of the CCP's rulebook. Additionally, advance planning for various potential scenarios will be crucial. In this regard, we also note that in some jurisdictions, a resolution authority may have to transfer the contracts cleared by the CCP to a bridge or other eligible transferee (assuming the CCP as opposed to a holding company of the CCP is in resolution) within limited stay periods in order to avoid exercise by clearing members of their rights to close-out their positions with the CCP.[19] In relevant jurisdictions, the resolution authority must therefore put in place a clear and detailed plan so that it is able to rebalance the CCP's book (or, alternatively, ensure that the CCP enters resolution with a balanced book) and effectuate the transfer of the matched book to the bridge or other transferee within the limited stay period.[20] Some members believe that if a resolution authority is required to transfer a matched book away from a failed CCP within a limited stay period, but is unable to develop a credible plan for doing so, it should consider alternative resolution strategies, such as, potentially, resolution of a holding company of the CCP, which could address timing constraints associated with transfers.[21]

To facilitate the foregoing, CCPs should have in place processes and real-time risk management capabilities to capture, monitor and report records and conditions (including total exposures, specific large clearing member and client exposures, liquidity demands (*i.e.,* uses) and coverage (*i.e.,* sources), available cash by currency, composition of non-cash collateral and certain other aspects of the CCP's default management process). Such processes and capabilities would enable CCP management and relevant authorities (including resolution authorities) to assess the stress situation in real time.[22]

---

[19] For example, clearing members of a CCP subject to resolution under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in the United States would be prevented from exercising any close-out rights in respect of their contracts until the end of the business day following commencement of resolution, after which time they would be free to exercise close-out rights, unless they had received notice their contracts were being transferred to a bridge or other transferee.

[20] It is important to bear in mind that transfer of the CCP's book to a bridge or other transferee does not restore the CCP to a matched book or allocate losses (or otherwise address the risks that resulted in a failure of the CCP's default management process) and, thus, in a jurisdiction (such as the United States) where the resolution authority has to effect a transfer when entering at the CCP level, it would have to transfer an already rebalanced book to the bridge or other transferee. Transfer to a bridge of a book that has not been rebalanced would be wholly inconsistent with the concept of a bridge and any other transferee (*e.g.,* a third-party purchaser) would presumably have no interest in acquiring an unbalanced book. Additionally, a resolution strategy that contemplates the possibility of transferring an unbalanced book to a bridge or other transferee might raise an interpretive question that is potentially relevant to whether clearing members could net exposures to a CCP for capital and other purposes in some jurisdictions, including the United States. We strongly encourage the FSB and national regulators to consider netting and other capital implications of CCP resolution strategies in the context of current regulatory capital requirements for banks prior to implementing any such strategies.

[21] If, however, the FDIC placed a holding company of a CCP into resolution under Title II, and the CCP's obligations under its contracts were guaranteed or otherwise supported by or linked to the holding company, such guaranty or other support and all related assets and liabilities would have to be transferred from the holding company to a bridge or other transferee within the limited stay period in order to avoid exercise by clearing members of any closeout rights under the CCP's closeout netting provisions, if such rights were triggered by the holding company's resolution (as opposed to the CCP's resolution).

[22] We recognize that many CCPs have such capabilities in place today, at least with respect to their supervisors. However, we urge universal implementation of these capabilities with respect to all relevant authorities, including resolution authorities.

3. Claims for Clearing Participants Affected by the Application of Recovery and Resolution Tools

As noted above, CCP rulebooks should provide senior debt claims for clearing participants who suffer losses beyond the CCP's funded (*i.e.,* default fund) and unfunded (*i.e.,* capped assessments) default resources, in CCP recovery and resolution, including in connection with our recommended use of VMGH and PTU. Issuing senior debt claims would:

- Ensure that clearing participants suffering losses beyond their contribution to funded and unfunded mutualized resources are "creditors" for the amounts of such losses in resolution, irrespective of whether they incur such losses in recovery or resolution. In particular, clearing members must be creditors for these amounts in order to benefit from creditor protections in resolution such as "no creditor worse off" (NCWO).[23]
- Mitigate moral hazards associated with allocating losses or positions among clearing participants and thereby protecting equity holders of for-profit CCPs.
- Incentivize CCPs to focus on resilience in order to avoid exhaustion of funded and unfunded default resources and subsequent use of tools that would entitle clearing participants to senior claims.
- Offer greater likelihood of repayment than equity in the CCP if recovery is successful and resolution does not commence.
- Facilitate a subsequent bail-in of all senior debt claimants on a *pari passu* basis for equity in order to wipe out existing shareholders in resolution.

As noted above, if resolution does not occur, the terms of these senior debt claims should require repayment from the CCP's earnings prior to any such earnings being distributed to shareholders or any existing debt holders that are affiliates of the CCP.[24] If recovery measures fail and resolution commences, then such claims should be paid prior to any distribution to the CCP's shareholders or could be exchanged or bailed in for debt or equity in the successor or resolved CCP, in accordance with the hierarchy of claims under the relevant resolution regime. This would ensure structural subordination of existing shareholders.[25] It is crucial that the holders of the senior debt claims have recourse beyond the defaulting clearing member's estate.
Senior debt claims for losses due to VMGH are relatively simple to value and should be valued as the amount by which variation margin gains were haircut. However, the value of such senior debt claims for PTUs is less straightforward. We believe that the claims should follow the

[23] As discussed in greater detail below, under current CCP rulebooks, clearing members would be creditors in resolution only for the return of their initial margin and, if they are in-the-money vis-à-vis the CCP, the net amount by which they were in the money to the extent that the CCP's resources covered such amounts. Limited recourse provisions in existing CCP rulebooks limit the amount of a clearing member's claims to the amount of resources held by the CCP or the relevant silo of the CCP.
[24] We recognize that additional work is necessary to establish precisely where such senior debt claims should fall within the creditor hierarchy. Among other things, liquidity providers to the CCP may ultimately find themselves with claims against the CCP and the ranking of such claims deserves careful consideration, as it should not hinder a CCP's ability to source liquidity in a time of stress.
[25] In addition to wiping out existing shareholders, we believe that a resolution authority should have the power to replace the existing board of directors and senior management.

calculations typically used in the uncleared derivatives markets and therefore the value of claims should generally be based on the cost to clearing participants' of re-establishing their torn-up positions. We believe that more work needs to be done in determining the appropriate price for torn-up positions.

As noted above, many view compensation in the form of senior debt claims upon the use of VMGH and PTU as essential to align the interests of a CCP's shareholders with those of its clearing participants. In this regard, we note that the availability of such compensation would have implications for the CCP's solvency in a time of distress and could impact a CCP's decisions regarding which products to clear and how to structure its default management process. Some members believe that such compensation may also impact incentives for clearing participants to bid in auctions. Accordingly, we believe that when structuring the terms of compensation (including type, amount, priority, repayment terms and maturity of any claims), careful consideration should be given to resulting incentives for both a CCP's shareholders and its clearing participants. We also believe that additional work is necessary to determine which entity (the CCP or a holding company of the CCP) should issue the senior debt claims. This determination will likely depend in part on the resolution strategy for a particular CCP and the CCP's existing corporate structure.

4. CCP Resolution for Non-Default Losses

As a general matter, we support additional work to analyze potential non-default losses (*e.g.,* losses from custodial, investment, credit, liquidity,[26] market, operational, legal, general business and cyber risks) and the effect that they could have on the viability of CCPs. However, at this time the Associations do strongly believe that only the CCP's management is able to control and mitigate the CCP's exposure to non-default losses. Therefore, we believe that non-default losses should accrue to the ultimate equity holders of the CCP.[27] If CCPs and their shareholders bear the risk of non-default losses, they will be properly incentivized to exercise prudent risk management and focus on CCP resilience.

Some members believe that if clearing participants were to bear non-default losses in certain situations, they could be incentivized to post non-cash collateral (to the extent permitted), which would be more difficult to use in covering non-default losses and therefore could increase the likelihood of liquidity shortfalls for a CCP in distress. Many members believe that CCP regulatory capital should be right-sized to cover credit, liquidity, market, operational, legal, general business and cyber risks and that CCPs should bear the burden of demonstrating to their regulators and clearing participants that their capital covers these risks. Other members believe that CCPs should hold dedicated reserves (that are not funded by clearing participants) outside of regulatory capital for this same purpose. In absolutely no event should initial margin be

[26] Liquidity risk could be associated with default losses and/or non-default losses. In the context of non-default losses, liquidity risk includes, *e.g.,* the risk that a liquidity provider defaults and the CCP experiences liquidity stresses that are unrelated to a clearing member default.
[27] One exception would be if a clearing member has an active right to direct specific investments of funds held by the CCP and the CCP does not profit from such investments. Under these circumstances, it would be appropriate for the clearing member to bear losses from such investments. For clarity, the right to allocate investments of assets generally is not an active right to direct specific investments and therefore would not trigger this exception.

available to cover any losses, including non-default losses. In the unlikely event that regulatory capital (or, as some members prefer, a separate right-sized quantum of dedicated reserves to cover non-default losses) does not cover non-default losses, additional losses should be covered exclusively by any additional CCP equity and/or a parent company of the CCP (as opposed to loss allocation measures imposed on clearing participants). In order to ensure the foregoing and also create the right incentives for the CCP and its management, CCP rulebooks should unambiguously indicate that default "waterfalls" do not apply to non-default losses.

In the event that non-default losses cause the CCP to enter into resolution, we realize that clearing participants would be creditors for any amounts the CCP owes them and may therefore bear losses. In light of this, we believe it is critical that non-recourse provisions do not shield CCP shareholders from non-default losses as such losses should not be passed along to clearing participants in the creditor hierarchy until all equity has been wiped out.[28] To ensure that shareholders bear non-default losses, it is also important that any intercompany debt owing to a CCP's parent is junior to claims for non-default losses.

Currently clearing participants do not have adequate transparency regarding how CCPs measure and manage the potential for non-default losses or how CCPs would handle such losses in recovery or resolution. As discussed above for default losses, we believe it is critical for publicly available resolution strategies to address treatment of non-default losses completely separately from treatment of default losses.

If a CCP suffers both a default loss and a non-default loss (because, *e.g.,* a clearing member that is also a settlement bank or custodial bank for the CCP defaults), the portion of the losses that are attributable as non-default losses should not be treated the same as default losses. That is, the CCP's default "waterfall" should not cover these non-default losses. Among other scenarios, CCP resolution strategies should therefore contemplate simultaneous management of default losses and non-default losses. We believe that more work is necessary to analyze these different scenarios.

Specific Responses to Questions

Q1. Does this discussion note identify the relevant aspects of CCP resolution that are core to the design of effective resolution strategies? What other aspects, if any should authorities address?

The Discussion Note identifies many of the significant aspects of CCP resolution. We suggest that future FSB work in this area also cover:

- *Coordination between recovery rules and resolution.* Coordination among applicable regulators and resolution authorities is essential to ensure that recovery rules are not

[28] Please see our response to question 15 below for additional discussion of issues associated with non-recourse provisions. Please also note that one large U.S. bank continues to support limited recourse clearing.

structured in a way that is contrary to the objectives of resolution.[29] For example, recovery rules should not have limited recourse provisions that protect shareholder equity from loss allocation in recovery or resolution. Additionally, recovery tools should not extinguish losses incurred by clearing participants but instead, as discussed elsewhere in this letter, clearing participants should receive senior debt claims that ensure priority over shareholders.

- *Rights to claims.* The rights of clearing participants suffering losses from the use of loss allocation tools utilized after exhaustion of funded (*i.e.,* default fund) and unfunded (*i.e.,* capped assessments) mutualized resources, and position allocation tools (which we believe should be PTUs) utilized upon the failure of the CCP's auction (or similar mechanism to rebalance its book), to senior debt claims and the details of such claims, as discussed elsewhere in this letter.

- *Beginning of resolution.* Articulation of what should occur during the first approximately two business days of a CCP resolution. We anticipate that resolution authorities will need to act very expeditiously during this period in order to restore market confidence, and therefore may not have time to evaluate different potential courses of action. Therefore, advance planning for various potential scenarios will be crucial. Among other things, such planning should cover steps that must be taken to ensure that clearing participants do not have the right to close-out their positions with the CCP during a limited-stay period and coordination with relevant authorities, including market regulators as well as domestic foreign regulators of clearing participants. Resolution authorities should assume that they may have to restore the CCP to a matched book and resume normal operations on a stable platform with fully replenished default fund resources, CCP SITG and regulatory capital, all within a limited stay period.

- *Joint fire-drills.* Joint resolution-related fire-drills across multiple CCPs and among CCPs and other market participants including settlement banks, custodians, liquidity providers, investment counterparties and other financial market infrastructures.

- *Concurrent default and non-default losses.* Instances in which a CCP suffers both default and non-default losses. As noted above, we strongly believe that the portion of such losses that are attributable as non-default losses should not be treated the same as default losses and, in particular, should not be covered by the CCP's default "waterfall."

- *Statutory resolution frameworks.* Availability of statutory resolution frameworks for CCPs that provide resolution authorities with a broad set of rights, powers and privileges and contain protections (including a NCWO safeguard) applicable to the use of such rights, power and privileges. Among other things, regardless of whether the relevant resolution regime contemplates transfer to a bridge or other transferee, or resolution within the same entity, statutory resolution regimes should provide resolution authorities with:

[29] Note objective (iii) in the preamble to the FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions* (the Key Attributes) and paragraph 5.1 of the Key Attributes.

- The power to enforce the CCP's rulebook;
- The ability to ensure that a successor or resolved CCP has temporary licences and is otherwise authorized to continue operations without interruption;
- The power to effectuate transfers of the CCP's assets and liabilities without consents;
- The ability to obtain financing in the name of a successor or resolved CCP;
- The ability to administer a claims process;
- The power to replace a CCP's board and senior management;
- The power to subordinate inter-company debt owed by a CCP to any parent holding companies to claims of clearing participants;
- The power to write-down or bail-in debt and equity of the CCP and any parent holding companies; and
- The power to stay temporarily litigation against the CCP.

- *CCP structures.* Consideration of structuring alternatives, including but not limited to the establishment of "dedicated" intermediate holding companies that would wholly-own the CCP. The primary purposes of these intermediate holding companies (which would be established in the same jurisdiction as the CCP to avoid cross-border issues) would be to facilitate resolution (as resolution authorities would enter at the intermediate holding company).[30] Under potential resolution strategies for CCPs, some members believe that these intermediate holding companies could also serve as a "pre-positioning" vehicle by holding high-quality liquid assets in an amount equal to regulatory capital plus the CCP's SITG, which would be contributed down to the CCP to effectuate the recapitalization discussed below in response to question 4 immediately prior to the resolution authority placing the intermediate holding company into resolution. Analysis of structural issues should also address issues related to structural subordination that exists between CCPs and their parent holding companies and any effects that such structural subordination could have on resolution strategies. Any structuring alternatives should be considered on a CCP-by-CCP basis and must take into account all aspects of applicable regulatory regimes.

- *Impact on netting and clearing participant capital.* The impact of CCP resolution on clearing participants' ability to net their exposures to a CCP for regulatory capital and other purposes. We strongly believe that CCP resolution regimes and strategies should not impede clearing participants' ability to net exposures for their cleared transactions or require clearing participants to hold additional capital and that resolution authorities should always consider whether their actions would implicate these issues for clearing participants.[31]

[30] Members who support intermediate holding companies for these purposes believe that they could address some of the issues (which are described above) associated with requirements to transfer contracts within a limited stay period.

[31] A resolution strategy that contemplates the possibility of transferring an unbalanced book to a bridge or other transferee raise an interpretive question that is potentially relevant to whether clearing members could net exposures to a CCP for capital and other purposes in some jurisdictions, including the United States. We strongly encourage the FSB and national regulators to consider netting and other capital implications of CCP resolution strategies in the context of current regulatory capital requirements for banks prior to implementing any such strategies.

- *Cross-border coordination.* Cross-border coordination in the event of a CCP resolution, including but not limited to measures to ensure that resolution tools would apply in a cross-border context. This is particularly important for any tools that are not contained in a CCP's rulebook (and are therefore not part of the CCP's contract with its clearing members).

- *Clearing member resolution.* Coordination with resolution authorities for clearing members to further reduce the likelihood of that a clearing member would default to a CCP.

Q2. What is the impact on incentives of the different aspects of resolution outlined in this note for CCP stakeholders to support recovery and resolution processes and participate in central clearing in general? Are there other potential effects that have not been considered?

Incentives play a critical role in determining how various stakeholders act prior to and during recovery and resolution. We strongly believe that clearing participants currently have the proper incentives to support CCP resilience, recovery and resolution, as the failure of the CCP in an already stressed market would make it difficult, if not impossible, for clearing participants to maintain their portfolios of cleared transactions, which could result in additional losses to the clearing participants.

The potential for usage of default fund contributions and subsequent assessments incentivizes clearing members to participate in the CCP's default management process. Additionally, the potential for PTUs upon the failure of a default management process further incentivizes clearing participants to participate in such default management process to avoid having their positions torn up. Any PTUs in a stressed market may likely be akin to failure of the CCP if clearing participants cannot replace torn-up positions. As a result of the foregoing, we strongly disagree with any notions that clearing participants would "rig" an auction or other mechanism to rebalance a CCP's portfolio.[32] Separately, some members believe that VMGH creates the right incentives by encouraging the subset of clearing participants with positions opposite the defaulting clearing member's (or clearing members') positions to close-out this risk.

However, we believe that incentives for CCPs and their shareholders to support CCP resilience, recovery and resolution may not be properly aligned with those of clearing participants. Currently, as a result of non-recourse provisions in CCP rulebooks, clearing participants would bear losses before CCP shareholders upon a stress event at the CCP, a result that we view as problematic. This shield from potential losses effectively dis-incentivizes CCPs from prudently addressing risks prior to and in a CCP resolution. As discussed above, we believe that CCPs should provide two tranches of SITG in the default "waterfall" to better align their potential losses with those of clearing members.[33] Many CCPs currently do not disclose how they will

[32] It is also important to note that such actions would be illegal.
[33] *See* the "CCP Contribution to Losses" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/.

cover non-default losses. As discussed elsewhere in this letter, we believe that in order to create the right incentives for the CCP, its shareholders and its management, CCP rulebooks should unambiguously indicate that default "waterfalls" do not apply to non-default losses. We also believe that CCP equity and potentially funds from the CCP parent should be available to cover both default and non-default losses.

Finally, as discussed in greater detail elsewhere in this letter, any clearing participants that suffer losses from VMGH or PTUs should receive compensation in the form of senior debt claims (either against the CCP or a parent company of the CCP).

Q3. What are the appropriate factors for determining timing of entry into resolution? How might a presumptive timing of entry (or range of timing), if any, be defined in light of the criteria set out in the FMI Annex to the *Key Attributes*? If defined, should the presumptive timing of entry be communicated to the CCP and its participants?

The Associations fully concur with the conditions for CCP resolution set forth in Section 4.3 of the FMI Annex to the FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions*, which are:

- Recovery measures available to the [CCP], including the use of its available assets and default resources and the application of any loss allocation rules, are exhausted and have failed to return the [CCP] to viability and continuing compliance with applicable legal and regulatory requirements, or are not being implemented in a timely manner; or
- The relevant oversight, supervisory or resolution authority determines that the recovery measures available to the [CCP] are not reasonably likely to return the [CCP] to viability within the timeframe required to enable continued compliance with applicable legal and regulatory requirements, or that they are otherwise likely to compromise financial stability.

The Discussion Note indicates that resolution authorities may decide to commence resolution before a CCP has utilized all tools in its rulebook because, for a resolution to be credible, it requires a quantum of resources sufficient to absorb losses as well as replenish the CCP's financial resources. The Associations urge resolution authorities to carefully weigh the potential benefits of such an intervention prior to the point at which financial stability is threatened against the potential costs, including uncertainty for clearing participants and all market participants.

The Associations recommend that resolution regimes and/or publicly disclosed resolution strategies, as applicable, indicate a time at which resolution could commence but provide flexibility for recovery to continue beyond that time. More specifically, we believe that resolution authorities should be able to intervene once a CCP's funded resources are exhausted but we do not think that resolution should be automatic at that point if recovery could proceed within pre-determined limitations and subject to applicable regulatory and resolution regimes.[34]

---

[34] As an example that we discuss in greater detail herein, if it remains likely that a CCP could re-establish a matched book for all but a subset of illiquid, highly concentrated and/or outsized positions in the defaulting clearing member's (or clearing members') portfolio(s), it may be preferable for the CCP to exercise PTUs (under regulatory

In the event that resolution does not commence prior to assessments on clearing members, we believe that subsequent recovery measures exercised by the CCP should be subject to supervision and oversight by applicable regulators and, to the extent possible under applicable law, the resolution authority. During the time after exhaustion of pre-funded resources, resolution authorities should consider the following factors when determining whether a CCP-led recovery should proceed:

- Is the stress at the CCP impacting orderly trading in the market?
- Is the CCP able to macro-hedge its exposure?
- What are the costs to establish such hedges?
- Are clearing participants transacting in the market in ways that impede the CCP's recovery?
- Are clearing participants voluntarily withdrawing (indicating erosion of confidence in the CCP)?
- Are regulators in foreign jurisdictions cooperating with the CCP's home country supervisors and resolution authority?
- Is the CCP's default management process proceeding in a timely manner?
- What will a resolution authority be able to do and what it will have to do (*e.g.,* transfer contracts or equity to a bridge or successor entity) on an expedited basis upon commencement of resolution?
- Are clearing members able to make required contributions without jeopardizing their own viability?
- Is the CCP balance sheet insolvent?
- Is there a credible private sector solution to resolution if recovery fails?
- What would be the impact of subsequent liquidation under applicable general insolvency laws?

As noted above, disclosure of when resolution could commence and the criteria that resolution authorities would use to determine whether resolution should commence is crucial to clearing participants. This is even more important if the resolution regime applicable to CCPs in a particular jurisdiction applies to entities other than CCPs. We urge resolution authorities in these jurisdictions to make public specific criteria and considerations for triggering CCP resolution (within the confines of the applicable statutes).

Q4. Should CCPs be required to hold any additional pre-funded resources for resolution, or otherwise adopt measures to ensure that there are sufficient resources committed or reserved for resolution? If yes, what form should they take and how should they be funded?

We note that regulators are reviewing adequacy of CCP resources as part of ongoing work on CCP resilience and recovery. We urge regulators and CCPs to continue this analysis and believe

---

oversight and supervision, including to the extent possible under relevant law, oversight by a resolution authority) for such subset, without entering a resolution that would apply to a broader set of products.

that CCP resolution planning should anticipate and account for adequate resources in "extreme but plausible" situations upon completion of this work.[35]

We also agree with the concerns articulated in paragraph 4.9 of the Discussion Note regarding the balance between the need to have sufficient and credible resources to carry out a resolution and the impact on central clearing of the cost of such resources. As a result of these concerns, if regulators determine that pre-funded resources are required as an absolute back-stop for resolution, they should not be funded by clearing participants.

Many members do not believe that additional pre-funded resources will be necessary to cover default or non-default losses if the ongoing work to review the adequacy of CCP resources mentioned above results in capital requirements for CCPs that are right-sized to cover potential risks (or, as some members prefer, a separate right-sized quantum of dedicated reserves to cover non-default losses) and appropriate levels of CCP SITG.[36] Members believe that under these circumstances, any exhaustion of funded and unfunded resources would *de facto* be beyond an extreme but plausible circumstance and that it would not be appropriate from an economic perspective to pre-fund in anticipation of such a circumstance.

Some members also do not believe that pre-funded resources should be required for any purpose at all, including recapitalization of a successor or resolved CCP. On the other hand, other members believe that in order to address the potential need for resources to facilitate immediate recapitalization of the successor or resolved CCP and replenishment of its SITG contributions in resolution, CCPs should be required to pre-position, or otherwise demonstrate that they have reliable access to, an amount equal to SITG plus right-sized regulatory capital requirements from sources other than clearing participants.[37] These pre-positioned or otherwise available amounts would be *in addition to the* actual regulatory capital[38] that a CCP is required to hold in the ordinary course.[39] These resources should not be used to further allocate any remaining losses but should be preserved for recapitalization of the post-resolution CCP's clearing services, in addition to amounts paid in by clearing members to replenish their default fund obligations.

Importantly, in the event that such resources are not pre-positioned, resolution strategies should clearly articulate an alternative credible plan for timely recapitalization and replenishment of CCP SITG and contemplate any related issues that could arise at the relevant point in time.

---

[35] *See* the "CCP Coverage" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/.

[36] *See* the "CCP Contribution to Losses" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/.

[37] Some members believe that any such pre-positioning requirements should apply to CCP regulatory capital requirements only. They believe that it is not crucial for a CCP to replenish its SITG immediately in order to continue operations.

[38] Many members believe that CCP regulatory capital should be right-sized to cover credit, liquidity, market, operational, legal, general business and cyber risks and that CCPs should bear the burden of demonstrating to their regulators and clearing participants that their capital covers these risks. Other members believe that CCPs should hold dedicated reserves outside of regulatory capital for this same purpose.

[39] Of the members who support such requirements, some believe that CCPs should hold resources at a central bank to mitigate investment and depository risk.

Q5. How should the appropriate quantum of any additional CCP resources be determined? In sizing the appropriate quantum, what factors and considerations should be taken into account? Do your answers vary for default and non-default losses?

Many members believe that regulatory capital requirements for CCPs should be sized to cover non-default losses. Other members believe that CCPs should hold dedicated reserves (that are not funded by clearing participants) outside of regulatory capital for this same purpose. We believe that additional work to model non-default losses is crucial in order to establish more robust, right-sized capital requirements for CCPs (which many members support) or, alternatively, to determine the quantum of dedicated reserves outside of regulatory capital that CCPs should hold to cover non-default losses.

As noted in the response to question 4, some members believe that CCPs should be required to pre-position or otherwise demonstrate that they have reliable access to an amount equal to its SITG plus right-sized regulatory capital from sources other than clearing participants. In the case of both default and non-default losses, these amounts would be reserved exclusively for recapitalization of a successor or resolved CCP.

Q6. Should resolution funds external to the CCP be relied upon? If so, how should such funding arrangements be structured so as to minimise the risk of moral hazard, including for CCPs with significant cross-border participation? Where these are pre-funded, how should the target size be determined and which entities should be required to contribute?

If funds external to the CCP are relied upon to cover any losses or replenish resources in resolution, we do not think that clearing participants should be required to contribute to them.[40] As noted above, we agree with the concerns in paragraphs 4.8 and 4.9 of the Discussion Note regarding potential costs to clearing participants of prefunded resources, which would be in excess of existing costs of clearing. We believe that additional work is necessary to determine the potential extent of these costs.

Q7. What factors should the resolution authority consider in choosing and exercising tools to return the CCP to a matched book? Is one (or more) of the tools for restoring a matched book preferable over others and if so, why?

If a CCP is in resolution due to one or more clearing member defaults, it is likely that the CCP's default management process failed to return the CCP to a matched book in recovery. However, if for some reason resolution commences prior to completion of the default management process (*e.g.,* because resolution was necessary to maintain financial stability), the resolution authority should have the power to continue the default management process in accordance with the CCP's rulebook provided that the CCP has access to funded resources and/or assessments.

[40] We realize that if resolution strategies contemplate a resolved CCP that is owned by "bailed in" clearing members, such clearing members may be required to provide funding in their capacity as owners. However, in this situation, these clearing members could chose to either provide such funding or sell their ownership. We view this as different than a requirement for clearing participants to provide undefined amounts of funding to the CCP.

In the event that the CCP's auction or similar mechanism to rebalance its book fails prior to resolution or in resolution, we support the use of PTUs to return a CCP to a matched book (as opposed to other tools contemplated by the FMI Annex to the FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions*). In particular, we oppose forced allocation as a means of returning a CCP to a matched book. Forced allocation requires clearing members to take on positions that they may not be suited to risk manage in extreme market conditions.
In the context of a resolution, resolution authorities should exercise PTUs in accordance with clear and transparent procedures set forth in CCP rulebooks on an *ex ante* basis. PTUs should apply to the smallest portion of illiquid contracts possible, with recognition that the scope of contracts may need to expand in certain circumstances and/or may be affected by concerns regarding financial stability.[41] Governance procedures that are established and disclosed in CCP rulebooks, and that account for the views of clearing participants whose positions could be torn up, should continue to apply to decisions regarding the scope of contracts to be torn up in resolution.

The price for torn-up contracts should be as close to fair market value as possible[42] so as not to negatively impact accounting or capital treatment for cleared transactions. We note that appropriate pricing may differ across product classes and urge the FSB and national regulators to work with CCPs and their clearing participants to establish globally-appropriate procedures for pricing torn-up positions on an *ex ante* basis.

As noted above, any clearing participants that suffer losses from PTUs should receive senior debt claims equal to the replacement value of their contracts. Without debt claims, these clearing participants would not be "creditors" with respect to such amounts and therefore would not be entitled to protections such as NCWO. In addition, many resolution regimes contain so-called "anti-cherry picking" requirements that require resolution authorities to treat all financial contracts in a netting set or, in some instances, all financial contacts with a counterparty and the counterparty's affiliates, in the same manner. For example, the resolution authority must either affirm all such contracts or reject all such contracts. Under these regimes, a resolution authority could not tear up some contracts in a relevant set without tearing up all contracts. And if the resolution authority tore up all contracts, the affected parties would be entitled to claims. Notwithstanding the foregoing, a resolution authority could exercise PTUs in resolution by enforcing the relevant provisions of a CCP's rulebook. If it does this, the result to certain clearing participants would be the same as if the resolution authority had violated anti-cherry picking requirements. While we accept this outcome and recognize it as potentially necessary to return a CCP to a matched book in extreme situations, we strongly believe that affected clearing participants should receive senior debt claims as compensation for losses they are required to incur in reestablishing their torn-up positions. Without these claims, these clearing participants would effectively be deprived of the fundamental protections set forth in resolution regimes.

---

[41] However, we note that for accounting purposes, it is necessary that offsetting contracts be widely held and terminated on a *pro* rata basis.
[42] It is also important to price PTUs as close to fair market value as possible to reflect the fact that PTUs are not a loss allocation tool.

Q8. Should any tools for restoring a matched book only be exercisable by resolution authorities? If so, which tools and subject to what conditions?

As noted above in response to question 3, we generally believe that any use of PTUs for more than a limited set of relatively illiquid contracts would raise questions regarding the viability of the CCP and therefore may indicate that resolution is more appropriate than continued recovery.

Q9. What are in your view effective tools for allocating default and non-default losses and what are the pros and cons of these tools? Should initial margin haircutting be considered as a tool for the allocation of losses in resolution? Is one or more of the tools preferable over others? What are your views on the use of tools to restore a matched book as a means of loss allocation?

Default Losses. If default losses exceed funded and unfunded mutualized resources, VMGH can be applied to all clearing participants of the CCP. Some members believe VMGH is an effective and efficient loss allocation tool, as it distributes losses, and therefore risk, widely. These same members also believe that VMGH creates the right incentives by encouraging the subset of clearing participants with positions opposite the defaulting clearing member's (or clearing members') positions to close-out this risk. Other members believe that the use of VMGH could have knock-on effects in an already distressed market.[43] Many of these members support VMGH only after exhaustion of funded and unfunded mutualized resources, provided that it is administered by a resolution authority in resolution. Other members support a "modest"[44] use of VMGH in recovery and believe that a more significant use of VMGH would be more appropriate in resolution than recovery. Some members also maintain that VMGH should not be used until the CCP's own resources have been exhausted, including any funding obligations or guarantees from the CCP's parent. One member does not support any use of VMGH prior to, or in, resolution.

As noted above, any clearing participants that suffer losses from VMGH should receive senior debt claims. Without debt claims, these clearing participants would not be "creditors" with respect to such amounts and therefore would not be entitled to protections such as NCWO. In addition, typically if a resolution authority fails to make a payment in full, the affected party would be entitled to claims. And if the resolution authority fails to make a payment on financial contracts, many resolution regimes allow counterparties to such contracts to exercise default rights. Notwithstanding the foregoing, a resolution authority could exercise VMGH in resolution by enforcing the relevant provisions of a CCP's rulebook. If it does this, the result to certain clearing participants could be the same as if the resolution authority had taken statutory actions that entitle affected parties to rights. While we accept this outcome and recognize it as potentially necessary to allocate default losses in extreme situations, we strongly believe that

---

[43] These members believe that potential knock-on effects are particularly an issue if clearing members causing the four largest losses (assuming "Cover 2" plus one assessment), have already defaulted. *See* the "Coverage" section of the letter from the Associations to CPMI-IOSCO regarding Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* (October 18, 2016) *available at* http://www2.isda.org/functional-areas/risk-management/ for additional explanation of this point.

[44] These members support additional work to determine appropriate thresholders for what constitutes a "modest" use of VMGH.

affected clearing participants should receive senior debt claims as compensation for losses they incur from the use of VMGH. Without these claims, theses clearing participants would effectively be deprived of basic protections set forth in resolution regimes.

We do not support IMH at any point in recovery or resolution. We believe that IMH would have knock-on effects in an already distressed market, is procyclical in that clearing participants would have to replenish haircut margin at the worst possible time (*i.e.,* in a severely distressed market). IMH could also incentivize clearing members to close out of positions in order to reduce their initial margin requirements at the first sign of distress. This would likely cause further disruption in the market and could impede the CCP's recovery. IMH could also dis-incentivize participation in the CCP's default management process, as clearing members may not want to bid on positions that would increase their initial margin requirements. Finally, the potential for IMH could incentivize clearing members to post non-cash collateral, which could cause undue liquidity constraints in a CCP's day-to-day operations and therefore require larger liquidity facilities and additional sources of liquidity in the ordinary course. Moreover, in the event of a clearing member default, non-defaulting clearing participants would likely substitute their cash collateral immediately, which would further exacerbate liquidity constraints during a period of stress. Additionally, if IMH is permitted in some jurisdictions, it could drive clearing participants to clear only through CCPs in jurisdictions that prohibit IMH. Finally, in many jurisdictions initial margin for uncleared derivatives must now be held with a third-party custodian to shield it from the insolvency of the receiving counterparty. Not providing the same degree of protection to initial margin for cleared derivatives could dis-incentivize central clearing, which would be contrary to stated objectives of the G-20. For these reasons, we strongly believe that clearing participants should always maintain a claim for the return of the full amount of their initial margin posted, without any haircuts or other risk of such claim being reduced.[45]

Non-default losses. The Associations believe that only the CCP's management is able to control and mitigate the CCP's exposure to non-default losses (*e.g.,* losses from custodial, investment, credit, liquidity,[46] market, operational, legal, general business and cyber risks). Therefore, we believe that non-default losses should accrue to the ultimate equity holders of the CCP.[47] If CCPs and their shareholders bear the risk of non-default losses, they will be properly incentivized to exercise prudent risk management and focus on CCP resilience.

Some members believe that if clearing participants were to bear non-default losses in certain situations, they could be incentivized to post non-cash collateral (to the extent permitted), which would be more difficult to use in covering non-default losses and therefore could increase the likelihood of liquidity shortfalls for a CCP in distress. Many members believe that CCP

[45] We note that this is required by law in some jurisdictions.

[46] Liquidity risk could be associated with default losses and/or non-default losses. In the context of non-default losses, liquidity risk includes, *e.g.,* the risk that a liquidity provider defaults and the CCP experiences liquidity stresses that are unrelated to a clearing member default.

[47] One exception would be if a clearing member has an active right to direct specific investments of funds held by the CCP and the CCP does not profit from such investments. Under these circumstances, it would be appropriate for the clearing member to bear losses from such investments. For clarity, the right to allocate investments of assets generally is not an active right to direct specific investments and therefore would not trigger this exception.

regulatory capital should be right-sized to cover credit, liquidity, market, operational, legal, general business and cyber risks and that CCPs should bear the burden of demonstrating to their regulators and clearing participants that their capital covers these risks. Other members believe that CCPs should hold dedicated reserves (that are not funded by clearing participants) outside of regulatory capital for this same purpose. In absolutely no event should initial margin be available to cover any losses, including non-default losses. In the unlikely event that regulatory capital (or, as some members prefer, a separate right-sized quantum of dedicated reserves to cover non-default losses) does not cover non-default losses, additional losses should be covered exclusively by any additional CCP equity and/or a parent company of the CCP (as opposed to loss allocation measures imposed on clearing participants). In order to ensure the foregoing and also create the right incentives for the CCP and its management, CCP rulebooks should unambiguously indicate that default "waterfalls" do not apply to non-default losses.

In the event that non-default losses cause the CCP to enter into resolution, we realize that clearing participants would be creditors for any amounts the CCP owes them and may therefore bear losses. In light of this, we believe it is critical that non-recourse provisions do not shield CCP shareholders from non-default losses as such losses should not be passed along to clearing participants in the creditor hierarchy until all equity has been wiped out.[48] To ensure that shareholders bear non-default losses, it is also important that any intercompany debt owing to a CCP's parent is junior to claims for non-default losses.

Q10. Which, if any, loss allocation tools should be reserved for use by the resolution authority (rather than for application by a CCP in recovery)?

As noted above in response to question 3, some members believe that VMGH should only be used in resolution. Other members support a "modest"[49] use of VMGH in recovery, subject to regulatory oversight and supervision (including by a resolution authority to the extent possible under applicable law), but believe that a more significant use of VMGH would be more appropriate in resolution than recovery. Members who support VMGH prior to resolution do not believe that CCPs should be able to utilize it for an indefinite period of time.[50] In these situations, it is likely that losses are substantial and unpredicted.

Q11. How much flexibility regarding the allocation of losses is needed to enable resolution authorities to minimise risks to financial stability? For example, to what extent should a resolution authority be permitted to deviate from the principle of pari passu treatment of creditors within the same class, notably different clearing members in resolution? What would be the implications of a resolution strategy based primarily or solely on a fixed order of loss allocation in resolution set out in CCP rules vs. a resolution strategy that confers discretion to the resolution authority to allocate losses in resolution differently to CCP rules?

As a driving principle, we think that flexibility afforded to resolution authorities should be minimized and limited to circumstances in which it is absolutely necessary to ensure a successful

---

[48] One large U.S. bank continues to support limited recourse clearing.
[49] We support additional work to determine appropriate thresholds for what constitutes a "modest" use of VMGH.
[50] We support additional work to determine an appropriate length for application of VMGH.

resolution. In particular, we view deviation from the principle of *pari passu* treatment of creditors within the same class as an extreme measure that should be carefully scrutinized and used only in very narrow circumstances.[51] For example, PTUs in accordance with clear and transparent rulebook provisions, including governance procedures that account for the views of clearing participants whose positions could be torn up, may be an acceptable deviation from *pari passu* treatment of all clearing participants. As discussed above, those members who support VMGH believe that it should apply to all clearing participants. Application of VMGH is a situation in which we do not support deviation from *pari passu* treatment of clearing participants under any circumstances.[52]

Outside of the foregoing, we generally do not support even a limited deviation from the *pari passu* treatment of clearing participants. For other creditors in the same class, we believe that any deviation from *pari passu* treatment should be absolutely limited to circumstances in which it is necessary to maintain financial stability, maximize the value of the assets of the CCP in resolution, minimize losses or initiate and continue operations essential to the viability of the resolved or successor CCP.[53] Any such deviations must also be subject to NCWO protections. Even in these limited circumstances and subject to applicable protections for creditors, we believe that resolution authorities should carefully consider any disparate treatment of creditors and exercise relevant powers judiciously. It is also crucial that publicly-disclosed resolution strategies clearly contemplate any potential deviation from the *pari passu* treatment of creditors.

Additionally, we note that resolution authorities and other relevant regulators must account for any segregation requirements and other regulatory protections applicable to any classes of clearing participants or other creditors. It is very important to consider whether any resolution strategies that would treat any subset of creditors differently comply with applicable regulatory requirements and protections.

With regard to deviation from a CCP's rulebook, as noted above, if resolution commences prior to exhaustion of all tools in the applicable rulebook, we strongly recommend that the resolution authority apply the remaining default management processes and steps set forth in the CCP's rulebook,[54] as this would be consistent with the *ex ante* risk management decisions made by clearing participants prior to resolution. By applying this known framework, the clearing participants' risk management plans would better enable them to participate in the resolution

[51] One member has very strong concerns about any deviation from the *pari passu* treatment of all clearing participants and believes that more work should be done to determine if any such deviations would actually be appropriate in CCP resolution.

[52] Some members believe that a benefit of VMGH is that it distributes losses, and therefore risk, widely. Application of VMGH to less than all clearing participants would erode that benefit.

[53] We note that paragraph 5.1of the FSB *Key Attributes of Effective Resolution Regimes for Financial Institutions* provides that resolution powers should be exercised in a way that respects the hierarchy of claims while providing flexibility to depart from the general principle of equal (*pari passu*) treatment of creditors of the same class, with transparency about the reasons for such departures, if necessary to contain the potential systemic impact of a firm's failure or to maximize the value for the benefit of all creditors as a whole. In particular, equity should absorb losses first, and no loss should be imposed on senior debt holders until subordinated debt (including all regulatory capital instruments) has been written-off entirely (whether or not that loss-absorption through write-down is accompanied by conversion to equity).

[54] We assume in this statement that the CCP rulebooks are amended consistent with our recommendations, including our recommendations with regard to senior claims for those who are affected by the exercise of VMGH and/or PTU.

process, as they would have planned for the steps to be taken and processes to be effectuated. Such certainty and predictability would go a long way in promoting financial stability in resolution. To further these objectives and therefore minimize market disruption, any potential deviations from the CCP's rulebook should be clearly articulated on an *ex ante* basis in publicly disclosed resolution strategies. Publicly disclosed resolution strategies should also clearly disclose any statutory tools outside of the applicable CCP's rulebook that the resolution authority contemplates utilizing under various articulated scenarios. In addition, any deviations should be subject to NCWO protections.

Q12. What are your views on the potential benefits or drawbacks of requiring CCPs to set out in their rules for both default and non-default losses:

> **(i) The preferred approach of the resolution authority to allocating losses;**
> **(ii) An option for, or ways in which, the resolution authorities might vary the timing or order of application of the loss allocation tools set out in the rules?**

Aside from the statutory powers available to resolution authorities, we believe that the sequence of tools set forth in CCP rulebooks and publicly-disclosed resolution strategies should determine how CCP resolution proceeds. While we strongly support adherence to the sequence of tools in a CCP's rulebook, we recognize that resolution authorities may need flexibility to respond to different circumstances in resolution. If this is the case, we believe that publicly-disclosed resolution strategies should clearly articulate and limit what a resolution authority may do in various different scenarios. Resolution strategies should also cover how resolution authorities expect to use their applicable statutory power together with enforcement of CCP rulebooks and application of the NCWO safeguard.

It is also critical to note that VMGH and PTU serve two different purposes and are, therefore, not interchangeable. VMGH is a tool to source additional resources by allocating losses whereas PTU is a tool to rebalance a CCP upon failure of an auction or similar mechanism to return a CCP to a matched book. As discussed below, PTUs should be priced as close as possible to fair market value and, therefore, do not allocate losses. Similarly, VMGH would not return a CCP to a matched book if the CCP's default management process fails. To the contrary, if the CCP's auction process (or similar mechanism to rebalance its book) fails, the CCP may still have funded or unfunded mutualized resources that could be used alongside a limited amount of PTUs. On the other hand, the auction or similar mechanism may function beyond exhaustion of the CCP's funded and unfunded mutualized resources. If this happens, either additional resources from the CCP or a parent of the CCP, or some form of loss allocation, would be necessary.

Q13. How should non-default losses be allocated in resolution, and should allocation of non-default losses be written into the rules of the CCP?

As a general matter, we support additional work to analyze potential non-default losses (*e.g.,* losses from custodial, investment, credit, liquidity,[55] market, operational, legal, general business

[55] Liquidity risk could be associated with default losses and/or non-default losses. In the context of non-default losses, liquidity risk includes, *e.g.,* the risk that a liquidity provider defaults and the CCP experiences liquidity stresses that are unrelated to a clearing member default.

and cyber risks) and the effect that they could have on the viability of CCPs. However, at this time the Associations do strongly believe that only the CCP's management is able to control and mitigate the CCP's exposure to non-default losses. Therefore, we believe that non-default losses should accrue to the ultimate equity holders of the CCP.[56] If CCPs and their shareholders bear the risk of non-default losses, they will be properly incentivized to exercise prudent risk management and focus on CCP resilience.

Consistent with the foregoing, we generally support paragraph 7.2 of the Discussion Note, which provides that, consistent with the PFMI, CCPs should hold adequate capital against the risks of non-default losses. Many members believe that CCP regulatory capital should be right-sized to cover credit, liquidity, market, operational, legal, general business and cyber risks and that CCPs should bear the burden of demonstrating to their regulators and clearing participants that their capital covers these risks. Other members believe that CCPs should hold dedicated reserves (that are not funded by clearing participants) outside of regulatory capital for this same purpose. In absolutely no event should initial margin be available to cover any losses, including non-default losses. Some members believe that if clearing participants were to bear non-default losses in certain situations, they would be incentivized to post non-cash collateral that would be more difficult to use in covered non-default losses, which could increase the likelihood of liquidity shortfalls for a CCP in distress (unless the CCP caps the amount of non-cash collateral it will accept).

In the unlikely event that regulatory capital (or, as some members prefer, a separate right-sized quantum of dedicated reserves to cover non-default losses) does not cover non-default losses, additional losses should be covered exclusively by any additional CCP equity and/or a parent company of the CCP (as opposed to loss allocation measures imposed on clearing participants). In order to ensure the foregoing and also create the right incentives for the CCP, its shareholders and its management, CCP rulebooks should unambiguously indicate that default "waterfalls" do not apply to non-default losses.

In the event that non-default losses cause the CCP to enter into resolution, we realize that clearing participants would be creditors for any amounts the CCP owes them and may therefore bear losses. In light of this, we believe it is critical that non-recourse provisions do not shield CCP shareholders from non-default losses as such losses should not be passed along to clearing participants in the creditor hierarchy until all equity has been wiped out.[57] To ensure that shareholders bear non-default losses, it is also important that any intercompany debt owing to a CCP's parent is junior to claims for non-default losses.

We agree with the statement in paragraph 7.3 of the Discussion Note providing that an assessment of whether the CCP meets the applicable conditions for entry into resolution will depend on the ability to quantify the actual or expected losses to which the CCP is subject and an assessment of the likelihood that other actions available to the CCP would restore a breach, or

[56] One exception would be if a clearing member has an active right to direct specific investments of funds held by the CCP and the CCP does not profit from such investments. Under these circumstances, it would be appropriate for the clearing member to bear losses from such investments. For clarity, the right to allocate investments of assets generally is not an active right to direct specific investments and therefore would not trigger this exception.
[57] One large U.S. bank continues to support limited recourse clearing.

likely breach of the minimum regulatory requirements necessary for the CCP to continue. We support additional work to ensure that regulators, including resolution authorities, have access to such information on an *ex ante* basis and clear plans regarding how to analyze it in a stress event. Currently clearing participants do not have adequate transparency regarding how CCPs measure and manage the potential for non-default losses or how CCPs would handle such losses in recovery or resolution. As discussed above for default losses, we believe it is critical for publicly available resolution strategies to address treatment of non-default losses completely separately form treatment of default losses.

If a CCP suffers both a default loss and a non-default loss (because, *e.g.,* a clearing member that is also a settlement bank or custodial bank for the CCP defaults), the portion of the losses that are attributable as non-default losses should not be treated the same as default losses. That is, the CCP's default "waterfall" should not cover these non-default losses. Among other scenarios, CCP resolution strategies should therefore contemplate simultaneous management of default losses and non-default losses. We believe that more work is necessary to analyze these different scenarios.

Q14. Aside from loss allocation, are there other aspects in which resolution in non-default scenarios should differ from member default scenarios?

Non-default losses are more likely to erode market confidence in a CCP's management. Therefore, it is even more crucial that the resolution authority have the power to replace the existing board of directors and terminate existing senior management.

Q15. What is the appropriate NCWO counterfactual for a resolution scenario involving default losses? Is it the allocation of losses according to the CCP's rules and tear-up of all the contracts in the affected clearing service(s) or liquidation in insolvency at the time of entry into resolution, or another counterfactual? What assumptions, for example as to timing and pricing or the re-establishment of the CCP's matched book, will need to be made to determine the losses under the counterfactual?

We believe that the appropriate NCWO counterfactual is liquidation under the CCP's rulebook upon commencement of resolution. However, we do not believe that the counterfactual should try to account for, or make assumptions regarding, unexercised provisions of the CCP's rulebook. To do so could require assumptions that are contrary to prevailing market conditions. For example, if an auction or similar mechanism to return a CCP to a matched book failed, it would be extremely difficult, if not impossible, to accurately calculate what would have happened if the default management process played out and re-established a matched book at the CCP. Notwithstanding the foregoing, as noted above, we believe that a resolution authority should have the power to enforce unexercised provisions of the CCP's rulebook without violating NCWO.

In addition to the foregoing, it is extremely important to note that currently, clearing participants will not be creditors of the CCP entitled to NCWO protection except with respect to a return of their initial margin and, subject to non-recourse provisions, any net amounts that the CCP owes them, which is concerning. Non-recourse provisions at CCPs today generally restrict clearing

participants' recoveries to a limited amount of financial resources allocated to a particular clearing service of the CCP. If these resources are exhausted prior to payment in full of clearing participants' claims against the CCP, the unpaid portions of such claims are extinguished. Thus, limited recourse provisions in effect represent an agreement between a CCP and its clearing participants that the clearing participants will not be creditors of the CCP to the extent their claims are extinguished. For these amounts clearing participants are therefore subordinated not only to the CCP's other general unsecured creditors (which may include the CCP's parent or other affiliates that hold inter-company debt issued by the CCP), but also to the CCP's shareholders. Without a more meaningful status as creditors, NCWO does not protect clearing participants in the way that it protects other creditors of the CCP or creditors of other types of financial entities that could be in resolution.

To address these issues and ensure that clearing participants are general unsecured creditors for the full amount of any losses they incur as a result of CCP recovery and resolution and rank ahead of CCP shareholders, we believe that national regulators should require CCPs to (1) remove non-recourse provisions from their rulebooks (subject to certain exceptions for product silos provided that assets of a parent company are available to clearing participants in the affected silo)[58] and (2) provide senior debt claims to clearing participants that suffer losses from the application of loss allocation tools utilized after exhaustion of funded (*i.e.,* default fund) and unfunded (*i.e.,* capped assessments) mutualized resources and position allocation tools utilized upon the failure of the CCP's auction (or similar mechanism to rebalance its book). As noted above, absent resolution, these senior debt claims would be paid from future earnings of the CCP. In resolution, they could be bailed in for debt or equity as part of a recapitalization. In these situations, clearing participants would benefit from NCWO protection because they would be entitled to receive as much for their claims as they would have received for such claims in a liquidation of the CCP.

Without taking the steps outlined above to limit non-recourse provisions in CCP rulebooks and provide senior debt claims to clearing participants that suffer losses from VMGH and PTUs, clearing participants would be entitled to significantly less protection in resolution than other creditors of the CCP and it would be difficult to wipe out existing shareholders.

Q16. What is the appropriate NCWO counterfactual for a resolution scenario involving non- default losses? Is it the liquidation of the CCP under the applicable insolvency regime, assuming the prior application of any relevant loss allocation arrangements for non-default losses that exist under the CCP's rules or another counterfactual?

For non-default losses, we believe that the appropriate NCWO counterfactual is liquidation under the applicable insolvency regime at the time of resolution.

---

[58] One large U.S. bank continues to support limited recourse clearing and therefore does not support compensation claims structured as described herein. This large U.S. bank does, however, support additional work to determine if compensation could be structured in a way that is consistent with non-recourse clearing.

Q17. How should the counterfactual be determined in cases that involve both default losses and non-default losses?

We also believe that the appropriate NCWO counterfactual in these situations is liquidation under the applicable insolvency regime at the time of resolution. Among other things, this ensures that non-default losses could not be covered by resources in the CCP's default "waterfall."

Q18. Should CCP owners' equity be written down fully beyond the committed layer of capital irrespective of whether caused by default or non-default events?

Yes, we believe that shareholders of a CCP should be completely wiped out in a resolution.

Q19. Should new equity or other instruments of ownership be awarded to those clearing participants and other creditors who absorb losses in resolution?

As noted above, we strongly believe that CCP rulebooks should provide senior debt claims for clearing participants who suffer losses beyond the CCP's funded (*i.e.,* default fund) and unfunded default resources (*i.e.,* capped assessments), in CCP recovery and resolution. Under our recommendations for CCP resolution tools, such losses would be from VMGH and PTUs. Issuing senior debt claims as compensation for VMGH and PTU losses would:

- Ensure that clearing participants suffering losses beyond their contribution to funded and unfunded mutualized resources are "creditors" for the amounts of such losses in resolution, irrespective of whether they incur such losses in recovery or resolution. In particular, clearing members must be creditors for these amounts in order to benefit from creditor protections in resolution such as "no creditor worse off" (NCWO).[59]
- Mitigate moral hazards associated with allocating losses or positions among clearing participants and thereby protecting equity holders of for-profit CCPs.
- Incentivize CCPs to focus on resilience in order to avoid exhaustion of funded and unfunded default resources and subsequent use of tools that would entitle clearing participants to senior claims.
- Offer greater likelihood of repayment than equity in the CCP if recovery is successful and resolution does not commence.
- Facilitate a subsequent bail-in of all senior debt claimants on a *pari passu* basis for equity in order to wipe out existing shareholders in resolution.

As noted above, if resolution does not occur, the terms of these senior debt claims should require repayment from the CCP's earnings prior to any such earnings being distributed to shareholders

[59] As discussed in greater detail below, under current CCP rulebooks, clearing members would be creditors in resolution only for the return of their initial margin and, if they are in-the-money vis-à-vis the CCP, the net amount by which they were in the money to the extent that the CCP's resources covered such amounts. Limited recourse provisions in existing CCP rulebooks limit the amount of a clearing member's claims to the amount of resources held by the CCP or the relevant silo of the CCP.

or any existing debt holders that are affiliates of the CCP.[60] If recovery measures fail and resolution commences, then such claims should be paid prior to any distribution to the CCP's shareholders or could be exchanged or bailed in for debt or equity in the successor or resolved CCP, in accordance with the hierarchy of claims under the relevant resolution regime. This would ensure structural subordination of existing shareholders.[61] It is crucial that the holders of the senior debt claims have recourse beyond the defaulting clearing member's estate.
Senior debt claims for losses due to VMGH are relatively simple to value and should be valued as the amount by which variation margin gains were haircut. However, the value of such senior debt claims for PTUs is less straightforward. We believe that the claims should follow the calculations typically used in the uncleared derivatives markets and therefore the value of claims should generally be based on the cost to clearing participants' of re-establishing their torn-up positions. We believe that more work needs to be done in determining the appropriate price for torn-up positions.

As noted above, many view compensation in the form of senior debt claims upon the use of VMGH and PTU as essential to align the interest of a CCP's shareholders with those of its clearing participants. In this regard, we note that the availability of such compensation would have implications for the CCP's solvency in a time of distress and could impact a CCP's decisions regarding which products to clear and how to structure its default management process. Some members believe that such compensation may also impact incentives for clearing participants to bid in auctions. Accordingly, we believe that when structuring the terms of compensation (including type, amount, priority, repayment terms and maturity of any claims), careful consideration should be given to resulting incentives for both a CCP's shareholders and its clearing participants. We also believe that additional work is necessary to determine which entity (the CCP or a holding company of the CCP) should issue the senior debt claims. This determination will likely depend in part on the resolution strategy for a particular CCP and the CCP's existing corporate structure.

Q20. What are your views on the suggested standing composition of CMGs? Should resolution authorities consider inviting additional authorities to the CMG on an ad-hoc basis where this may be appropriate?

We support the suggested standing composition of CMGs. We believe that any permanent or *ad hoc* additions should be based on:

- The need for a holistic understanding of all the consequences of the actions contemplated in CCP resolution, including by prudential regulators, market regulators and central banks, all of whom may have to take actions to support CCP resolution (*e.g.,* relaxation

---

[60] We recognize that additional work is necessary to establish precisely where such senior debt claims should fall within the creditor hierarchy. Among other things, liquidity providers to the CCP may ultimately find themselves with claims against the CCP and the ranking of such claims deserves careful consideration, as it should not hinder a CCP's ability to source liquidity in a time of stress.
[61] In addition to wiping out existing shareholders, we believe that a resolution authority should have the power to replace the existing board of directors and senior management.

of capital requirements, suspension of clearing mandates, provision of liquidity on standard market terms).

- The cross-border nature of most systemically important CCPs, and thus the necessity for international participation.
- The need for rapid and effective decision making at the time of CCP resolution.

Q21. What should be the nature of engagement with authorities in jurisdictions where the CCP is considered systemically important, for the purpose of resolution planning and during resolution implementation?

We believe that authorities should have transparency into resolution strategies for these CCPs on an *ex ante* basis and should be in real-time communication with the CCP and the relevant supervisors and resolution authorities in the CCP's home jurisdiction if resolution is contemplated. In order to properly plan for and anticipate a CCP resolution, we also believe that that authorities in all relevant jurisdictions should have transparency into recovery plans for such CCPs, both on an *ex ante* basis and on a real-time basis in the event that the CCP exercises its recovery plans. Home resolution authorities should particularly plan and coordinate on an *ex ante* basis with any third-country authorities who may be required to make quick decisions in the event of a CCP resolution. Such coordination should limit the need for any time-consuming coordination upon commencement of resolution.

To facilitate the foregoing, as noted above, CCPs should have in place processes and real-time risk management capabilities to capture, monitor and report records and conditions (including total exposures, specific large clearing member and client exposures, liquidity demands (*i.e.,* uses) and coverage (*i.e.,* sources), available cash by currency, composition of non-cash collateral and certain other aspects of the CCP's default management process). Such processes and capabilities would enable CCP management and relevant authorities (including resolution authorities) to assess the stress situation in real time.[62]

Q22. Should CCP resolution authorities be required to disclose basic information about their resolution strategies to enhance transparency and cross-border enforceability? If so, what types of information could be meaningfully disclosed without restricting the resolution authority's room for manoeuvre?

The Associations believe that regulators should disclose CCP resolution strategies to the maximum extent possible to clearing participants and other relevant regulators (both domestic and foreign). At a minimum, clearing members and any other clearing participants that are expected to support default management processes and/or bear losses should have full access to resolution strategies. We also support fire drills to enhance operational understanding of resolution strategies.

[62] We recognize that many CCPs have such capabilities in place today, at least with respect to their supervisors. However, we urge universal implementation of these capabilities with respect to all relevant authorities, including resolution authorities.

Q23. Does this section of the note identify the relevant CCP-specific aspects of cross-border effectiveness of resolution actions? Which other aspects, if any, should also be considered?

The Associations support the considerations outlined in the Discussion Note, particularly with regard to ensuring cross-border enforceability of rulebook provisions, any other relevant resolution tools (including statutory tools) and the terms of relationships with custodians and other key counterparties.

Q24. What should be the role, if any, of the suspension of clearing mandates in a CCP resolution and how should this be executed in a cross-border context?

The Associations support the ability of all supervisory authorities to suspend their clearing mandates on an expedited basis (*i.e.,* within one day) in the event of distress at a CCP that is eligible to clear products covered by that mandate. This should apply regardless of whether the CCP is actually located in the jurisdiction of the relevant clearing mandate. We also think that clearing mandates for products covered by a CCP in resolution should be reviewed as a general matter on an *ex post* basis to determine if they are still appropriate under the applicable regulatory regime.

****

We very much appreciate your consideration of our comments. If we may provide further information, please do not hesitate to contact the undersigned or staff at any of the Associations. Specifically, as we have noted to the FSB recently, the Associations plan to continue working on the novel and complex issues related to CCP resolution. We look forward to responding to future FSB consultations on these issues and would also welcome the opportunity for further engagement with the FSB in the interim as we expect that we will have more to share in the coming months.

Walt L. Lukken
President & Chief Executive Officer
Futures Industry Association (FIA)

Andrés Portilla
Managing Director - Regulatory Affairs
Institute of International Finance (IIF)

George Handjinicolaou
Deputy CEO
International Swaps and Derivatives Association, Inc. (ISDA)

Paige E. Pidano
Managing Director and Senior Associate General Counsel
The Clearing House

David Strongin
Executive Director
Global Financial Markets Association

FIA is the leading trade organization for the futures, options, and cleared swaps markets worldwide. FIA's membership includes clearing firms, exchanges, clearinghouses, and trading firms from more than 25 countries as well as technology vendors, lawyers, and other professionals serving the industry. FIA's mission is to support open, transparent, and competitive markets, to protect and enhance the integrity of the financial system, and to promote high standards of professional conduct.

The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, visit http://www.gfma.org.

The Institute of International Finance is the global association of the financial industry, with close to 500 members from 70 countries. Its mission is to support the financial industry in the prudent management of risks; to develop sound industry practices; and to advocate for regulatory, financial and economic policies that are in the broad interests of its members and foster global financial stability and sustainable economic growth. IIF members include commercial and investment banks, asset managers, insurance companies, sovereign wealth funds, hedge funds, central banks and development banks. For more information visit www.iif.com.

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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, clearing houses 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.

ISDA® is a registered trademark of the International Swaps and Derivatives Association, Inc.

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

Appendix B
Attachment 6

March 13, 2017

Submitted Electronically

Financial Stability Board
fsb@fsb.org

Re: Consultative Document: *Guidance on Central Counterparty Resolution and Resolution Planning*

The Futures Industry Association (FIA), the Global Financial Markets Association (GFMA), the Institute of International Finance (IIF) and the International Swaps and Derivatives Association, Inc. (ISDA) (ISDA; and together with FIA, GFMA and IIF, the Associations) welcome the Consultative Document regarding *Guidance on Central Counterparty Resolution and Resolution Planning* recently published by the Financial Stability Board (FSB). The role and significance of central counterparties (CCPs) has increased in recent years as over-the-counter (OTC) derivatives have moved to clearing. Effective resilience, recovery and resolution mechanisms for CCPs are now more than ever critical to the efficient operation, stability and sustainability of the global financial markets. The Associations support the Consultative Document as another important step towards addressing the financial disruption that could occur in the unlikely event that a CCP fails and welcome the opportunity to provide the following comments.[1]

The Associations agree with many aspects of the Consultative Document and commend the FSB for incorporating a number of the points that the Associations and other industry participants raised in response to the August 2016 FSB Discussion Note on *Essential Aspects of CCP Resolution Planning*. In particular, the Associations support:

- Maximum possible transparency regarding the resolution authority's powers in the jurisdiction's legal framework and, to the extent appropriate, CCP rules and arrangements.
- Subject to the considerations discussed below, a presumption that the resolution authority continues to utilize the tools set forth in CCP rules and arrangements.
- CCP equity that is loss absorbing in resolution.

[1] Please note that CCP (and other FMI) members of FIA, IIF and ISDA do not necessarily support all of the views expressed herein. We understand that some CCPs will submit separate comments to the FSB expressing different views on certain issues.

- Subject to the concerns noted below, preservation of claims of clearing participants[2] that suffer losses in CCP resolution.
- Continued FSB work on financial resources for resolution and additional guidance on this topic.

The Associations do, however, have a number of concerns regarding other aspects of the Consultative Document and strongly encourage the FSB to address these issues before issuing final guidance. As discussed in greater detail below, the Associations maintain that:

- Forced allocation should never be utilized in recovery or resolution, even as a last-resort tool.
- Initial margin haircutting should never be utilized, even as a last-resort tool for non-bankruptcy remote initial margin.
- Clearing members should be obligated to satisfy one capped assessment, either in recovery or resolution. A resolution authority could call for this assessment if the CCP did not do so prior to resolution, but if a CCP exercises assessment powers in recovery, then a resolution authority should not have the right to call for additional assessments, even subject to caps. As discussed herein, the Associations believe that variation margin gains haircutting (VMGH)[3] over a minimal time period, CCP capital and allocation of losses to the CCP's ultimate equity holders would provide resolution authorities with sufficient resources and therefore additional assessments would not be necessary.
- In no event should non-default losses be allocated to clearing participants, whether through assessments or otherwise.[4]
- Key elements of CCP resolution plans and triggers for resolution must be available to clearing participants without exception. Clearing participants must understand such information on an *ex ante* basis so that they can measure, manage and control their exposure to the CCP and so that they can actively participate in the CCP's default management process.
- Clearing participants that suffer losses from the use of any tools beyond one capped assessment in recovery or resolution should retain claims that position them as senior to existing equity holders.

---

[2] As used herein, "clearing participants" refers to clearing members and their direct and indirect clients.
[3] VMGH must not be used for anything other than allocation of a finite quantum of losses. That is, VMGH is inappropriate to keep the CCP operational unless a finite quantum of losses has been established at the time it is exercised. We also note that members' support for VMGH, and views on when VMGH should be applied, vary widely. While some members believe that VMGH is an effective loss allocation tool and would support its use prior to the CCP's ultimate equity holders bearing losses in a resolution, other members support VMGH only if it is administered by a resolution authority in resolution. Some of these members also maintain that VMGH should not be used unless CCP capital is exhausted. One member does not support any use of VMGH. *See* Letter from the Associations and The Clearing House (TCH) to the FSB dated October 21, 2016 at pages 4-6 & 20-22 for more a more detailed discussion regarding members views on VMGH. Finally, the Associations recognize that VMGH is not appropriate for certain non-derivative products, including repos and cash transactions.
[4] As discussed below, we realize that clearing participants would be creditors for any amounts the CCP owes them and may therefore bear losses in accordance with the applicable creditor hierarchy. Our concern is that clearing participants should not be contractually or statutorily liable for non-default losses outside of the applicable hierarchy of general creditors.

- The no creditor worse off (NCWO) counterfactual for default losses should not require assumptions that are inconsistent with the reality of what would happen if resolution did not occur. Accordingly, subject to the issues and considerations described below, the NCWO counterfactual for default losses should generally be liquidation or termination of the CCP in accordance with applicable insolvency laws.

Below we elaborate on these issues in greater detail and also raise some technical points regarding the Consultative Document.

Forced Allocation

Section 2.7 of the Consultative Document contemplates imposition of a forced allocation of open contracts if a resolution authority has the explicit power to do so under the legal framework and/or CCP rules and arrangements. Section 2.7 goes on to note that when considering forced allocation, resolution authorities should take into due account the impact on financial stability and should use such power only as a last-resort tool.

In the Associations' view, the impact on financial stability if clearing members are forced to take on positions that they may not be suited to risk manage in extreme market conditions would always be too great and therefore forced allocation should not even be contemplated. Forced allocation would not come into play until an auction or similar voluntary process had failed. In these circumstances, it would have been established that clearing participants are unable or unwilling to clear the problematic positions, for risk management or other reasons. Forcing clearing members to clear these positions regardless could have adverse consequences on individual clearing members and would almost certainly have adverse systemic consequences. Separately, any application of forced allocation that tried to address such concerns by allocating positions to those clearing members that "could bear them" would be completely unequitable and therefore should not be allowed.

Contrary to the foregoing, partial tear-ups return a CCP to a matched book in a way that more evenly distributes risk and exposure across clearing participants and does not require any clearing participants to clear positions that they are not able to risk manage. Instead, partial tear-ups affect only positions in products that clearing participants have elected to clear. Clearing participants that clear these products that could not be liquidated through the normal default management procedures bring the risk associated with them to the CCP and therefore it is appropriate for them to bear risks associated with their tear up in a last resort scenario.

Based on the foregoing, the Associations strongly disagree with any use of forced allocation, even as a last-resort. If a resolution authority cannot allocate positions necessary to return a CCP to a matched book by voluntary means, it should utilize partial tear-up as described in Sections 2.4-2.5 of the Consultative Document or, subject to the limitations in Section 2.6, full tear-up.

Initial Margin Haircutting

Section 2.11 of the Consultative Document contemplates haircutting of initial margin that is not bankruptcy remote if a resolution authority has the power to do so under the legal framework or the CCP's rules and arrangements. Section 2.11 goes on to note that when considering initial

margin haircutting, resolution authorities should account for the impact on financial stability and on incentives to centrally clear and should use initial margin haircutting only as a last-resort tool.

As consistently stated on previous occasions, the Associations strongly disagree with any use of initial margin haircutting, even as a last-resort.[5] Initial margin haircutting that applies to non-bankruptcy remote initial margin only is potentially even more problematic because it would create incentives to post non-cash collateral that is traditionally held in a bankruptcy remote manner, which could cause undue liquidity constraints in a CCP's day-to-day operations and therefore require larger liquidity facilities and additional sources of liquidity in the ordinary course. The foregoing could potentially result in a subset of initial margin that is subject to haircutting and a subset of initial margin that is not subject to haircutting at the same CCP, which would make it incredibly difficult for clearing participants to measure and manage their exposures to the CCP and would likely result in disparate treatment of similarly situated clearing participants based on the type of initial margin they post. Additionally, if initial margin haircutting is permitted in some jurisdictions, it could drive clearing participants to clear only through CCPs in jurisdictions that either prohibit initial margin haircutting or require initial margin to be held in a bankruptcy remote manner.

Among other things, the Associations believe that initial margin haircutting would be inconsistent with Section 1.2(iii) of the Consultative Document, which provides that CCP resolution should seek to "maintain continuous access by [clearing participants] to securities and cash collateral posted to and held by the CCP in accordance with its rules and that is owed to such [clearing participants]." More generally, initial margin haircutting would have knock-on effects in an already distressed market and is procyclical in that clearing participants would have to replenish haircut margin at the worst possible time (*i.e.,* in a severely distressed market). Initial margin haircutting could also incentivize clearing participants to close out of positions in order to reduce their initial margin requirements at the first sign of a CCP's distress and, by doing so, compete against the CCP for hedges required in the CCP's default management process. This would likely cause further disruption in the market and could impede the CCP's return to viability through recovery or resolution. Additionally, initial margin haircutting could disincentivize participation in the CCP's default management process, as clearing members may not want to bid on positions that would increase their initial margin requirements if additional initial margin posted to satisfy those requirements could be haircut. Finally, in many jurisdictions initial margin for uncleared derivatives must now be held with a third-party custodian to shield it from the insolvency of the receiving counterparty. Not providing the same degree of protection to initial margin for cleared derivatives could disincentivize central clearing, which would be contrary to the stated objectives of the G-20.

In the Associations' view, for the reasons stated above, the impact of initial margin haircutting on financial stability and incentives to centrally clear would always be too great and therefore initial margin haircutting should never be allowed. Upon exhaustion of a CCP's default waterfall (including one capped assessment over recovery and resolution), any remaining losses

[5] *See* Letter from the Associations and TCH to the FSB dated October 21, 2016 at page 21.

should be covered by VMGH[6] over a minimal time period, CCP capital and allocation of losses to the CCP's ultimate equity holders (as contemplated by Sections 4.1-4.3 of the Consultative Document). Allocation of losses to CCP capital and the CCP's ultimate equity holders would require removal of any non-recourse provisions that limit the exposure of a CCP's parent and such equity holders to so-called CCP "skin-in-the-game." Some members support the removal of such provisions as crucial to ensuring that resolution authorities can allocate losses comprehensively.[7]

Moreover, the Associations maintain that CCPs in all jurisdictions should be required to hold initial margin in a bankruptcy remote manner. This would avoid the possibility of any initial margin haircutting, including the problematic disparate application of initial margin haircutting discussed above.[8]

Clearing Member Assessments

Section 2.9 of the Consultative Document contemplates resolution authority cash calls or assessments, *i.e.,* resolution authorities would have an explicit statutory power to require non-defaulting clearing members to make contributions in cash to the CCP up to a specific limit. While the Associations support caps on assessments and fully agree with the sentence at the end of Section 2.9, which provides that clearing members should be able to assess at all times the maximum amount that they may be required to contribute under any assessments or cash calls, the Associations absolutely do not support an additional resolution authority assessment if the CCP already exercised assessment powers in its rulebook. For clarity, the Associations do not support statutory assessments powers or any assessment powers beyond those in the CCP's rulebook under any circumstances. Moreover, the Associations strongly believe that assessment powers in the CCP's rulebook should apply across recovery and resolution, without differentiation or duplication. It is crucial that clearing members have the ability to estimate their exposure to a CCP based on the CCP's rulebook. Introducing additional contingent exposure in resolution statutes would be hugely problematic from a risk-management perspective and would likely be procyclical.

The Associations have previously expressed concerns regarding caps on the overall liability of clearing members across default fund replenishment requirements and assessments, as well as across recovery and resolution.[9] The Associations maintain that CCP rules and arrangements should provide for a standard capped liability framework that limits the amount of total resources that could be required of clearing members across single and multiple defaults during the longer of a defined period (*e.g.,* 30 days for cleared OTC derivatives)[10] or the end of the default

---

[6] Please refer to footnote 3 for a discussion of members' varying views on VMGH.
[7] Other members do not believe that the value of the CCP's existing equity should necessarily be reducible to zero and therefore do not support removal of all non-recourse provisions.
[8] A requirement to hold all initial margin in a bankruptcy remote manner would also facilitate an equitable exercise of NCWO protections because clearing participants would not suffer losses in respect of their initial margin in insolvency proceedings or in resolution.
[9] *See* Letter from the Associations and TCH to CPMI-IOSCO dated October 18, 2016 at pages 14-16.
[10] The Associations support additional work to determine whether the correct time period is 30 days and to determine whether different time periods should apply to different products.

management process (whether in recovery or resolution and irrespective of the number of defaults). This cap would apply to the replenishment requirements contemplated by Section 2.12 of the Consultative Document, as well as assessments.

The Associations believe that CCPs should be required to size their funded default fund appropriately to ensure that they have access to sufficient resources in the event of a member default. And once the default fund has been used, the number of assessments should be capped to one times the default fund irrespective of the number of defaults that occur during the defined period (*e.g.,* 30 days for cleared OTC derivatives), and irrespective of whether resolution commences, to ensure a clear and consistent cap on member liability. This cap should be applied consistently for both withdrawing and continuing clearing members to ensure that there are no incentives to exit the market, which could potentially cause a run on the CCP and aggravate market instability.

Assuming that a CCP holds "cover 2" resources,[11] additional resources equal to one times the default fund would cover defaults of clearing members that would cause the four largest losses. Based on CPMI-IOSCO public quantitative disclosures for CCPs that clear listed products, the largest clearing member loss is generally two to three times the size of the second largest clearing member loss. In these situations, additional resources equal to one times the default fund would generally cover losses from four additional clearing members (*i.e.,* six clearing members in total). Also based on the quantitative disclosures, losses from the top five members account for 50% of total potential losses. The Associations maintain that coverage for such losses would be sufficient across recovery and resolution. Losses beyond these would suggest extreme market moves and/or clearing members failing at a rapid and unprecedented rate. Under these circumstances, an additional resolution authority assessment would likely be procyclical and even further destabilizing.

As noted above, upon exhaustion of a CCP's default waterfall (including one capped assessment over recovery and resolution), any remaining losses should be covered by VMGH[12] over a minimal time period, CCP capital and allocation of losses to the CCP's ultimate equity holders (as contemplated by Sections 4.1-4.3 of the Consultative Document).

Non-default Losses

A previously stated, the Associations strongly believe that non-default losses should not be allocated to clearing participants, either contractually through the CCP's rulebook or otherwise outside of the general creditor hierarchy.[13] Only the CCP's management is able to control and mitigate the CCP's exposure to non-default losses (*e.g.,* losses from custodial, investment, credit,

---

[11] If a CCP does not hold "cover 2" resources, the appropriate default fund multiple for the cap on additional resources should be considered in light of the quantum of resources that the CCP does hold.

[12] Please refer to footnote 3 for a discussion of members' varying views on VMGH.

[13] Please note that, notwithstanding the foregoing, some members strongly believe that publicly disclosed strategies should clearly articulate how non-default losses should be allocated. The concerns we raise here relate solely to anything that would contractually or legally allocate non-default losses to clearing participants outside of the general creditor hierarchy in a resolution or insolvency regime, not to public disclosure of how non-default losses would be allocated.

liquidity,[14] market, operational, legal, general business and cyber risks). CCPs and their shareholders must bear the risk of these losses so that they are properly incentivized to exercise prudent risk management and focus on CCP risk management. Accordingly, the Associations strongly disagree with Section 2.14 of the Consultative Document, which contemplates an assessment on clearing members if non-default losses are not fully absorbed by extinguishing[15] CCP equity and applying any other loss allocation measures available under the CCP's rules and arrangements for non-default losses. In absolutely no event should resolution authorities have a statutory power to call for assessments from clearing participants to cover non-default losses.

Many members believe that CCP regulatory capital should be right-sized to cover credit, liquidity, market, operational, legal, general business and cyber risks and that CCPs should bear the burden on demonstrating to their regulators and clearing participants that their capital covers these risks. Other members believe that CCPs should hold dedicated reserves (that are not funded by clearing participants) outside of regulatory capital for this same purpose. In either case, this amount should be completely separate from a CCP's "skin-in-the-game" or other resources to cover default losses. In the unlikely event that regulatory capital (or, as some members prefer, a separate right-sized quantum of dedicated reserves to cover non-default losses) does not cover non-default losses, additional losses should be covered exclusively by CCP equity and/or a parent company of the CCP (as opposed to loss allocation measures imposed on clearing participants). The Associations support formal guarantees from CCP parents to cover non-default losses. Under any such guarantees, CCP parents should be prohibited from paying any dividends until payment in full of all claims arising out of the CCP's recovery and resolution. In order to ensure the foregoing and also create the right incentives for the CCP and its management, CCP rulebooks should unambiguously indicate that default "waterfalls" do not apply to non-default losses.

Based on the foregoing, the Associations support Section 2.13 of the Consultative Document, which contemplates extinguishing CCP equity, and potentially other unsecured liabilities in accordance with the creditor hierarchy in insolvency, to cover non-default losses. However, the Associations believe that Section 2.13 should further clarify that equity should be completely extinguished before any non-default losses are allocated to other creditors. Additionally, as noted above, the Associations believe that Section 2.13(i) should further clarify that any loss allocation measures available under the CCP's rules and arrangements for non-default losses are explicitly for non-default losses only and are therefore completely separate from the CCP's rules or any other contractual arrangements between the CCP and its clearing members.[16]

Additionally, we realize that in resolution, clearing participants would be creditors for any amounts the CCP owes them and may therefore bear losses, potentially at an early point in the creditor hierarchy. In light of this, we believe it is critical that non-recourse provisions do not

---

[14] Liquidity risk could be associated with default losses and/or non-default losses. In the context of non-default losses, liquidity risk includes, *e.g.,* the risk that a liquidity provider defaults and the CCP experiences liquidity stresses that are unrelated to a clearing member default.

[15] Note that we interpret "writing down equity" to be "extinguishing equity interests in CCP and ensuring that equity holders bear losses."

[16] Please refer to footnote 13 regarding *ex ante* public disclosure of how non-default losses would be allocated.

shield CCP shareholders from non-default losses as such losses should not be passed along to clearing participants in the creditor hierarchy until all equity is extinguished such that equity holders are no longer entitled to any value or payment of any additional amounts (including in respect to recoveries, NCWO compensation or otherwise). To ensure that shareholders bear non-default losses, it is also important that any intercompany debt owing to a CCP's parent is junior to claims for non-default losses.

Transparent Resolution Plans

Section 7.7 of the Consultative Document provides that resolution authorities should consider the merits of publicly disclosing some elements of the resolution plan. The Associations maintain that it is crucial for resolution authorities to disclose certain key elements of resolution plans and therefore believe that Section 7.7 should take a more definitive position and provide that resolution authorities *must* publicly disclose certain elements of the resolution plan. Moreover, CCPs should be required to disclose additional elements to clearing participants who will be called upon to support the CCP's recovery prior to resolution and, in many cases, resolution. It is imperative that clearing participants have transparent and predictable information regarding the expected resolution strategy so that they can measure, manage and control their potential exposures in these circumstances. At an absolute minimum, clearing participants must understand triggers for resolution and any separate level of regulatory intervention and/or coordination among regulators and resolution authorities (including whether such triggers are discretionary or automatic), resources available to the resolution authority, tools that the resolution authority would utilize and any restrictions on the use of such resources and tools. We also believe that clearing participants should have access to information regarding the resolvability assessments contemplated by Section 8 of the Consultative Document. With regard to triggers, the Associations maintain that Section 3.3 of the Consultative Document should also take a more definitive position and provide that resolution authorities *must communicate* publicly the indicators that would inform their determination to trigger resolution.

Greater public disclosure of key elements of resolution plans would also help to ensure a higher level of consistency among CCP resolution frameworks across jurisdictions. This is particularly pertinent given that, under the approach proposed by the FSB, local authorities would be responsible for developing the resolution frameworks for their jurisdictions in accordance with the principles set forth in the Consultative Document. Disclosure of key elements and, hopefully, consistency across such elements (to the extent appropriate given differences in legal frameworks and CCP structures), would mitigate opportunities for regulatory arbitrage.

Separately, as noted above, we support the beginning of Section 2 of the Consultative Document, which contemplates incorporation of a resolution authority's powers in the CCP's rules and arrangements and Section 2.2 of the Consultative Document, which provides for a presumption that the resolution authority continues to follow unused provisions of the CCP's rules and arrangements. However, we think it is crucial to disclose more specifically when a resolution authority would deviate from a CCP's rules and arrangements. Moreover, we believe that any such deviations should be subject to explicit limitations. We also think that it is crucial to ensure

that CCPs themselves would not have the power to exercise any of their rules and arrangements that are intended only for use by a resolution authority.

Claims for Clearing Participants Suffering Losses

As previously stated, the Associations strongly believe that CCP rulebooks must provide for clearing participants to retain senior claims in respect of losses they suffer beyond the CCP's funded (*i.e.,* default fund) and unfunded (*i.e.,* one capped assessment)[17] default resources, in CCP recovery and resolution.[18] Therefore, the Associations commend the FSB for contemplating compensation in Section 2.15 of the Consultative Document. However, the Associations have strong concerns about the limitations on such compensation in Section 2.15 and, specifically, the limitation that equity or debt would only be awarded to clearing members that contribute financial resources to a resolution in excess of their obligations under the CCP's rules and arrangements. First, we believe such claims should be awarded to all clearing participants suffering losses beyond the CCP's funded and unfunded default resources in both recovery and resolution. Separately, we strongly believe that such claims should not be limited to contributions in excess of what is contemplated in the CCP's rules and arrangements. Finally, we do not believe that the resolution authority should have any discretion with regard to whether clearing participants retain claims.

The introduction to Section 2 of the Consultative Document provides that, to the extent appropriate, the resolution authority's powers should be set out in the jurisdiction's legal framework *and reflected in the CCP's rules and arrangements.* Accordingly, unlike the contractual relationship between a non-CCP financial entity and its counterparties and other creditors, it is contemplated that the contractual relationship between a CCP and its clearing members would cover resolution and potential losses to clearing members (and their clients) in resolution. If a counterparty of a non-CCP financial entity suffered losses in, or prior to, a resolution, it would have a claim against the entity in resolution. The situation should not be different solely because CCPs are expected to contemplate resolution in the rules and arrangements that form the contractual relationship between the CCP and its clearing members.

Based on the foregoing, we strongly believe that Section 2.15 of the Consultative Report should require[19] claims for *clearing participants* that contribute financial resources to a resolution[20] in excess of their *funded contribution and one capped assessment in order to establish such clearing participants as creditors of the CCP* (changes italicized).[21] Such claims would:

---

[17] We note that some members also support senior claims for assessments.
[18] *See* Letter from the Associations and TCH to the FSB dated October 21, 2016 at pages 9-10, 19-21, 26-29. We note that at least one member would also support senior claims for default fund contributions and assessments.
[19] Absent a requirement in FSB guidance that is implemented by national regulators, we believe it would be very difficult, if not impossible, for clearing participants to negotiate rights to claims in CCP rulebooks.
[20] The Associations also believe that any claims arising in recovery should be retained. However, we have focused on resolution as it is the topic of the Consultative Document.
[21] For the avoidance of doubt, clearing participants that provide liquidity in recovery or resolution and already retain a right to repayment for such liquidity would not be entitled to the claims we describe here.

- Ensure that clearing participants suffering losses beyond such contributions are "creditors" for the amounts of such losses in resolution. In particular, clearing participants must be creditors for these amounts in order to benefit from creditor protections in resolution such as NCWO.
- Mitigate moral hazards associated with allocating losses or positions among clearing participants and thereby protecting equity holders of for-profit CCPs.
- Incentivize CCPs to focus on resilience in order to avoid exhaustion of funded and unfunded default resources, and subsequent use of tools that would entitle clearing participants to claims.

In general, claims should be senior to existing CCP equity in the creditor hierarchy,[22] not be extinguishable in resolution or post-resolution and should entitle holders to future CCP profits before the CCP or its parent pays any dividends. If structured as debt, such claims should be able to be "bailed-in" if necessary and appropriate pursuant to the applicable resolution strategy.

The form of new instruments to be issued to clearing participants entitled to claims may differ from jurisdiction to jurisdiction and CCP to CCP. The most important objectives in structuring compensation claims and related instruments should be that (1) clearing participants losses are repaid in full prior to distribution of any amounts or value to the CCP's parent or other affiliates in respect of equity or debt of the CCP that they may hold at the commencement of resolution and (2) neither the claims nor the related instruments should render the resolved entity insolvent. Some members also believe that a third important objective should be that the claims and related instruments do not result in resolution or insolvency prior to the point in time at which resolution or insolvency would have otherwise occurred.

A number of members believe that compensation claims should always be bailed in, or exchanged for, new equity or debt issued by the resolved entity. Of these members, some also believe that the new instruments should be issued as equity in the resolved entity, and the equity of the failed CCP should be extinguished, so that the resolved CCP is separated from the control of the failed CCP's parent. Other members are concerned that a bail-in or exchange resulting in clearing participants owning the resolved CCP could negatively affect incentives for participation in a CCP's recovery efforts, as well as potentially raise regulatory issues associated with certain clearing participants holding equity in a CCP.

Some members also have concerns that claims structured as debt could render the resolved entity balance sheet insolvent and therefore impede an orderly resolution.

To address the concerns articulated above, some members specifically support further consideration of nil paid "preference share" or similar instruments. Such instruments would provide a right to accumulated earnings in excess of regulatory capital requirements until they are paid in full. Based on preliminary work, such claims could be structured as either true shares

[22] Any intercompany debt of the CCP should be converted into equity upon the commencement of resolution so that it is junior to claims of clearing participants in the creditor hierarchy.

or a contractual right. Consistent with the principles stated above, neither the CCP nor its parent would be permitted to pay dividends until the instruments were paid in full.

Finally, some members believe that i an inflexible requirement to bail-in or exchange claims for equity (or debt) of the resolved entity may not be necessary, provided that clearing participants' claims against the failed CCP remain outstanding and entitled to received recoveries (if any) and NCWO compensation payments senior to the CCP's equity in accordance with the creditor hierarchy.

The Associations also have some concerns regarding the statement at the end of Section 2.15, which provides that, alternatively, the resolution authority may have the power to award clearing participants with claims on the parent of the group to which the CCP is affiliated. We believe that claims would not be appropriate unless the resolution authority is executing a strategy pursuant to which it enters at such parent and the claims completely extinguish the parent's existing equity holders.[23]

NCWO Counterfactual

Section 5 of the Consultative Document covers the NCWO counterfactual and, in several instances, contemplates that the assessment of the losses that would have been incurred and of the recoveries that would have been made by CCP participants, equity holders and creditors if the CCP or relevant clearing service had been liquidated or terminated *should assume the full application of the CCP's rules and arrangements and any other contractual agreements subject to the applicable insolvency law* (emphasis added). The Associations believe that clarification is necessary to confirm the meaning of the italicized language and address scenarios in which the CCP's rules and arrangements and/or applicable insolvency law would apply to a different segment, entity or scope of contracts than resolution.

Subject to the concerns noted below, the Associations believe that the NCWO counterfactual for both default and non-default losses should generally be liquidation in accordance with the applicable insolvency regime and applicable CCP rules and arrangements at the time of resolution.[24] The foregoing is consistent with the underlying objective of a NCWO protection, which is to protect creditors from suffering losses that they would not have occurred absent resolution. Upon entry into insolvency, the applicable insolvency regime would dictate how contractual provisions in the CCP's rules and arrangements (including claims of clearing participants that have suffered losses) would be enforced. We interpret the "subject to the applicable insolvency law" qualifier at the end of the italicized language above, as meaning that a resolution authority should not be required to separately account for anything *different* than what would actually occur in accordance with the CCP's rules and arrangements in a liquidation

---

[23] Some members also believe that if the resolution authority enters at the CCP, then the Associations maintain that in order to allocate losses to the CCP's ultimate equity holders, as contemplated by Section 4 of the Consultative Document, CCP equity must be extinguished and ownership of the CCP must transfer from the CCP's parent.

[24] For the avoidance of doubt, the Associations absolutely expect the resolution authority to continue to follow the steps and processes under the CCP's rules and arrangements, as contemplated by Section 2.2 of the Consultative Document.

under the applicable insolvency regime if resolution did not occur.[25] An assumption regarding different application of such rules and arrangements would be contrary to the reality of the situation.

Consistent with the foregoing, we believe that "and the extent" should be deleted from Section 5.2 of the Consultative Document. As noted above, the objective of a NCWO safeguard is to protect creditors from suffering losses that they would not have occurred if resolution had not commenced. Accordingly, the safeguard should apply regardless of whether the resolution authority departs from the CC's rules and arrangements, if the outcome to clearing participants and other creditors differs from what it would have been absent resolution.

Relatedly, the Associations also believe that as part of resolution planning, regulators should ensure that, notwithstanding their rules and arrangements, CCPs are eligible for insolvency proceedings under applicable law at the time that resolution is expected to be triggered. If a resolution authority contemplates commencing resolution at an earlier time, then presumably absent resolution, recovery would proceed in accordance with the CCP's rules and arrangements. Some members do not think that this scenario should be contemplated and have serious concerns about a counterfactual that does not contemplate insolvency proceedings, but other members support additional work to determine the appropriate NCWO counterfactual in any jurisdiction in which the scenario may arise.

Separately, we believe that additional work is necessary to address situations in which a CCP's rules and arrangements and/or applicable insolvency law would apply to a different scope of contracts than resolution. For example, in some jurisdictions we understand that CCP resolution could apply to a clearing service whereas in other jurisdictions resolution would apply at the legal entity level, regardless of whether all clearing services or silos in the legal entity were affected by the contagion. However, contrary to Section 5.5 of the Consultative Document, we are not aware of any insolvency regimes that apply to anything other than a legal entity, which would result in a disconnect between the resolution of a clearing service and the application of relevant insolvency law. Moreover, we note that some CCP rulebooks provide for a close out across multiple clearing services upon insolvency or liquidation, again, regardless of the scope of the contagion. Such provisions in CCP rulebooks would also lead to a disconnect in applying the contemplated NCWO counterfactual. The Associations support additional work to address these disconnects and ensure that the NCWO counterfactual does not conflict with the reality of what would occur absent resolution.

The Associations also have concerns regarding the effect of certain existing non-recourse provisions on NCWO protections. Section 5.5(iii) of the Consultative Document provides that when computing the NCWO counterfactual, the resolution authority should take into consideration any limited recourse provisions in the CCP's rules, and the CCP's rules and

[25] For example, if an auction or similar mechanism to return a CCP to a matched book failed, it would be extremely difficult, if not impossible, to accurately calculate what would have happened if the default management process played out and re-established a matched book at the CCP. Moreover, if a CCP entered insolvency after a failed auction, the insolvency court would not make any such assumptions when determining amounts owed to creditors. Incorporation of resolution powers in CCP rulebooks only further complicates and exacerbates these issue.

arrangements for loss allocation, including the tear up of contracts. CCPs have limited recourse provisions for a variety of purposes, including among siloed clearing services[26] as well as between a CCP and its parent and ultimate equity holders. The latter could significantly limit (and in some cases reduce to zero), the amounts that a CCP owes clearing participants that suffer losses. Currently, clearing participants are not creditors of the CCP entitled to CCP protection except with respect to a return of their initial margin and, subject to non-recourse provisions, any net amounts that the CCP owes them.

Non-recourse provisions at CCPs today generally restrict clearing participants' recoveries to a limited amount of financial resources allocated to a particular clearing service of the CCP. If these resources are exhausted prior to payment in full of clearing participants' claims against the CCP, the unpaid portions of such claims are extinguished. Thus, limited recourse provisions in effect represent an agreement between a CCP and its clearing participants that the clearing participants will not be creditors of the CCP to the extent their claims are extinguished. For these amounts clearing participants are therefore subordinated not only to the CCP's other general unsecured creditors (which may include the CCP's parent or other affiliates that hold intercompany debt issued by the CCP), but also the CCP's shareholders. Without a more meaningful status as creditors, NCWO does not protect clearing participants in the way that it protects other creditors of the CCP or creditors of other types of financial entities that could be in resolution. Moreover, absent removal of limited recourse provisions between a CCP and its parent and ultimate equity holders, equity holders could be more likely to receive recoveries in insolvency while losses allocated to clearing participants would remain unreimbursed, which is problematic on principle and for purposes of applying NCWO.

The Associations do not believe that the requirement to consider limited recourse provisions in CCP rulebooks is at all strong enough to address the foregoing issues. We believe that to address these issues fully and ensure that CCP equity holders are in a true first-loss position and do not receive amounts that could otherwise be applied to reimburse clearing participants for losses allocated to them, CCPs should be required to (1) remove non-recourse provisions from their rulebooks (subject to certain exceptions for product silos provided that assets of a parent company are available to clearing participants in the affected silo)[27] and (2) adopt rules that would permit retention of senior claims by clearing participants in respect of losses from the application of loss allocation tools utilized after exhaustion of default fund resources and one capped assessment in recovery or resolution.

Other Points

Partial Tear-Ups. Section 2.5(ii) of the Consultative Document provides that the price of a partial tear-up should be based, as far as possible on a fair market price determined on the basis of the CCP's own rules and arrangements or other appropriate price discovery method. We view this language as somewhat vague and therefore potentially problematic. At this time, the

---

[26] Some members support these non-recourse provisions, which are separate from the problematic non-recourse provisions that we discuss herein.
[27] We believe that regulators and resolution authorities should require removal of such provisions as part of the resolvability assessments contemplated by Section 8 of the Consultative Document.

Associations strongly support ongoing industry work to establish appropriate pricing for partial tear-ups, which will differ across CCPs and across product types.

In general, based on work to date, the Associations believe that the most important issues to consider when establishing pricing for partial tear-ups include: (1) liquidity in the market for the contracts to be torn up; (2) potential to hedge exposure on the open positions; and (3) time elapsed since the most recent margin call or settlement price valuation and market movements since that time. In addition, the CCP's available resources should in no event influence pricing for partial tear-ups. We also believe that one approach to pricing for partial tear-ups likely would not work for all products and/or all market participants. The Associations and their members continue to explore the advantages and disadvantages of several different approaches and look forward to discussing this work with regulators and resolution authorities.

The Associations also strongly agree with Section 2.5(i) of the Consultative Document, which provides that partial tear-up should be used for the purpose of returning the CCP to a matched book and not to allocate losses. However, we think that the statement at the beginning of Section 2.5 regarding use of partial tear-up if, *inter alia*, market-based actions to return to a matched book would likely result in losses that exceed the prefunded and committed financial resources that are available under the CCP's rules and arrangements to cover those losses should be amended. If partial tear-up is utilized under these circumstances, it is important that it be accompanied by a loss allocation tool such as VMGH.[28] Additionally, we note that some members do not believe that the quantum of expected losses from market-based actions should be a trigger for partial tear-ups. Finally, it is crucial for clearing participants affected by partial tear-up to receive claims in the manner discussed above that establish them as creditors. Such claims should be for the amount of losses suffered by the clearing participants as a result of the partial tear-up.

Separately, the Associations support clarification in final guidance that partial tear-ups should apply to the smallest portion of illiquid contracts possible, recognizing that the scope of contracts may need to expand in certain circumstances and/or may be affected by financial stability concerns. Any decisions regarding the scope of contracts to be torn up should be subject to strict governance procedures that are established and disclosed to clearing participants on an *ex ante* basis and that account for the views of clearing participants whose positions could be torn up. Importantly, in no event should partial tear-ups take the form of an "invoicing back" that would apply only to those contracts that the defaulting clearing member entered into at inception. Such a scenario would affect only those non-defaulting clearing members that were the original counterparties to the relevant contracts and would therefore mean that such clearing members ultimately remained exposed to bilateral counterparty risk towards another clearing member instead of the CCP. This would in turn challenge the principle of a CCP as the buyer to every seller and the seller to every buyer, which could have adverse regulatory and capital requirements for clearing participants.

---

[28] Please refer to footnote 3 for a discussion of members' varying views on VMGH.

Finally, Section 2.3 of the Consultative Document provides that the resolution authority should have the power to restore the CCP to a matched book by soliciting voluntary actions, conducting auctions or by tearing up or otherwise terminating contracts. The Associations strongly agree that the resolution authority's primary objective should be to return the CCP to a matched book as expeditiously as possible. On this point, we anticipate that resolution authorities will need to act very quickly during the first approximately two days of a resolution to restore market confidence, and therefore may not have time to evaluate different potential courses of action. While, as noted above, most members strongly support a presumption that the resolution authority will continue to follow any unused provisions of the CCP's rulebook, we believe that, upon resolution, the resolution authority must weigh that presumption against the need to return to a matched book quickly and the likelihood that auctions or other voluntary mechanisms would achieve this objective in two business days or less.

Full Tear-Up. Section 2.6 contemplates a full tear-up in certain situations. The Associations recognize that either a CCP resolution or a CCP liquidation would be an extreme event and likely involve drastic measures. We support full tear-up and liquidation of a CCP or, to the extent possible under applicable law, clearing service, *provided that the CCP or clearing service is not critical, such full tear-up would not have systemic consequences and affected clearing participants retain claims that preserve their status as creditors.*[29] However, we request clarification regarding how resolution authorities would make such a determination and support FSB guidance regarding criteria to be considered. We also believe that if a resolution authority believes that full tear up of a CCP would be the best course of action, the resolution authority should consider not intervening and allowing the full tear up to proceed in insolvency or in accordance with the CCP's rulebook outside of resolution or insolvency proceedings. Some members believe that resolution should not replace insolvency if the latter would not be systemically destabilizing.

VMGH.[30] Section 2.10 provides that resolution authorities should have an explicit power to haircut variation margin payable to non-defaulting clearing participants. The Associations support VMGH in resolution over a minimal time period.[31] As noted above, some members support such a use of VMGH only after CCP capital has been exhausted and the CCP's equity holders are not entitled to any further amounts or value in respect of their equity interests (as a result of recoveries, NCWO compensation payments or otherwise). Other members of the Associations also support a limited use of VMGH prior to resolution in recovery, subject to safeguards, and want to ensure that section 2.10 would not preclude such a limited use of VMGH in recovery. These members support section 3.1 of the Consultative Document, which provides that a CCP's recovery plan should be designed to address comprehensively any uncovered credit

---

[29] As with partial tear-up, such claims should be for the amount of losses suffered by clearing participants affected by the full tear-up. Also like partial tear-up, the Associations believe that the most important issues to consider when establishing pricing for full tear-up include (1) liquidity in the market for the contracts to be torn up; (2) potential to hedge exposure on the open positions; and (3) time elapsed since the most recent margin call or settlement price valuation and market movements since that time. Again, the CCP's available resources should have no influence on the pricing for full tear-up.

[30] Please refer to footnote 3 for a discussion of members' varying views on VMGH.

[31] Please refer to footnote 3 for a discussion of members' varying views on VMGH.

losses, and believe that a limited amount of VMGH should be permitted in recovery to accomplish such loss allocation.

Departure from Pari Passu *Treatment of Creditors.* Section 5.3 provides that a resolution authority should not be prohibited from departing from the general principle of *pari passu* treatment of creditors within the same class and order of loss allocation in accordance with the CCP's rules and arrangements, if necessary to achieve the resolution objectives or maximize value for all creditors. The Associations continue to have serious concerns about any such deviations and maintain that any non-*pari passu* treatment of similarly situated creditors should be subject to explicit and pre-defined limitations.[32] .

Moreover, while it could be tempting to a resolution authority, allocation of losses to seemingly more financially stable clearing participants would be extremely inequitable and should not be permitted.

Recovery of Temporary Funding. Section 6.5 of the Consultative Document provides that resolution authorities should recover any available temporary public funding from the assets of the CCP, its participants and/or other market participants. While the Associations understand that political pressure may require resolution regimes to provide for recovery from market participants generally, a recovery from clearing participants is potentially problematic and we request clarification regarding how that would work. Among other things, any such recovery should not violate caps on clearing participant assessments, as discussed above.

Financial Resources for Resolution. The Associations strongly support the additional work contemplated by Section 6 of the Consultative Document. We specifically believe that such work should consider the appropriate levels of (1) CCP capital and (2) additional resources necessary to facilitate immediate recapitalization of the successor or resolved CCP and replenishment of its "skin-in-the-game" contributions. In analyzing and considering appropriate levels of CCP capital, we believe it is crucial to consider and stress-test specific non-default loss scenarios to ensure that CCP capital would cover any potential non-default losses. As part of this work, we support additional guidance and transparency regarding the "appropriate prudent assumptions about financial resources that may be required to achieve the resolution objectives and the resources that it expects to remain available under the CCP's rules and arrangements at the time of entry into resolution," as provided in the introduction to Section 6 of the Consultative Document.

Resolvability Assessments. The Associations strongly support resolvability assessments and powers of resolution authorities to require changes to CCP rulebooks, including some of the changes discussed above. As CCP resolution strategies will likely differ jurisdiction to jurisdiction and CCP to CCP, resolvability assessments for individual CCPs serve a crucial role in CCP resolution planning. Among other things, some members believe that resolution

[32] As an example, *see* the limitations on when the U.S. Federal Deposit Insurance Corporation (FDIC) could deviate from *pari passu* treatment of creditors under Section 210(b)(4) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These generally include scenarios in which the FDIC determines that such deviation is necessary to maximize value, minimize losses or continue essential operations.

authorities should have the power to require structural and organizational changes by CCPs, their parents and their other affiliates if necessary to achieve resolvability. Notwithstanding the foregoing, the Associations urge regulators and resolution authorities to ensure that any rule changes are subject to a CCP's standard clearing member review and approval process.

Structuring Resolution Strategies. Resolution authorities should have flexibility to structure CCP resolution strategies, including among other things, point of entry for resolution, in the manner best suited for the applicable legal framework and structure of the particular CCP. Among other things, FSB guidance should not preclude resolution authorities in certain jurisdictions from entering at a CCP's holding company (including an intermediate holding company) if that is the most appropriate strategy for the particular CCP under the applicable resolution regime.

CCP Interoperability. The Associations support additional work by resolution authorities and other regulators to address CCP interoperability. We support the acknowledgment of the effects that intra-group dependencies, interoperability arrangements and links with other financial market infrastructures in Section 7.5(viii) and Section 10.1(i) of the Consultative Document, as they relate to CCP resolution planning. However, given the relatively high likelihood that stress at one CCP could jeopardize the functioning of other CCPs, we believe that more work is necessary to ensure protections for clearing members of all linked CCPs.

****

We very much appreciate your consideration of our comments. If we may provide further information, please do not hesitate to contact the undersigned or staff at any of the Associations.

Walt L. Lukken
President & Chief Executive Officer
Futures Industry Association

Andrés Portilla
Managing Director - Regulatory Affairs
Institute of International Finance

David Strongin
Executive Director
Global Financial Markets Association

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

Appendix B
Attachment 7

afme/ asifma sifma

The Clearing House
At the Center of Banking Since 1853

October 18, 2016

CPMI-IOSCO
cpmi@bis.org
consultation-2016-091@iosco.org

Submitted Electronically

Re: Consultative Report: *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI*

The Futures Industry Association (FIA), the Global Financial Markets Association (GFMA), the Institute of International Finance (IIF), the International Swaps and Derivatives Association, Inc. (ISDA) and the Clearing House (TCH; and together with FIA, GFMA, IIF and ISDA, the Associations) appreciate the opportunity to comment on the *Resilience and recovery of central counterparties (CCPs): Further guidance on the PFMI* Consultative Report recently published by CPMI-IOSCO.

The role and significance of central counterparties (CCPs) has increased in recent years as over-the-counter derivatives have moved to clearing. Effective resilience, recovery and resolution mechanisms for CCPs are now more than ever critical to the efficient operation and sustainability of the global financial markets. The Associations support the Consultative Report as another important step towards enhancing the safety and soundness of CCPs and welcome the opportunity to provide comments.

Our comments below are broken out by sections of the Consultative Report.

Governance

Is the guidance provided on CCPs' governance sufficient and appropriate?

Overall, we believe the guidance on governance is helpful, and we are supportive of the approach taken by CPMI-IOSCO. We believe the additional granularity provided in this guidance will improve the governance structure of CCPs.

Below we make some initial comments on the way the guidance places a number of additional risk management responsibilities on the CCP's board. We support the approach of ensuring that the board is key to setting the risk appetite and providing overall risk management oversight of the CCP, and that board members are fully aware of, and responsible for, the actions of the CCP. While there is a limit to the extent the board can be involved in highly granular elements of a CCP's operations and risk calculation process, we are strongly supportive of the proposed approach in the guidance regarding ultimate responsibility for the CCP's board.

The introduction of the Governance section refers to the need for the CCP's board to "have explicit responsibility to ensure that the CCP's margin system and stress-testing framework, as key elements of the CCP's overall risk management framework." We believe this section should make clear that final responsibility for risk management rests with a CCP's board of directors, in its role overseeing senior management (taking into account the role of the risk committee as appropriate) in managing a CCP's material risks including[1]:

- Changes to membership criteria;
- Risk framework (*e.g.,* initial margin, sizing of the default fund);
- Sizing of loss absorbency resources;
- Default management framework;
- Default waterfall;
- New products that introduce new, material risk into the system; and
- Procedures for recovery and resolution of the CCP.

We would further note the importance of the board in having ultimate responsibility for other forms of risk (*e.g.,*. operational, legal and investment risk) at the CCP. The board must ensure that the CCP's financial resources are sufficient to cover any losses arising from any of these non-default risks. One area which is not covered in detail in the guidance relates to CCP emergency powers. We believe there should be clarity on (a) the discretionary authority available to CCPs in emergency situations, and (b) the need for transparency around the decision making process by CCPs during an emergency. A key concern for clearing participants[2] is that CCPs balance the need for clearing participants to measure and manage exposures with the CCP's discretionary authority. More importantly, even during an emergency the CCP should have a mechanism to seek consent from all clearing participants who may be materially impacted by the CCP's use of emergency powers.

An important point that we have outlined in further detail below is the role of risk committee members. The guidance should state clearly that risk committee members provide an independent, expert opinion on a CCP's risk management strategy and the impact of a CCP's actions on CCP and clearing participant stability and market integrity, rather than acting as a fiduciary on behalf of the CCP. Additionally, as detailed below, the guidance should explicitly

[1] This recommendation was outlined in more detail in TCH's September 2015 letter to CPMI-IOSCO with Recommendations on Current CCP Risk Governance & Member Consultation Processes. As outlined in that letter: "Because of the possible systemic risks that CCPs may pose, it is critical that CCPs' management and boards of directors understand fully the potential risks associated with the CCP's activities."

[2] As used herein, "clearing participants" refers to clearing members and their direct and indirect clients.

require CCPs to seek public comment on important rule changes. Even if the national rules allow for filing rule change without a public comment period, we believe the guidance should ensure that rule changes processes that do not provide for open comment periods are used on a limited basis and only for non-material risk issues. As we outline in more detail below, the ability for clearing participants to comment on changes to material risk issues is a fundamental requirement for CCPs to ensure that any such changes take account of the views of all key stakeholders.

Is the current level of public disclosure by CCPs appropriate? In particular, is there a need for further disclosure related to margin and stress testing methodologies? If so, would the disclosure of the items included in the list (or a subset of the list) suggested by an industry group and attached as an Annex be appropriate and sufficient for disclosure and feedback purposes?

Clearing members consider that the following information is required to enable the effective review of margin models:

- The provision of sufficiently detailed information on models, as described in "CCP Transparency on Margin Framework" attached hereto;
- An appropriate timescale for review/analysis of the impact of the changes, both systemic and clearing member specific (it was tentatively proposed that this should be 8 weeks);
- The ability of the clearing member to distribute the information to the relevant risk experts within the firm;
- Evidence that the feedback received has been considered by the CCP risk committee and board.

We do not believe the current level of disclosure by CCPs is appropriate and therefore think that guidance should provide greater specificity on information to be provided by CCPs. The Annex to the Cover Note to the Consultative Report speaks to stress results only, but does not address margin/stress methodology or other material risk areas. Information shared by CCPs on margin methodologies should not just enable feedback, but should allow for replication and testing by members. This means CCPs need to provide clearing members with underlying detail of the CCP's margin algorithm and all the parameters for all the inputs to the model in order for clearing members to be able to (a) replicate the model; and (b) assess the impact of changes to the model and/or any of the parameters. CCPs should be required to provide clearing members with full risk management policies and procedures they are required to have under PFMI Principle 3 or as otherwise mandated by national legislation and the independent validation reports. To provide further clarity regarding what we believe should be disclosed, please see the attached "CCP Transparency on Margin Framework."

Our comments on each individual section of the guidance are provided below.

Design and objectives of the margin system and stress-testing framework

We note that paragraph 2.2.4[3] refers to the need for the board to have explicit responsibility for a number of factors, including "the target degree of credit and *liquidity risk mutualization*" (emphasis added). The reference to liquidity risk mutualization is not mentioned elsewhere in the guidance. The definition is unclear. We therefore believe the reference to liquidity risk mutualization should be deleted.

As we noted in our response to the question above on the sufficiency and appropriateness of the guidance on governance, we believe the guidance provided and related transparency requirement should not be limited to margin and stress testing, but rather should cover all material risk issues.

Determining the amount and characteristics of a CCP's own financial resources to absorb losses

We reiterate the view made on previous occasions[4] that clearing members should not be responsible for covering any non-default losses incurred by a CCP. These are losses that exceed a CCP's financial resources above the minimum regulatory capital requirements, which are not the result of clearing member defaults (*e.g.,* CCP operational failures).[5] With respect to governance, we believe the guidance should recognize the potential moral hazard for CCP management if clearing members have responsibility for losses that are within the CCP's sole control. Clearing member contributions to a CCP's financial resources should not be available to absorb a CCP's non-default losses. We believe the guidance should be explicit that default and non-default losses should be transparently defined and segregated, and we further believe that non-default losses should accrue entirely through the CCP ownership and control structure.

We would also note that this section refers to the need for CCP boards to be involved in "determining the amount and the characteristics of the CCP's own contribution." We would note that currently not all CCPs contribute their own capital, so this guidance will not always be relevant today. We believe however this is clearly not best practice, and all CCPs should work towards providing their own financial resources, in order to ensure the interests of the CCP are aligned with its clearing participants.[6] We would note more generally that CCP boards should consult widely, particularly with the CCP risk committee, on the quantum of the CCP's own contribution.[7] This is to avoid a potential conflict of interest of the board, which has a duty to shareholders that could result in the CCP's own funds contribution not being reflective of the CCP's overall risk exposure.

---

[3] Unless otherwise noted, paragraph references are to paragraphs of the guidance in the Consultative Report.
[4] *See, e.g.,* FIA "CCP Risk Position Paper" (April 2015) and ISDA "CCP Loss Allocation at the End of the Waterfall" (August 2013).
[5] *See* the "CCP Contribution to Losses" and "Recovery" sections for more discussion on this issue.
[6] See the "CCP Contribution to Losses" section below for a discussion of this issue.
[7] *Id.*

Review and validation of margin system and stress-testing framework

The guidance includes the statement that "any validations and reviews of the margin system and stress-testing framework (*e.g.,* methodology, parameters, assumptions, changes, and improvements) could be provided to the CCP's risk committee (*whose membership typically includes representatives of clearing members and often also clients of clearing members*)" (emphasis added). We note two points in respect of this statement:

- The statement in parentheticals is not always the case, as some CCPs do not have representation from clearing participants. We would recommend that there be clearing participant representation on risk committees at CCPs globally to provide market expertise in connection with important risk decisions that risk committees make. Note that it is reasonable for there to be a materiality threshold for non-clearing member representatives given the range of sizes of clearing participants that are not clearing members.

- Representatives from clearing participants on the risk committee provide their own independent opinion to the risk committee on the impact of changes to risk management practices and/or rules. As noted in the next section, it should be clear that while representatives of clearing participants may sit on CCP risk committees, they provide an independent, expert opinion on a CCP's risk management strategy and the impact of a CCP's actions on CCP and clearing participant stability and market integrity.

Paragraph 3.6.18 of the PFMI states: "A CCP should regularly review and validate its margin system. A CCP's margin methodology should be reviewed and validated by a qualified and independent party at least annually or more frequently if there are material market developments." It is not clear in the PFMI if this independent review is required to be external, or whether it could be an internal team, such as internal audit. Given the importance of the margin system to the safety and resilience of CCPs, we believe the guidance should make clear that the independent review of the margin system should be done by a qualified entity external to the CCP.

The guidance includes the statement: "For example, any validations and reviews of the margin system and stress-testing framework (*e.g.,* methodology, parameters, assumptions, changes, and improvements) *could* be provided to the CCP's risk committee. The risk committee, as in other instances, *could* then discuss these validations and reviews for presentation to and final endorsement by the board" (emphasis added). Given the key role of the CCP's risk committee in the margin system and stress-testing framework, we believe that it is vital that the risk committee remain involved in any validations and reviews of the framework. Therefore the references to "could" in the above quote should be changed to "should." This reflects the risk committee's expertise in these areas, and the important role it should have in the ongoing maintenance and any reviews of the margin system and stress-testing framework. We would also note that, depending on the nature of the validation or review, other external parties may have expertise that would assist the CCP in the review, including, *e.g.,* clearing participants. The CCP's board should therefore seek feedback from any other such interested external parties in undertaking these validations and reviews.

Disclosure and feedback mechanism for reviewing the margin system and stress-testing framework

We welcome the additional guidance provided on feedback mechanisms for reviewing the margin system and stress-testing framework. We believe this is a key process for CCPs to undertake, and one they currently do not always undertake in the most effective way. While we support the additional guidance provided, we believe it should go further and detail a process CCPs should follow for seeking feedback from their members. As we noted in our response to the questions above, we also believe that the guidance should not be limited to margin and stress testing, but rather should cover all material risk issues. The additional guidance we propose covers:

- The role of the risk committee and its members;
- The process of seeking feedback from participants; and
- Risk related disclosures to general membership.

We have a number of comments about the functioning of the risk committee and the role of its members:

- It should be clarified that risk committee members provide an independent, expert opinion on a CCP's risk management strategy and the impact of a CCP's actions on CCP and clearing participant stability and market integrity. Consultation with the risk committee cannot replace consultation with clearing participants, as not all clearing participants are represented on the risk committee. This is necessary to ensure the positions of clearing participant stakeholders are taken into account prior to the implementation of changes by the CCP. This ensures a wider perspective on any rule changes than that of the risk committee and the CCP's board.

- Membership on the risk committee must not confer any commercial advantage to clearing participants who sit on the risk committee. These clearing participants must be prohibited from sharing information with commercial colleagues. However, risk committee representatives should be able to seek guidance from risk experts within their organization, and it must be clear they are doing this with the purpose of providing expertise to the CCP. However, this must not constitute a substitute for seeking member feedback.

More generally, it would be helpful for the guidance to provide detail on the desired scope/mandate, structure, composition, eligibility, duties/objectives of risk committee members. In addition to points raised elsewhere in this response, additional detail was provided in the TCH 2015 Letter on Current CCP Risk Governance & Member Consultation Processes, including recommendations in respect of:

- Minimum Eligibility Criteria. CCPs should be required to prescribe explicit minimum background and expertise requirements (*e.g.,* risk, trading, operational), as well as

seniority requirements, for risk committee representatives to ensure that the risk committee benefits from diverse perspectives and a sufficient level of expertise. The risk committee should include a minimum number of representatives with risk expertise in the asset classes overseen by the risk committee, as well as a minimum number of representatives with credit risk expertise relevant to the CCP. Risk committee representatives should be nominated by their respective institutions based on these criteria.

- Risk Committee Composition. Risk committees should be recomposed annually, and, as clearing services are added to the CCP, the risk committee representatives should be reviewed to ensure that there are appropriate market experts on the risk committee. Where CCPs have risk working groups for particular clearing services and also a risk committee that reviews risk working group recommendations, then the risk committee must have appropriate product expertise to review and potentially reject the recommendation. The details must be explicitly disclosed to the CCP's board.

- Risk Committee Confidentiality Agreements. CCPs should be required to permit risk committee representatives, clearing member working group representatives, and clearing members themselves to share materials, on a confidential basis, with internal risk personnel within their respective organizations to obtain needed input to effectively perform their duties as risk committee representatives, thereby maximizing the risk expertise the risk committee may provide to the CCP's management and boards of directors.

Paragraph 2.2.18 provides four channels for feedback from clearing participants to the CCP, in addition to the use of the risk committee. We believe the guidance should state that all four channels of feedback described in paragraph 2.2.18 should be used – it is not for the CCP to choose among them.

In addition to the four channels of feedback outlined, we believe more granular guidance would ensure CCPs follow best practice in the process of seeking feedback from clearing participants, particularly in respect of material risk issues. This more granular guidance should include:

- For material risk issues, CCPs should engage clearing participants early in the process of risk management framework development and rule development. By waiting until the last stage of a public comment period, it can be more difficult for participant feedback to be incorporated in the CCP's rules.

- All material risk changes should be subject to public comment.

- The length and form of the feedback process must depend on the importance of the issue to the CCP and clearing participants. If a rule change would result in a change in the liability of clearing participants, there should be a more thorough process, such as ballots, in order to solicit participant approval.

- Industry members have previously called for an appropriate timescale (tentatively proposed to be eight weeks) for review/analysis of the impact of the changes, both systemic and clearing member specific.

- Industry members have also noted the need for clearing participants to distribute information about material rule changes to the relevant risk experts within their firm (subject to a prohibition on the information being used for commercial purposes).

- There have been some recent examples of clearing participant feedback being sought at a late stage in the process and with too short a window to comment.

- The use of rule change mechanisms that do not directly allow for clearing participant feedback should be used on a limited basis and only for non-material risk issues. For example, there has been increasing use recently of the U.S. Commodity Futures Trading Commission's Rule 40.10 filing process, which does not provide a direct feedback mechanism for participants.

- In making final decisions on rule changes, there should be evidence that feedback from clearing participants has been considered by the risk committee or board. If such feedback is not considered, CCPs should be required to advise regulators of their rationale for not considering such feedback.

- There should be a reporting mechanism straight to the regulators to provide feedback. While most jurisdictions have a structure for clearing participant feedback to regulators, it is not always used. It is important that clearing participants have the ability to provide feedback to regulators prior to changes being implemented.

CCPs should report to all members at least on an annual basis, the adequacy and performance of stress and margin back tests. The level of detail provided should in no way expose commercial or individual member details, but it should provide members with the overall performance and any weaknesses identified or potential remediation. Details should include the assumed scenarios and shocks, material inputs and results in an anonymized manner as detailed in the Annex to the Cover Note to the Consultative Report that would ensure such information would not disclose risk or commercial concerns of individual clearing participants.

Stress Testing

Is the guidance provided on stress testing sufficient and appropriate?

We strongly support the guidance on stress testing and note that it incorporates a number of recommendations from the industry. We commend CPMI-IOSCO for recognizing the importance of establishing standards that a CCP should follow in choosing stresses to model and constructing stress scenarios.

Below we point out a number of aspects of the guidance that we strongly support and also raise a limited number of issues for CPMI-IOSCO to consider before issuing final guidance, particularly with respect to liquidity stress testing, the interactions between liquidity and credit stress testing and disclosure of information about stress testing. We have broken out our comments below by sections of the guidance.

Structure of credit and liquidity stress-testing frameworks

We strongly agree with the statement in paragraph 3.2.2 that a CCP should conduct distinct but consistent stress tests for credit risk and liquidity risk and cover resulting exposures with prefunded available financial resources and qualifying liquid resources, respectively. We also agree that in ensuring coverage of credit and liquidity exposures, CCPs must account for the likely value of available collateral in stressed market conditions. We think that final guidance should require CCPs to stress the value of collateral in extreme but plausible market conditions.

We support the statement in paragraph 3.2.5, which provides that a CCP should ensure that its credit and liquidity stress tests are structured in a way that is consistent with the rules and procedures that govern, respectively, how credit and liquidity risk is managed day to day following a participant default. We believe that final guidance should require CCPs to conduct fire drills across asset classes to justify using the same stress scenarios across all asset classes and verify the adequacy of assumptions used to set the applicable stressed period of risk for each asset class.

Identification of all sources of credit risk

We agree with paragraph 3.2.11, which provides that a CCP should identify all sources of credit risk to which it could be exposed in extreme but plausible market conditions and ensure that each source of risk is appropriately captured in credit stress tests. We support application of credit risk stress scenarios to the market values of both portfolios and collateral but note that few CCPs do this currently. We believe that these scenarios should be applied to portfolios and collateral simultaneously to determine the overall impact on the portfolio.

Identification of all liquidity risks

We agree with the statement in paragraph 3.2.15 that liquidity exposures can arise even in the absence of a participant default or when there is no uncovered credit exposure. We therefore believe that CCPs should account for liquidity risks from settlement banks, custodians, investment counterparties and any relevant liquidity providers. On the other hand, we believe that final guidance should emphasize that liquidity stresses may be caused by credit stresses. CCPs should also account for these potential interactions in developing hypothetical scenarios for liquidity stress testing. In addition, liquidity stress testing should account for other scenarios specific to liquidity risk, including, *inter alia*, higher haircuts required to finance collateral.

We also agree with the statements paragraphs 3.2.15-3.2.21 generally that liquidity stress testing should identify liquidity risks for all currencies in which a CCP could have payment obligations

individually. It would not be sufficient for a liquidity stress testing to focus on only major currencies.

We generally agree with the sources of liquidity risk related to liquidity exposures in paragraph 3.2.17. However, we think that final guidance should require CCPs to analyze their liquidity exposures consistently with how they manage credit exposures and therefore, if they manage credit exposures by services lines, they should analyze each of the identified liquidity risks by service lines as well. For liquidity risks that are managed across service levels, CCPs should still be required to account for any challenges that could arise in modelling risks across service levels.

Further, in jurisdictions where CCPs have the ability to borrow cash collateral posted by non-defaulting members. CCPs should be required to return cash collateral to the non-defaulting clearing members and should be liable for any market risk that results from transforming non-cash collateral into cash. Some members also believe that CCPs should be required to replace these with non-cash collateral. Members therefore think that final guidance should require CCPs to account for these scenarios and potential risks as well as require that rulebooks clearly specify any rights of the CCP to use cash collateral posted by clients for liquidity purposes.

We believe that final guidance should require a CCP to account for the risks it could impose on the financial system if it relies too heavily on clearing members and their bank affiliates for liquidity in times of market stress. It is conceivable that these facilities may not be available and, even if they are, overreliance on them could be procyclical. We believe that final guidance should account for the systemic contagion risk introduced by over-reliance on clearing members and their bank affiliates, as well as other clearing participants. Some members also believe that any reliance on clearing participants for liquidity should be limited.

Finally, we strongly support CCP access to liquidity from central banks on standard market terms (including the requirement for high quality liquidity collateral). To facilitate such access, we believe that CCPs should be required to ensure that they hold an adequate amount of such collateral.

Development of extreme but plausible scenarios, comprehensiveness of scenarios, development of forward-looking scenarios, changes in relationships between different products or asset classes

We generally think that the guidance on what constitutes "extreme but plausible market conditions" and "risk tolerance" are still vague. We urge CPMI-IOSCO to provide clarity beyond the guidance in paragraph3.2.23, which merely suggests that stress testing account for interactions between a member default and potential market scenarios. We also believe that guidance should require regulators to consider consistency of stress scenarios across CCPs to ensure that similar asset classes at different CCPs utilize similarly severe stress assumptions.

We strongly agree with the statement in paragraph 3.2.25 that historical stress scenarios alone are not sufficient. We also agree with guidance in paragraphs 3.2.26-3.2.29 and 3.2.36-3.2.41 regarding the expertise and knowledge required to derive forward-looking stress scenarios that are specifically tailored to the products cleared by each individual CCP. Accordingly, we think

that paragraph 3.2.26 should more clearly distinguish between historical, hypothetical (forward looking) and theoretical (statistical) scenarios and mandate the use of all three.

We also strongly agree with the statement in paragraph 3.2.51 that for the purposes of reflecting the extreme but plausible market conditions appropriate for stress testing, a CCP should assume that it will be unable to port client positions because porting requires a willing and able transferee. Consistent with this, we believe that final guidance should require CCPs to use conservative assumptions regarding the period of time during which it would need to manage client positions.[8]

Stressed period of risk

Paragraph 3.2.43 requires the stressed period of risk to be at least as long as the margin period of risk. Some members think that CPMI-IOSCO should reconsider whether the margin period of risk is the correct benchmark. Stressed markets are characterized not only by increased volatility but potentially could also be characterized by reduced market liquidity, which would impact the time required to liquidate defaulted portfolios. A CCP's default management strategy typically involves entering into hedges. We believe that CCPs employing this strategy should demonstrate consideration for illiquid markets when estimating the stressed period of risk. A longer stressed period of risk than margin period of risk may also be appropriate for certain products that are inherently illiquid. We urge CPMI-IOSCO to provide additional guidance regarding when stressed period of risk should be longer than margin period of risk.

Additionally, with regard to liquidity risk, we believe that upon one or more default events, liquidity strains may persist over multiple days. We therefore think that liquidity stress scenarios should be based on multi-day coverage to ensure that a CCP has sufficient liquidity to return to a matched book.

Analysis of the risk management framework

Final guidance should require CCPs to ensure a thorough understanding of the complexity of stress test results to avoid unilateral application of these results. In particular, CCPs should analyze whether the drivers and relationships within different data sets are reasonable to ensure that coverage of risks is appropriately conservative.

We also urge CPMI-IOSCO to require additional disclosures regarding results of stress testing to CCP members and other clearing participants. Disclosures should cover the results of stress testing (as detailed in the Annex to the Cover Note to the Consultative Report), scenarios used, assumptions used to develop hypothetical (forward looking) and theoretical (statistical) scenarios, rationale for sizing resources held based on relevant stress testing, sensitivity results and the results of reverse stress tests. With regard to liquidity in particular, we believe that CCPs should establish liquidity waterfalls that identify sources and uses of liquidity. These waterfalls should be well documented, subject to stress testing (including from an operational perspective) and disclosed to clearing participants. For scenarios, disclosures should cover the actual basis points, or other relevant measure, that the market is assumed to move so that industry

[8] See the "Margin" section below for a discussion of this period of time.

participants fully understand the magnitude of relevant market events covered by the stress testing.

Granular information about scenarios should also be disclosed publicly. These disclosures would facilitate the conversations amongst industry participants and regulators that are necessary to determine the adequacy of stress testing. We fully support the disclosures in the Annex to the Cover Note to the Consultative Report.

We note that pursuant to the recently published *Progress Report on the CCP Workplan*, a joint BCBS, CPMI, FSB and IOSCO study group on CCP interdependencies is expected to publish a report in early 2017. We encourage CPMI-IOSCO to consider the results of this report when issuing final guidance on stress testing. Final guidance should require stress testing to cover interdependencies with custodians, letter of credit providers, liquidity providers, investment counterparties, settlement banks and obligors on credit-sensitive collateral (*e.g.,* corporate bonds). Final guidance should also address the interplay between credit and liquidity stresses across these interconnections, including in a cross-border context.

In light of the potential for member positions and market prices to change significantly during the day, is the proposed guidance on capturing intraday positions and price movements in stress tests appropriate and sufficient?

We support guidance on intraday stress testing as default events may be driven by intraday movements of prices and positions. We particularly support intraday stress testing as necessary to prevent procyclical collateral calls. However, we think that the final guidance should provide additional clarity regarding what intraday stress testing should cover. We interpret paragraphs 3.2.4 and 3.2.5 to require intraday stress testing to address (1) the risk that initial margin is not sufficient to cover intraday fluctuations, which could be procyclical if calls for additional collateral occur in a time of market stress, (2) trading behavior that causes position fluctuations throughout the day but that is not picked up by end-of-day data and (3) the potential for having to liquidate mid-day as opposed to at the end of a day and related liquidity constraints for positions that vary greatly throughout the day. We support these objectives and suggest that CPMI-IOSCO articulate them more clearly in final guidance.

Coverage

Is the guidance provided on coverage sufficient and appropriate?

Overall, we support the guidance provided. However, we think that the final guidance should provide additional granularity in certain areas. We also strongly believe that final guidance should emphasize a CCP's ability to cover potential default losses as opposed to satisfaction of a minimum "cover 1" or "cover 2" standard. Separately, we maintain the importance of clearly articulating on an ex ante basis, and protecting, the liability of clearing members. As discussed in more detail below, we urge CPMI-IOSCO to address this point in final guidance.

Below we point out a number of aspects of the guidance that we strongly support and also raise a number of issues for CPMI-IOSCO to consider before issuing final guidance (broken out by each section of the guidance).

Cover 1 or Cover 2 as a minimum

We strongly support the guidance in paragraph 4.2.1 providing that a CCP's assessment of relevant extreme but plausible scenarios and market conditions should include an analysis of the number of simultaneous clearing member defaults that are extreme but plausible given the composition of its particular base of clearing members and their distribution of risk across a particular clearing service. Please see the response to the question below for the remainder of our comments on this section.

Determining the largest exposures

We strongly agree with the guidance in paragraph 4.2.2, which provides that CCPs should monitor the distribution of projected stress-testing losses across clearing members. However, we believe that the guidance should be more prescriptive regarding situations in which composition of the membership base and distribution of projected losses across participants could require higher coverage. We also believe that CCPs should provide disclosure on this distribution as part of its membership feedback and governance process. In particular, we believe that CCPs should be required to demonstrate to their stakeholders that their prefunded resources are appropriate based on their projected loss distribution, taking into account distribution risk across the CCP's membership. It is important to understand how relatively equal loss distributions would affect required resources. As noted above and discussed below, we believe that the focus should be on a CCP's ability to cover potential default losses as opposed to satisfaction of a minimum "cover 1" or "cover 2" standard and we believe that an understanding of these issues is crucial to achieving such coverage.

We also agree with the statement in paragraph 4.2.2 that a CCP should assume simultaneous default of a participant and all of its affiliates. On principle, we agree that a CCP should only allow for offsetting to the extent the rules of the CCP and the applicable legal framework allow for such offsetting in the event of default. However, we think that guidance should further recommend that CCPs take a conservative approach in determining whether any such offsetting would be permitted. It may be most appropriate to not apply offsetting between affiliates for stress-testing purposes given legal restrictions on such offsetting.

We strongly support the guidance in paragraph 4.2.3 providing that a CCP consider using unsynchronized stress-testing results to better reflect the potential sequential default. This is particularly important for CCPs that clear different assets classes or uncorrelated products within a single clearing service or within the same default "waterfall." Unsynchronized stress tests are appropriately conservative as they provide an additional buffer in the event that stress-testing frameworks are not appropriately comprehensive or robust. Additionally, we again believe that the criteria for such stress testing and the results should be disclosed to a CCP's stakeholders.

Ignoring voluntary, excess contributions

We agree that a CCP should ignore any voluntary, excess contributions from clearing members because they could be withdrawn, particularly in a period of stress. We believe that this is particularly true in the context of liquidity coverage as we think it is very likely that clearing members would withdraw excess cash in a period of distress.

Maintaining resources on an ongoing basis

As an overarching principle, liability of clearing members should be clearly articulated on an ex ante basis and protected. Unlimited assessment rights on clearing members may be unreliable and could lead to procyclicality and liquidity or funding issues for clearing members, thereby perpetuating systemic risk at a time of market distress.[9] We therefore support the guidance in paragraph 4.2.7 requiring CCPs to clearly articulate the circumstances in which they will call for additional financial or liquidity resources from clearing members, the nature of the resources it will call (*e.g.,* additional margin or additional contributions to the default fund), how the allocation of additional contributions will be determined and the payment deadline. We strongly believe that potential obligations of clearing members and the circumstances in which they would arise should be clearly communicated to clearing members on an ex ante basis.

Clearing members must have a full understanding of when and how they could be assessed. We agree with the requirement that CCPs maintain a sufficient minimum amount of resources at all times relative to targeted coverage and have procedures to call for additional resources to address any breaches. However, we do not believe that CCPs should have the ability to call for default fund replenishments on a continual basis. Requiring members to replenish the default fund immediately after its usage would mean that in the case of multiple defaults, members would have to keep replenishing the default fund after each default. The process would be iterative depending on the number of defaults that occur. As such, clearing members would have no means of determining the number and amount of replenishments that they would have to make over a given period making it challenging to estimate their liabilities and measure or risk manage their exposure. Even where CCPs do not resize the default fund immediately following each default, continual replenishments can still lead to very high default fund liability, potentially conflicting with bank regulatory limits. Continual default fund replenishments are also procyclical and multiple calls increase probability that a member would fail to pay in the call.

To address our concerns about membership risk, we suggest that CCP rules provide for a standard capped liability framework which limits the amount of resources that they can use across single and multiple defaults during the latter of a 30 calendar-day period or the end of the default management process. This is in line with the time provided to CCPs in certain jurisdictions to replenish their "skin-in-the-game" contributions. There is no rationale why the CCP would be provided a longer window to replenish its first tranche contribution. CCPs should be required to size their funded default fund appropriately to ensure they have access to sufficient resources in the event of a member default. And once the default fund has been used,

---

[9] We note that, at present, insured depository institutions in the United States are restricted from taking on membership obligations in a CCP (or entering into a transaction) whereby the institution is exposed both legally and practically to unlimited liability. 12 C.F.R. § 225.28(b)(7)(iv).

the number of assessments should be capped to one times the default fund irrespective of the number of defaults that occur during the 30-day period to ensure a clear and consistent cap on member liability. This cap should consistently be applied for both withdrawing and continuing members to ensure there are no incentives to exit the market, which could potentially cause a run on CCP that could then lead to market instability.

Assuming that a CCP holds "cover 2" resources, additional resources equal to one times the default fund would cover defaults of members that would cause the four largest losses. Based on CPMI-IOSCO public quantitative disclosures for CCPs that clear listed products, the largest member loss is actually two to three times the size of the second largest member loss. In these situations, additional resources equal to one time the default fund would actually cover losses from four additional members (*i.e.,* six members in total). Also based on the quantitative disclosures, losses from the top five members account for 50% of total potential losses. Losses beyond these would suggest extreme market moves and/or members failing at a rapid and unprecedented rate. Additionally, we believe that recent reforms to address G-SIB resolution, including requirements to hold "bail-in-able debt," should significantly reduce the likelihood of a large number of member failures within a 30-day period. Finally, we note that losses from additional defaults would likely be lower in magnitude because the larger number of defaulting positions would result in more potential offsets for the CCP to realize in liquidation.

Additionally, we strongly support the guidance in paragraph 7.2.5 (and also in the previously published Recovery Report), which provides that a CCP's rules and procedures should avoid automatic triggers but instead provide the CCP with the capacity to effect a replenishment as soon as practicable, including by the following business day when that would be the case, along with the capacity and responsibility to determine the most appropriate pace for replenishment in the light of prevailing circumstances (with the CCP bearing the burden of proof to demonstrate why it would be impracticable to replenish its resources by the following business day). We suggest adding consistent language to paragraphs 4.2.6-4.2.7 and re-evaluating the language in paragraph 4.2.6 regarding automatic triggers and same-day contributions to re-establish compliance with coverage requirements.

We also believe that anything paid in by clearing members to replenish resources should count towards caps on clearing member assessments so that continual replenishments across multiple defaults do not raise the cap on membership liability. Instead, CCPs should ensure availability of adequate margins to cover losses. To clarify, the CCP would only have the authority to call for additional resources to replenish the default fund once (regardless of whether it referred to such cash calls as an assessment or replenishment) during the longer of a 30-day period or the end of default management process. Beyond this amount, additional initial margin, CCP capital and/or funding from a CCP's parent could be used to meet coverage requirements and any new default losses in the continuing default management process/30-day period.[10] This would ensure that the

---

[10] In adopting this approach, we noted that such initial margin requirements could be quite high in a time of stress. CCPs should strongly consider alternative means to meet coverage requirements, including CCP capital and funding from a parent company of the CCP as an interim measure.

CCP has funded resources to replenish the default fund at all times, while also providing members with clarity on their assessment liability over a fixed period.[11]

Is the current two-tiered Cover 1/Cover 2 minimum standard still appropriate in relation to the guidance in the report?

Many of our members strongly support "cover 2" for all CCPs and not only for CCPs that are involved in a more complex risk profile or are systemically important in multiple jurisdictions. However a few members believe that a "cover 1" minimum standard would be appropriate for some CCPs. These members believe that for CCPs that do not have a more-complex risk profile and that are not systemically important in multiple jurisdictions, "cover 1" is an appropriate measure. Cover standards should be determined by the local supervisor with consideration given to, among other things, the systemic importance of the CCP, the risk profile of the CCP's membership, market depth, liquidity, and the cleared financial instruments' risk profile, performance under stressed events, and acceptability as collateral at the governing central bank. In the event that a CCP determines that "cover 1" is the appropriate standard, we believe that CCP should have to publicly disclose why "cover 1" is sufficient. In addition, members would support additional guidance regarding what constitutes "activities with a more complex risk profile" to ensure that the "cover 1" standard is applied appropriately and consistently.

We also believe that the "cover 2" standard should be used consistently for both credit and liquidity. We note that the European Market Infrastructure Regulation (EMIR) already requires "cover 2" for both credit and liquidity. We do not envision many circumstances in which it would be appropriate or sufficient for a CCP to plan credit resources for the default of two clearing members and their affiliates but only ensure liquidity resources to cover one such default. Moreover, we think that a CCP is potentially more likely to face liquidity shortfalls than credit shortfalls. We believe this further supports liquidity coverage requirements that are at least as robust as credit coverage requirements. However, while we think that a globally consistent "cover 2" standard is necessary for both credit and liquidity, we think it would be appropriate for guidance to allow regulators to grant exceptions to CCPs in appropriate circumstances based on, *e.g.,* composition of membership.

In addition to the foregoing, we believe that final guidance should emphasize that the technical coverage standards are minimums. CCPs should be required to justify their coverage holistically based on the products they clear and their membership base. CCPs should also share the analysis associated with this justification with their membership to provide members with comfort that the CCP has sufficient resources to cover its unique risk distribution under extreme but plausible conditions.

[11] This approach appears to be in line with regulatory expectation as seen from Sec. 5.6.2.5 of the Level 3 assessment report which acknowledges that some CCPs cap replenishment and rely on additional initial margin as measures to limit mutualized resources and provide cap on liability and takes exception with only those CCPs that do not employ an interim measure to provide full coverage.

Margin

Is the guidance provided on margin sufficient and appropriate?

We generally agree with the margin system design guidance set forth in paragraphs 5.2.1-5.2.3., indicating that a CCP should design its margin system (including margin and pricing models) so that it appropriately captures the characteristics and complexity of the products it clears. We suggest providing additional guidance indicating that CCPs should ensure their margining models are both sufficiently proactive and adequately responsive to developments in the market and to implied volatilities, while retaining appropriate anti-procyclicality features.

Concerning model assumptions discussed in paragraphs 5.2.9 – 5.2.11, we note that the lack of granular guidance concerning look-back periods has contributed to widespread variation among CCPs. Although a short look-back period tends to reflect current market conditions effectively, responsivity to the market also encourages procycliality. In addition, shorter look-back periods may fail to account for highly-relevant stress events in the recent past. We would recommend that, regardless of the length of the look-back period CCPs choose to use, CCPs should ensure that the scenarios underlying margin determinations are sufficiently diverse and always include relevant stress events (but could, where appropriate, scale historical prices to reflect current market conditions, prices, and volatility). We would also note, however, that, while we do not believe that look-back periods should be uniform across all products, we do believe they should be as consistent as possible for the same type of product across CCPs.

In addition, a CCP's margin model should take account of maximum price changes within a given margin period of risk (MPOR). As the guidance mentions in paragraph 3.2.35, the largest price movement during any two points of an MPOR cannot be accounted for if the model only considers the price movement from the beginning to the end of such MPOR. The margin parameters therefore should reflect peak historical price changes and should also capture maximum variation, calibrated by the distribution of price movement during a single day, and continuing for the duration of distribution of price movement during a given MPOR.

With respect to paragraphs 5.2.17 – 5.2.21, we note that the guidance should clarify that all CCPs, even those clearing listed and/or the most liquid products, should have policies and procedures for identifying when such prices are unavailable, obviously stale or fail to accurately reflect current market prices. Such policies and procedures should also be shared with clearing members. We believe that the guidance should specifically indicate that CCP rulebooks and procedures should disclose the fallback methods for establishing settlement prices, including for listed contracts for which the pricing is drawn directly from an exchange in the normal course.

We believe that the guidance concerning the monitoring of intraday exposure under paragraphs 5.2.22 – 5.2.24 should be expanded to address member concerns that certain CCPs are too frequently making intraday margin calls. We acknowledge that the ability to make intraday margin calls is an important tool necessary for the prudent management of CCP risk, but it should never be a substitute tool for a weak initial margin model and should be leveraged only in times of extreme market dislocation, and in coordination with other CCPs, as well as other FMIs, so as to manage the procyclical implications of a sudden spike in the demand on intraday

liquidity. CCPs should strive to minimize *ad hoc* intraday calls, as these can create liquidity strains in times of stress. In addition to the direct effect on clearing member liquidity, intraday margin calls often increase the credit risk that a clearing member absorbs from its clients wherever a client cannot meet intraday calls for operational or liquidity reasons, normally leaving the clearing member to fund both the intraday and overnight calls. Such strains are exacerbated if the MPOR is short.

The guidance should stress that, in light of the strain intraday calls can have on liquidity, CCPs should not view intraday calls as replacements or mitigants for appropriate end of day margining and should note that the occurrence of frequent intraday margin calls may indicate that the current margin framework is not performing adequately. Margin calculations should be sufficient to ensure that intraday calls occur relatively infrequently—either when prompted by new positions or in highly unusual market situations where unforeseen market movements and volatility make them necessary.[12] To balance the stress intraday calls can have on market liquidity, such calls should flow equally in both directions and with respect to all currencies. In other words, CCPs should not solely call margin to cover losses but should also pay out gains. The guidance should also encourage CCPs to coordinate and communicate with each other during times of stress to establish common thresholds because otherwise small losses may be called at one CCP, while large gains are not paid out at another.

We also believe that CCPs should provide full transparency for triggers of intraday margin calls. This will assist clearing participants in actively tracking and monitoring liquidity demands, encouraging the collection of greater amounts of initial margin. Likewise, the variation margin component of the intraday call should be made on a net basis within client accounts in order to ensure that intraday margin calls do not cause unnecessary liquidity burdens on members resulting from offsetting positions across clients.

We generally agree with the discussion of backtesting in paragraphs 5.2.25-5.2.30. We believe, however, that the guidance could be more prescriptive. Some CCP backtesting amounts only to "margin performance monitoring," in which CCPs test the actual margin levied on clearing members' cleared portfolios against the profit and loss of those portfolios over the targeted MPOR. CCPs should be required to conduct regular and representative backtesting on a static portfolio, which evaluates whether margin requirements on a given day's portfolio would be sufficient over the economic conditions that existed in the past. Margins and hypothetical profit and loss should be compared on these portfolios over a significant backtest period (so-called static portfolio backtesting). CCPs should conduct backtesting daily.

Testing should be sufficiently robust to cover all potential correlations, even when such correlations do not exist in current clearing member portfolios. Note that if the backtesting period does not include periods of market stress (which is possible, especially when rolling stress

---

[12] We note that as far back as 1988, the United States Report of the Presidential Task Force on Market Mechanisms (commonly known as the "Brady Commission Report") identified excessive intraday margin calls as creating substantial risk. *See generall*y, Report of the Presidential Task Force on Market Mechanisms, submitted to the president of the United States, the secretary of the Treasury, and the chairman of the Federal Reserve Board (1988), available at
https://openlibrary.org/books/OL2148247M/Report_of_the_Presidential_Task_Force_on_Market_Mechanisms.

periods are used), then such backtesting is unlikely to be stringent enough to identify weaknesses in margin models. CCPs should create a wide variety of portfolios, including current clearing member portfolios, historic member portfolios, and hypothetical portfolios. To the extent that information about specific clients is available, CCPs should also model stresses to specific clients.

Additionally, CCPs should regularly report backtesting results to clearing participants. Currently, little transparency exists with respect to CCP coverage results. CCPs often share coverage results only with risk committees and boards, but seldom with the clearing participants generally. While some clearing members may supply representatives to the risk committees, these individuals serve only as market experts, not as representatives of their firms and are not permitted to share coverage results within their firms for internal risk management, due diligence or any other purpose.

Finally, we also believe the guidance should require CCPs to undertake both portfolio and product-level backtesting and disclose the results to clearing members on a regular basis. Relying on portfolio-level backtesting only may allow conservatively-margined products to mask under-margined products. Product-level backtesting should capture spreads and butterflies in addition to forward outrights, as margin offsets can be overstated for these strategies.

We support the guidance contained in paragraphs 5.2.31-5.2.32, providing that a CCP should conduct a sensitivity analysis at least monthly in order to assess the responsiveness of margin system parameters and to determine which parameters and assumptions have the largest impact on margin outputs. We believe, however, that the guidance should do more to prescribe which aspects of the margin system parameters should be subject to sensitivity analysis. For example, analysis with respect to correlation offsets and look-back periods are particularly helpful for determining the appropriate framework for measuring margin, and for determining the right level of margin. As we noted with respect to backtesting, the guidance should require CCPs to share their sensitivity analysis with members and generally encourage greater transparency on the part of CCPs in respect of sensitivity analysis.

We strongly support the guidance concerning procyclicality provided in paragraphs 5.2.38-5.2.44. Please see our responses to the question about procyclicality below for additional considerations on this subject.

We agree with the guidance in paragraphs 5.2.45-5.2.47, indicating that a CCP should have clear rules, policies and procedures in place to identify, assess and mitigate specific wrong-way risk.

We agree with the guidance in paragraphs 5.2.48-5.2.52, indicating that a CCP using portfolio margining should identify and apply clear criteria when determining which products are correlated and therefore potentially eligible for portfolio margining, including criteria to evaluate whether portfolios may be reliably liquidated and risk-managed in the event of a participant

default. The guidance should also clarify that correlations should be based on strong economic relationships that do not break, even during a crisis.[13]

We also agree with the guidance in paragraphs 5.2.53-5.2.54, indicating that a CCP should monitor the performance of its portfolio margining system on an ongoing basis in order to ensure that the margin system of the CCP performs appropriately under both current market conditions and during periods of market volatility.

Additional guidance would be helpful in respect of CCP model documentation requirements. Specifically, we believe that CCPs should be required to fully document models and provide their rationale and justification for the choice of elements included in their margin models. Sufficient transparency should be provided to clearing members in order to allow them to replicate accurately margin models and add-ons of the CCP. Current CPMI-IOSCO public quantitative disclosures, while helpful, are insufficient to enable the level of due diligence that is required to be undertaken by participants to meet their own internal risk management standards.[14]

Application of the guidance is particularly important with respect to new products. We recognize that CCPs are continually introducing new products and believe that regulators should stress the need for caution in reviewing the liquidity of such products and setting their margin requirements accordingly. Commercial needs must be balanced with market demands, close out assumptions, and the relevant MPOR applied new products that may not initially have much liquidity. The guidance should clarify that CCPs should only clear products that they can adequately margin and default-manage. CCPs should not justify clearing complex products that lack sufficient standardization or liquidity, or for which CCPs would need to rely on various types of add-ons to ensure sufficiency of resources, among others model risks.

We also believe the guidance should make clear that similar products cleared by different CCPs should have consistent margin standards.

Additional guidance should also be provided with respect to concentration margin. In particular, CCPs should be required to estimate the market capacity to absorb trades for each product they clear without leading to significant widening of bid-ask spreads. For trades that exceed the market capacity, the CCP should levy additional margin to ensure that the margin it levies is sufficient to cover close-out costs. Best practice is to estimate market capacity and the impact of trade size on bid-ask spreads through trader surveys in stress periods, checked against historical experience. Member default fire-drills also can helpfully supplement this approach. The guidance should also clarify that CCPs should appropriately allocate concentration margin add-ons across all clearing participants by including such add-ons in initial margin specific to products and/or contracts.

[13] See, *e.g.,* LCH.Clearnet "Stress This House: A Framework for the Standardised Stress Testing of CCPs" *available at* http://www.lch.com/documents/731485/762444/Stress+Testing+Final+Paper+1.pdf/dd0d30c3-2012-41bd-8df6-cc98da39de59.

[14] For a specific list of detailed documentation that should be provided to clearing members in order to replicate margin calculations, see "CCP Transparency on Margin Framework", attached hereto].

CCPs that have entered into interoperability arrangements should collect at least the amount of inter-CCP margin that would normally be collected from a clearing member with the same open positions and risk. Interoperating CCPs should not be exempt from concentration margin, particularly where the open positions of the interoperating CCPs have an assumed liquidation period that is greater than that which is assumed by the CCP's models. Moreover, a CCP should be required to include its exposure to an interoperating CCP when calibrating the size of its default fund. Greater transparency concerning margin held between interoperating CCPs is necessary to determine the appropriateness and size of liquidity or concentration add-ons. Clearing members possess limited visibility into the total amount and proportional responsibility of each clearing member associated with interoperable margin.

Is the guidance provided on procyclicality appropriate and sufficient?

We agree with the guidance provided in paragraphs 5.2.33-5.2.37, indicating that a CCP should assess the appropriateness of procyclicality in its margin system and develop clearly articulated frameworks for addressing and disclosing this particular risk. We recommend that the guidance take a more stringent and quantitative approach, and should indicate that regulators should play a larger role in mandating and approving each CCP's approach to procyclicality. While some jurisdictions (*e.g.,* EMIR) have a prescriptive approach, and we believe that some degree of prescription is helpful, such an approach may not be effective due to interpretational issues or differences in implementation. We believe that a principles-based approach to this issue at the level of international standards is more likely to be effective. In particular, we believe that procyclicality should be defined by way of a standard set of metrics so as to enable CCPs to determine targets to be achieved; and that CCPs should adopt appropriate and conservative anti-procyclicality measures, taking into account the specific characteristics of cleared contracts and at least ten years of history of patterns in changes in volatility regimes.

We also believe it is crucial that the governance and transparency procedures applicable to the development and design of anti-procyclicality measures be robust. CCPs should be required to provide transparency to members and participants on these features of their margin models. The onus should then be on the governance process to ensure that the CCP utilizes the appropriate framework (depending on product or portfolio) for addressing procyclicality. CCPs should disclose overall tolerance for procyclicality in sufficient detail to allow clearing members to use such measures in the management of their own positions. This will ensure that market participants can model the impact of these tools, and ensure a more even playing field across CCPs and products, as well as ensuring that there is an appropriate brake on the procyclical tendencies of the rest of the margin framework.

We believe that each CCP's policy should make clear how the different components of a CCPs risk management system (*e.g.,* base initial margins, add-ons, stress margin, intraday margin, default fund increases and collateral haircuts, add-ons) interact with each other to affect procyclicality. To the extent that a CCP may select one framework to address procyclicality over another, the CCP should justify to its governing bodies and its regulators the suitability of the framework proposed and the rationale for its choice.

We also believe that it is critical that the CCP seeks and receives feedback through its member governance/consultation process[15] and that the risk committee approves such procyclical measures. Clearing participants need to be able to plan for potential margin calls as part of their broader liquidity needs. Large margin calls also can trigger internal approval requirements for clearing participants, potentially causing delays in margin posting. The more insight the market possesses into this process, the more reasonable and substantiated assumptions regarding liquidity can be made, thereby, preventing operational payment delays and making the system safer. Predictability and availability of buffers provided by clearing participants is critical.

The PFMI do not explicitly address margin add-ons. Is the guidance provided on margin add-ons adequate to ensure sufficient coverage by the margin system and other prefunded financial resources in line with the PFMI?

We completely agree with the guidance that CCPs must use margin add-ons to capture risks that may not be captured in price histories and believe that the list of add-ons contemplated in the guidance is comprehensive. We also agree with the statement that add-ons are not substitutes for a robust margin framework and where risk can be addressed by the margin systems, CCPs should avoid using add-ons. Therefore, we believe that the only add-ons that should apply are those external to the margin model and that impose the greatest risk for a CCP, such as liquidity or concentration add-ons. We also believe that it is vital for there to be increased transparency to ensure participants fully understand and are able to replicate, evaluate and review margin models and add-ons.[16] Currently, specific requirements for CCPs to disclose their add-ons or to indicate the way add-ons are calculated do not exist. CCPs should be required to fully document margin add-ons as well as their rationale and justification for the choice of elements in their margin models.

In addition, we believe that CCPs should transparently convey to clearing members the portion of initial margin resulting from add-ons. Currently, most CCPs calculate margin add-ons separately from initial margin amounts, making it difficult for clearing members to conduct holistic risk management of margin models and to identify margin associated with individual client accounts. Where possible (*e.g.,* for liquidity add-ons) the add-on should form a portion of the per lot initial margin amount, as in the case of listed derivative contracts. CCPs should provide sufficient reporting to allow clearing members to map margin add-ons to individual client accounts so that clearing members can appropriately apportion such add-ons to each of their clients. In addition, the guidance should highlight that add-ons impact the wider market, and that CCPs should clearly indicate which portions of initial margin result from add-ons so that all market participants, not just clearing participants, can better understand their effect.

The PFMI do not prescribe a minimum margin period of risk or closeout period. Is further guidance in this area needed?

We believe that the calculation of appropriate margin levels at a CCP must take into account several factors in order to ensure that the amount of margin the CCP collects is consistent with its default management objectives, taking into account the legal, regulatory and contractual

---

[15] See "Governance" section above.
[16] See "CCP Transparency on Margin Framework" attached hereto.

framework in which it operates and, for client accounts, the practical realities of its ability to port, and, if necessary, to liquidate positions and collateral. The MPOR is merely one component of the margin framework, and must be considered in conjunction with other margin variables, the look-back period used, the confidence interval used and add-ons and, for client accounts, whether margin requirements are calculated on a net or gross basis. Considering the goal of porting positions and collateral, the CCP realistically will not have the information readily available to it necessary to port positions and assets to alternative clearing members immediately upon a clearing member's default. The MPOR should be aligned with the time needed to either (i) port client positions to a new clearing member or (ii) otherwise liquidate the positions in the market. CCPs should be required to demonstrate that they can complete all of these steps within the MPOR they employ. It is unlikely that each of these steps will be completed within one day and therefore, for most products and most CCPs, we believe the MPOR should reflect that a longer time period is needed.

In many regimes, gross margining would improve the likelihood of porting individual client positions and assets, to the extent that the identity of the client is known to the CCP post default. Under a net margin methodology (such as the net omnibus accounts in the European Union) porting all clients of a clearing member requires the consent of the clients in order to port from one specific clearing member to a single receiving clearing member. Consequently, we do not take a view on whether there should be a preference between gross or net margining. The ability to easily and quickly port clients is the top priority of clearing members. Whether net or gross margin is better for porting depends on the account structure and underlying legal regime. While ease of porting would be better achieved under a gross structure, net margining would be more consistent with certain specific legal and regulatory environments.

<u>CCP Contribution to Losses</u>

Is the guidance provided on a CCP's contributions to financial resources to cover losses sufficient and appropriate?

We do not think that the guidance provided on these issues is sufficient. We believe that final guidance should address the appropriate quantum of CCP contributions to losses and the losses to which such contributions should be applied. As discussed below, we believe that CCP resources should be appropriately sized to cover all potential non-default losses. For default losses, we urge CPMI-IOSCO to provide additional guidance regarding the specific quantum of resources to be placed ahead of non-defaulting clearing member's mutualized resources. Currently this CCP "skin-in-the-game" amount varies greatly across different CCPs. Many of our members support requiring an amount equal to a percentage of the default fund (*e.g.,* ten percent), an amount equal to the largest default fund from a group of affiliated clearing members, or the higher of these amounts.[17] As noted below, we also urge CPMI-IOSCO to require a second

---

[17] *See e.g.,* JPMorgan Chase & Co. "Perspectives: What is the Resolution Plan for CCPs (September 2014) *available at* https://www.brookings.edu/wp-content/uploads/2015/02/jpmc_packet.pdf; BlackRock "Viewpoint: Central Clearing Counterparties and Too Big to Fail" (April 2014) *available at* http://www.blackrock.com/corporate/en-sg/literature/whitepaper/viewpoint-ccp-tbtf-april-2014.pdf; PIMCO "Viewpoints: Setting Global Standards for Central Clearinghouses" (October 2014) *available at* https://www.pimco.com/insights/viewpoints/viewpoints/setting-global-standards-for-central-clearinghouses;

tranche of appropriately sized "skin-in-the-game" after assessments in a CCP's default "waterfall."

We also generally believe that changes are necessary to better align risk management incentives between CCP shareholders and clearing participants. Currently, clearing members and their clients bear the majority of losses, which is particularly problematic now that many CCPs are publicly owned (as opposed to "utilities" owned by their clearing members). We believe that CCPs and their shareholders should be financially accountable for any failure in the CCP's duties to manage credit, market, legal and operational risk both internally and externally. We also believe that a CCP's contributions should be risk-based and scaled up as its clearing activity increases. Among other things, CCPs should have to demonstrate that their contributions are commensurate with the risks that they bring to the system (*e.g.,* model-failure risk).

Below we point out a number of aspects of the guidance that we strongly support and also raise a number of issues for CPMI-IOSCO to consider before issuing final guidance (broken out by each section of the guidance).

Custody and investment losses

We support the statements in the guidance that CCP contributions to both losses causes by a clearing member default as well as custody and investment losses enhance confidence that the CCP's design, rules, overall strategy and major decisions reflect appropriately the legitimate interest of its clearing participants and other relevant stakeholders. We would add that in order to enhance such confidence to the maximum degree, such contributions should be appropriately robust and based on fully disclosed stress testing. Both the size of such resources and the rationale for that size should be clearly articulated to clearing participants and other relevant stakeholders to demonstrate that a CCP is well-capitalized to cover potential losses. Today clearing participants have almost no transparency into how CCPs would cover non-default losses such as custody and investment losses.

With regard to investment losses in particular, we also believe that additional guidance is necessary regarding risks of specific types of investments, including, *e.g.,* investment in government securities issued by the CCP's home jurisdiction.

We partially disagree with the statement in paragraph 6.2.3 that a CCP should identify the amount of its own resources to be applied towards losses arising from custody and investment risk. To align incentives in instances, particularly when a CCP derives profit from investments or custodial arrangements, we believe that CCPs should cover all related losses and should therefore hold funded and appropriately segregated resources to do so.[18]

Risk.net "CCPs Need Thicker Skins – Citi Analysis" (April 2015) *available at* http://www.risk.net/risk-magazine/feature/2419321/ccps-need-thicker-skins-citi-analysis.

[18] One exception would be if a clearing member has an active right to direct specific investments of funds held by the CCP, and the CCP does not profit from any such investments. Under these circumstances, it would be appropriate for the clearing member to bear losses from the relevant investments. For clarity, the right to allocate investments of assets generally is not an active right to direct specific investments and therefore would not trigger this exception.

We note that the guidance is silent on a CCP's contributions to non-default losses other than custody and investment losses. We strongly believe that CCPs should account for all non-default losses and therefore should hold resources to do so and we urge CPMI-IOSCO to provide specific guidance to this effect. In doing so we believe that guidance should require CCP capital to be sized based on potential default and non-default losses (including from credit, liquidity, market, operational, legal, general business and cyber risks) rather than a six-month period of wind-down expenses.

Seniority of the CCP's own financial resources

We generally support the guidance provided in paragraph 6.2.4, which provides that a CCP may also choose to expose a separate amount of its own resources to remaining losses concurrently or after allocating a portion of such losses to its clearing members. We urge CPMI-IOSCO to take a stronger position on this point in final guidance and provide that a CCP should expose a "second tranche" of its own resources immediately following assessments in the CCP's default "waterfall." The second tranche of CCP "skin-in-the-game" further incentivizes the CCP and its shareholders to engage in prudent risk management both prior to and during a stress event as they would share in any resulting losses. It therefore better aligns the motivations of clearing participants on the one hand and the CCP and its shareholders on the other.

Form of a CCP's own resources exposed to losses

We also recommend that final guidance require CCP contributions to losses to be in the form of clearly identified, pre-funded and segregated liquid assets that are readily available for use if necessary.

In addition, we recommend that guidance specifically require a CCP to replenish its contributions promptly to ensure that it could cover subsequent defaults. A CCP should be required to replenish resources at least as quickly as clearing members are required to replenish their resources. In no event should clearing members be required to satisfy assessments or replenish their mutualized resources if the CCP is not required to do the same. In order to meet this standard, it may be appropriate for a CCP to have arrangements for contributions from its parent. We urge CPMI-IOSCO to consider guidance on such arrangements.

Recovery

Is the guidance already provided on recovery planning in the Recovery Report sufficient and appropriate?

We strongly support the statement in the guidance that a CCP's ability to recover its viability and financial strength following a stress event is critical to financial stability. However, we are very concerned about the statements in paragraph 1.5.2, which indicate that a number of CCPs have not yet put in place the full set of recovery rules and procedures as required under the PFMI. We strongly support efforts by CPMI-IOSCO and national regulators to require CCPs to fully implement recovery measures as soon as practicable without sacrificing opportunities for meaningful member comments to proposed CCP rules.

We agree that it is imperative that each CCP subject to the PFMI have a recovery plan in place and the ability to operationalize that plan. We would add, however, that the plan should be transparent to clearing participants, as well as domestic and certain foreign regulators, including resolution authorities. We believe that clearing members and their clients must have maximum visibility into CCP recovery plans to allow them to properly risk manage their exposures to the CCPs. This is of utmost important in a time of stress. An understanding of the steps that a CCP will take in a recovery scenario also reduces incentives for clearing members and their clients to take "self-help" measures that could impede the CCP's recovery. At a minimum, CCPs should disclose the default and non-default scenarios in which recovery tools would be used, which tools would be used in these scenarios, how recovery would proceed and the governance around determining which tools to use and when. We also believe that CPMI-IOSCO should provide guidance regarding regulator endorsement or approval of recovery plans.

We note that paragraph 3.4.7 of the Recovery Report contemplates compensation for clearing members and clients of clearing members who incur losses in recovery. We fully support such compensation and we specifically support the example in paragraph 3.4.7 of the Recovery Report, which provides that a CCP could provide an instrument that has a degree of seniority in terms of being paid back from future profits of the CCP and money recovered from the defaulting clearing member.[19] We believe that it is crucial for the claim be senior to existing equity in the CCP and for those who suffer losses to have full recourse against the CCP and, if applicable, its parent for satisfaction of their claims. Recourse against only the estate of the defaulting clearing member is not sufficient. We also think that the claim should be a senior debt claim that could, if necessary, subsequently be bailed-in for equity or otherwise converted to equity.[20] Despite this guidance, however, we are not aware of any CCPs that have implemented adequate mechanisms for compensation. We urge CPMI-IOSCO and national regulators to require CCPs to comply with this aspect of the Recovery Report.

We generally support the guidance provided on recovery and agree that it addresses many of the material aspects of CCP recovery planning. However we do think that certain aspects of the guidance may not be appropriate. Specifically:

- Section 4 of the Recovery Report provides a range of tools that may be appropriate for a CCP to use in recovery. While we appreciate the breadth of this guidance and realize that different tools may be appropriate for different CCPs based on the products they clear,

[19] One member believes that such compensation may also impact incentives for clearing participants to bid in auctions. Accordingly, this member believes that when structuring the terms of compensation (including type, amount, priority, repayment terms and maturity of any claims), careful consideration should be given resulting incentives for both a CCP's shareholders and its clearing participants.

[20] It is very important to note that currently, clearing members are not creditors of the CCP entitled to protections such as "no creditor worse off" except with respect to return of their initial margin and, subject to non-recourse provisions, any net amounts that the CCP owes them. Non-recourse provisions at CCPs today generally limit clearing members' recoveries to assets at the CCP. In the event that the CCP is in liquidation or resolution, it is likely that these assets are minimal and that therefore clearing members' claims for net amounts they are owed are worth pennies on the dollar. Without a more meaningful status as creditors, "no creditor worse off" does not protect clearing members and other clearing participants in the way that it protects other creditors of the CCP or creditors of other types of financial entities that could be in resolution. These issues further underscore the importance of including rights to compensation in CCP rulebooks.

their regulatory landscape and their legal structure, we think that more granular and specific guidance would be appropriate at this time.

- Paragraph 4.2.9 of the Recovery Report contemplates uncapped cash calls, which we do not support. Uncapped cash calls prevent clearing members from risk managing their exposure to a CCP on an *ex ante* basis, as well as in a time of distress, and significantly increase the capital that clearing members must hold for their cleared positions with some CCPs. Additionally, regulatory regimes in some jurisdictions such as the European Union and the United States do not permit uncapped cash calls. As a result of these points, we note that CCPs in most jurisdictions have capped cash calls and we believe that the guidance should reflect this position. We also urge CPMI-IOSCO and national regulators to require all CCPs to implement caps on cash calls and member liability generally.

- Paragraphs 4.2.17-4.2.23 of the Recovery Report contemplates variation margin gains haircutting (VMGH) as a recovery tool. While some members support VMGH as a loss allocation tool in recovery with certain limitations others do not. Members who do not support the use of VMGH in recovery believe that "comprehensive loss allocation" beyond funded (*i.e.,* default fund) and unfunded (*i.e.,* capped assessments) mutualized resources would not be appropriate outside of resolution unless remaining resources come from the CCP or its parent. These members maintain that if a CCP exhausts all of its resources and cannot obtain additional resources from its parent, then the CCP is in principle unable to pay its obligations when they come due, and therefore should be placed into resolution. Other members who do not support VMGH in recovery believe that its use could have knock-on effects in an already distressed market, particularly if clearing members causing the four largest losses (assuming "Cover 2" plus one assessment), have already defaulted. One member does not support any use of VMGH in recovery or resolution. Members who support VMGH in recovery believe that it is an effective and efficient loss allocation tool that facilitates a CCP-led recovery, provided that it is subject to strict regulatory oversight and constraints (*e.g.,* quantitative limits) determined on an ex ante basis. These members also believe that VMGH should be used only at the very end of the default "waterfall."

- Paragraphs 4.2.25 and 4.2.26 of the Recovery Report contemplate initial margin haircutting (IMH), which we universally do not support. We believe that IMH is procyclical and could incentivize clearing participants to close out of positions in order to reduce their initial margin requirements at the first sign of distress. This would likely cause further disruption in the market and could impede the CCP's recovery. IMH could also dis-incentivize participation in an auction, as clearing participants may not want to bid on positions that would increase their initial margin requirements. The potential for IMH could incentivize clearing participants to post non-cash collateral in the ordinary course, which could cause undue liquidity constraints in the event of a member default and result in CCPs needing to source liquidity from clearing participants in time of stress. Additionally, if IMH is permitted in some jurisdictions, it could drive clearing participants to clearing only through CCPs in jurisdictions that prohibit IMH. Finally, in many jurisdictions initial margin for uncleared derivatives must now be held with a third-

party custodian to shield it from the insolvency of the receiving counterparty. Not providing the same degree of protection to initial margin for cleared derivatives could dis-incentivize central clearing, which would be contrary to stated objectives of the G-20.

- Paragraphs 4.4.1-4.4.3 of the Recovery Report cover replenishment of resources. We refer to our comments regarding limitations on aggregate membership liability in the "Coverage" section above and urge CPMI-IOSCO to include such limitations as additional guidance in the Recovery Report.

- Paragraphs 4.5.6-4.5.11 of the Recovery Report contemplate forced allocations of contracts, which we do not support. Forced allocation requires clearing members to take on positions that they may not be suited to risk manage in extreme market conditions.

- Paragraphs 4.5.17-4.5.20 of the Recovery Report contemplate partial tear-ups (PTUs), which we support. However, we believe that such a tool should be subject to strict regulatory oversight and constraints. We also think that guidance is necessary with regard to pricing for PTU. We believe that the price for a torn-up position should be as close to fair market value as possible. However, given that PTUs for many cleared products are likely to be used only upon the failure of an auction in a very distressed market, we question how that price would be determined and believe that CCPs need additional guidance on this point. We note that CCPs contemplate using the last settlement price. However, we do not think that such a price would likely be accurate under relevant market conditions.

- Paragraph 4.6.12 of the Recovery Report contemplates sharing non-default losses with clearing participants, which we do not support. As discussed in the "CCP Contributions to Losses" section above, we believe that CCP capital should be appropriately sized to cover non-default losses.

In addition to the foregoing, we believe that at this time additional guidance would be useful with regard to global coordination of CCP default management. If a clearing member (or multiple clearing members) default(s) to one CCP, it is likely that the clearing member or members will default to other CCPs. Therefore, we think that CCPs and their regulators should undertake comprehensive reviews of how CCP default management processes would interact. Among other things, the review should analyze the results of simultaneous default management processes such as auctions that follow different procedures and seek to harmonize processes across CCPs to reduce operational risks. We also believe that CCPs should adhere to consistent standards regarding secondment requirements to ensure that available trader have sufficient expertise and that clearing members are only required to second traders for a particular asset type/class to one CCP at a time. We suggest cross-CCP fire drills, including cross-CCP fire drills at CCPs that clear similar products, as part of this review.

Other Considerations

Is there a need for further guidance on the role of risk committees as an effective means of achieving proper corporate oversight and for receiving input from persons representing stakeholder interests?

Please see discussion of risk committees in "Governance" section above.

Is there a need for guidance regarding governance and the organizational (legal) structure of the CCP?

We would support guidance on the organizational (legal) structure of the CCP, provided that such guidance provided flexibility for differences in products cleared, composition of membership and other unique aspects of each different CCP. We believe that any such guidance should be informed by the work of the Financial Stability Board on CCP resolution. Any such guidance should also encourage national regulators to tailor additional guidance to CCPs in their jurisdictions, accounting for applicable legal regimes.

Is there a need for further guidance on the allocation of default fund requirements among clearing participants?

We would support guidance requiring CCPs to disclose their methodology for allocating default fund requirements to its members and other stakeholders.

Is there a need for further guidance on the composition of prefunded financial resources?

We think that this question could be interpreted in at least two ways: either as a question about composition of different resources in a CCP's default "waterfall" (*e.g.,* initial margin, CCP "skin-in-the-game" and default fund contributions) or as a question about the types of collateral that a CCP should hold as part of the prefunded resources it holds to satisfy its coverage requirements. We would generally support guidance on both of these issues and note that our comments on margin and CCP contributions to losses would be applicable to the first issue. With regard to the second issue, we note that in the event that a CCP is required to use prefunded resources in a stressed environment, it will be crucial for CCPs to have collateral with the most liquid profiles.

****

We very much appreciate your consideration of our comments. If we may provide further information, please do not hesitate to contact the undersigned or staff at any of the Associations.

Sincerely,

Walt L. Lukken
President & Chief Executive Officer
Futures Industry Association (FIA)

Andrés Portilla
Managing Director - Regulatory Affairs
Institute of International Finance (IIF)

George Handjinicolaou
Deputy CEO
International Swaps and Derivatives Association, Inc. (ISDA)

Paige E. Pidano
Managing Director and Senior Associate General Counsel
The Clearing House

David Strongin
Executive Director
Global Financial Markets Association

CCP Transparency on Margin Framework

A CCP should be required to provide enough information to allow clearing members to accurately replicate the CCP's initial margin model in order to fully evaluate its effectiveness in protecting the CCP and all of its clearing members. Specifically, all CCPs should provide (1) full documentation of the data and algorithms used to calculate initial margin and any add-ons, (2) key assumptions/ parameters (*e.g.,* confidence level and margin period of risk (MPOR)), and (3) independent model validation reports.

In order to replicate margin calculated based upon a Value-at-Risk (VAR) or Expected Shortfall (ES) approach, the following detailed documentation should be provided to clearing members:

- Rationale for chosen approach
- Tiering structure, such as maturity buckets and expiry groups for risk factors.
- Assumptions regarding factor changes (generally either absolute or relative changes)
- Look-back period and specification of any weighting scheme, *e.g.,* exponential weighting with a decay parameter of 0.94
- Full specification of methodologies used to simulate profit-and-loss
  - Full valuation
    - Documentation for calculating initial margin with respect to interest rate swaps using full valuation would, for example, require documentation of the yield curves used for discounting and cash flow generation including data and methodology used for bootstrapping, as well as the method used to calculate discount factors
  - Linear/quadratic approximation
    - Documentation of the specific parameters and their estimations
- For Monte Carlo and parametric VAR or ES
  - Distributional assumptions in simulating risk factors , *e.g.,* factor changes are assumed to be distributed normally
  - Disclosure of any models underlying Monte Carlo simulation (*e.g.,* Black-Scholes, Vasicek)
  - Strategies for estimating necessary parameters, *e.g.,* estimating volatilities with mean absolute deviation
- For Historical simulation VAR or ES
  - Where applicable, filters for data and rationale for filtering
  - Specification of any volatility scaling scheme including
    - Estimation methodology of decay parameter used if an exponential moving average volatility updating scheme is employed
    - Precise implementation methodology (*e.g.,* common decay parameter)
    - Magnitude of any volatility floor

Initial Margin Methodology Disclosure: Parametric Approaches

In order to replicate a SPAN or other parametric margin components, documentation should include:

- Rationale for chosen approach
- Description and discussion of the rationale of all parameters underlying initial margin (for SPAN, this would be scanning range, inter-month spreads, inter-contract credits, short option charge, etc.)
- Full specification of the methodologies by which these parameters are determined, including
  - Underlying data
  - Tiering structure, such as maturity buckets and expiry groups for risk factors
  - Holding period
  - Statistic(s) applied to the data
    - Volatility, min/max, VAR
  - Look-back period and details of any weighting scheme, such as the decay factor for EWMA
  - Confidence level
  - Assumptions regarding factor changes (either absolute or relative changes)
- Documentation of algorithms used to apply these parameters (for SPAN, these algorithms would include how priorities and correlations are determined in applying inter-month spreads to tenor pairs and in applying inter-contract credits to commodity pairs)
- Additions to IM driven by concentration, stress portfolio or other measurements within the default fund

Initial Margin Methodology Disclosure: Add-ons to Base Calculation

It is greatly preferable for CCPs to incorporate commonly established add-ons directly into the upfront initial margin requirement. When this occurs, the CCP would be appropriately allocating the risk across all clearing participants. Any add-ons that seek to capture risks that may not be fully captured by the initial model should be fully documented. Once again, CCPs should seek to provide enough information to allow Clearing Members to accurately replicate the add-on to fully evaluate their effectiveness.

- Thresholds, add-ons are invoked when position size or another metric exceeds a specified value. The values and rationales/underlying analytics supporting the thresholds must be provided to members.
- Common add-ons include:
  - Liquidity Risk / Concentration Risk
    - Calibration and rationale of parameters used for liquidity/concentration risks add-on should be documented (*e.g.*, penalization factors and thresholds)
    - Market risk from liquidating positions which are large relative to the market

    - This add-on may involve bid-ask spreads and volume measures and the source of these data should be documented.
- Correlation Risk
    - Market risk owing to changes in correlations during stress periods
- Basis Risk
    - Product P/L not fully captured by risk factors covered by initial margin .
- Model Risk
    - Add-on to cover general failure of initial margin model
- Wrong Way Risk
    - General wrong way risk
        - Where the exposure to a counterparty is likely to increase when the creditworthiness of that counterparty is deteriorating.
    - Specific wong way risk
        - Where a member has a direct exposure to other members' creditworthiness and/ or underlying contracts

Aggregate CCP Level IM Summary Stats Report

CCPs should compare each day's actual initial margin to the following day(s) profit and loss for each portfolio on a daily basis, and share summary level statistics to all members monthly. Such tests should include a full year of results. Summary statistics should be reported as follows:

Data Item	Description
Approach	Initial margin requirement on T is compared to the following day(s) profit and loss. The profit and loss should be calculated on the same basis as the initial margin calculation. For example if the initial margin is derived from end of day positions on T, the profit and loss should be the based on the same positions held constant over IM-assumed holding period.
Holding Period	The period (# of days) of potential future exposure/losses the initial margin is attempting to cover.
Profit and loss	The change in fair value over the holding period of the positions subject to the test.
Market/ Product	Name of market (e.g. name of exchange or OTC segment name)/ product (e.g. futures, IRS) subjected to back tests
# of Members	Number of members active in the market under review
# of Accounts	Number of accounts related to the members under review. For example House and Client(s) accounts. Accounts should include those opened and/or closed during the period.
Look back Period	The look back period in the test; this should be at least 12 months. CCPs should be encouraged to use longer periods where possible.
Confidence Level	Targeted confidence level that actual IM is intended to cover
# of Observations	Number of business days in the window multiplied by the number of accounts. For example, 250 business days and 20 accounts results in 5000 observations.
Exceedance ($)	The $ amount by which the profit and loss exceeds the initial margin when a breach occurs.
Sum of Exceedances ($)	Sum of the exceedance values across all breaches over the window being observed.
Maximum Exceedance ($)	The maximum exceedance across all breaches
Average Exceedance ($)	Average exceedance across all breaches
Number of Exceedances	Number of account level breaches
Coverage Rate	(total observations)-(number of exceedances) / (total observations)
Total Initial Margin Requirement	Initial margin requirement at aggregate market level under test. . The initial margin requirement should exclude any margin add-ons as these will not usually be observed in the profit and loss calculation. However if the CCP includes margin add-ons as part of the backtest, then the CCP should clearly state so.
Remarks	Supporting comments to explain the results (if needed)

Member Portfolio Level Back Tests and Summary Statistics

Anonymous member-level portfolio back tests generated from comparing static portfolios over a full look back period of profit and loss should be shared with members on a monthly basis, along with summary statistics as listed below. Summary statistics should be reported at the aggregate CCP level as well as shared at an anonymous individual clearing member portfolio level.

Data Item	Description
Approach	Initial margin portfolio requirement on T is compared against portfolio P&L based on current portfolio held constant over the defined holding period and look back period.
Holding Period	The period (# of days) of potential future exposure/losses the initial margin is attempting to cover.
Profit and loss	The change in fair value over the holding period of the positions subject to the test.
Market/ Product	Name of market (e.g. name of exchange or OTC segment name)/ product (e.g. futures, IRS) subjected to back test
# of Members	Number of members active in the market under review
# of Accounts	Number of accounts per member and at aggregate level under review. For example House and Client(s) accounts. Accounts should include those opened and/or closed during the period.
Look back period	The look back period in the test; this should be at least 12 months. CCPs should be encouraged to use longer periods where possible.
Confidence Level	Targeted confidence level that actual IM is intended to cover. Separate test may also include "IM's" calibrated to lower confidence levels (95%, 90%) purely to facilitate testing.
# of Observations	Number of business days in the window multiplied by the number of accounts. For example, 250 business days and 20 accounts results in 5000 observations. This statistic should also be provided at a member level.
Exceedance ($)	The $ amount by which the profit and loss exceeds the initial margin when a breach occurs. This should be reported a member level and aggregate CCP level.
Sum of Exceedances ($)	Sum of the exceedance values across all breaches over the window being observed. This should be reported a member level and aggregate CCP level.
Maximum Exceedance ($)	The maximum exceedance across all breaches. This should be reported a member level and aggregate CCP level.
Coverage Rate	(total observations)-(number of exceedances) / (total observations) .This should be reported a member level and aggregate CCP level.
Total Initial Margin Requirement	Initial margin requirement at aggregate market level and portfolio level under test. . The initial margin requirement should exclude any margin add-ons as these will not usually be observed in the profit and loss calculation. However if the CCP includes margin add-ons as part of the back test, then the CCP should clearly state so.
Frequency Test	Test to evaluate whether frequency of breaches is not significantly larger than that predicted by the target confidence level (e.g., Kupiec test)
Clustering Test	Test to evaluate whether breaches occur at random or whether clustering indicates otherwise (e.g., Christoffersen Test).

Hypothetical Portfolio Level Back Tests and Statistics

Hypothetical portfolio back testing can be very informative, as long as portfolio composition is revealed in detail with rationale along with the following data items/statistics and full back-test reports. Statistics and full back-test reports should be shared with members by each hypothetical portfolio level.

Data Item	Description
Approach	Initial margin portfolio requirement on T is compared against portfolio P&L on a hypothetical portfolio held constant over the defined holding period and for a given look back period.
Holding Period	The period (# of days) of potential future exposure/losses the initial margin is attempting to cover.
Profit and loss	The change in fair value over the holding period of the positions subject to the test.
Market/ Product	Name of market (e.g. name of exchange or OTC segment name)/ product (e.g. futures, IRS) subjected to back test
Hypothetical Portfolio (s)	Position-by-position listing of each portfolio's contents.
Look back period	The look back period in the test; this should be at least 12 months. CCPs should be encouraged to use longer periods where possible.
Confidence Level	Targeted confidence level that actual IM is intended to cover. Separate test may also include "IM's" calibrated to lower confidence levels (95%, 90%) purely to facilitate testing.
# of Observations	Number of business days in the window for the given portfolio back test.
Exceedance ($)	The $ amount by which the profit and loss exceeds the initial margin when a breach occurs.
Sum of Exceedances ($)	Sum of the exceedance values across all breaches over the window being observed.
Maximum Exceedance ($)	The maximum exceedance across all breaches.
Coverage Rate	(total observations)-(number of exceedances) / (total observations) .
Total Initial Margin Requirement	Initial margin requirement of portfolio under test. . The initial margin requirement should exclude any margin add-ons as these will not usually be observed in the profit and loss calculation. However if the CCP includes margin add-ons as part of the back test, then the CCP should clearly state so.
Frequency Test	Test to evaluate whether frequency of breaches is not significantly larger than that predicted by the target confidence level (e.g., Kupiec test)
Clustering Test	Test to evaluate whether breaches occur at random or whether clustering indicates otherwise (e.g., Christoffersen Test).

Factor Level Back Tests and Statistics

Factor-level back testing is most typically applicable to parametric approaches like SPAN, and can be viewed as an indirect approach to back testing. It simply tests the performance of parameters (across all member portfolios) upon which initial margin is derived. Given the large number of CCPs still using SPAN, this is an important type of back test to include within any CCP industry level request. Both summary level statistics and full factor level back-test reports should be shared with members.

Data Item	Description
Approach	The parameters underlying IM are tested against relevant factor data (for example , for SPAN IM for a futures contract might compare the "scanning range" paramter against actual changes in in the contract price)
Holding Period	The period (# of days) of potential future exposure/losses the initial margin is attempting to cover.
Market/ Product	Name of market (e.g. name of exchange or OTC segment name)/ product (e.g. futures, IRS) subjected to factor level back test
Parameter Under Test	Name and description of the IM parameter being tested. For example, the parameter might be "CDS Index Basis: the risk that CDS Index Spread deviates from those predicted by the underlying CDS contracts".
Factor	Factor(s) employed in back test. For the "CDS Index Basis" the factor might include the five years of CDS Index Spread less that predicted by the spreads of udnerlying CDS contracts"
Look back period	The look back period in the test; this should be at least 12 months. CCPs should be encouraged to use longer periods where possible.
Confidence Level	Targeted confidence level that actual IM is intended to cover. Separate test may also include "IM's" calibrated to lower confidence levels (95%, 90%) purely to facilitate testing.
# of Observations	Number of business days in the window for the factor level back test.
Exceedance	The amount by which factor exceeds parameter value in a given instance
Sum of Exceedances	Sum of the exceedance values across all breaches over the window being observed.
Maximum Exceedance	The maximum exceedance across all breaches.
Coverage Rate	(total observations)-(number of exceedances) / (total observations) .

Product Level Back Tests

CCPs should undertake both portfolio and product-level back testing. Assuming a portfolio is relatively diversified, relying on portfolio-level back testing only may allow conservatively-margined products to mask under-margined products. Product-level back testing should capture spreads and butterflies in addition to forward outrights, as margin offsets can be overstated for these strategies.

FIA is the leading trade organization for the futures, options, and cleared swaps markets worldwide. FIA's membership includes clearing firms, exchanges, clearinghouses, and trading firms from more than 25 countries as well as technology vendors, lawyers, and other professionals serving the industry. FIA's mission is to support open, transparent, and competitive markets, to protect and enhance the integrity of the financial system, and to promote high standards of professional conduct.

The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, visit http://www.gfma.org.

The Institute of International Finance is the global association of the financial industry, with close to 500 members from 70 countries. Its mission is to support the financial industry in the prudent management of risks; to develop sound industry practices; and to advocate for regulatory, financial and economic policies that are in the broad interests of its members and foster global financial stability and sustainable economic growth. IIF members include commercial and investment banks, asset managers, insurance companies, sovereign wealth funds, hedge funds, central banks and development banks. For more information visit www.iif.com.

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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, clearing houses 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.

ISDA® is a registered trademark of the International Swaps and Derivatives Association, Inc.

The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

Appendix C
Attachment 1

ISDA® Safe, Efficient Markets

sifma Invested in America

August 21, 2017

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

Re: Request for Comments from the Division of Market Oversight of the U.S. Commodity Futures Trading Commission Regarding Staff's Comprehensive Review of the Commission's Swaps Reporting Rules and Staff's *Roadmap to Achieve High Quality Swaps Data*

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] and the Securities Industry and Financial Markets Association (**"SIFMA"**)[2] (collectively, **"the Associations"**) greatly appreciate the opportunity to provide comments to the Division of Market Oversight ("**Division**") of the U.S. Commodity Futures Trading Commission ("**CFTC**" or "**Commission**") in response to the Division's *Roadmap to Achieve High Quality Swaps Data* ("**Roadmap**").[3] The Roadmap was prepared in connection with the Division's comprehensive review of the CFTC's swap data reporting rules in Parts 43, 45, and 49 of the CFTC's regulations ("**Swap Reporting Rules**").[4] The Associations strongly support the Commission's initiative to review its Swap Reporting Rules with a view towards streamlining reporting requirements, right-sizing the number of data elements that are necessary to fulfill the Commission's regulatory oversight function, and improving the

---

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 875 member institutions from 68 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, clearing houses 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.

[2] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[3] "DMO Roadmap to Complete Review" diagram of *Roadmap to Achieve High Quality Swaps Data*, July 10, 2017, http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf.

[4] 17 C.F.R. Parts 43, 45, and 49 (2017).

overall quality of swap data that is reported to registered swap data repositories ("**SDRs**"). In addition, we applaud the Division's efforts to examine whether the CFTC's Swap Reporting Rules are meeting the standards established at the Pittsburgh G-20 Summit[5] and codified in the Dodd-Frank Wall Street Report and Consumer Protection Act ("**Dodd-Frank Act**").[6] The Associations have consistently supported the intent of the G-20 and the Dodd-Frank Act to improve transparency in derivatives markets and to ensure that the CFTC has the necessary information to effectively monitor systemic risk. However, we also agree with Chairman J. Christopher Giancarlo that any proposed changes to the Swap Reporting Rules should seek to collect quality swap data in the most effective and efficient manner based on the collective experiences of all swap data reporting stakeholders.[7]

With these objectives in mind, we have organized our comments to the Roadmap into two parts. The first part of our comment letter provides specific recommendations with respect to the Roadmap's proposed timeline and implementation. The second part of our letter provides our initial views regarding the specific approaches proposed by Division staff in the Roadmap.

I. COMMENTS RELATED TO THE ROADMAP'S PROPOSED TIMELINE AND IMPLEMENTATION

The Associations are generally supportive of the Roadmap's proposed timeline, which correctly identifies the key milestones that must be met in order to successfully achieve full industry implementation of any amendments to the Commission's Swap Reporting Rules. In particular, the Roadmap envisions that the Commission will amend its Swap Reporting Rules through various public consultations and by leveraging the international data harmonization initiatives organized by the Committee on Payments and Market Infrastructures and the International Organization of Securities Commission ("**CPMI-IOSCO**") and the Financial Stability Board ("**FSB**").[8] The Roadmap also contemplates that the Commission's adoption of any amendments to its Swap Reporting Rules will provide market participants and SDRs with an appropriate amount of time to design and test such required system changes. We agree that any proposed rulemakings in this area

[5] Organization for Economic Co-operation and Development, Leaders' Statement: The Pittsburgh Summit, G-20 (September 24-25, 2009).

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376, Pub. Law 111–203 (July 21, 2010), as amended.

[7] Speech by Commissioner J. Christopher Giancarlo, *Making Market Reform Work for America* (Jan. 18, 2017), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-19 ("The CFTC has faced many challenges in optimizing swaps data ranging from data field standardization and data validation to analysis automation and cross-border data aggregation and sharing. Market participants vary significantly in how they report the same data field to SDRs. Those same SDRs vary in how they report the data to the CFTC").

[8] In 2014, the FSB asked the CPMI and IOSCO to develop global guidance on the harmonization of data elements reported to trade repositories and important for the aggregation of data by authorities. In 2017, the board of IOSCO issued its latest in a series of consultative reports titled *Harmonisation of critical OTC derivatives data elements (other than unique transaction identifiers and unique product identifiers) – Third Batch* (June 2017) available at http://www.bis.org/cpmi/publ/d160.pdf.

should leverage, and be fully-inclusive of, all information learned as a result of international initiatives related to derivatives reporting. We also agree that the proposed implementation of any amendments must consider the appropriate amount of time it will take for full industry adoption.

Although the Roadmap has correctly identified the critical milestones and implementation considerations, we believe that the Roadmap's proposed timeline and implementation can be improved in several ways to ensure that the Division's efforts achieve their intended results. Specifically, we recommend that the Commission: (1) align the project timeframes for SDR operations review ("**Tranche 1**") and reporting workflow review ("**Tranche 2**"); (2) publish the proposed changes to Tranche 1 and Tranche 2 following the publication of the CPMI-IOSCO Harmonisation Group Technical Guidance; (3) ensure that any proposed changes to the Swap Reporting Rules do not require retroactive reporting; and (4) harmonize any amendments to the Swap Reporting Rules by consulting and coordinating with international regulators and the U.S. Securities and Exchange Commission ("**SEC**"). We have provided more detail on each of these recommendations below.

1. Align Anticipated Timeframes for SDR Operations Review and Reporting Workflow Review Projects

The Associations are concerned that the Roadmap's anticipated timeframes for finalizing each project are misaligned, which could frustrate the Division's ultimate goals. The Roadmap provides that as part of Tranche 1, the Commission will publish a notice of proposed rulemaking regarding SDR operations sometime in the fourth quarter of 2017, and will finalize the rulemaking by the second quarter of 2018. The Roadmap also provides that as part of Tranche 2, the Commission will publish a notice of proposed rulemaking regarding counterparties' reporting workflows sometime in the first or second quarter of 2018, and will finalize the rulemaking by the fourth quarter of 2018. Given the interconnection between SDR functions and the counterparties' reporting workflows, we believe that any proposed rule amendments and final rules associated with Tranche 1 and Tranche 2 should be issued at the same time, and any finalized amendments to the Swap Reporting Rules should have the same compliance dates.[9] Moreover, finalizing Tranche 1 while Tranche 2 is still in a proposed stage could result in additional and unnecessary compliance costs as SDRs and market participants will need to build interim solutions to comply with just one set of rules, pending finalization of the related ruleset. We believe that a better approach would be for the Division to first identify the specific data that counterparties must report to SDRs and then to provide guidance on the allowable values and format in which counterparties must provide such data (including SDR data validations).

Alternatively, should the Commission decide to publish the proposed rule amendments to the SDR rules first in Tranche 1, then we recommend that the public comment period for this release remain open for at least 90 days following publication of the proposed rule amendments to the reporting

[9] 17 C.F.R. Parts 43, 45, and 49.

workflow rules in Tranche 2.[10] This extended comment period would provide market participants with a comprehensive and holistic understanding of whether the two proposals achieve the desired policy outcomes and account for operational costs and possible additional builds to comply with a modified reporting regime.

2. **Publish Proposed Changes to the SDR Operations and Reporting Workflows Following Publication of CPMI-IOSCO Harmonisation Group Technical Guidance and FSB Working Group**

We support the Commission's efforts to leverage the international data harmonization processes to avoid contradictory outcomes and/or duplicative regulatory obligations. We applaud the Commission's work on the CPMI-IOSCO Harmonisation Group ("**Harmonisation Group**"),[11] as well as the FSB Working Group on Unique Transaction Identifier (**"UTI**") and Unique Product Identifier ("**UPI**") Governance.[12] We, however, would note that the independent recommendations of the Harmonisation Group and the FSB Working Group have the potential to conflict with the Commission's efforts to improve data quality. For example, we note that the Harmonisation Group is expected to issue Critical Data Elements ("**CDE**") before the end of this year. We are concerned that the Roadmap's anticipated timeframe does not allow sufficient time for both the Division and market participants to review the final recommendations and for the Commission to harmonize applicable data elements. We would also caution that the Harmonisation Group's recommendations contain numerous data fields that, in our view, should not be included in the forthcoming CFTC proposals as they do not enhance data quality. Consequently, we would request that the Commission utilize such recommendations as a tool in improving data requirements for the data elements needed for its regulatory obligations, not as a mandate to propose additional data fields. Finally, we recommend that any changes to the Swap Reporting Rules should incorporate the FSB Working Group's recommendations for the UPI and the UTI to further ensure a consistent data reporting language approach across the globe.

---

[10] 17 C.F.R. Parts 43 and 45.

[11] Over the last several years, the Harmonisation Group has issued the following consultative reports: *Harmonisation of key OTC derivatives data elements (other than UTI and UPI) - First Batch* (Sept. 2015); *Harmonisation of critical OTC derivatives data elements (other than UTI and UPI) - Second Batch* (Oct. 2016); *Harmonisation of the Unique Transaction Identifier* (Aug. 2015); *Harmonisation of the Unique Product Identifier – first consultative report* (Dec. 2015); *Harmonisation of the Unique Product Identifier – second consultative report* (Aug. 2016); *Final technical guidance on UTI* (Feb. 2017); and *Harmonisation of critical OTC derivatives data elements (other than UTI and UPI) – Third Batch* (June 2017). More information on the Harmonisation Group's efforts is available at http://www.bis.org/cpmi/publ/d160.htm.

[12] The FSB recommended the creation of the UTI in its 2014 publication Feasibility study on approaches to aggregate OTC derivatives data, which is available at http://www.fsb.org/2014/02/r_140204/. Since then, the FSB has issued consultations and held roundtable discussions regarding UTI governance. More information on the FSB's efforts is available at http://www.fsb.org/publications/consultation-documents/?policy_area%5B%5D=17.

3. The Forthcoming Changes to the Reporting Rules Should Not Require Retroactive Reporting

Although the Roadmap does not expressly discuss how any proposed amendments to the Swap Reporting Rules will impact historic or legacy swap data that was previously reported to SDRs, we believe that the forthcoming changes should not require reporting counterparties to backload any new or revised reporting data elements or to retroactively meet other new or modified requirements with respect to such data. Indeed, requirements to enrich historic and legacy swap data would be costly and burdensome to both SDRs and market participants. This issue is further complicated by the fact that in many cases counterparties to historical and legacy trades reported those trades to different SDRs. For those reasons, the Associations believe that any changes to the Commission's Swap Reporting Rules should only apply to swaps and events occurring on or after the compliance date of the amended rules.

4. Harmonize with Global Regulators and the SEC

The Associations strongly encourage regulatory harmonization among the CFTC, global regulators, and SEC, including aligning reporting requirements on key economic and real-time data fields and values to the maximum extent possible. Inconsistencies in the global reporting requirements create significant operational complexity for counterparties, which may be required to report a swap to multiple jurisdictions. In order to meet the G-20 commitments related to derivatives reporting, various elements of trade reporting need to be considered in the context of what works best from an international perspective. Similarly, harmonized reporting requirements within the domestic framework will also contribute to producing higher quality data for use by global regulators while reducing the cost of compliance for market participants. Thus, domestic and international regulatory consultation and cooperation are equally essential to understanding systemic risks in the global swaps market and to solving legal and operational issues affecting trade reporting globally, such as concerning data privacy and confidentiality.

II. PRELIMINARY VIEWS ON SPECIFIC ITEMS IN THE PROPOSED TRANCHES

We generally support the Division's decision to review the items identified under Tranche 1 and Tranche 2. For the Division's convenience, we have organized our preliminary views on specific (but not all) items listed under each tranche in the manner in which those items are presented in the Roadmap. In addition, we have provided suggested alternative measures for the Division's consideration, which would further the Roadmap's stated objectives.

1. Tranche 1: SDR Validations

- *Leverage Existing SDR Validation Processes*. The Associations believe that an amendment to the Swap Reporting Rules should eliminate the ability for SDRs to request additional data not required under the Commission's regulations.

- *Work with SDRs to Establish Processes for Data Report Rejections*. The Associations believe that, when soliciting input from the industry, the Division should ensure reporting counterparties have the ability to provide their feedback with respect to such processes. SDR processes to reject data reports for missing or invalid data may vary by data field. Thus, the Division should propose these processes only once the amended reporting requirements for reporting counterparties have been established.

- *Identify an Initial Set of Minimum Validations*. It is our view that the Commission should ensure that data field collection and validations are consistently implemented across SDRs. The Commission should further resolve any uncertainty about what a reporting counterparty is obligated to report when a data field may not apply and/or data may not be available at the time of reporting. Finally, as part of this initiative, the Division should explore the possibility of utilizing data validation tables similar to those used under the European Market Infrastructure Regulation.[13]

2. **Tranche 1: Ensure Counterparties Confirm Accuracy of SDR Data**

- *Consider Which Counterparty(ies) Must Perform Reconciliations*. The Associations generally believe that the responsibility to perform reconciliations should be borne by the entity that is most effectively and efficiently situated to undertake that obligation. In particular, we believe that the Division should exempt counterparties that use existing third-party reconciliation services from performing its own reconciliations to the extent that such services already flag data discrepancies in SDR reported data. In addition, we believe that counterparties that execute swaps on swap execution facilities, which are either (i) required to or intended to be cleared, (ii) or affirmed through an affirmation, matching, and/or confirmation services, should not be required to perform reconciliations. Lastly, we believe that the Division should not require non-reporting counterparties, end-users, and smaller firms to perform reconciliations because these entities generally do not have the resources to effectively validate their swap transactions.

- *Consider Whether to Require Reconciliation of Position Data or Full Audit Trail of Each Swap*. The Associations believe that the Commission should take into consideration the high costs of the additional technological builds that would be needed to perform full audit trails and reconciliation.

---

[13] ESMA, Final Report - Review of the Regulatory and Implementing Technical Standards on reporting under Article 9 of EMIR, RTS 2015/1645, Nov. 13, 2015, available at https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1645_-_final_report_emir_article_9_rts_its.pdf.

3. **Tranche 2: Streamline Workflows**

- *Explore Whether to Combine PET and Confirmation Data into Single Set of Data Elements*. The Associations preliminarily believe that it would be more efficient for any final rulemaking amending the Swap Reporting Rules to combine primary economic terms ("**PET**") data and confirmation data into a single stream of data elements. Moreover, we believe that, as part of its comprehensive review, the Division should ensure that such data stream only represents the key economic data necessary to achieve the Commission's regulatory oversight function.

- *Remove Uncertainty Around What Must Be Reported and How*. We believe that the Commission should codify the substance of the various staff no-action letters and interpretive guidance related to the Swap Reporting Rules, where appropriate, in such a way that promotes efficiency and market certainty, while maintaining the integrity of reported swap data. We also recommend that the Commission consider, for purposes of Part 43 and Part 45 reporting, clarifying the appropriate manner in which a number of unique swap transactions and situations must be reported. In particular, we recommend that any final rulemaking amending the Swap Reporting Rules must address: (i) the impact of a change in the registration status of a reporting counterparty on the counterparty's reporting obligations, including limitation of data reportable under Part 46 for new registrants; (ii) packages, bespoke, and complex trades; (iii) novation flows, including novation fees; (iv) block trades and allocations; (v) mixed swaps; (vi) cross-border transactions between U.S. and non-U.S. counterparties; (vii) the transfer of portfolios (also known as "portfolio take-downs"); (viii) prime brokerage transactions; (ix) the definitions of SDR message types, such as amend, new, and modify, and clarification of execution time reporting for continuation data lifecycle events; (x) trade corrections for Part 43 public dissemination and back reporting; (xi) reporting based on different clearing models; and (xii) Part 45 amendments as applicable in order to sunset the Part 20 Large Trader Reporting Rules.

- *Eliminate Multiple Reporting Streams and Unnecessary Messages*. The Associations believe that the Division should consider whether to eliminate data fields that cannot be aggregated for regulatory analysis purposes (*e.g.*, "Any Other Terms" fields). The Division should also consider whether to eliminate reporting obligations for *void ab initio* swaps and other data fields that are not necessary for the Commission to achieve its regulatory oversight function.

4. **Tranche 2: Focus on Key Data Fields**

- *Harmonize Data Fields with Foreign Regulators (Building on CPMI-IOSCO Process and December 2015 CFTC Request for Comment)*. The Associations preliminarily believe that in instances where the identical data fields are required to be reported across multiple global reporting regimes, the definitions, formats, and allowable values should be harmonized. In addition, we believe that the Commission's December 2015 Request for Comment—which introduced additional data elements that are not contained in its current Swap Reporting Rules—would unnecessarily increase costs without any associated regulatory benefits.[14] Instead, we believe that the Division should focus on balancing the appropriate volume of data elements that are required under its Swap Reporting Rules against the economic value and burdens of reporting such data.

- *Look to Reduce the Number of Fields Currently Reported*. The Associations preliminarily believe that the Division should remove "catch-all" data fields (*e.g.*, "Any Other Terms"). In addition, and as noted above, we believe that the Division should reexamine Part 43 and Part 45 data fields and keep only those data elements necessary for price discovery and the Commission's regulatory oversight function, respectively. Lastly, we believe that SDR data field specifications should be reduced commensurately with any reductions in the number of data fields.

- *Potential Expand to Cover Margin Movements and Discrete Data Points (Consistency with European Securities and Markets Authority's Rules)*. The Associations believe that the Division should consider looking for alternative means to collect data (*e.g.*, from margin). We also believe that the Division should maintain the set of values that are currently used in regulatory reporting requirements for collateralization, but collaborate with global and foreign regulators to harmonize the definitions.

- *Continue Recordkeeping Requirements for All Swap Terms*. The Associations believe that swap dealers should be able to rely on the SDRs to fulfill certain recordkeeping requirements. In addition, we recommend that the Commission revise the timing in which reporting counterparties must retrieve Part 45 data. Longer data retrieval times would be helpful in cases when the requested data volume is significant, the swap data is older, the Commission requests swap data or information in a specific format, or the swap data is located in a foreign jurisdiction.

---

[14] CFTC DMO Staff, Draft Technical Specifications for Certain Swap Data Elements, Dec. 22, 2015, available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/specificationsswapdata122215.pdf.

5. **Tranche 2: Technical Specifications**

- *Propose Detailed Technical Specifications Once CPMI-IOSCO Harmonization Efforts Have Sufficiently Progressed*. As noted above in Section I of this letter, we believe that the Division should consider providing more time for analyzing CPMI-IOSCO recommendations and harmonizing, where appropriate, with the Swap Reporting Rules. In addition, the original CFTC technical specifications for the Unique Swap Identifier (**"USI"**) should be aligned with the CMPI-IOSCO recommendations for the UTI.

- *Include Definitions, Form, and Manner Specifications, Mapping to Existing Data Languages and Allowable Values Where Appropriate*. The Associations believe that the Division should review FpML and FIX against any technical specifications that it considers. We further believe that, in any final rulemaking amending the Swap Reporting Rules, the Commission should eliminate items that are not necessary and would not promote the Roadmap's stated objectives of streamlining reporting requirements. Lastly, we believe that the Commission should clarify that reporting counterparties are not obligated to map any new or modified technical specifications to existing messaging languages.

6. **Tranche 2: Re-evaluate Reporting Deadlines under Part 45**

- *Explore Alignment of CFTC Reporting Deadlines with SEC and ESMA*. The Associations support the Division's proposed evaluation of a "no-later than" T+1 deadline for swap data reporting under Part 45. While this item under Tranche 2 calls for the Division to consider changing reporting deadlines under Part 45, we also respectfully urge the Division to consider aligning Part 43 public dissemination timelines with the SEC and ESMA.

7. **Tranche 2: Increase the Utility of the Real-Time Public Tape**

- *Evaluate Real-Time Reporting Regulations in Light of Goals of Liquidity, Transparency, and Price Discovery in the Swaps Market*. The Associations generally support the Commission's efforts to review public dissemination requirements in light of product liquidity. We believe that the Division should consider whether there should be increased time delays for public reporting of block trades and reduced public dissemination caps for large off-facility transactions. Additionally, we believe that for certain large transactions, the Commission should enable reporting counterparties to request that SDRs do not publicly disseminate data that would reveal the counterparty's identity. We also believe that reporting counterparties should be able to send one data-stream reporting message that includes real-time, PET, and confirmation data. Division staff should consider making Part 43 data a subset of Part 45 data, instead of requiring reporting counterparties to submit three separate messages.

- *Address Ongoing Special Reporting Issues (*e.g., *Packages, Prime Brokerage, Allocations, Etc.)*. The Associations recommend that the Division consider how to clarify the definition of "execution" and how modifications or other lifecycle events should be publicly disseminated under Part 43 of the Commission's regulations. The Division should also consider how to ensure that the timing obligations under the "embargo rule" of Part 43 of the Commission's regulations do not conflict with post-trade price transparency requirements in foreign jurisdictions.[15] The Division should further consider how to clarify reporting obligations under Part 43 for portfolio take-downs and for post-priced swaps, which should be reportable only when all the final PET data details are determined.

III. Conclusion

The Associations appreciate the opportunity to submit our comments on the Roadmap. We commend the Division for its efforts to improve data quality and streamline the reporting requirements. We look forward to continuing our engagement with the Division and the Commission as the Commission moves forward with proposing changes to the Swap Reporting Rules. We are committed to working closely with the Commission to ensure that it has access to complete, accurate, and high-quality data and hope that Division staff will consider our comments, as they reflect the extensive knowledge and experience of market professionals within our memberships.

Please feel free to contact the undersigned should you have any questions.

Steven Kennedy
Global Head of Public Policy
ISDA

Kyle Brandon
Managing Director, Head of Derivatives
SIFMA

[15] For example, CFTC regulation 43.3(b) effectively prohibits the disclosure of swap transaction and pricing data relating to publicly reportable swap transactions prior to the public dissemination of such data by a SDR. Under MiFIDII/MiFIR (effective January 3, 2018), however, investment firms are required to make public, through Approved Publication Arrangements ("**APA**"), post-trade information in relation to financial instruments traded on a trading venue. The timing requirement for such post-trade transparency obligations may result in a counterparty subject to both MiFIDII/MiFIR and the CFTC's Swap Reporting Rules to publicly report swap data to the APA prior to publically disseminating such data to an SDR, possibly resulting in a violation of CFTC regulation 43.3(b).

Appendix C
Attachment 2

ISDA® Safe, Efficient Markets

17 CFR Part 45

June 15, 2015

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: Reporting Requirements for International Swaps (Part 45.3(h))

Dear Mr. McGonagle:

The International Swaps and Derivatives Association, Inc.[1] ("ISDA") and its members recognize the importance of the Part 45 regulations (the "Reporting Rules") of the Commodity Futures Trading Commission (the "Commission" or "CFTC") and strongly support initiatives to increase regulatory transparency. ISDA previously submitted a letter[2] to staff of the Division of Market Oversight ("DMO") requesting relief from the international swaps reporting requirements of §45.3(h) of the Reporting Rules. As discussed in our previous letter on this topic and in ISDA's response to the CFTC's Request for Comment on Part 45[3], §45.3(h) cannot be complied with efficiently or consistently, and this data requirement contradicts industry and regulatory efforts to harmonize and aggregate data by means of global standards, including use of a global Unique Trade Identifier ("UTI"). Therefore, ISDA, on behalf of its members that are "reporting counterparties" under Part 45[4] (collectively, "Reporting Parties"), hereby renew our request for relief from the requirements in §45.3(h) until such time as the provisions are revised or removed in order to facilitate alignment with globally standard practices and initiatives to aggregate data.

[1] 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 68 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.

[2] http://www2.isda.org/attachment/NjY4Mg==/Request%20for%20NAR%20for%20International%20Swaps%20(Part%2045%203(h))_11Feb14_FINAL.pdf

[3] http://www2.isda.org/attachment/NjY1NQ==/2014%20May%2023%20CFTC%20RFC-%20ISDA%20Response_FINAL.pdf, pg. 37

[4] 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."

I. Background

Part 45.3(h) requires that with respect to each international swap[5], the Reporting Party shall report (i) the identity of the non-U.S. trade repository not registered with the Commission to which the swap was also reported and (ii) the swap identifier used to identify such swap. It further provides that if necessary, this information must be obtained from the non-reporting party.[6]

We understand that the purpose of Part 45.3(h) is to provide a mechanism for the Commission and foreign regulators to identify international swaps reported to multiple repositories so that swaps are not double-counted by regulators[7]. We further acknowledge that by including the international swap reporting requirement in the Reporting Rules, the Commission has aligned with the direction of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to consult and coordinate with foreign regulatory authorities regarding establishment of a consistent international standard for the regulation of swaps[8]. Keeping these objectives in mind, we believe that existing industry standards for global trade identification and an anticipated trade identification standard recommended by global regulatory authorities should be adopted by the Commission to effectively meet the aims of the international swaps reporting requirement, as further described below.

Evolution of the UTI global standard

ISDA is committed to developing and promoting data standards that facilitate consistent, efficient methods for Reporting Parties to agree, implement and maintain values suitable for use in regulatory reporting. For instance, ISDA promoted the *Unique Swap Identifier (USI) Data Standard* issued by the CFTC's Office of Data and Technology[9], and worked with industry participants to build a best practice to supplement the USI requirements under the Reporting Rules. ISDA published the results of this collaboration as an industry best practice, *Unique Swap Identifier (USI): An Overview Document* [10] (the "USI standard"), which established standard process flows for treatment of USI and a convention for determining which party should generate the USI. The USI standard has been implemented by Reporting Parties for use in meeting their CFTC reporting requirements and has proven successful.

---

[5] 77 Fed. Reg. 2197 (January 13, 2012). Sec. 45.1 *International swap* means a swap required by U.S. law and the law of another jurisdiction to be reported both to a swap data repository and to a different trade repository registered with the other jurisdiction.
[6] We note that with respect to information relating to reporting of international swaps by non-reporting parties under non-U.S. laws, Reporting Parties are dependent on non-reporting parties providing the relevant information to the Reporting Party (as may be required under relevant agreements among the parties).
[7] 77 Fed. Reg. 2151 (January 13, 2012)
[8] Ibid.
[9] http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/usidatastandards100112.pdf
[10] http://www2.isda.org/attachment/NjE0MQ==/ISDA%20USI%20Overview%20Paper%20updated%202013%20Nov%2018%20v8%20clean.pdf

In developing an approach for global reporting, ISDA leveraged the USI standard to develop a standard to generate and exchange UTIs in a way that allows one trade identifier globally. Like USI, the goal of the UTI is to have a single trade identifier known by both parties. As the commencement of reporting to Trade Repositories ("TRs") in foreign jurisdictions has expanded globally in jurisdictions like the European Union, Canada, Singapore, Australia and Hong Kong, many trades are or will be required to be reported to multiple jurisdictions. Rather than the parties to a trade agreeing, maintaining and reporting a distinct USI or UTI value for each jurisdiction to which the trade may be reportable, it is both efficient and prudent to leverage the technological builds developed by Swap Data Repositories ("SDRs") and Reporting Parties for CFTC reporting to allow submission of a single report with a single UTI to satisfy multiple jurisdictions' requirements[11].

Therefore, our members, through the ISDA Reference Data & Workflow Working Group, developed a standard (the "global UTI standard") for generating and exchanging a single UTI for purposes of global trade reporting. ISDA published such standards as best practices in the paper *Unique Trade Identifiers (UTI): Generation, Communication and Matching*[12]. The CFTC's required use of a USI Namespace as the prefix for the USI renders the value jurisdiction-specific, and so in order to facilitate a single trade identifier for global reporting, one of the key principles provides that "If a trade requires a Unique Swap Identifier (USI), this should be used at the UTI." [13] To date, global regulators, including the European Securities and Markets Authority ("ESMA"), the Hong Kong Monetary Authority ("HKMA") and the Ontario Securities Commission ("OSC"), have specifically agreed to accept the USI as the UTI for reporting in their jurisdictions. Reporting Parties are using or intend to use ISDA's global UTI standard best practice to meet their reporting requirements under the rules of the Australian Securities and Investments Commission, HKMA, the Monetary Authority of Singapore, OSC, Manitoba Securities Commission and the Canadian Authorité des Marches Financiers. ISDA continues to work broadly with foreign regulators and market participants, including non-ISDA members, to enhance and promote the best practice standards to address both cross-jurisdictional reporting and jurisdiction-specific considerations.

Regulatory adoption of a global standard

Despite broad use and acceptance of ISDA's UTI standard, a single UTI value (to which USI may be a subset), may not be used in all cases by both parties to a transaction as the trade identifier for all their global reporting requirements for a particular transaction since it is not required by the reporting regulations of any jurisdiction that the parties must use a globally uniform UTI.

Global regulators, including the CFTC, have been working diligently to address data quality issues that negatively impact their ability to understand and utilize reported data. Data quality

[11] We note that in some foreign jurisdictions, parties are allowed to report directly to the regulator rather to a TR. In such scenarios, Part 45.3(h) will not apply.

[12] http://www2.isda.org/attachment/NjE4Ng==/2013%20Dec%2010%20UTI%20Workflow%20v8%207%208%20clean.pdf

[13] Id at p. 4.

issues, including the use of a single UTI in all cases, are an impediment to global data aggregation. These issues are being addressed by global regulators through the CPMI-IOSCO Data Harmonization Working Group, which intends to issue recommendations regarding the adoption of global data standards for reporting, including for UTI. Once such recommendations are issued, have been adopted by global regulators into their respective reporting requirements and market participants have had an opportunity to implement any necessary changes to their UTI generation and communication architectures, the use of a single UTI for global reporting should vastly improve the ability for regulators to identify duplicative reporting and aggregate data in an accurate manner.

Meeting the objective of Part 45.3(h)

The use of a single global UTI created in accordance with the uniform requirements of global regulators would meet the Commission's objective to identify international swaps reported to multiple repositories so that swaps are not double-counted and thereby negate the need for the international swaps data reporting requirement of §45.3(h). In the meantime, the same result can be achieved by use of ISDA's global UTI standard. Where the global UTI standard is followed, the swap identifier used to report to the non-U.S. TR as required by Part 45.3(h) will be a global UTI. Because the UTI reported to the TR is the same as the USI reported to the SDR, there would be no need for the Reporting Party to provide an alternate trade identifier value and the identity of the relevant foreign TR. Rather, the CFTC would be able to identify duplicate reporting for an international swap by comparing the USI to the UTI reported to TRs authorized by foreign regulators.

Neither Reporting Parties nor the Commission could have foreseen the precise evolution of a global UTI standard when Part 45 was promulgated. But in consideration of the efficiency of this method for identifying a transaction in reporting to an SDR or TR, we believe that the aim of Part 45.3(h) is or will be substantively met by Reporting Parties by use of a global UTI as reporting requirements in foreign jurisdictions are fulfilled. We further believe that the global UTI standard is currently the best way for global regulators to effectively aggregate global swap data, and that its use provides a consistent international standard for regulating swaps that effectively facilitates data aggregation and allows for information-sharing arrangements among regulators in accordance with the Dodd Frank Act [14].

---

[14] Dodd-Frank Act. SEC.752. International Harmonization. http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

II. Relief request

In consideration of the development, broad use and acceptance of ISDA's global UTI standard and the efforts of global regulators and the CPMI-IOSCO Data Harmonization Working Group to recommend and adopt a globally endorsed UTI standard, ISDA respectfully requests that DMO recommend that enforcement action not be taken against a Reporting Party which does not provide the "swap identifier" or the "identity of the non-U.S. trade repository" as required by Part 45.3(h) if (i) the Reporting Party has used the USI as the UTI when reporting an international swap to a non-U.S. trade repository not registered with the Commission or (ii) in the case where the non-reporting counterparty reports the international swap to a non-U.S. trade repository not registered with the Commission, the regulator which authorized the TR or its TR accepts the USI as the UTI in the trade report.

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

Sincerely,

Tara Kruse
Director, Co-Head of Data, Reporting and FpML
International Swaps and Derivatives Association, Inc.

cc: Dan Bucsa, Deputy Director, 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 June 15, 2015 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,

Tara Kruse
Director, Co-Head of Data, Reporting and FpML
International Swaps and Derivatives Association, Inc.

Appendix C
Attachment 3

ISDA® Safe, Efficient Markets

17 CFR Part 45

February 11, 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: Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))

Dear Mr. McGonagle:

The International Swaps and Derivatives Association, Inc. ("ISDA") and its members recognize the importance of the Part 45 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 45[1] (collectively, "Reporting Parties"), hereby request relief from certain requirements under the Reporting Rules, 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 62 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.

[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."

I. Background

Part 45.3(h) of the Commission rules requires that with respect to each international swap[2], the Reporting Party shall report (i) the identity of the non-U.S. trade repository not registered with the Commission to which the swap was also reported and (ii) the swap identifier used to identify such swap. It further provides that if necessary, this information must be obtained from the non-reporting party.[3]

We understand that the purpose of Part 45.3(h) is to provide a mechanism for the Commission and foreign regulators to identify international swaps reported to multiple repositories so that swaps are not double-counted by regulators[4]. We further acknowledge that by including the international swap reporting requirement in the Reporting Rules, the Commission has aligned with the direction of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to consult and coordinate with foreign regulatory authorities regarding establishment of a consistent international standard for the regulation of swaps[5]. Keeping these objectives in mind, we believe that a better mechanism exists to effectively meet the aims of the international swaps reporting requirement, as further described below.

Evolution of the UTI global standard

ISDA is committed to developing and promoting data standards that facilitate consistent, efficient methods for Reporting Parties to agree, implement and maintain values suitable for use in regulatory reporting. For instance, ISDA promoted the *Unique Swap Identifier (USI) Data Standard* issued by the CFTC's Office of Data and Technology[6], and worked with industry participants to build a best practice to supplement the USI requirements under the Reporting Rules. ISDA published the results of this collaboration as an industry best practice, *Unique Swap Identifier (USI): An Overview Document* [7] (the "USI standard"), which established standard process flows for treatment of USI and a convention for determining which party should generate the USI. The USI standard has been implemented by Reporting Parties for use in meeting their CFTC reporting requirements and has proven successful.

In developing an approach for global reporting, the industry leveraged the USI standard to develop a similar standard to generate and exchange Unique Trade Identifiers ("UTI") in a way that allows one Trade Identifier globally. Like USI, the goal of the UTI is to have a single trade

---

[2] 77 Fed. Reg. 2197 (January 13, 2012). Sec. 45.1 *International swap* means a swap required by U.S. law and the law of another jurisdiction to be reported both to a swap data repository and to a different trade repository registered with the other jurisdiction.

[3] We note that with respect to information relating to reporting of international swaps by non-reporting parties under non-U.S. laws, Reporting Parties are dependent on non-reporting parties providing the relevant information to the Reporting Party (as may be required under relevant agreements among the parties).

[4] 77 Fed. Reg. 2151 (January 13, 2012)

[5] Ibid.

[6] http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/usidatastandards100112.pdf

[7] http://www2.isda.org/attachment/NjE0MQ==/ISDA%20USI%20Overview%20Paper%20updated%202013%20Nov%2018%20v8%20clean.pdf

identifier known by both parties. As the commencement of reporting to Trade Repositories ("TRs") in foreign jurisdictions rapidly approaches, certain trades will be required to be reported to multiple jurisdictions. Rather than the parties to a trade agreeing a distinct UTI value for each jurisdiction to which the trade may be reportable, it would seem both efficient and prudent to leverage the technological builds developed by Swap Data Repositories ("SDRs") and Reporting Parties for CFTC reporting to allow submission of a single report with a single UTI to satisfy multiple jurisdictions' requirements[8].

Therefore, our members, through the ISDA Reference Data & Workflow Working Group, developed a standard (the "global UTI standard") for generating and exchanging a single UTI for purposes of global trade reporting. ISDA published such standards as best practices in the paper *Unique Trade Identifiers (UTI): Generation, Communication and Matching*[9]. One of the key principles provides that "If a trade requires a Unique Swap Identifier (USI), this should be used at the UTI." [10] To date, global regulators, including the European Securities and Markets Authority ("ESMA"), the Hong Kong Monetary Authority ("HKMA") and the Ontario Securities Commission ("OSC"), have specifically agreed to accept the USI as the UTI for reporting in their jurisdictions. ISDA continues to work broadly with foreign regulators and market participants, including non-ISDA members, to enhance and promote the best practice standards to address both cross-jurisdictional reporting and jurisdiction-specific considerations.

Use of this global UTI standard has been implemented by various Reporting Parties for use in EMIR[11] reporting and is expected to be implemented by other market participants with reporting obligations under EMIR in due course. Reporting Parties have committed to extending the global UTI standard best practice to meet their reporting requirements under the rules of the Australian Securities and Investments Commission, HKMA, the Monetary Authority of Singapore, OSC, Manitoba Securities Commission and the Canadian Authorité des Marches Financiers. ISDA will continue to engage in proactive dialogue with global regulators as they issue their reporting rules to promote acceptance of the global UTI standard.

Meeting the objective of Part 45.3(h)

A direct benefit of the global UTI standard is the ability for regulators to identify duplication of reported transactions between their jurisdictions and across SDRs and TRs, thus efficiently meeting the objective of Part 45.3(h). Where the global UTI standard is followed, the swap identifier used to report to the non-U.S. TR as required by Part 45.3(h) will be a global UTI. Because the UTI reported to the TR is the same as the USI reported to the SDR, there would be no need for the Reporting Party to provide an alternate trade identifier value and the identity of the relevant foreign TR. Rather, the CFTC would be able to identify duplicate reporting for an

[8] We note that in some foreign jurisdictions, parties are allowed to report directly to the regulator rather to a TR. In such scenarios, Part 45.3(h) will not apply.

[9] http://www2.isda.org/attachment/NjE4Ng==/2013%20Dec%2010%20UTI%20Workflow%20v8%207%208%20clean.pdf

[10] Id at p. 4.

[11] European Market Infrastructure Regulation. (Overview of requirements: http://www.esma.europa.eu/page/European-Market-Infrastructure-Regulation-EMIR

international swap by comparing the USI to the UTI reported to TRs authorized by foreign regulators.

We further note that to the best of our knowledge, no other foreign regulators have included a comparable data requirement in their reporting rules mandating reporting of either the identity of a TR authorized by another regulator (including the CFTC) or the relevant trade identifier. Using the global UTI as the international standard for swap data reporting and aggregation reinforces the usefulness of the USI, since foreign regulators otherwise would not know the USI reported by a Reporting Party to an SDR registered with the CFTC.

We acknowledge that further work is necessary to ensure (i) acceptance of the global UTI standard by all regulators that have issued or will issue reporting rules and (ii) implementation of the global UTI standard by all market participants that either have a reporting obligation for a swap in foreign jurisdictions or play a role in meeting the reporting obligation on behalf of such parties (e.g., middleware providers, execution platforms). Therefore there may be cases initially where the USI is not used as the UTI for purposes of reporting to a foreign TR. We believe there will be fewer of these cases over time as reporting obligations commence for additional foreign jurisdictions and as outreach by ISDA and Reporting Parties who support the global UTI standard results in consistent implementation by market participants to reuse the USI as the UTI whenever applicable.

Neither Reporting Parties nor the Commission could have foreseen the evolution of a global UTI standard when Part 45 was promulgated. But in consideration of the efficiency of this alternative method for reporting a unique identifier, we believe that the aim of Part 45.3(h) is or will be substantively met by Reporting Parties by use of the global UTI as reporting requirements in foreign jurisdictions are fulfilled. We further believe that the global UTI standard is the best way for global regulators to effectively aggregate global swap data, and that its use provides a consistent international standard for regulating swaps that effectively facilitates data aggregation and allows for information-sharing arrangements among regulators in accordance with the Dodd Frank Act [12].

II. Relief request

In consideration of the development, broad use and acceptance of the global UTI standard, ISDA respectfully requests that DMO recommend that enforcement action not be taken against a Reporting Party which does not provide the "swap identifier" or the "identity of the non-U.S. trade repository" as required by Part 45.3(h) if (i) the Reporting Party has used the USI as the UTI when reporting an international swap to a non-U.S. trade repository not registered with the Commission or (ii) in the case where the non-reporting counterparty reports the international swap to a non-U.S. trade repository not registered with the Commission, the regulator which authorized the TR or its TR accepts the USI as the UTI in the trade report.

[12] Dodd-Frank Act. SEC.752. International Harmonization. http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

In addition, ISDA respectfully requests that DMO recommend that enforcement action not be taken against a Reporting Party which does not fulfill the requirements of Part 45.3(h) because either (i) the use of the global UTI standard is not yet accepted for reporting under the laws of the foreign jurisdiction under which the swap was also reported or (ii) the non-reporting party which reported an international swap to a non-U.S. trade repository not registered with the Commission, or the relevant market infrastructure service providers, has not yet implemented the changes necessary to reuse the USI as UTI in accordance with the global UTI standard. We currently believe that within a year reporting requirements may commence in the majority of jurisdictions which have finalized their reporting legislation and parties new to regulatory reporting will have had an opportunity to implement the necessary standards. Therefore we request relief from Part 45.3(h) under these circumstances until January 31, 2015.

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

Sincerely,

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

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

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 February 11, 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,

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

Appendix C
Attachment 4

ISDA® Safe, Efficient Markets

May 23, 2014

Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Review of Swap Data Recordkeeping and Reporting Requirements (79 Fed. Reg. 16689)

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to provide the Commodity Futures Trading Commission (the "**CFTC**" or "**Commission**") with comments in response to the request for comment referenced above (the "**Comment Request**").

I. Introduction

While composing ISDA's response to the Comment Request, three key themes emerged that form the basis of many of our answers: (i) the data currently required under Part 45 seems sufficient to meet the rule's objectives (ii) there is a trade-off between timing and accuracy and (iii) there is a need for global regulatory consistency and coordination. In addition, ISDA found it difficult to reply to many of the questions in the Comment Request because the Commission has not clearly articulated how the detailed data provided under Part 45 will be used to assist it in discharging its regulatory responsibilities. ISDA believes that the dialogue regarding swap data reporting requirements would be greatly enhanced if the Commission were to elaborate on how the data will be used by it and what purposes are served in providing highly detailed information regarding individual swaps.

Several questions ask responders to advise the Commission whether the data currently required under Part 45 is sufficient and seek suggestions for additional data elements that may be necessary to meet the objectives of Dodd Frank with respect to Swap Data Repository ("SDR") data collection. We believe the data elements currently provided are more than sufficient to meet the objectives of Dodd Frank to provide transparency and a mechanism for regulators to monitor and mitigate risk. Reducing the complexity of the reporting rules and clearly defining a focused list of key economic values will improve both the quality and timeliness of reported data since it promotes consistency and lessens the difficulty of reporting and maintaining such data. If the Commission's primary use for reported swap data is to calculate aggregate product notionals in order to understand party and industry exposures, then a limited set of clearly defined data fields more accurately and timely supports those objectives.

[1] 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.

The Primary Economic Terms ("PET") reporting deadlines are significantly shorter than trade repository reporting deadlines for comparable global regulators. Since there is a trade-off between timing and accuracy, these deadlines may run counter to the compelling need for data accuracy. The need to report data to an SDR in as little as fifteen minutes from point of execution means there is a greater likelihood of error or omission. Fewer corrections would be necessary if the reporting counterparty had until end of day on the Trade Date or T+1, as other regulators require, and as is recognized as a permitted approach under Part 45 rules, in certain circumstances. Since data accuracy seems to be the primary concern for regulators, this would be improved by amending the PET deadlines to allow additional time to report. Unless use of SDR data in real time by the Commission is effective, upholding the current PET deadlines only serves to undermine the data quality. Retaining the current deadlines for Part 43 reporting means public transparency will remain intact.

The Part 45 rules blazed the trail for SDR reporting and formed the basis of the initial SDR and firm builds to report trade data. Many global regulators now have trade reporting requirements either in effect already or which will become effective later this year. Many of these build off of the CFTC's established approach pursuant to Part 45, but others differ in key ways, including (i) which party(ies) are compelled to report, (ii) construction and creation of Unique Swap Identifier ("USI") or Unique Trade Identifier ("UTI"), (iii) data elements required to be reported and (iv) timelines for reporting. These inconsistencies create significant operational complexity for parties which may be required to report a swap to multiple jurisdictions, as well as for SDRs and industry infrastructure providers that facilitate reporting. This in turn undermines the quality of the data for use not just by the Commission to meet its own objectives, but also undermines the ability of the Commission and global regulators to utilize the data to meet the goals of global data aggregation, transparency and risk mitigation.

In order to meet the aligned objectives of global regulators stemming from their G20 commitments, certain elements of trade reporting addressed in this Comment Request need to be considered in the context of what works best from a global perspective (e.g. USI/UTI) and in other cases, regulatory cooperation is essential to solve issues that impact trade reporting globally (e.g. data privacy and confidentiality).

In section III, we provide additional clarity and granularity with respect to the preceding statements in our specific answers to the questions provided in the Comment Request. In some cases we recommend changes to the Part 45 rules, certain reportable data elements or reporting flows or obligations which we believe are more operationally efficient, promote consistency, and will result in improved data quality. We condition those proposals with the need to separately consider and agree with the Commission on appropriate timeframes for all impacted market participants to implement any corresponding technological changes and to effect a coordinated transition from the current requirements.

II. Executive Summary

As further detailed in section III of our response, ISDA believes the Commission should enact some important changes to the Part 45 regulations in order to simplify compliance, improve data quality and increase the Commission's ability to rely on and successfully utilize the SDR data to meet its objectives to achieve market transparency and mitigate risk. These include, but are not limited to:

- Simplifying creation data reporting requirements, including the establishment of a specified data set for confirmation data
- Eliminating reporting obligations for alpha swaps and void *ab initio* swaps
- Eliminating valuation data reporting for cleared swaps by Swap Dealers and /Major Swap Participants
- Clarifying the impact of a change in the status of a reporting counterparty to reporting obligations
- Addressing prime brokerage transaction flows
- Allowing USI creation by additional non-registrants
- Clarifying that post-priced swaps are reportable only when all PET details are finally determined
- Revising Appendix 1 to:
    - Include field level distinctions for Part 45 vs. Part 43
    - Eliminate the "any other terms" field
- Eliminating the requirement to update party specific static data for non-live swaps
- Clarifying reporting obligations for cleared swap transaction flows, including alpha swaps and clearing model distinctions

In addition, we strongly believe that the Commission should invest in international harmonization for purposes of improving the value of global data aggregation and analysis by working with global regulators to agree uniform standards and solutions pertaining to:

- Transaction flows, including for cleared swaps
- Standardization of reportable data fields
- Unique Swap Identifiers/Unique Transaction Identifiers
- Unique Product Identifiers
- Technical standards for SDRs, including standard product representation
- Data privacy and confidentiality

Table of Contents

I. Introduction 1

II. Executive Summary 3

III. Responses to CFTC Request for Comment on Part 45 and Related Provisions of the Commission's Swap Data Reporting Rules (79 Fed. Reg. 16689) 6

A. Confirmation Data (§ 45.3): What terms of a confirmation of a swap transaction should be reported to an SDR as "confirmation data"? 6

B. Continuation Data (§ 45.4): How can the Commission ensure that timely, complete and accurate continuation data is reported to SDRs, and that such data tracks all relevant events in the life of a swap? 9

i. Snapshot/State/Lifecycle Methods (§ 45.4) 12

ii. Valuation Data Reporting (§§ 45.4(b), 45.4(c), and NALs 13-34 and 12-55) 12

iii. Events in the Life of a Swap (§ 45.4) 14

iv. Change in Status of Reporting Counterparty (§ 45.8) 16

C. Transaction Types, Entities, and Workflows: Can the Swap Data Reporting Rules be Clarified or Enhanced to Better Accommodate Certain Transactions and Workflows Present in the Swaps Market? 18

i. Bespoke Transactions (§ 45.3, Appendix 1 to Part 45, and NALs 13-35, and 12-39) 21

ii. Allocations and Compressions (§§ 45.3, 45.4, NALs 13-01 and 12-50) 22

iii. Prime Brokerage (NAL 12-53) 23

v. Swaps Executed or Cleared on or by FBOTs, No-Action CCPs, QMTFs, and Other Non-Registrants/Exempt Entities (§§ 45.3, 45.4, 45.5, and NALs 14-27, 14-16, 14-07, 13-73, 13-43, 13-33, 12-63, and 12-56) 26

vi. Inter-Affiliate Swaps (§§ 45.3, 45.4, 45.6, and NAL 13-09) 28

vii. Reliance on No-Action Relief in General 29

viii. Post-Priced Swaps (§§ 45.3 and 45.4) 29

ix. Complex Swap Transactions (NAL 14-12) 32

D. PET Data and Appendix 1 (§ 45.3 and Appendix 1): Monitoring the Primary Economic Terms of a Swap 33

E. Reporting of Cleared Swaps (§§ 45.3, 45.4, 45.5, and 45.8): How Should the Swap Data Reporting Rules Address Cleared Swaps? 43

i. CDS-Clearing Related Swaps and Open Offer (Part 45 and NALs 12-59, 13-36, and 13-86) 47

ii. DCO Reporting, Netting Processes, and Positions (§§ 45.3 and 45.4) 48

F. Other SDR and Counterparty Obligations (§§ 45.9, 45.13, 45.14): How Should SDRs and Reporting Entities Ensure That Complete and Accurate Information is Reported to, and Maintained by, SDRs? 49

i. Confirmation of Data Accuracy and Errors and Omissions (§ 45.14) 49

ii. SDR Required Data Standards (§ 45.13) 50

iii. Identifiers (§§ 45.5, 45.6 and 45.7) 52

G. Swap Dealer/Major Swap Participant Registration and Compliance: How Can the Commission Enhance Part 45 to Facilitate Oversight of Swap Dealers and Major Swap Participants? 57

H. Risk: How Can Part 45 Better Facilitate Risk Monitoring and Surveillance? 58

I. Ownership of Swap Data and Transfer of Data Across SDRs 60

J. Additional Comment 62

IV. Summary 64

V. Appendices 65

III. Responses to CFTC Request for Comment on Part 45 and Related Provisions of the Commission's Swap Data Reporting Rules (79 Fed. Reg. 16689)

A. Confirmation Data (§ 45.3): What terms of a confirmation of a swap transaction should be reported to an SDR as "confirmation data"?

1. What information should be reported to an SDR as confirmation data? Please include specific data elements and any necessary definitions of such elements.

a. For confirmations that incorporate terms by reference (e.g., ISDA Master Agreement; terms of an Emerging Markets Trade Association ("EMTA")), which of these terms should be reported to an SDR as confirmation data?

Confirmation Data

The current confirmation data reporting requirements are both ambiguous and overly broad. In the absence of clear technical standards, reporting entities and Swap Data Repositories ("SDRs") have implemented the confirmation data requirement by separately interpreting the obligation with the result that there are inconsistencies in the data submissions by market participants (which the CFTC may characterize as data quality issues). However, this same ambiguity leaves CFTC staff to interpret if the data received is sufficient. This risks creating an evolving data standard based on regulatory interaction rather than explicit requirement, which, in turn, creates questions on how enforcement could or would proceed.

The Commission should establish the minimum data necessary to accomplish its regulatory mandate. Although additional data provided by market participants may enhance the Commission's understanding of individual transactions, the Commission must consider (i) the technical ability or standards that can reasonably apply across all potential reporting counterparties (ii) the data necessary to meet its regulatory mandate, including the ability to aggregate data across and within trade repositories and (iii) the corresponding necessity for consistent data. This can only occur with explicit data requirements.

Ideally, the Commission should have one set of creation data fields for reporting, rather than separate Primary Economic Terms ("PET") and confirmation data requirements. Swap Execution Facilities ("SEFs"), Designated Contract Markets ("DCMs") and Derivatives Clearing Organizations ("DCOs") are already required to report PET and confirmation data in one report, and reporting counterparties could do the same, provided creation data is limited to key economic terms of the swaps known at the point of reporting, and not values derived from the process of confirming the swap. A single set of creation data fields would be consistent with global regulatory requirements, (e.g. in Canada, the European Union and Singapore) where messaging is simplified by virtue of a streamlined set of data fields contained in one piece of legislation.

We do not believe the legal confirmation for the swap should be replicated as part of SDR reporting, rather to the extent the Commission believes there are terms that extend beyond the current PET fields that are valuable to meeting the objectives of Part 45, then these should be identified and required as either an expansion of PET data, or to the extent they would not be available at the point of PET reporting, preserved separately as confirmation data. This

"confirmation data" should be a limited and enumerated list of fields that complement the current PET data, rather than duplicating it. Submission of searchable documents as an electronic representation of the full confirmation is a technologically intensive process and costly process for market participants. We propose that the Commission amend the definition of confirmation data in §45.1 to reflect that counterparties do not have to report all terms matched and agreed by the parties but rather just the data fields specified as the reportable confirmation data.

To the extent the Commission is unclear what specific additional data might be required, we believe the best means to determine a defined list of useful and consistent confirmation data fields is through the formation of a CFTC sponsored working group that includes representatives from SEFs, DCMs, DCOs, SDRs, reporting counterparties and relevant trade organizations. The aim of the working group would be to agree any additional creation data elements for each asset class or product which are materially important to the Commission's objectives. If these values are not currently supported by Financial products Markup Language ("FpML"), then they could be prioritized for standardization and included in the reportable data set based on an industry agreed timetable for transition. Once the initial aims of the working group are met, it could reconvene annually to determine whether industry evolution and product development warrants any additions or changes to the set of enumerated fields. A periodic review would also allow for any adjustments to facilitate proper systemic analysis based on the changing landscape of regulatory reporting regimes.

A limited and defined set of confirmation data fields also allows reporting electronically in accordance with §45.3 and eliminates any need for submission of images of paper confirmations – a practice which is onerous for reporting counterparties and ineffective for regulatory review and aggregation. Even for complex and bespoke transactions, a limited and defined set of PET and confirmation terms could be represented electronically in FpML. These terms provide sufficient information for data aggregation and analysis of market exposures.

In the event the Commission should require more fulsome details with respect to party level agreements, such documentation may be readily obtained from the relevant parties or their prudential regulator rather than reiterating on a trade by trade level. In the preamble to Part 45[2], the Commission determined it should not require master agreement reporting. The rationale provided for such decision still persists, as the terms of these agreements are not readily reportable in an electronic format nor could this be easily or accurately achieved. Any attempt to require master agreement terms must be considered under the right framework, based on industry evolution to standardize these elements for a broader purpose. As a first example, FpML has started the development of a framework for the representation of legal documents; version 5.7 contains a representation for the Standardized Credit Support Annex ("SCSA"). But in the meantime, this has not evolved sufficiently and should not be required. Importantly, other global regulators have reviewed the need for master agreement terms and have limited their trade reporting requirements to the relevant date, type and version of the agreement.

In summary, ISDA sees little utility in the reporting of terms that are incorporated by reference into a confirmation. In the case of the ISDA Master Agreement, the terms of the Schedule, which includes the parties' choice of largely non-economic elective variables that are provided for in the Master Agreement as well as customized and individually negotiated terms, are too highly varied to

[2] 77 FR at 2152.

be capable of standardized representation, as needed for SDR reporting. Moreover, it is not apparent what objective would be served by noting, for example, that a cross-default provision or individualized termination events apply. Understanding the effect of such provisions often requires a close analysis of drafting and language, as well as knowledge of factual circumstances beyond the four corners of the Master Agreement (e.g., outstanding indebtedness that is within the scope of a cross-default clause). If such an inquiry is ever needed by the Commission, the relevant documents would be available to it pursuant to the recordkeeping requirements of Regulation 45.2. Limiting confirmation data to a defined set of electronically reportable data fields would provide the Commission with more accurate and meaningful data that can be constructively aggregated and compared.

2. ***Should the confirmation data reported to an SDR regarding cleared swaps be different from the confirmation data reported to an SDR regarding uncleared swaps? If so, how?***

<u>Cleared swap confirmation data</u>

Confirmation data should not be required for an alpha trade that is intended for clearing at point of execution, whether due to the clearing mandate or bilateral agreement. Confirmation data for alpha swaps is not meaningful since they will be terminated and replaced with cleared swaps simultaneously or shortly after execution for which confirmation data will be reported by the DCO. See our response to Question 33 for our additional feedback on the reporting of alpha swaps.

3. ***Should the confirmation data reported to an SDR regarding swaps that are subject to the trade execution requirement in CEA section 2(h)(8) be different from the confirmation data reported to an SDR regarding:***
   a. ***swaps that are required to be cleared but not subject to the trade execution requirement;***
   b. ***swaps that are not subject to the clearing requirement but that are intended to be cleared at the time of execution;***
   c. ***swaps that are voluntarily submitted to clearing at some point after execution (e.g., backloaded trades); and***
   d. ***uncleared swaps? If so, how?***

<u>SEF confirmations</u>

Regardless of execution method, the confirmation for a swap on a particular product should be based on industry standard templates and definitions. Counterparties rely on this consistency to ensure they do not carry basis risk between like swaps. Therefore, the confirmation data reported should be the same as well.

4. ***More generally, please describe any operational, technological, or other challenges faced in reporting confirmation data to an SDR.***

Confirmation data challenges

As described in the previous responses, the current confirmation data reporting requirements are ambiguous, overly broad, and duplicative of PET data requirements. Reporting confirmation data for complex or bespoke swaps is extremely challenging as by nature these products or trades are not sufficiently standardized to have a full normalized representation that can be represented electronically. Limiting confirmation data to a defined set of electronically reportable data fields will provide the Commission with more accurate and meaningful data that can be constructively aggregated and compared.

The confirmation data requirements should better align with international requirements and should be less onerous in nature. No other regulatory regime requires a separate layer of reporting for data pertaining to the confirmation. Rather, where required at all, those additional elements are limited, specifically defined and form part of a single list of reportable fields. Such an approach is possible because the reporting timeframes are T+1 or later, allowing the submission of a single, complete report. In addition, no other regime requires reporting of every term agreed between the parties to the swap, thus equating to the restatement of the confirmation or requiring the submission of the actual confirmation, rather the relevant terms of the trade are prescribed in a common data set.

B. Continuation Data (§ 45.4): How can the Commission ensure that timely, complete and accurate continuation data is reported to SDRs, and that such data tracks all relevant events in the life of a swap?

5. ***What processes and tools should reporting entities implement to ensure that required swap continuation data remains current and accurate?***

Maintenance of swap continuation data

Reporting counterparties have internal mechanisms in place already to reconcile reportable trades and provide any necessary updates either via intraday or end of day reporting. As such, they believe continuation data is being maintained appropriately to reflect the current swap data. In addition, reporting parties are required to conduct the reconciliation of material terms with their counterparties in accordance with the Commission's Part 23 regulations[3] or similar rules of other jurisdictions. Any discrepancies that are revealed as part of this process are subsequently corrected in the SDR reporting for the swap.

If the Commission believes that data is not being maintained timely and accurately, then reporting parties request that the CFTC use industry trade organizations to convey concerns about trends in the quality of specific data fields. On a number of occasions, informal guidance on the approach to a particular field or feedback on the quality or consistency of the data has been received second-hand from SDRs as a result of the Commission's efforts to harmonize data between SDRs.

---

[3] http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-21414a.pdf

However, this indirect method makes it difficult for reporting counterparties to substantiate and clarify the guidance and appropriately prioritize any necessary technological changes.

Guidance from Commission staff with respect to reporting certain fields should be made publicly available by the Commission for the sake of consistency amongst reporting entities. Making a guidance document, such as a user guide or a Q&A, available on cftc.gov would prove a useful tool for communicating the Commission's expectations and promoting consistency.

6. ***Swaps should be linked when new swaps result from the assignment, netting, compression, clearing, novation, allocation, or option exercise of existing swaps (or other events wherein new swaps result from existing swaps).***
   a. ***What is the most effective and efficient method for achieving this link (including information regarding the time of the relevant event)?***
   b. ***How should reporting entities identify the reason why two swaps are linked (e.g., identify that swap A is linked to swaps B and C in an SDR or across multiple SDRs because swaps B and C arose from the clearing and novation of swap A)?***
   c. ***Aside from those events set forth in part 45, are there other events that require linkage between related swap transactions?***
   d. ***How should related swaps reported to different SDRs be linked?***

<u>Swap Linkage</u>

As recognized by the Commission in the Summary of the Proposed Part 45 Rule[4], the USI is a "crucial regulatory [tool] for linking data together and enabling data aggregation by regulators to fulfill the systemic risk mitigation, market manipulation prevention, and other important purpose of the Dodd-Frank Act." The USI is the current and best approach to achieving a link between related swaps where such linkage furthers the goals of Commission. The Part 45 rules currently require linkage only with respect to allocations; in this case, reporting counterparties report the USI of the pre-allocation swap as the "prior USI" in their messaging for the post-allocation swap(s). Providing USI linkages between pre-allocation and post-allocation swaps has been challenging for firms in some cases due to system limitations. The reason for the linkage is clear in this scenario since the swap data report includes an indication of whether the swap is pre-allocation or post-allocation.

Of the events provided in the definition of life cycle event in Part 45, only a novation would result in the creation of a new USI that may be linked to the USI for the original swap subject to that event. In some cases, cleared swaps are linked to the original bilateral swap, if applicable. In examples such as these, the reason for the linkage is not reported as a separate value, but in most cases the type of post-trade event has been reported under either Part 43 and/or Part 45. Therefore the chain of events that corresponds to related swaps has been reported to the SDR and should be available to the Commission as part of the swap history. Requiring a separate linkage reason does not provide a substantive additional benefit to the analysis of current exposures. System capabilities vary between reporting entities; as trade capture systems were not designed to track trade linkage in this manner there would be a substantial cost and challenge for the industry to implement.

---

[4] 77 FR at 2138.

It is important to acknowledge as well that swap linkage may not be achievable or transparent to the Commission in cases where related swaps are subject to reporting in different regimes. This can occur for instance, when a pre-allocation swap is reported under Part 45, but based on the ultimate counterparties only a portion of the post-allocation swaps are reportable under Part 45. As a result, the pre-allocation and post-allocation swaps will not tie-out completely. Similarly, a swap reported under Part 45 may be novated or partially novated and the resulting swap may not also be subject to Part 45 so USI linkage between the original swap and the novated swaps will not be transparent to the Commission.

Due to the volume of trades that may be involved in a compression cycle, it is not possible to link all the original swaps to the resulting new swap(s) via USI due to systematic limitations on the part of both reporting entities and SDRs. However, an Event Processing ID is routinely used to connect swaps that have been subject to the same compression event, as well as some other post-trade processes. All terminated trades and any replacement trades in a termination cycle share the same Event Processing ID. The ID is printed on the termination result files that all participants consume after a termination cycle, and is forwarded to the SDR after each termination cycle.

We also recognize that the components of package transactions that are exempt from the trade execution requirement under NAL 14-62, or any substantively similar rule-making, may need to be identified in SDR reporting by a means other than USI. See our response to Question 27 for further feedback on this topic.

Related swaps sent to different SDRs can also be linked via use of the USI; however this is not being applied consistently. This occurs now with respect to cleared swaps reported by some DCOs, for instance, for which the USI for the original ("alpha") swap is reported as the prior USI to the cleared swaps ("beta" and "gamma"). Provided both swaps are sent to the same SDR, the alpha swap may be automatically decremented. Even in the event different SDRs are used for the alpha swap versus the beta and gamma, use of the prior USI on the cleared swap facilitates reconciliation amongst aggregated data. However, on the topic of cleared swaps, we believe reporting of the alpha swaps should not be required; see our response to Question 33.

There is a need for international consistency with regards to whether and how reported trades should be linked. For instance, the Regulatory Technical Standards of the European Market Infrastructure Regulation ("EMIR") do not allow for use of a prior USI, UTI or other mechanism to link transactions and require that a single UTI be used to track a cleared swap through all lifecycle events, including compression. We know that this cannot be practically achieved as new and separate legal transactions result from the novation and compression processes for cleared swaps which take on individual trade histories that cannot be tracked via the single UTI created for the alpha swap. We encourage the CFTC to work with global regulators to form consensus around a limited set of harmonized requirements for trade linkage that are most useful to your mutual aims. Specifically, global regulatory consensus on the use of the alpha/beta/gamma[5] approach to cleared swaps will benefit global data aggregation. Consistency allows parties to submit a single multi-jurisdictional report and maintains global data quality. If trade linkage is required differently between regulators, the task of reporting is significantly more complex and the quality of the data will be lessened.

---

[5] ISDA, *Unique Trade Identifier (UTI): Generation, Communication and Matching* (December 10, 2013) http://www2.isda.org/attachment/NjI3MQ==/2013%20Dec%2010%20UTI%20Workflow%20v8.7.8b%20clean.pdf

i. Snapshot/State/Lifecycle Methods (§ 45.4)[6]

7. ***What are the benefits and/or disadvantages of reporting continuation data using: (i) the lifecycle reporting method; and (ii) the snapshot reporting method?***

   a. ***Are there events or information that can be represented more effectively using one of the reporting methods rather than the other?***

   b. ***Should all SDRs be required to accept both the snapshot and lifecycle methods for reporting continuation data?***

Currently, some reporting entities send continuation data via the snapshot reporting method at end of day, while others are sending intraday lifecycle events. Reporting counterparties also have a responsibility to correct errors and omissions, which can be done via either method, but are more likely to be reported via the snapshot reporting method since they may be discovered as part of a reporting counterparty's end of day reconciliations. SDRs should be required to accept both methods for reporting continuation data and firms should be allowed to report via either method.

Either approach meets the continuation data objective for timely and accurate maintenance of creation data. It would be costly and time-consuming to change current builds, especially for reporting counterparties with more limited technical capacity that may submit via csv or other more manual methods.

ii. Valuation Data Reporting (§§ 45.4(b), 45.4(c), and NALs 13-34 and 12-55)

8. ***How can valuation data most effectively be reported to SDRs to facilitate Commission oversight? How can valuation data most effectively be reported to SDRs (including specific data elements), and how can it be made available to the Commission by SDRs?***

   a. ***Should SDs and MSPs continue to be required by the swap data reporting rules to provide their own valuation data for cleared swaps to SDRs? If so, what are the benefits and challenges associated with this valuation reporting?***

   b. ***What challenges and benefits are associated with unregistered swap counterparties (both financial entities and non-financial entities) reporting valuation data for uncleared swaps to SDRs on a quarterly basis?***

Effective Valuation Data reporting[7]

We believe the current Part 45 requirement for Swap Dealers ("SDs") and Major Swap Participants ("MSPs") to report valuation data daily is the only effective and accurate approach for uncleared swaps. Current valuation is determined as part of end-of-day processes and the resulting values are used by the accounting and risk systems of the reporting counterparties, and therefore are also the accurate figures for any consolidated review of exposures by regulators. SDs and MSPs should continue to be allowed to submit their valuation data each day in accordance with the timing

---

[6] This subsection responds to Question 7.
[7] This subsection responds to Question 8.

allowed by their internal firm policies and procedures. Valuations produced via any other method would not be meaningful for risk transparency.

Reporting counterparties currently report the mark-to-market value and currency, as well as the date and time of the valuation. These fields align with requirements from other global regulators and should be adequate to assess market exposures.

Swap Dealers and Major Swap Participants[8]

We believe the valuation data reported by the DCO pursuant to section 45.4(b)(2)(i) provides sufficient and accurate data for understanding the swap valuation. The DCO's valuations are based on an average of the valuations submitted to the clearing houses by its members, so reflect a fair industry view. Further, the DCO's valuations drive the collateral requirements for cleared swaps and would be the only valuation used in the event of a default. The addition of a daily valuation by the SD or MSP does not provide a material benefit.

SDs and MSPs should not be required by the swap data reporting rules to provide their own valuation data for cleared swaps. Relief for the reporting requirement currently exists under CFTC Letters 12-55 and 13-34. In its approval of CME Rule 1001, the Commission set out its interpretation of the single-SDR rule, Rule 45.10, to the effect that the rule applies separately to the original swap and to the swaps resulting from novation to the clearinghouse, each of which is a distinct "given swap" under the rule.[9] As a result, if valuation reporting of cleared swaps is required after the expiration of current no-action relief, SD/MSPs could be required to establish connectivity to multiple SDRs, as each DCO could designate a different SDR. The costs of building such connectivity, which would serve no other purpose than to enable valuation reporting by SD/MSPs to DCO-selected SDRs, is not justified by the purported benefits of SD/MSP valuation reporting of cleared swaps. As its justification for requiring SD/MSP valuation data reporting of cleared swaps, the Commission states: "Because prudential regulators have informed the Commission that counterparty valuations are useful for systemic risk monitoring even where valuations differ, the final rule requires SD and MSP reporting counterparties to report the daily mark for each of their swaps, on a daily basis."[10] DCOs' valuations of outstanding swap exposures to each of their counterparties[11] are already available to the Commission in the DCO's SDR reports. It is not apparent, nor has the Commission explained, why SD/MSP valuations would have any greater utility to the Commission for risk monitoring purposes than these DCO valuations.

Any potential benefits that could be gained from an analysis of divergences between DCO and SD/MSP valuations will be attenuated at best and insufficient to justify the costs. The Commission already has oversight of the DCO settlement price determination process. If differences emerged between the DCO's valuations and those of individual SD/MSPs, understanding the causes and significance of the differences would involve the Commission in a highly technical analysis of

[8] This subsection responds to Question 8(a).

[9] Commission Statement approving request from Chicago Mercantile Exchange (CME) to adopt new "Chapter 10 -Regulatory Reporting of Swap Data" and new "Rule 1001 - Regulatory Reporting of Swap Data" of *CME's Rulebook* (March 6, 2013): 6. http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/statementofthecommission.pdf

[10] 77 FR at 2154.

[11] It appears that the DCO's "counterparty" for Part 45 reporting purposes is the entity that entered into the original swap, rather than that entity's clearing member. "Swap Data Repositories – Access to SDR Data by Market Participants," 79 FR 16672, 16674 n.14 (March 26, 2014).

valuation methodologies, assumptions, and the purposes for which valuations are prepared. The relevance of such an analysis for the effective monitoring of systemic risk is difficult to discern.

Other regulators, including those in Europe and in Canada, have assigned sole responsibility for reporting valuation for cleared swaps to the clearing agency. So a similar approach by the CFTC would be in line with the global perspective. Further, revocation of §45.4(b)(2)(ii) would eliminate the significant expense and difficulty of multiple parties reporting all data for a cleared swap to the same SDR pursuant to §45.10. The cost savings for SDs and MSPs who may otherwise be expected to build to additional SDRs solely for the purpose of reporting an additional set of valuation data greatly outweighs any perceived benefit of receiving such additional data.

On February 12, 2014, ISDA requested[12] the Commission extend the relief currently granted under NAL 13-34, and previously under 12-55, to SDs and MSPs from the valuation data reporting requirements for cleared swaps under §45.4(b)(2)(ii) until January 31, 2015 in order to allow additional time for the Commission to resolve current ambiguities on the choice of SDR for cleared swaps and implement a permanent solution. We believe that part of the solution is to revoke the requirement under 45.4(b)(2)(ii), but in the meantime, we request that the Commission work quickly to extend the relief currently available under NAL 13-34[19] in order to eliminate concerns related to expiration of the relief and resumption of the corresponding valuation data requirements.

iii. Events in the Life of a Swap (§ 45.4)

9. Please: (i) identify and (ii) describe the complete range of events that can occur in the life of a swap. Please also address whether, and if so how, reporting entities should report each such event.

a. How should events in the life of a swap be represented in SDR data? For example, should an "event type" identifier, as well as a description of the specific event, be required?

Swap events

A rich representation of trade events is already supported by SDRs and reported by reporting counterparties, including indication of a new trade, an amendment, a termination resulting from compression, a corporate action, a full or partial exercise, a full or partial novation, and a full or partial termination. [13]

We believe that the current set of events is sufficient to cover reporting of all substantive swap events. These events have industry standard definitions that should not be described on a swap by swap basis, as doing so would be redundant. Any attempt to expand the list of events or make them more granular would result in more data volume that might lead to less clarity rather than more and may be onerous and costly for some market participants to implement.

[12] See Appendix, "Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Valuation Data Reporting for Cleared Swaps (Part 45.4(b)(2)(ii))," (February 12, 2014).

[13] ISDA, "Event Table," *Unique Swap Identifier (USI): An Overview Document* (November 18, 2013): 15 http://www2.isda.org/attachment/NjE0MQ==/ISDA%20USI%20Overview%20Paper%20updated%202013%20Nov%2018%20v8%20clean.pdf

The Commission should work with SDRs to determine the best method to obtain event specific data, as needed, and clarify the manner in which the Commission will use such data so that it can be made available in a useful format.

10. ***Can swap data reporting be enhanced so that the current state of a swap in an SDR (e.g., open, cancelled, terminated, or reached maturity) can be determined more efficiently and, if so, how?***
    b. ***Should reporting entities and/or SDRs be required to take any actions upon the termination or maturity of a swap so that the swap's status is readily ascertainable and, if so what should those requirements be?***
    c. ***Should swaps that are executed on or pursuant to the rules of a DCM or SEF, but which are not accepted for clearing and are therefore void ab initio, continue to be reported to and identified in SDR data? Why or why not? If so, how?***
        i. ***Should the swap data reporting rules be enhanced or further clarified to address void ab initio swaps?***

Swap status[14]

Reporting entities report the maturity date of swaps and the SDR automatically removes matured swaps from the live data set. Terminations of swaps are also reported as part of continuation data. If the Commission requires additional clarity with respect to the status of matured or terminated swaps, such information should be obtained from the SDR.

Void *ab initio* swaps[15]

Void *ab initio* swaps ("VAI") should not be subject to a reporting requirement, as it is both contrary to the premise of "void *ab initio*" and also would operationally complicate matters as many market participants have built their reporting logic to only capture and persist trades that come into existence and not voided or hypothetical trades.

We recognize, however, that there are instances where a SEF may report a trade before it is determined to be VAI, particularly with respect to real time reporting. In those instances, we agree it would be necessary for the SEF to "cancel and correct" any existing report to show that such trade is now VAI.

We note that End of Day reporting or generally a longer time frame between execution and reporting to the SDR would avoid the initial reporting to the SDR and eliminate the need to correct that reporting (the real time reporting would still happen). Unless there is specific information the Commission is seeking to derive from the reporting and subsequent cancellation of a VAI trade, the elimination of these flows from the SDR reporting would improve the overall data quality.

We further note that the relief for resubmission of VAI trades that were voided for operational issues under CFTC letter 13-66 requires linking reporting of the "new trade on old terms" to the old trade. We recommend a modification of that condition in that relief letter to only require linking to

[14] This subsection responds to Question 10(b).
[15] This subsection responds to Question 10(c).

the extent the reporting on the VAI trade actually was done, and that linking not be required if no reporting on the VAI trade was done, or only partial linking if only partial reporting on the VAI trade was done (e.g., only real time reporting but not SDR reporting).

11. ***Should the Commission require periodic reconciliation between the data sets held by SDRs and those held by reporting entities?***

Periodic reconciliation should not be required between the data held by SDRs and reporting entities. Reporting entities already have internal processes in place to monitor their compliance with the Part 45 reporting rules, and should be allowed to follow those established policies and procedures. Moreover, reporting counterparties perform reconciliation of material terms in accordance with Commission's Part 23 regulations or similar rules of other jurisdictions. Any errors or omissions that are revealed as a result of that process are subsequently corrected in SDR reporting.

iv. Change in Status of Reporting Counterparty (§ 45.8)

12. ***Commission regulation 45.8 establishes a process for determining which counterparty to a swap shall be the reporting counterparty. Taking into account statutory requirements, including the reporting hierarchy in CEA section 4r(a)(3),29 what challenges arise upon the occurrence of a change in a reporting counterparty's status, such as a change in the counterparty's registration status? In such circumstances, what regulatory approach best promotes uninterrupted and accurate reporting to an SDR?***

As fully detailed in the Request for No-Action Relief and Interpretive Guidance pertaining to changes in registration submitted to the Division of Market Oversight by ISDA on April 4, 2014[16], changes or limitations to a registered person's status as a Swap Dealer ("SD") or Major Swap Participant ("MSP"), in particular deregistration and limited purpose designation, impact the operational ability of its counterparties to comply with their obligations as SDs or MSPs, including, but not limited to, Part 43 and Part 45 regulations, external business conduct, clearing, and confirmation, portfolio reconciliation and portfolio compression requirements. The current process for granting such changes to registration does not consider these implications in a manner that allows for a consistent and coordinated approach to changes or transfer of obligations, which imposes compliance challenges and, with respect to the reporting, may impact the quality of reported data and the ability for parties to comply with their obligations.

In order to promote uninterrupted and accurate reporting to an SDR, the Commission should address the following areas (i) adequate notification (ii) technological requirements imposed on market participants and (iii) clarification of reporting responsibility.

[16] See Appendix, "Request for Division of Market Oversight Staff No-Action Letter and Interpretive Letter Pursuant to CFTC Regulation 140.99: Impact of Swap Dealer and Major Swap Participant Registration Status Changes on Counterparties' Obligations under Reporting Requirements," (April 4, 2014).

Notification

The lack of public transparency with respect to the Commission's intention to approve a deregistration or limited designation does not allow time for market participants to prepare and coordinate the necessary static data and/or technological changes to accurately determine reporting responsibility in accordance with the relevant effective date.

In order to allow time to operationally facilitate the transition, we propose that the Commission issue a publicly available notice with respect to its decision to approve an application for deregistration a minimum of 30 days prior to the effective date of such deregistration and 60 days prior for a limited designation, especially in the event the conditions are unprecedented. Such notice will allow reporting counterparties to assess the impact and plan for any requisite technological changes and static data updates. Despite advance notice, in some cases this suggested notification period may be insufficient depending on the difficulty of any technological changes, as further described below.

Technological requirements

In order to accurately determine the reporting counterparty to a swap, the counterparties to the SD or MSP which has been deregistered or granted limited designation may be required to make significant technological changes to their reporting infrastructure and their static data mechanisms. Limited designations are of particular concern since they may be granted at a business unit, asset class, desk or activity level. The party which is granted such limited designation has prepared to make such a distinction, but all of its counterparties may not be equally privy to the trade specific conditions that may determine whether or a not a swap falls within the scope of the limited designation.

We ask that the Commission strongly consider the technological difficulty imposed on other market participants when determining the conditions for a limited designation, reducing the complexity of such conditions to simplify any corresponding technological changes in order to mitigate the potential for errors or inconsistencies in reporting counterparty determination that impact data quality.

Depending on the difficulty of any requisite technological changes, market participants may need longer than the recommended 60 day notice period to prepare for a limited designation. We ask that the Commission seek input from reporting counterparties via ISDA and other trade organizations in order to proactively issue any necessary no action relief to facilitate a coordinated transition.

Reporting responsibility

The Part 45 rules do not specifically address how reporting counterparty responsibilities are impacted by a change in registration. We assume a change in the status of a SD or MSP impacts determination of the reporting counterparty on a going-forward basis from the effective date of the change for new swaps or swaps subject to a post-trade event that changes the party(ies) to the swap (e.g. a novation.), but explicit guidance in the rules would promote consistency. Based on the limited designations and deregistration approved by the Commission to date, it is apparent that the industry requires clarification with respect to the which party holds the reporting counterparty

obligation for (i) swaps entered into during any period of no-action relief granted in advance of the approval and effectiveness of the change in registration status and (ii) swaps entered into prior to the effective date of the change in registration for which continuation data reporting obligations remain. A clear, consistent approach will allow reporting parties to prepare appropriately and preserve the continuity and accuracy of reported data.

We note for your consideration that a change to the reporting counterparty for a previously reported swap poses operational challenges for both reporting counterparties and market infrastructure providers who have built logic that maintains a reporting counterparty determination for the life of the USI. Consequently, an alternate approach will require technological changes and/or manual overrides.

Also, reporting counterparties have no publicly available means of knowing whether a party that has been granted a limited designation has complied and continues to comply with the conditions, if any, set forth in the relevant Limited Designation Order. Therefore, we propose that the Part 45 rules acknowledge that absent a notification by the Commission, reporting counterparties may assume that the limited designation is in effect and applies, as appropriate, to their mutual swaps. In addition, a reporting counterparty may reasonably rely on representations from the limited designation entity regarding its SD or MSP status with respect to a particular swap.

C. Transaction Types, Entities, and Workflows: Can the Swap Data Reporting Rules be Clarified or Enhanced to Better Accommodate Certain Transactions and Workflows Present in the Swaps Market?

13. Please describe all data transmission processes arising from the execution, confirmation, clearing, and termination of a swap, both cleared and uncleared. Please include in your response any processes arising from all relevant platforms and methods of execution.

<u>Data transmission processes</u>

ISDA has done work to capture the idealized models for specific flows and processes through both our FpML Business Process Architecture[17] and Unique Trade Identifiers[18] initiatives. However, it is extremely difficult to document all possible flows as there are seemingly endless variations based on asset class, a variety of middleware and execution platforms and various levels of electronification. The aim in asking this question is not clear, but we are happy to work with the Commission to provide insight on specific processes or flows for which it is seeking to better understand the implications with respect to Part 45.

[17] http://www.fpml.org/documents/FpML-SDR-reporting-CFTC.pdf

[18] ISDA, *Unique Trade Identifier (UTI): Generation, Communication and Matching* (December 10, 2013) http://www2.isda.org/attachment/NjI3MQ==/2013%20Dec%2010%20UTI%20Workflow%20v8.7.8b%20clean.pdf

14. Please identify any Commission rules outside of part 45 that impact swap data reporting pursuant to part 45. How do such other rules impact part 45 reporting?

<u>Rules that impact Part 45 reporting</u>

The Part 43 rules impact swap data reporting pursuant to Part 45 in a couple of ways. First, and as more fully described in our response to Question 28, certain reportable fields (e.g. execution timestamp, execution venue and block trade indicator) apply to both Part 43 and Part 45, but each section requires a different approach to reporting values based on the standard for these rules (i.e. one is event based and one is swap based). Though the rules are not clear on this distinction, the value for a Part 43 report is based on the price-forming event that has been reported, while reporting counterparties believe the Commission expects the value pertaining to the original swap execution to be reported for Part 45 and persist through the life of the swap without regard to how subsequent post-trade events have been treated. This means a single report cannot be sent in all cases to meet Part 43 and Part 45 requirements, but messaging has not been designed to provide separate values for each purpose, therefore this can only be achieved if the SDR has mechanisms in place to retain and persist the reported value for the original swap for Part 45. Clarity from the Commission is needed to ensure consistent treatment for these fields and inform any additional technological changes that may be required. Depending on the requisite changes, a suitable period for development, testing, implementation and transition would be necessary.

Also pertaining to Part 43 as well as Part 37, ISDA requested no-action relief from Commission staff on September 23, 2013 and April 3, 2014[19] with respect to the order aggregation prohibition on Permitted Transactions under §43.6(h)(6). Due to condition (i) on page 4[20] of NAL 13-48 (the "Condition"), beginning on the October 2, 2013 compliance date for Part 37, 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 SEF or DCM in accordance with Part 37, but which is not executed on or pursuant to the rules of a SEF or DCM. Reporting counterparties are currently complying with the Condition with respect to Required Transactions[21]; 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) lack of 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. We ask that the Commission consider ISDA's latest request on this matter and ideally, provide permanent relief from the order aggregation prohibition on Permitted Transactions, and otherwise address the sourcing and connectivity recommendations in our request.

With respect to addressing how the order aggregation prohibition for Permitted Transactions impacts Part 45 SDR reporting, 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, notional caps and masking for other commodity swaps. The

---

[19] See Appendix, "Revised Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Order Aggregation of Certain Permitted Transactions," (April 3, 2014)

[20] 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.

[21] 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.

task of determining whether a swap is a Permitted Transaction offered by any SEF or DCM 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 counterparties must have robust logic to report a block trade indicator value of "No" when sending the swap to an SDR instead of being able to rely on the ancillary service. 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[22], a manual update would be required each time a new Permitted Transaction is certified or approved. Such approach is resource intensive and prone to errors or inconsistencies, especially in cases where the product descriptions are not subject to a consistent standard. As a result, the value may be reported incorrectly for Part 43 and/or Part 45 reporting, and with respect to Part 43, the block treatment for publicly disseminated swaps may not be applied correctly despite the best intentions of the reporting counterparty. Eliminating this prohibition will resolve the operational difficulties and resulting impact to data quality, and better serve the needs of the buy-side and end-user community that rely on the anonymity of block treatment to preserve the quality and confidentiality of their swap activity. In the meantime, and as conveyed in our answer to Question 28, we believe that Appendix 1 to Part 45 should be amended to remove the requirement to report the Block Trade Indicator since this value is not meaningful for Part 45 as it is determined solely and specifically with respect to a particular publicly reportable event and determines how that event is treated for purposes of public dissemination.

15. ***What are the challenges presented to reporting entities and other submitters of data when transmitting large data submissions to an SDR? Please include the submission methods utilized and the technological and timing challenges presented.***

The occasions for which reporting entities need to submit large quantities of data are infrequent, but when they occur they can be challenging since SDRs are not designed to regularly accommodate for such capacity of reporting. Therefore data may not be consumed in a timely fashion and a disparity could exist between the reporting timestamp known by the reporting entity and the timestamp provided by the SDR. Allowing a phase-in period over which reporting counterparties can submit large volumes of swaps is essential to preserving the data quality. The extended period of time provided by the Commission for Part 46 reporting, for instance, was crucial to scheduling an organized backload amongst reporting entities and the SDRs. A similar period for compliance should be proactively provided by the Commission in advance of any other effective dates in the future that would require a backloading effort. The potential expiration of the relief under NAL 13-75 for reporting cross-border swaps on December 1, 2014 is an important milestone where industry coordination is essential to ensure complete and accurate reporting of swaps that may become reportable as a result of the expiration of this relief.

---

[22] http://sirt.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationProducts

i. Bespoke Transactions (§ 45.3, Appendix 1 to Part 45, and NALs 13-35, and 12-39)

16. ***Market participants have indicated that they face challenges electronically representing all required data elements for swap transactions because those elements have not yet been incorporated into standard industry representations (e.g., FpML, FIXML). In particular, various market participants have indicated that these challenges impact reporting to SDRs. What is the most efficient methodology or process to standardize the data elements of a bespoke, exotic or complex swap, to ensure that all required creation data is electronically represented when reported to the SDR? Do these challenges vary depending on the asset class? If so, how?***

FpML version 5.5, which was released in May 2013, contains enhancements in the generic product structure – used for the reporting of complex and bespoke transactions[23] - that allow for the representation of all trade details explicitly required under Parts 43 and 45. These enhancements have subsequently been implemented by market participants.

A proposal has been developed and discussed with CFTC staff to report the PET field "any other terms of the swap matched or affirmed by the counterparties in verifying the swap", via a searchable document solution. The development of an implementation plan for this solution is pending confirmation by the Commission that this is an appropriate solution. While the proposed solution could be put in place if required, we strongly believe that this particular PET field actually represents confirmation data. It would be better from a cost/benefit point of view for the Commission to rely upon the confirmation data of the trade to get access to any other economic terms outside of the listed PET data fields. The costs and technologically intensive process required to implement this proposed solution is not justified by any clear benefit to the Commission in receiving this data within the timeframe for PET reporting rather than with the confirmation data. Please see our response to Q28 for a fuller discussion of this PET data field.

As we indicated in our meeting with CFTC staff in February 2013, bespoke and complex transactions represent a limited part of the derivatives landscape. We estimated these products on average to represent less than 5% of the notional across asset classes. Bespoke and complex transactions are more predominant in the equity derivatives and commodity derivative asset classes. Work is ongoing to improve the level of standardization in those asset classes. We would welcome any guidance from the CFTC on standardization priorities based on an analysis of the data currently reported to the SDRs.

[23] "Bespoke or complex swaps" are those swaps 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; and (e) not represented in Financial products Markup Language ("FpML"). http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-39.pdf

ii. Allocations and Compressions (§§ 45.3, 45.4, NALs 13-01 and 12-50)

17. *Please describe any challenges associated with the reporting of allocations. How should allocation data elements (i.e., indications of whether swaps will be allocated, as well as the identities of entities to which portions of executed swaps are allocated) be reported to SDRs?*

Allocations

In response to a request from ISDA[24], Commission staff provided relief under NAL 12-50 to agents which gave them additional time to provide the counterparties for the post-allocation swaps to the reporting counterparty in cases where agent and the reporting counterparty are located in different time zones. This relief expired on June 30, 2013, but the issue remains.

Reporting counterparties are responsible for reporting allocated swaps as soon as technologically practicable after receipt of the identity of the counterparties. The agent is responsible for reporting the identities of the counterparties to the allocated swaps within eight business hours based on the location of the *reporting counterparty*. In cases where the parties are in different time zones, this may not be achievable due to differences in working hours and business calendars. Even in cases where the parties are in closer proximity, the rule is unclear how to calculate the eight business hours since it does not define when a business day begins or ends for the purpose of calculating consecutive business hours. As a result, it is nearly impossible for both agents and reporting counterparties to consistently track compliance with the requirements in §45.3(e)(ii). Further, compliance with the post-allocation requirement is contingent on the compliance of a non-reporting counterparty that may not be subject to the Commission's oversight.

Since the pre-allocation swap has already been reported for both Part 43 and Part 45 purposes, the swap execution has been substantively reported. Additional information provided by the reporting of the post-allocation swaps is limited to the notional breakdown and specified funds. Therefore the reporting counterparty's gross exposure doesn't change, only their counterparty-specific exposure. Allowing additional time for the reporting of post-allocation swaps which takes into consideration the respective locations of the counterparties means the Commission is likely to receive more accurate data from the initial report, and both agents and reporting counterparties will be more reasonably capable of meeting their respective obligations. This is another requirement for which we contend that accuracy is more important than the speed of reporting.

We propose that §45.3(e)(ii)(A) be amended to clarify that the agent's timeframe to provide the counterparties resulting from allocation is based on eight business hours after execution *in its own location*. We also propose that the term "business hours" in §45.1 be amended to "*Business hours* means consecutive hours during one or more consecutive business days calculated based on the hours of 9 a.m. to 5 p.m. on any applicable business day(s)." We note that §1.35[25] of the Commission's rules defines a contradictory timing requirement for account managers to provide allocation information "no later than the end of the calendar day that the swap was executed." We suggest that either §1.35 be amended to remove the discrepant language or revised in accordance with our suggestions for §45.3(e)(ii)(A).

---

[24] See Appendix, "Request for No-Action Relief - Part 45: Swap Allocation Report Timing," (December 10, 2012).
[25] 77 FR at 21306

Finally, with respect to the reporting counterparty's responsibility to report post-allocation swaps as soon as technologically practicable ("ASATP") after receipt of the identity of the counterparties, we note that reporting counterparties may receive such information during non-business hours, especially in cases where the agent is located in another time zone. The reporting counterparty books the allocations in its own business hours and reports ASATP thereafter. We propose that §45.3(e)(ii)(B) be amended to acknowledge that the reporting counterparty's obligation to report ASATP is measured in its own location based on the revised definition of business hours proposed in the preceding paragraph.

18. ***How should swaps resulting from compression exercises and risk mitigation services be reported to, and identified in, an SDR so that the Commission is able to effectively review these exercises and determine what swaps result from a specific exercise***
    a. ***Please describe any technological, operational, or logistical challenges associated with reporting of such swap transactions.***

<u>Compressions</u>

Due to the volume of trades that may be involved in a compression cycle, it is not possible to link all the original swaps to the resulting new swap(s) via USI due to systematic limitations on the part of both reporting entities and SDRs. However, an Event Processing ID is routinely used when compression cycles are conducted via a compression service (e.g. triResolve) to connect swaps that have been subject to the same compression event, as well as some other post-trade processes. All terminated trades and any replacement trades in a termination cycle share the same Event Processing ID. The ID is printed on the termination result files that all participants consume after a termination cycle, and is forwarded to the SDR after each termination cycle.

iii. <u>Prime Brokerage (NAL 12-53)</u>

19. ***Please describe any challenges associated with the reporting of prime brokerage swap transactions (e.g., challenges related to transactions executed either bilaterally or on a platform and/or involving different asset classes)?***

Prime brokerage is a credit intermediation arrangement whereby, in its simplest form, a counterparty commits to the economic terms of a transaction with an "executing dealer", with whom the counterparty need not have a credit relationship, and as a result of such commitment two "mirror image" swaps are entered into. One swap (the "<u>PB-ED swap</u>") is between the executing dealer and the counterparty's "prime broker", and is generally on the terms committed to between the counterparty and the executing dealer. The other swap (the "<u>PB-counterparty swap</u>") is between the counterparty and its prime broker, and is on substantially identical terms to the PB-ED swap, subject to differences that may reflect the prime broker's fee or other customized terms agreed to between the counterparty and its prime broker. The legally binding effectiveness of the mirror image transactions against the prime broker is generally conditioned on the satisfaction of certain pre-agreed terms, such as the transactions not causing the breach of specified exposure and settlement limits, a commitment to terms actually having been made between the counterparty and the executing dealer, and the receipt by the prime broker of matching trade notifications from each of the executing dealer and the counterparty. If the mirror

transactions conform to the pre-agreed terms, the prime broker generally must accept and perform the role of credit intermediary for the transactions. Variants of such arrangements exist, including ones that interpose an additional prime broker between the executing dealer and the counterparty's prime broker.

Currently, Commission regulations provide that the timeframe for reporting of swap transactions begins to run upon execution of the transaction.[26] Although Part 45 definitions do not contain a definition of the term "execution",[27] the related real-time reporting provisions of Part 43 define "execution" to mean an agreement by the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap that legally binds the parties to such swap terms under applicable law.[28] The definition further states that execution occurs simultaneously with or immediately following the affirmation of the swap,[29] but affirmation does not necessarily constitute execution.[30]

Neither Part 43 nor Part 45 contemplate prime brokerage execution methodology, and literal application of their provisions would result in reporting of the mirror image transactions in a manner that fails to portray the economic realities of the transactions. The commitment to terms between the counterparty and the executing dealer is a single pricing event, yet, upon the prime broker's 'acceptance' of those terms, two separate (but mirror image) transactions are established. The reporting result under Parts 43 and 45 as written is problematic:

- because the definition of 'execution' focuses on legally binding obligations of the counterparties to a swap, no reports would be made at the time of the relevant pricing event (i.e., the time at which the counterparty and the executing dealer commit to the economic terms and assume the market risk of the transaction);[31] and

- duplicate Part 43 reporting of the single price-forming event would take place belatedly at the time of 'acceptance' by the prime broker.

In response to these problems, a practical and effective prime brokerage transaction reporting methodology was made possible by CFTC No-Action Letter No. 12-53 ("Letter 12-53"), which established a work flow for reporting the pair of linked, mirror image transactions that are generated by prime brokerage arrangements. Letter 12-53's reporting methodology (which was acknowledged in the letter not to be the exclusive acceptable means of reporting prime brokerage transactions) assigns responsibility for Part 45 reporting of the ED-PB swap to the executing dealer, while assigning responsibility for Part 45 reporting of the PB-counterparty swap to the prime broker, an allocation that realistically reflects when the respective parties become aware of required reporting information and what information is available to each within this work flow. The relief under Letter 12-53 excused Part 43 reporting of the PB-counterparty swap by the prime broker and made clear that the prime broker could treat the time of "acceptance" as the time of execution for purposes of Part 45 reporting. The conditions of Letter 12-53 included that both the

---

[26] Regulations 45.3 and 43.3.
[27] Regulation 45.1.
[28] Regulation 43.2 (definition of "execution").
[29] Id.
[30] Regulation 43.2 (definition of "affirmation").
[31] We note that in some variants of prime brokerage methodology, execution might be deemed to occur upon the commitment to economic terms.

executing dealer and the prime broker be registered swap dealers and that the prime broker and the executing dealer had entered into an agreement to report in accordance with the letter. The relief provided by Letter 12-53 expired on June 30, 2013.

Subject to concerns regarding extraterritorial implications that we discuss below, ISDA submits that the reporting workflows of Letter 12-53 should be established in Commission rules as the default methodology for reporting of prime brokerage transactions involving PB's and ED's that are registered swap dealers. The Part 43 and Part 45 reporting responsibilities set out in Letter 12-53 should be available without the need for a written agreement among the swap dealers, but swap dealers should have the right to agree in writing on alternative assignments of responsibility for a given swap. Furthermore, the reporting rules should expressly state that a prime broker may treat the time of acceptance as the time of execution for reporting purposes, and the executing dealer may treat the time of commitment to economic terms as the time of execution. Consistent with our proposed treatment of Part 43 reporting, the Part 43 rules should expressly recognize that the PB-counterparty swap serves no price discovery function by excluding such swaps from the definition of "publicly reportable swap transaction". The pricing of the PB-counterparty swap is determined by the earlier commitment to economic terms reflected in the ED-PB swap, and the prime broker assumes no net market risk upon acceptance of the mirror image swap transactions.

In addition, Commission rulemaking should provide an operationally feasible, prospectively applied means of linking the USIs of the PB-ED swap and the PB-counterparty swap that is consistent with automated processing of Part 45 reports. (The Part 43 and Part 45 rules, which took no notice of prime brokerage, do not suggest, or offer a means of, such linkage.) This mechanism should be designed in consultation with prime brokerage market participants and should be made part of the pre-determined workflows for Part 45 reporting. Failure to integrate the provision of the USI into reporting workflows will result in highly manual (i.e., time and labor intensive) processes, which are neither cost-justified nor conducive to orderly and accurate reporting and may also result in untimely reporting of the USI linkage.

Neither the Commission nor its staff have addressed the interplay between the allocation of reporting responsibilities in prime brokerage and the Commission's criteria for the cross-border application of the Part 43 and Part 45 reporting obligations. The Commission should attempt to clarify the responsibilities of the parties (including with respect to USIs) under the various cross-border transactional patterns encountered in prime brokerage, such as when execution occurs on a non-U.S. trading platform for give-up to a prime broker that is a U.S. person, or when the counterparty is the only U.S. person that is party to the prime brokerage arrangement.[32]

[32] Several of these patterns raise additional issues with respect to USI linkage. There is a potential for inconsistent or duplicative identifiers if one of the mirror image transactions is reported under Part 45 using a USI identifier, but the corresponding mirror transaction is subject to EMIR reporting with a UTI identifier, or if a single transaction is subject to both reporting regimes. As part of the Commission's stated efforts to obtain improved global cooperation and consistency, it should endeavor to obtain ESMA's acceptance of the more detailed USI in place of UTI when there are linked transactions and work flows in a prime brokerage arrangement.

v. Swaps Executed or Cleared on or by FBOTs, No-Action CCPs, QMTFs, and Other Non-Registrants/Exempt Entities (§§ 45.3, 45.4, 45.5, and NALs 14-27, 14-16, 14-07, 13-73, 13-43, 13-33, 12-63, and 12-56)

21. Are there instances in which requirements of CFTC regulations or reliance on exemptive or staff no-action relief result in more than one party reporting data to an SDR regarding a particular swap? If so, how should such duplicative reporting be addressed? What should be the role of the reporting entities, as well as other submitters of data, and SDRs in identifying and deleting duplicative reports? What solutions should be implemented to prevent such duplicative reporting?

Non-registrant reporting

Assignment of reporting responsibility to non-registrants should be accomplished via Commission rulemaking rather than via No Action Letters. By issuance of the above referenced NALs and other similar letters, the Commission has created new reporting requirements for non-registered parties that are not specified in the Part 43 or Part 45 rules. This in turn has a created an obligation for reporting counterparties to implement technological changes to their reporting infrastructures that are not otherwise prescribed and that are being dictated in an indirect manner via relief primarily issued for the benefit of parties exempted from registration. Reporting parties may require more time than is allotted by the relevant NAL to implement mechanisms to suppress their Part 43 and Part 45 creation data reporting in order to prevent duplicative reporting.

SDR validations that accept data reported by a No-Action CCP over that of data reported by the reporting counterparty for the same USI could mitigate duplication for cleared swaps in cases where the parties use the same SDR. Similar validations are not available and cannot be implemented for QMTFs since reporting counterparties retain the responsibility for reporting continuation data for uncleared swaps. Therefore, until reporting parties are able to make the requisite changes, data quality may be compromised.

To solve this issue, assignment of reporting responsibility to non-registrants should be accomplished via Commission rulemaking rather than via No Action Letters, and a suitable time period should be agreed for all market participants to make technological changes and transition to the new reporting structures. In the meantime, reporting counterparties should be granted relief in the event they are not able to suppress their reporting in accordance with the timeline provided in any relevant no action letter granted to a QMTF or No-Action CCP.

22. In addition to those entities enumerated in Commission regulation 45.5, should other entities involved in swap transactions also be permitted to create unique swap identifiers ("USIs")? If so, please describe those situations and the particular rationale for any such expansion of the USI-creation authority.

Creation of USIs by non-registrants

In NAL 14-46, the Commission has introduced the Acknowledgment ID ("AID") which is the equivalent of a USI Namespace issued to QMTFs, No-Action CCPs and other parties that have been exempted from registration but have reporting obligations under Part 45, including the creation of a USI. There is an equally compelling argument for the Commission to issue a USI Namespace or AID to other market participants that are uniquely situated to create and transmit USIs on behalf of the parties.

Electronic communication networks ("ECNs") are used widely in the foreign exchange asset class, and to a certain extent in the other commodities asset class, to execute swaps. The ECNs are not required to register as SEFs due to the U.S. Treasury exemption for FX forwards and swaps[33] but the transactions are still subject to SDR reporting. The market infrastructure for these products dictates full confirmation matching to exchange USI created by the reporting counterparty; therefore in order to facilitate timely reporting and a mutually recognized USI, the ECN is the logical and appropriate party to generate the USI for the swap.

This approach aligns with the first touch principle for efficient USI creation and communication and is increasingly relevant from a global reporting perspective since under other regimes there is not a similar constraint as to who may create the UTI. For the sake of efficiency, accuracy and timeliness, the UTI is created by a central platform whenever possible. The inability for such platforms to create a UTI that aligns with the USI requirements results in the creation of separate UTIs for global reporting, rather than the use of a single global trade identifier based on the USI requirements. In addition, use of multiple identifiers in global reporting for a single transaction is not conducive to global data aggregation in accordance with the efforts of the Financial Stability Board.

We also propose that a non-SD/MSP reporting counterparty which is affiliated with an SD or MSP should be allowed to generate a USI using the USI namespace of its affiliated SD or MSP rather than being required to accept a USI from the SDR. The extra step of consuming the USI from the SDR is technologically challenging for some parties and impacts the ability of the reporting counterparty to report timely in other global jurisdictions using the USI as the trade identifier. Please see our response to Question 53 for further feedback on USIs.

[33] U.S. Treasury, "Final Determination" to exempt FX swaps and forwards from most requirement of the Dodd-Frank Act, *Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act,* (November, 2012): 69704 http://www.gpo.gov/fdsys/pkg/FR-2012-11-20/pdf/2012-28319.pdf

23. How should data reported to SDRs identify trading venues such as SEFs, DCMs, QMTFs, FBOTs, and any other venue?

Identification of trading venues

Trading venues should be identified in reporting by use of a Legal Entity Identifier ("LEI"), where available.

vi. Inter-Affiliate Swaps (§§ 45.3, 45.4, 45.6, and NAL 13-09)

24. In order to understand affiliate relationships and the combined positions of an affiliated group of companies, should reporting counterparties report and identify (and SDRs maintain) information regarding inter-affiliate relationships? Should that reporting be separate from, or in addition to, Level 2 reference data set forth in Commission regulation 45.6? If so, how?

Inter-affiliate relationships are party level data, not swap level data, and so should not be required for reporting on a swap by swap basis except in cases where an exemption is being claimed based on this status (e.g. an exemption from the clearing mandate). If needed by global regulators to consider the exposure across an organization of affiliated entities, this information would be more efficient and appropriate to implement by means of a global static data approach rather than including this information in swap by swap reporting.

The Global Legal Entity Identifier System provides for affiliate relationships as part of its level 2 data. The Financial Stability Board ("FSB") recommendations report[34] asserts that "...it will be important to expand and add to [phase 1 set of reference data], as additional reference information, for example, on corporate ownership and relationships is essential in order to aggregate risks and prepare consolidated exposure statements." The FSB continues on to acknowledge that "adding information on ownership and corporate hierarchies is essential to be able to undertake risk aggregation which is a key objective for the global LEI system." "...The aim is to have sufficient data to construct a map of the financial network and the complex groups of entities which participate in them."

We believe this would be a better mechanism for establishing a database of party affiliations since as a practical matter it is not possible to reflect all relevant affiliations repeatedly on a swap by swap basis. Understanding the combined positions of an affiliated group can only be done accurately at a global level. It is also essential to the Commission's efforts to promote global data aggregation and risk oversight that all global regulators are utilizing the same source of party affiliations.

[34] Financial Stability Board, "Recommendation 11- Standards for the LEI System" and "Recommendation 12 - LEI Reference Data on Ownership," *A Global Legal Entity Identifier for Financial Markets* (June 2012): 37-39, http://www.leiroc.org/publications/gls/roc_20120608.pdf

vii. Reliance on No-Action Relief in General

25. ***To the extent that a reporting entity is, in reliance on effective no-action relief issued by Commission staff, reporting to an SDR in a time and/or manner that does not fully comply with the swap data reporting rules (e.g., outside reporting rules' timeframe, required data elements missing), how can the reporting entity most effectively indicate its reliance upon such no-action relief for each affected data element.***

    a. ***Are there any other challenges associated with the reliance on staff no-action relief with respect to compliance with part 45? If so, please describe them and explain how the swap data reporting rules should address those challenges***

The use of staff letters to provide interpretative and no-action relief has proliferated greatly over the past several years. In most instances such relief provided the market with regulatory clarity and/or time to develop the systems and processes to facilitate compliance with the various reporting rules. ISDA greatly appreciates the efforts of CFTC staff to provide this relief. Ideally, proposed new regulatory requirements would be subject to a fulsome cost-benefit analysis which considers both the overall macro impact of the requirements as well as any related implementation and compliance costs. Absent such an analysis, staff letters often remain the best tool for remedying unintended consequences and providing market participants with additional time to comply with complex and costly new requirements. In addition, no-action relief remains a tool for addressing unforeseen or emerging issues related to compliance with CFTC rules. Going forward, the CFTC should revisit previously-granted no-action relief and determine whether more permanent relief is warranted to address these and other issues (e.g., clearing-created swaps, allocation timing, SD/MSP valuation data for cleared swap and data privacy). The CFTC should also be more cognizant of the time constraints and practical implementation challenges facing firms preparing for new regulatory effective dates and, where possible, provide no-action relief in advance of such effective dates that does not introduce complex conditions that require technological development. This approach will provide greater clarity to firms and assist in planning as it will allow them to focus resources on ultimate compliance and avoid the need to develop temporary or interim solutions. In no event should reporting entities be required to indicate as part of their Part 45 reporting that they are relying on relief for a particular swap or specific swap data elements. Such process would be extremely costly and difficult to implement. Since by its nature, the relief is temporary, such information will not add a justifiable benefit.

viii. Post-Priced Swaps (§§ 45.3 and 45.4)

26. ***Under the swap data reporting rules, are there any challenges presented by swaps for which the price, size, and/or other characteristics of the swap are determined by a hedging or agreed upon market observation period that may occur after the swap counterparties have agreed to the PET terms for a swap (including the pricing methodology)? If so, please describe those challenges.***

Swaps for which the price, size and/or other characteristics of the transaction are determined based upon subsequent hedging activity or an agreed upon market observation period are common transaction types, and are broadly used across equity, fixed income and commodities asset classes, and come in a variety of structures. We will refer to structures with these attributes as "post-priced

swaps." The primary challenge presented by such transactions is the information leakage which will result from the reporting of a post-priced swap before all material terms of the swap are finalized, in particular price and size, and the advantage which other market participants will gain due to this information leakage to the determinant of the swap customer.

By way of background, for swap transactions that are not post-priced, the SD and the customer will agree on all PET terms of the transaction, including price and size, at the point of execution. For post-priced swaps, the client will contact the SD and make a transaction request (either by phone or electronically) for a swap. The nature of the client's order will depend on their objectives and the market environment. The actual price and size of the transaction, if any, will be determined at some point later in the day as a result of the specified pricing methodology and availability of the swap dealer's hedge. Examples of these types of orders may include:

i. a "guaranteed" price (e.g., a market observable volume weighted average price or using an execution benchmark such as "VWAP" published on Bloomberg) with or without a set notional size,[35]
ii. an average price based on the swap dealer's hedge executions with or without a benchmark (e.g., "Target VWAP"),[36]
iii. executions subject to a price limit (e.g., Limit VWAP), or
iv. a combination of some or all of the above.[37]

With respect to size of a post-priced swap, while the size requested by the client initially may be the ultimate size of the transaction, the SD will, as a general matter, only agree to the size that it is able to hedge taking into account the specified pricing methodology. For example, if an early closure, trading halt or other market disruption event occurs that affects positions that would otherwise have been established to hedge a transaction, or if the pricing methodology specified by the client includes pricing conditions (e.g., Limit VWAP) that could not be met because market prices were not within the relevant parameters, the size of the transaction agreed to by the SD will equal the size the SD was able to hedge. If the SD could not establish any hedge, the transaction request will not result in a swap transaction.

Because of the use of the term "execution" under Part 43, the reporting rules could be interpreted as requiring the reporting of a post-priced swap before the price, size, and/or other characteristics of the swap are determined, which would effectively expose the investment strategy of market participants that rely on these products, such as institutional customers that use swaps to perform global asset allocation strategies, to the entire marketplace. This reporting would be the equivalent of publicly disclosing an "order" prior to its full and at times even partial execution. If such premature disclosure were required, certain other market participants likely would trade ahead of the client's order and thus negatively impact the price to the client. The effect of this would be to add a material transaction cost to trading a swap as compared to cash, listed options or futures. This higher cost would be imposed on long term investor types—money managers, insurance

[35] For a "guaranteed" benchmark transaction, the price will not be determined until that benchmark is known.
[36] For a "best efforts" pricing methodology, such as target VWAP, whether or not a target benchmark is specified in the transaction request, the price of the transaction will be a volume-weighted average price of the swap dealer's hedges.
[37] In both "best efforts" and "guarantee" pricing, transactions in the swap underlier, components of the swap underlier or related securities/futures by other market participants during the hedging period will impact the price of the client's transaction. If the client's transaction request is known to the market at the time it is made, other market participants, knowing that there will likely be demand or supply, as the case may be, in positions that would be established to hedge the transaction, will push the price against the interest of the client.

companies, pension plans, among others— and benefit market participants seeking to trade on such information leakage.[38]

ISDA believes that the higher cost to clients noted above would be avoided by clarifying that, for purposes of the reporting rules, post-priced swaps should be deemed "executed" and thus reportable only when all PET details are finally determined. This interpretation is not inconsistent with the rules as currently formulated—under Part 43, "execution" is defined both as (a) agreement by the parties to the terms of a swap that legally binds the parties under applicable law and (b) occurring simultaneously with or immediately following "affirmation" of the transaction. The rule defines "affirmation" to mean the process by which the parties verify that they agree on all the Primary Economic Terms of the swap.[39] It does not, however, define the term "primary economic terms". The economic terms that are relevant for Part 43 are different than the terms that are relevant and reportable under Part 45. Assuming that the term "primary economic terms" for purposes of Part 43 refers to the fields (or at least a subset of the fields) set forth in Table AI to Part 43, it follows that the term "price notation" must be included among the "primary economic terms" that are relevant for Part 43. The term "price notation" is defined as "the price, yield, spread, coupon, etc., depending on the type of swap, which is calculated at affirmation" (emphasis added). The words "is calculated" suggest that the price notation must be a numerical value and not simply a formula or methodology. If that is so, affirmation (and, therefore, execution) is not possible until at least the "price notation", expressed as a numerical value, is determined. If the words of the rule are consistent with the Commission's intention, it should be clarified that, in the context of post priced and other forward starting swaps, execution occurs after the prices have been determined using whatever method agreed between the parties.

In addition to avoiding the negative cost impact for clients, this interpretation will allow reporting parties to use their current systems that capture trade information only when price and size are known and will achieve the overall goal of regulatory and public transparency but not at the expense of reporting open unfilled "orders", which only serve to allow other market participants to trade ahead of these orders and thereby negatively impacting the client's price on the transaction. It is also consistent with the approach that currently applies to analogous cash market trades that are priced by reference to a formula (i.e., the way that VWAP trades are reporting in the U.S. equities market). In addition, such treatment will not adversely affect overall market transparency, as the underlying cash market that is the basis for the pricing is completely transparent, so reporting of the swap prior to finalization of the pricing terms will not perform a price discovery function.

---

[38] Over the past 12 months, ISDA scheduled several briefings with senior CFTC staff at which client representatives explained why post-priced swaps are an important component of their overall investment strategies and articulated their concerns with the premature reporting of such swaps.

[39] 17 C.F.R. §43.2

ix. Complex Swap Transactions (NAL 14-12)

27. Please describe how swap transactions such as strategies and packages should be represented in swap data reporting such that it enables the Commission to effectively understand timing and the economics of the strategy or package and the component swap transactions?

ISDA believes each individual component of a package transaction, and similar strategy, regulated by the Commission should be reported separately to an SDR until such time as the industry agrees on conventions for reporting packages in aggregate, and can implement those conventions. In the event that not all components of a package transaction are reportable under the CFTC's regulations, then only the components subject to SDR reporting will be reported. Support for package transactions is actively being developed in *Financial products Markup Language* ("FpML") version 5.7. The standard has addressed topics including package identification, approvals, and allocations, for both trading strategies (such as butterflies or switches). In respect to reporting, the current approach is to propagate package identifying information to each component of a package strategy. The package identifier will eventually be available for reporting purposes and provides a way to trace back each individual component to the original package. Utilizing the package identification code will enable counterparties to the transaction and the Commission to understand the timing and economics of the strategy, in addition to an aggregation of the component swap transactions. However, this solution is still under development for the purposes of trade reporting and requires that SDRs and other market infrastructure providers upgrade to the current version of FpML, a step that is not expected in the near term. Therefore, adequate time to develop, test, implement and transition to additional identification of packaged transactions should be separately discussed with the Commission and agreed with the industry.

D. PET Data and Appendix 1 (§ 45.3 and Appendix 1): Monitoring the Primary Economic Terms of a Swap

28. Please describe any challenges (including technological, logistical or operational) associated with the reporting of required data fields, including, but not limited to:

a. Cleared status;

b. Collateralization;

c. Execution timestamp;

d. Notional value;

e. U.S. person status; and

f. Registration status or categorization under the CEA (e.g., SD, MSP, financial entity).

Collateralization[40]

We believe there are inconsistencies in the way reporting counterparties determine the value to report as the Indication of Collateralization for each swap. This is due in part to some differences in the way reporting parties are interpreting the reportable values as defined in Part 43[41], and an overall need for global consistency with respect to categorizing the level of collateralization. ISDA raised some clarifications with respect to these values to Commission staff in March of 2012, and appreciates the opportunity to further comment.

Global initiatives are currently underway to establish margin requirements for uncleared swaps through the BCBS-IOSCO[42]. Any review of collateralization terms should consider the results of that initiative. In addition, reporting counterparties now have a requirement to report these same values in other regulatory jurisdictions, often accomplished by use of a single multi-jurisdictional report. As such, it is important that the meaning of these values aligns with the evolving industry standard and is globally consistent.

The following table shows the possible combinations of bilateral margin requirements:

Ref	Party A		Party B		Collateral Status
	Posts IM	Posts VM	Posts IM	Posts VM	
1	No	No	No	No	Uncollateralised
2	Yes	No	No	No	One Way Collateralised
3	No	Yes	No	No	One Way Collateralised
4	Yes	Yes	No	No	One Way Collateralised
5	No	Yes	No	Yes	Partially Collateralised
6	Yes	Yes	No	Yes	Partially Collateralised
7	Yes	Yes	Yes	No	Partially Collateralised
8	Yes	Yes	Yes	Yes	Fully Collateralised

[40] This subsection responds to Question 28(b).
[41] 77 FR at 1224.
[42] http://www.bis.org/publ/bcbs261.pdf

The only scenario that we believe should be categorized as "fully collateralized" is the one in which both parties are obligated to post both initial margin *and* variation margin. All other scenarios in which both parties have an obligation to post margin, but both parties are not required to post *both* initial margin and variation margin, should be considered "partially collateralized".

We recommend the Commission revise the descriptions of reportable values for the Indication of Collateralization field for Parts 43 and Part 45 as follows. (Please note that for the sake of comparing our proposed language versus the original, we have struck through existing text and underlined replacement text.)

1) "Uncollateralized" - An uncleared swap shall be described as "Uncollateralized" when there is no credit arrangement between the parties to the swap or when the agreement between the parties states that no collateral (neither initial margin nor variation margin) is to be posted at anytime.
2) "Partially Collateralized" – An uncleared swap shall be described as "Partially Collateralized" when the agreement between the parties states that ~~both parties will regularly post variation margin~~ each party is required to post initial margin and/or variation margin, but both parties are not required to post both initial margin *and* variation margin. ~~The word "regularly" is used to exclude situations where the parties may set threshold amount(s) that is so high that one or both parties will rarely post variation margin, if at all.~~
3) "One-way Collateralized" – An uncleared swap shall be described as "One-way Collateralized" when the agreement between the parties states that only one party to such swap agrees to post initial margin, ~~regularly~~ post variation margin or both with respect to the swap. ~~The word "regularly" is used to exclude situations where the parties may set threshold amount(s) that is so high that one or both parties will rarely post variation margin, if at all.~~
4) "Fully Collateralized" – An uncleared swap shall be described as "Fully Collateralized" when the agreement between the parties states that both initial margin ~~must be posted~~ and variation margin must ~~regularly~~ be posted by both the parties. ~~The word "regularly" is used to exclude situations where the parties may set threshold amount(s) that is so high that one or both parties will rarely post variation margin, if at all.~~

We note the following with respect to the above (i) no change is suggested for the definition of Uncollateralized (ii) an uncleared swap which is neither Uncollateralized, One-way Collateralized or Fully Collateralized should fall under the definition of Partially Collateralized and (iii) the use of the term "regularly" is subjective and therefore may be the cause of some of the inconsistent treatment of this reportable value. We believe it should be removed from the definitions and instead the value determined based purely on the terms of the credit agreement with respect to the parties' obligations to post variation and/or initial margin. This is party static data that should be subject to clear and consistent parameters. We refer to our response to Question 32 for further discussion on reporting pertaining to collateral.

Part 43 vs. Part 45 field value[43]

A number of fields are reportable under both Part 43 and Part 45 without distinction for whether and how they should be treated in each case considering the difference in nature of these levels of reporting (i.e. Part 43 is event based and Part 45 is swap level). These fields include execution timestamp, execution venue and block trade indicator. Based on guidance received either indirectly via the Commission's data harmonization discussions with SDRs or via direct inquiries from ISDA, reporting counterparties believe that CFTC staff expects that although the Part 43 messaging logically reflects these values as they pertain to a particular reported price forming event, that the value pertaining to the most recent price-forming event for public reporting of a swap should not be reflected in the SDR reporting for that swap. Rather, it seems, the value related to the original execution of the swap is meant to become a static data value that persists through the life of the swap in Part 45 reporting.

Since the rules do not articulate this distinction, reporting entities, middleware providers and SDRs did not build consistently to this view and additional work has been undertaken and may still be required to revise reporting infrastructures. Making this distinction is not easy, especially in cases where a single report is submitted for both real-time and PET data and therefore only one value is provided for these fields. In order to persist a particular value for Part 45 reporting based on the value for the new swap, the SDRs would have to build extraordinary logic that disregards the values submitted for subsequent price-forming events. Clarity from the Commission either through rulemaking or clear guidelines publicly available to all market participants is needed to ensure consistent treatment for these fields and inform any additional technological changes that may be required. Depending on the requisite changes, a suitable period for development, testing, implementation and transition would be necessary.

Appendix 1 to Part 45 should be revised to provide clarity with respect to these fields and any other fields for which the Commission expects the value should be based on the original execution of a swap and therefore a distinct value from any subsequent price-forming events that may be publicly reportable and reported as continuation data. However, the opportunity for reporting entities to submit a consolidated message should be retained, an approach the Commission has previously supported as cost-effective.

With respect to the block trade indicator value, we believe this is not meaningful for Part 45 as the value is determined solely and specifically with respect to a particular publicly reportable event and determines how that event is treated for purposes of public dissemination. Therefore, it may be meaningless or even misleading to analysis of a particular swap or aggregated swap data and should only be used by the Commission with respect to the review of real-time reporting under Part 43. We recommend that block trade indicator be removed as a PET field in Appendix 1.

[43] This subsection responds to Question 28 and 28(c).

Notional amount[44]

With respect to reporting to the Commission under Part 45 and trade reporting globally, there is a lack of clarity and consistency as to whether reported notional is a static data field that reflects the original notional of the trade or dynamic based on the latest post-trade event. Reporting parties believe that the correct approach is for the reportable notional amount to be current notional based on the latest reportable trade event, thus reflecting the current exposure of the swap.

We believe that Appendix 1 should be amended to clarify that the notional amount subject to reporting is the current notional based on the latest reportable trade event. Global consistency on the reporting of notional amount is essential; otherwise, the accuracy of any aggregated data will be diminished. We strongly believe that the Commission should engage with global regulators on this point.

Party specific fields[45]

The challenges pertaining to party specific fields are two-fold: (i) data accuracy and (ii) data maintenance.

In order for party static data to be accurate and useful, it should be consistent across swaps reported by different reporting entities. These values, including U.S. Person, financial entity, LEI and SD or MSP status, apply and are held internally at a party level rather than a swap level. Currently, there is no publicly available source for U.S. Person or financial entity qualification, like there is for SD and MSP status via the SD/MSP registry[46] maintained by the National Futures Association ("NFA").

Absent a publicly available source, reporting entities are required to individually seek representations from their clients to determine which are U.S. Persons and financial entities. Industry mechanisms, such as ISDA Protocols[47] and/or cross border representations (to the extent the counterparty has provided these Protocols or Representations), help facilitate the collection of this static data, but where the definitions have evolved since the start of reporting, as with U.S. Person, the process of maintaining accurate data is challenging and subject to inconsistencies between entities which report swaps transacted with the same counterparties. For non-U.S. parties, financial entity status may not be ascertainable given that only counterparties that are U.S. persons, guaranteed affiliates or affiliate conduits can be compelled to complete the relevant Protocol. It has been extremely difficult for reporting counterparties to persuade their counterparties to submit cross border representations, and thus the determination of U.S. person status may be solely based on information available to the reporting counterparty, which may be inadequate to make a determination in all cases.

Without a single, publicly available source for U.S. Person or financial entity, market participants leverage static data for reporting from a number of proprietary sources, including ISDA Amend and static data collected by middleware providers and confirmation platforms that aid reporting counterparties. Multiple sources and separate methods of collection and verification means there

---

[44] This subsection responds to Question 28(d).
[45] This subsection responds to Question 28(e) and 28(f).
[46] http://www.nfa.futures.org/NFA-swaps-information/regulatory-info-sd-and-msp/SD-MSP-registry.HTML
[47] http://www2.isda.org/functional-areas/protocol-management/open-protocols/

may be in consistencies among reporting counterparties in the values used to determine reporting eligibility, reporting counterparty and the corresponding reportable party specific data.

The SD/MSP registry provides a publicly available source for registration status and based on a request from ISDA, the NFA recently enhanced the registry to track deregistered parties and those which are subject to a limited designation. But, they do not have the technological capability to carry effective dates for a limited designation or any related conditions that may be relevant to determining whether a counterparty should be classified as a SD or MSP in reporting and for purposes of determining the reporting counterparty with respect to a particular swap. These changes to, or limitations on, SD/MSP applicability add additional complexity to reporting, increasing the potential that these values could be reported incorrectly or inconsistently. See our response to Question 12 for further input on this topic.

The other major challenge with respect to party specific data is the expectation that parties need to determine and update this information in instances where it was not available for previously reported swaps. Updating a single party specific attribute on previously reported trades is not easily achieved, as it is part of a reporting counterparty's static data and not an update to the swap in trade capture systems. The challenge is particularly difficult for swaps which are non-live and therefore are not regularly subject to continuation data reporting. In this case, the mechanisms available from SDRs to view and reconcile this data are limited and processes to update are manual in nature. Whether for pre-enactment and transition swaps reported under Part 46, or swaps reported subsequently that have terminated, matured or otherwise been rendered non-live, there is no discernible value to updating these attributes since these swaps do not play any part in analyzing current exposures and risk. We believe reporting counterparties should not have to update party specific data, such as U.S. Person, financial entity and party role (e.g. SD or MSP) for non-live trades in cases where the counterparty information becomes available or is clarified after the trade is no longer live.

International swaps[48]

As discussed further in relation to Unique Swap Identifiers[49], the need to provide the fields required for international swaps in accordance with §45.3(h) is extremely challenging and does not reflect the Commission's endorsement of USI as a mechanism for global data aggregation[50]. Industry methods do not exist to easily notify your counterparty that you have reported a swap to a trade repository ("TR") authorized in another jurisdiction, provide the identity of such TR and offer any alternate identifier. Likewise, a reporting counterparty does not have the systematic ability to retain and update reported swaps with this information. Instead, we believe the use of a global Unique Trade Identifier is the appropriate standard to identify duplicative reporting for the purposes of global data aggregation. Please see our response to Question 55 pertaining to Unique Swap Identifier for further explanation. Additional reference should be made to the Request for No-Action Relief for International Swaps filed with the Commission by ISDA[51] on February 11, 2014. We request the Commission revoke the requirements under §45.3(h) and instead work with global

[48] This subsection responds to Question 28.
[49] See response to Question 55.
[50] 77 FR at 2138 and 2224.
[51] See Appendix, "Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))," (February 11, 2014).

regulators to agree and endorse a global USI/UTI standard that is better suited to meet the stated objectives of this provision.

Any other terms[52]

Above all other PET fields, the requirement to report "any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap" (hereafter, "any other terms") poses the most challenges and concerns for reporting entities. As conveyed separately with respect to confirmation data in our response to Question 1, a requirement to provide data that is not defined breeds ambiguity and inconsistency as reporting entities will make different determinations as to what constitutes any other terms. Further, there will always be discrepancies in the set of terms that parties verify as part of swap affirmation and thus are subject to the any other terms requirement.

Beyond the interpretation concerns, the actual process of reporting these terms is difficult, as any terms reported need to fit within the prescribed parameters of fields available by the SDR and need to be supported by industry standard representation, such as FpML. Full product representation via FpML is not available for products or terms that are not sufficiently standardized. In addition, SDRs require specific technical requirements and field specifications to support additional values and therefore cannot adequately plan for a catch-all bucket of potential values to allow for both reportability and data quality oversight of any other terms data. A reporting counterparty may therefore be unable to systematically report a term they believe qualifies for the any other terms PET requirement. The need to report any other terms is the primary driver behind the challenge of reporting complex and bespoke swaps, which are more likely to suffer from an inability to report some term(s) electronically using specific data fields. As addressed in our response to Question 16, in this case the only realistic method of supplying additional data is through the submission of a searchable document, such as the confirmation. However, submission of documents is challenging and costly for reporting entities and is not a suitable solution for data aggregation. We question the value of such additional data to the Commission's goals and believe the PET data that is reportable electronically provides sufficient information to perform relevant analysis and oversight.

Requiring "any other terms" runs contrary to the title of "Primary Economic Terms" since they go beyond the scope of what standard industry practice would deem to be the actual primary, economic terms of the swap that are used by reporting counterparties for internal risk assessment. Data that is not subject to the benefits of prescriptive rule guidance, industry standard representations or SDR validation cannot be relied on to add a material benefit to swap analysis, rather it ensures that overall data quality will always be compromised by this subset of reported values. We propose that the Commission amend Appendix 1 of the Part 45 rules to remove the requirement to report any other terms in order to simplify SDR reporting and improve the overall data quality and usefulness.

[52] This subsection responds to Question 28.

29. What additional data elements beyond the enumerated fields in Appendix 1 of part 45, if any, are needed to ensure full, complete, and accurate representation of swaps (both cleared and uncleared)? For example, other fields could include additional timestamps (for each lifecycle event, including clearing-related timestamps); clearing-related information (identity of futures commission merchant, clearing member, house vs. customer origin indication, mandatory clearing indicator, or indication of exception or exemption from clearing); and/or execution-specific terms (order type or executing broker). Responses should consider the full range of oversight functions performed by the Commission including, but not limited to, financial surveillance; market surveillance; risk monitoring; and trade practice surveillance.

a. Should the Commission require reporting of the identities, registration status, and roles of all parties involved in a swap transaction (e.g., special entity (as defined in Commission regulation 23.401(c)); executing broker; or voice/electronic systems)?

b. What, if any, additional fields would assist the Commission in obtaining a more complete picture of swaps executed on SEFs or DCMs (e.g., order entry time; request for quote ("RFQ"), or central limit order book ("CLOB"), or order book; request for cross, blocks, and other execution method indicators or broker identification)?

c. Are there additional data elements that could help the Commission fulfill its oversight obligations, as described above?

d. Should the fact that a swap is guaranteed be a required data element for SDR reporting? If so, what information regarding the guarantee should be reported to the SDR? What will be the challenges presented to the reporting party in capturing this information?

Additional Data elements[53]

As reiterated in our introductory remarks as well as in response to a number of specific questions, including those on confirmation data and PET data, we believe the Commission's reporting rules are overly complex and require more swap data than can be practically used to meet key Part 45 objectives for systemic risk mitigation and market manipulation prevention. The CFTC's reporting rules, including Part 43, Part 45 and Part 46, require more data elements than any other global regulator and are the only ones to include a requirement to report terms that are not enumerated. The need to report multiple layers of data on different timeframes adds to the complexity of the reporting since a single report may not be possible to meet all creation data reporting requirements, including PET and confirmation data.

Requiring data in as little as fifteen minutes of execution cannot be justified unless the Commission is actually prepared to analyze data in real-time. Otherwise, we believe that data reported by the end of trade date or the business day following would be of higher quality and more useful to data aggregation and analysis. This is the approach that other global regulators have taken.

We do not believe that whether a swap is guaranteed should be required for reporting. Guarantees are not factored into execution and therefore this information may not be available in real-time. In addition, determining guarantees at a swap level has become more difficult as the cross-border landscape changes as a result of the reach of global regulatory oversight. We believe

[53] This subsection responds to Question 29.

that understanding the affiliate and guarantor relationships of reporting counterparties is more appropriate as a global static data initiative; please refer to our response to Question 24 for further discussion on this point.

Likewise, we believe that the identities, registration status, and roles of other parties involved in a swap transaction, including special entities, brokers and systems should not be required. The party data already subject to reporting provides its own challenges and expanding these requirements to non-registrants and other parties involved in the trade flow will only exacerbate the challenges of maintaining accurate party data. The involvement of additional parties in the trade flow that are not legal counterparties to the swap does not add a material benefit to risk analysis and transparency since they do not own any of the exposure.

The industry believes that, on an overall basis, the swap information is currently sufficiently captured, and therefore suggest that no additional data elements be added to Appendix 1 of Part 45. Instead, if the PET and confirmation data fields were streamlined and well defined, and the timeframe for PET reporting more in line with global standards (e.g. end of day or T+1), then the overall quality of data would improve vastly. We encourage the Commission to consider simplifying its reporting rules rather than seeking to expand the list of reportable data fields and thus further complicating the task of making sense of the swap data provided.

SEF or DCM executed[54]

Collecting data on the operation of markets is not part of the original intent of the Part 45 rules. Additional information pertaining to the execution of swaps on a registered execution facility should be obtained from the SEF or DCM, if and when needed, and not included as part of the reportable Part 45 data.

30. ***Have reporting entities been unable to report to an SDR terms or products that they believe are required under part 45 or related provisions? If so, please generally describe the data elements and/or products involved.***
    a. ***Where a single swap has more than two counterparties, please comment on how such information should be provided within a single part 45 submission (i.e., one USI)?***

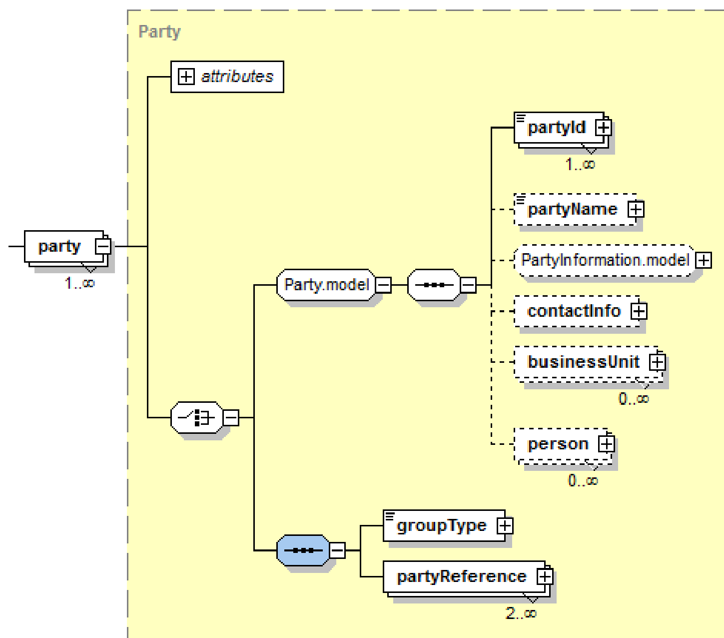
Joint and Several counterparties

There are multiple cases where more than two counterparties can exist. One such case recently addressed in FpML relates to the representation for joint and several counterparties. FpML version 5.7, which is currently in Last Call Working Draft status and for which the final Recommendation is expected by June, has a representation developed for jointly and severally liable counterparties. The party structure is enhanced with a new groupType (only added for the purpose of defining JointAndSeveralLiability group so far) followed by a series of two or more partyReference to define the collection of joint and several parties.

The representation looks as follows: (more information is available as part of the FpML specifications):

[54] This subsection responds to Question 29(b).

```
<party id="party1">
  <groupType>JointAndSeveralLiability</groupType>
  <partyReference href="js_party1" />
  <partyReference href="js_party2" />
</party>
```



Please note that although the representation is now available as part of the FpML standard, significant additional time might be required for firms and SDRs to implement version 5.7 of the standard. In order for SDRs and reporting entities to budget and plan for any related changes for this or other scenarios that might involve multiple counterparties, it is essential that the Part 45 rules be enhanced to clarify the Commission's expectations and that adequate timelines for implementation and transition be agreed.

31. Could the part 45 reporting requirements be modified to render a fuller and more complete schedule of the underlying exchange of payment flows reflected in a swap as agreed upon at the time of execution? If so, how could the requirements be modified to capture such a schedule?

Payment flows

The Part 45 reporting requirements should not be modified to require a complete schedule of underlying payments. The current reporting includes sufficient data pertaining to the payment terms. A full schedule of exchanges does not provide a material benefit to the understanding of the risk profile of the swaps and would be a major build for reporting entities that would require a lot of maintenance. A cost-benefit analysis would not substantiate this change.

32. Taking into account the European Union's reporting rules39 and Commission regulation 39.19, should the Commission require additional reporting of collateral information? If so, how should collateral be represented and reported? Should there be any differences between how collateral is reported for cleared and uncleared swaps?

Collateral reporting

As pointed out in the question, the European Union reporting rules require the reporting of collateral information. The industry is currently working through a number of issues that can have a substantial impact on the reporting of collateral and the usability of the collateral data and we strongly suggest to wait to define any collateral reporting requirements until the reporting in Europe has started and we can leverage the experience and build on the infrastructure put in place. In addition, as far as reporting of collateral for uncleared swaps is concerned we suggest waiting until the margin determination rules for uncleared swaps have been finalized.

Collateral is managed on a portfolio level, not on an individual transaction basis, and collateral reporting, to be most useful, should not be addressed through Part 45 reporting rules focused at the individual swap level. A separate collateral repository is the best way forward.

In order for the collateral data to be useful to the Commission in its regulatory function, collateral reporting requirements should be coordinated at both national and international levels. Differences in approach between different regulators will reduce the value of the collateral reported and might make data aggregation impossible. Collateral portfolios will include CFTC-reportable swaps and securities based swaps and non-swap transactions which are not reportable to the CFTC.

E. Reporting of Cleared Swaps (§§ 45.3, 45.4, 45.5, and 45.8): How Should the Swap Data Reporting Rules Address Cleared Swaps?

33. Part 45 requires the reporting of all swaps to SDRs. The Commission requests comment on how cleared swaps should be reported. Specifically:

a. For swaps that are subject to the trade execution requirement in CEA section 2(h)(8), and ipso facto the clearing requirement, do commenters believe that the part 45 reporting requirements with respect to original swaps (alpha) should be modified or waived, given that the two new resulting swaps (beta and gamma) will also be reported?

b. For swaps that are subject to the clearing requirement, but not the trade execution requirement, do commenters believe that the part 45 reporting requirements with respect to alpha swaps should be modified or waived, given that the beta and gamma swaps will also be reported?

c. For swaps that are not subject to the clearing requirement, but are intended for clearing at the time of execution, do commenters believe that the part 45 reporting requirements with respect to alpha swaps should be modified or waived, given that the beta and gamma swaps will also be reported?

d. Please discuss whether in each of the circumstances described above there actually is an alpha swap.

Alpha swaps

Whether there is an alpha swap which precedes the cleared swaps varies by asset class and execution model and may not be determined solely by whether a product is subject to the trade execution and/or clearing mandate. However, as products have become subject to the clearing mandate, there is a decreased likelihood of the parties entering into an alpha swap. Even where they do, these alpha swaps, regardless of whether they are executed bilaterally or on a SEF or DCM, are routinely cleared directly or shortly after execution and so are terminated and replaced by the beta and gamma swaps which are subject to full creation data reporting by the DCO. Therefore there is little value to reporting creation data, either PET or confirmation, for alpha swaps since they are almost immediately superseded by the cleared swaps, and thus are not meaningful to an analysis of counterparty exposure. We agree that the Part 45 reporting requirement for alpha swaps that are required to be cleared or executed with the intent to clear (and subsequently cleared) should be waived. Part 43 reporting provides sufficient transparency with respect to these executions.

Revoking the obligation to Part 45 report the alpha trade will also produce the benefit of eliminating orphaned alpha swaps that result from the beta and gamma being sent to another SDR, and thus not updating the alpha to reflect its terminated state.

Many reporting counterparties have built combined messaging for alpha swaps to meet both Part 43 and Part 45 PET reporting requirements. As a result, should the Commission eliminate the Part 45 reporting obligation for cleared swaps, reporting counterparties could not immediately halt the PET reporting since technological changes will need to be done to separate the messaging. Therefore, reporting of the alpha swap should be allowed, but not required. Since most alpha swaps are cleared at point of execution, a preferred solution may be for the rule to permit the DCO

to conduct the Part 43 reporting, when not reported by the SEF or DCM, since they will be ultimately responsible for reporting the related cleared swaps.

35. ***Can the existing rules be improved to more clearly represent how the clearing process impacts reporting obligations with respect to both the original swap (alpha) and the two new resulting swaps (beta and gamma)? If so, please explain.***

    a. ***Responses should address:***

        i. ***The reporting obligations applicable to alpha swaps;***
        ii. ***The reporting obligations applicable to beta and gamma swaps;***
        iii. ***Who holds the reporting obligation(s) for each swap;***
        iv. ***The reporting of the linkage of alpha, beta, and gamma swaps; and***
        i. ***Who has the legal right to determine the SDR to which data is reported?***

<u>**Reporting obligation for cleared swaps**</u>

Yes, the existing rules can be improved to more clearly represent how the clearing process impacts reporting obligations with respect to both the original swap ("alpha") and resulting swaps ("beta" and "gamma").

Alpha swaps should not be reportable under Part 45 if they are subject to the clearing mandate or executed with the intent to clear. An alpha swap should only be reportable if it is not subject to the clearing mandate and fails to clear the same day as intended. Although §45.3(b)(1) and §45.3(c)(1)(i) excuses the reporting counterparty from submitting swap creation data if the original swap is accepted for clearing before the applicable reporting deadline, monitoring the time of clearing acceptance vs. the PET deadline for each swap is extremely difficult and risks that the reporting counterparty will not meet its PET reporting deadline if the swap does not clear in the expected timeframe. Therefore, reporting counterparties routinely report alpha swaps without taking advantage of this carve out. An overall exemption for alpha swaps would greatly simplify these reporting flows.

For trades that were executed without the intention or requirement to clear but are subsequently cleared after the trade date of the original swap, the beta and gamma swaps should be sent to the same SDR as the original swap with the USI of the alpha reported as the prior USI in order to ensure the alpha is updated to reflect its termination and link it to the beta and gamma. We believe this approach is appropriate since according to §45.10, the reporting counterparty has the right to select the SDR to which a cleared swap is reported. In order for this to work effectively, the DCO must send a report to the chosen SDR that complies with that SDR's messaging specifications. Currently some DCOs send a "copy" of their report for a cleared swap to the SDR selected by the reporting counterparty, however these are sent in a format that cannot be consumed by the SDR and therefore cannot accurately reflect the terminated status of the alpha swap nor the beta and gamma positions.

If the Commission decides not to waive the requirement to report the alpha swap and does not compel the beta and gamma to be reported to the same SDR, then in order to eliminate orphaned trades the party that reported the alpha swap – whether SEF, QMTF or reporting counterparty -

would need to send a message to appropriately exit or update the alpha post-clearing. We believe this is less efficient than the other suggested approaches.

Clearing models

There are two primary models for clearing, the agency model (a/k/a FCM) and the principal model (a/k/a SCM). In our response above regarding the reporting obligation for cleared swaps, the examples of cleared swaps are based on the agency model, wherein there are legally two novated swaps (the beta and gamma) that result from the original alpha with the Futures Commission Merchant ("FCM") acting as agent between the client and the clearing agency without being a party to the swaps. However, under the principal model, the clearing house doesn't face the client directly and instead faces a clearing member ("CM") and the CM faces the DCO. As a result, there are four resulting swaps that the DCO should report, two between CMs and the DCO, and two between the CMs and their clients. Which model is used varies based on the asset class, the clearing house and client preferences, but generally the agency model is more prevalent in the U.S., whereas the principal model is used more frequently in Europe. For reference, ISDA's UTI Overview document includes diagrams of the clearing models and the resulting corresponding swaps[55].

The Part 45 rules should recognize these distinct models and the corresponding differences in the number of reportable swaps and their relevant counterparties. Based on our observations and subsequent conversations with clearing agencies, it seems that based on guidance from the Commission, DCOs are reporting all cleared swaps to the CFTC based on the agency model even if the alpha was cleared via the principal model. That approach incorrectly reports that the DCO directly faces the clients and fails to report two of the four resulting swaps. In this case, an insufficient number of USIs will be created by the DCO and the cleared swaps reported by the DCO will not align with those booked by the counterparties to the cleared swaps. If reporting counterparties are ultimately required to report valuation data for cleared swaps, their continuation data reporting will not be reconcilable with the cleared swaps reported by the DCO. DCOs should be required to create a USI for and report each swap resulting from the applicable clearing model.

This issue has further impact from a global data aggregation perspective since cleared swaps are being reported differently in separate jurisdictions. Contrary to the approach for CFTC, we understand that the European Securities and Markets Authority ("ESMA") has advocated that clearing agencies should report using the principal approach regardless of whether the trade was executed in the agency style. As a result, the number of cleared swaps and relevant legal counterparties may be misrepresented since the FCM is not a legal party to the cleared swaps. The same set of cleared swaps may be reported differently to the CFTC than they are reported under EMIR, undermining effective data aggregation. We recommend that the Commission consider the importance of global consistency of trade reporting flows and work with other regulators to agree on consistent requirements that reflect the legal status of the swaps and their counterparties.

[55] ISDA, *Unique Trade Identifier (UTI): Generation, Communication and Matching* (December 10, 2013): 13-20 http://www2.isda.org/attachment/NjI3MQ==/2013%20Dec%2010%20UTI%20Workflow%20v8.7.8b%20clean.pdf

Clearing member affiliates

As per Part 39 of the CFTC's regulations, affiliates of a clearing member must use a house account of the CM to clear swaps. However, not all DCOs report the resulting cleared swaps in a consistent manner under Part 45. In some cases, where an affiliate of a CM enters into a swap that is subsequently submitted for clearing through its affiliated CM, the DCO reports the CM (and not the affiliate of the CM) as the counterparty to the cleared swap. This causes issues for the affiliate and its CM, because the affiliate (and not the CM) entered into the alpha trade and the affiliate (and not the CM) should end-up with a cleared swap. Books and records of the CM and its affiliate will reflect that the affiliate (and not the CM) has a cleared swap with the DCO.

Additionally, for purposes of compression exercises the relevant DCOs commingle swaps of the CM with those of the CM affiliate. The end result is a discrepancy between what a DCO reports to the SDR and what the CM and its affiliates reflect on their books. Like the discrepancy in clearing model reporting, this will also create an issue if SDs and MSPs are ultimately required to report valuation data for cleared swaps as the internal systems of the CM and the affiliate will trigger that the affiliate (and not the CM) has to send swap valuation data reporting to the SDR.

The submission of the swap for clearing should not result in a change in the name of the counterparty that is reported to an SDR. While clearing of CM affiliate trades through a CM house account may create other issues, which we do not plan to comment on as part of this Comment Request, we ask that as long as affiliates of a CM have to clear their trades through a house account of the CM, the Part 45 rules provide explicit guidance that the Part 45 report submitted by the DCO for the cleared swap has to reflect the relevant affiliate (and not the CM) as the legal counterparty to the cleared swap with the DCO.

36. What steps should reporting entities and/or SDRs undertake to verify the absence of duplicate records across multiple SDRs for a single cleared swap transaction?

Duplicate records

The duplication of records for a cleared swap across SDRs is a scenario resulting directly from the Commission's decision to allow the use of captive SDRs by DCOs[56]. Rather than requiring reporting counterparties and SDRs to implement extraordinary efforts to verify the absence of duplicates, the Commission should seek a permanent solution that eliminates the duplicate reporting and improves the data quality over time. Eliminating the valuation data reporting requirement for SDs and MSPs, in accordance with our response to Question 8, will prevent a large volume of cleared swaps from being reporting to one SDR by the DCO and to another by the reporting counterparty. If the Commission retains the requirement under §45.4(b)(2)(ii), then allowing the reporting counterparty to select the SDR for a cleared swap in accordance with §45.10 will eliminate the need for a "copy" to be sent to a second SDR, thus eradicating the duplicate records that impact data quality.

38. What reporting technique, term, or flag is recommended to identify a cleared swap?

Part 45 sufficiently provides for a flag to identify a cleared swap. Appendix 1 communicates the requirement for a "clearing indicator" – a "yes/no indication of whether the swap will be cleared by the DCO." The industry is in alignment with this requirement, and believes this current technique is sufficient.

i. CDS-Clearing Related Swaps and Open Offer (Part 45 and NALs 12-59, 13-36, and 13-86)

39. Swaps created by operation of a DCO's rules related to determining the end-of-day settlement prices for cleared credit default swaps ("CDS") are also known as "firm trades" or "clearing-related swaps" (see NAL 13-86). How should these swaps be reported pursuant to the swap data reporting rules?

Clearing Related Swaps

DCOs have been meeting this reporting obligation on behalf of reporting counterparties in conjunction with NAL 13-86, but a permanent solution is needed. Reporting of an alpha trade in this case was instigated based on a requirement from the Commission to report an alpha swap even though reporting counterparties argued there wasn't a true bilateral swap in these cases and that the execution of the "firm" or "forced" trade was booked directly in their systems as a cleared swap facing the DCO. Therefore, we believe that the solution is for the Commission to acknowledge that like swaps created from open offer, as referenced in Question 40, these "clearing-related swaps" do not have an alpha swap and therefore there is no obligation for any party to report.

[56] http://www.cftc.gov/PressRoom/PressReleases/pr6525-13
http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf

40. ***Aside from "firm trades," some swaps may be created from "open offer," meaning there is no original swap between two counterparties, but only equal and opposite swaps between each of the counterparties and the clearinghouse. How should the swap data reporting rules address such swaps?***

Open offer

Like the clearing-related swaps, cleared swaps created from "open offer" for which there is no original swap between two counterparties should not be subject to reporting of an alpha swap. Doing so requires a reporting entity to fabricate a swap record and misrepresents the legally binding swap obligations. Only the cleared swaps should be reportable upon their execution.

ii. DCO Reporting, Netting Processes, and Positions (§§ 45.3 and 45.4)

42. ***For cleared swaps, how can the netting and compression of swaps and positions by DCOs be most effectively represented***

    b. ***Are netting and compression different concepts in the uncleared swaps markets versus the cleared swap market? If so, how?***

Netting vs. compression

Although the terms are sometimes incorrectly used interchangeably, netting and compression are different concepts. Portfolio compressions result in both a reduced number of positions and reduced total notional amount for a counterparty, usually without changing the overall risk of the portfolio. Netting, however, does not result in a change in the number of positions, and is primarily used for margin purposes.

F. Other SDR and Counterparty Obligations (§§ 45.9, 45.13, 45.14): How Should SDRs and Reporting Entities Ensure That Complete and Accurate Information is Reported to, and Maintained by, SDRs?

i. Confirmation of Data Accuracy and Errors and Omissions (§ 45.14)

46. Commission regulation 49.11(b) requires SDRs to verify with both counterparties the accuracy of swaps data reported to an SDR pursuant to part 45. What specific, affirmative steps should SDRs take to verify the accuracy of data submitted? Please include in your response steps that SDRs should take regarding data submitted by reporting counterparties on behalf of non-reporting counterparties who are not participants or users of the SDR.

47. In what situations should an SDR reject part 45 data from entities due to errors or omissions in the data? How should the Commission balance legal requirements for reporting as soon as technologically practicable and the need for complete and accurate data

48. All data in an SDR must be current and accurate, and the Commission expects SDRs, counterparties, and registered entities to take proactive steps to ensure data accuracy. Are there challenges that a reporting entity faces in confirming data accuracy? If so, how can those challenges most effectively be addressed

Data accuracy[57]

Reporting counterparties proactively reconcile their reported data against their internal records to maintain data accuracy and are required to submit swap reporting in accordance with the specifications and validations of their SDR. Swaps are also subject to a reconciliation of material terms between the parties pursuant to the Commission's Part 23 regulations or similar rules of other jurisdictions, which further serves to maintain data accuracy. We acknowledge that from an aggregated review of data, more prescriptive requirements and validations by the SDRs that align with the requirements of the other SDRs may improve overall data quality. But there is a downside to being more prescriptive. If more swaps are rejected due to additional validation, this will have an impact on timely reporting and reporting entities will incur additional costs to resolve their submissions.

SDRs could assist with efforts by both reporting counterparties and non-reporting counterparties to verify the accuracy of their reported swaps by providing a portal through which data on reported swaps could be searched and viewed in real-time. Some SDRs provide primarily end of day reporting and no access to data on non-live swaps, limiting the parties' view of their reported data and the ways in which they can verify its accuracy.

When asking these questions, the Commission should consider the importance they place on data accuracy and timeliness of reporting. As noted in our introductory remarks and elsewhere in our response, a trade- off exists between accuracy and speed. We believe that generally there is no

[57] This subsection responds to Questions 46, 47 and 48.

considerable downside to extending the PET reporting deadlines, while the Commission would benefit from improved data quality.

49. If an error or omission is discovered in the data reported to an SDR, what remedies and systems should be in place to correct the data? Within what time frame should a reporting entity be required to identify an error in previously reported data and submit corrected information to an SDR?

Errors or omissions

Reporting counterparties update any confirmed errors or omissions via the next reported message for that swap, in some cases intraday but in no event later than the end of day, in either case based on the firm's implemented reporting model. This approach is sufficient to maintain the quality of data and complies with the requirements under §45.14. However, reporting entities should not be required to update swaps that are no longer live in the event an error or omission is discovered. Consistent with our responses to other questions, amending data for swaps that are non-live is operationally challenging and does not provide a material benefit in the cases of swaps that have been terminated, matured or otherwise no longer represent existing swap exposures.

ii. SDR Required Data Standards (§ 45.13)

50. In addition to data harmonization, how can reporting entities and SDRs improve data quality and standardization across all data elements and asset classes within an SDR? Please provide examples of how the presentation of data may be standardized, utilizing specific data elements.

Consistent usage of FpML as the standard for product representation and messaging is a first and important step to improve data quality and standardization. The FpML schemes define the necessary elements to be reported and the format of each of these elements. In addition to the standardization of the data fields that this provides, FpML defines a large set of enumerations and scheme values[58] (such as currency code, floating rate indexes, day count fractions, etc.). The scheme values and enumerations allow for further standardization of the actual values submitted. While the scheme values and enumerations are integrated into the FpML standard, it is worth pointing out that they can be used to validate values and improve the data quality of information submitted, irrespective of the underlying messaging standard used. Lastly, FpML provides a set of validation rules for each of the asset classes that allows information checks at the business level (e.g., start date is before end date).

The different levels of validation provided by the FpML standard described above should be implemented first. In a later phase additional levels can be developed, such as agreement on computation of notionals.

When implementing the different levels of validation, the SDRs should initially send warning messages that allow the reporting parties to improve the data quality. Eventually the message

[58] http://www.fpml.org/spec/coding-scheme/index.html

should either be rejected if the required changes have not been implemented by the reporting counterparties or the reporting counterparty should be alerted that the data will not provided to the Commission until it meets the established data standards.

52. Are there additional existing swaps data standards (other than the legal entity identifier ("LEI"), unique product identifier ("UPI") and USI) that the Commission should consider requiring as part of any effort to harmonize SDR data with both domestic and foreign regulators

ISDA believes that global regulatory cooperation is essential to the success of LEI, UPI and USI values as appropriate tools for data aggregation. Use of the USI and UPI would be more valuable tools at this stage if regulatory consensus around their use had been achieved prior to the publication of reporting requirements and the commencement of trade reporting in various jurisdictions. The LEI is viewed as a highly valuable tool for data aggregation since it benefited from international coordination at an early stage and is well established. With regulatory agreement and endorsement of global standards for USI (or UTI) and UPI, they can become equally valuable tools as well. Please see our response to Questions 53, 54 and 55 for additional feedback with respect to these identifiers.

In addition to the identifiers mentioned above, we strongly suggest the Commission consider the multiple schemes and enumerations documented as part of the FpML standard as an important set of standardized reference data for global harmonization. These schemes and enumerations are based on ISDA documentation, reflect market practice and incorporate other standards such as ISO, where appropriate.

The full set of scheme values is publicly available (subject to the free FpML open source license), at: http://www.fpml.org/spec/coding-scheme/index.html

Mandatory use of these values would dramatically increase the data quality of the trade information reported to the SDRs. Although these values are maintained and published by FpML use of the values does not require use of the FpML standard for reporting to the trade repositories. The values can equally be used to improve the quality of a CSV data submission.

By way of example a subset of the dayCountFractionScheme:

CODE	SOURCE	DESCRIPTION
1/1	FpML	Per 2006 ISDA Definitions, Section 4.16. Day Count Fraction, paragraph (a) or Annex to the 2000 ISDA Definitions (June 2000 Version), Section 4.16. Day Count Fraction, paragraph (a).
30/360	FpML	Per 2006 ISDA Definitions, Section 4.16. Day Count Fraction, paragraph (f) or Annex to the 2000 ISDA Definitions (June 2000 Version), Section 4.16. Day Count Fraction, paragraph (e).
30E/360	FpML	Per 2006 ISDA Definitions, Section 4.16. Day Count Fraction, paragraph (g) or Annex to the 2000 ISDA Definitions (June 2000 Version), Section 4.16. Day Count Fraction, paragraph (f). Note that the algorithm defined for this day count fraction has changed between the 2000 ISDA Definitions and 2006 ISDA Definitions. See Introduction to the 2006 ISDA Definitions for further information relating to this change.
30E/360.ISDA	FpML	Per 2006 ISDA Definitions, Section 4.16. Day Count Fraction, paragraph (h). Note the algorithm for this day count fraction under the 2006 ISDA Definitions is designed to yield the same results in practice as the version of the 30E/360 day count fraction defined in the 2000 ISDA Definitions. See Introduction to the 2006 ISDA Definitions for further information relating to this change.
ACT/360	FpML	Per 2006 ISDA Definitions, Section 4.16. Day Count Fraction, paragraph (e) or Annex to the 2000 ISDA Definitions (June 2000 Version), Section 4.16. Day Count Fraction, paragraph (d).
ACT/365.FIXED	FpML	Per 2006 ISDA Definitions, Section 4.16. Day Count Fraction, paragraph (d) or Annex to the 2000 ISDA Definitions (June 2000 Version), Section 4.16. Day Count Fraction, paragraph (c).

iii. Identifiers (§§ 45.5, 45.6 and 45.7)

53. Please explain your experiences and any challenges associated with obtaining and maintaining an LEI.

a. What additional steps can market participants and SDRs take to help ensure counterparties have valid LEIs?

Legal Entity Identifiers (LEI)

Regulatory cooperation is vital to eliminating the challenges the industry currently faces with respect to ensuring all parties identified in reporting have obtained and maintain a Legal Entity Identifier ("LEI"). We acknowledge and appreciate the efforts the Commission has already made to inform counterparties of their obligation to obtain an LEI. As additional global regulators require the parties under their oversight to acquire one, the instances where a reporting counterparty cannot identify their counterparty in reporting by an LEI have reduced and will continue to decline. However, certain challenges remain and are discussed in the following paragraphs.

Dealers are limited in what remedies they can take if the counterparties they face do not obtain or maintain an LEI. The situation would improve dramatically if all regulators require that counterparties in their jurisdiction get LEIs and keep them current. The CFTC could help by actively reiterating the importance of the global standard and publicly encouraging counterparties to obtain

and maintain LEIs. If all SDRs require parties signing up to their service to obtain an LEI, this would further alleviate this issue. While the scope of global LEI evolves, the CFTC, global regulators and market participants should accept the full use of LEIs as a mutual aim, rather than expecting reporting counterparties to bear the burden for producing party identification that is not within their control.

With respect to whether an LEI is maintained (i.e. the party affirms its data is still valid and pays its annual fee) and thus considered current, we have been advised by a Local Operating Unit ("LOU") that it is the CFTC's position that a non-current LEI is not a valid LEI for Part 45 reporting purposes. Based on this stance, a reporting counterparty would have to implement additional layers of static data that influences their reporting logic to determine whether an existing LEI should be included in a swap report. If non-current at time of reporting, this implies that the reporting counterparty should not use the LEI, which diminishes the Commission's clarity on the non-reporting counterparty to the swap and impedes data aggregation. It also presumably creates an obligation for the reporting counterparty to update the swap reporting once the counterparty maintains its LEI and it is relabeled as current. Similarly, if the original swap report submitted to the SDR contained a current LEI that subsequently fell into a non-current status during the life of the swap (or for 5 years following the termination date), then the reporting counterparty arguably would have to amend that swap report to reflect that there was no longer a "valid" LEI, and then perhaps amend it again if and when the non-reporting counterparty maintained the LEI. These scenarios are not reasonable for reporting counterparties to implement and undermine the quality of the reported data and ability for regulators to aggregate swaps at a party level.

We recognize that periodic verification is essential to upholding the integrity of the LEIs and their metadata. However, the FSB has stated that "Responsibility for the accuracy of reference data should rest with the LEI registrant."[59] Despite outreach from reporting counterparties and LOUs, counterparties not subject to the Commission's oversight or another G20 regulator may be less likely to pay an annual fee and recertify their LEI registration absent that direct regulatory obligation. We believe that an otherwise active and valid LEI should be an acceptable LEI for purposes of swap data reporting and note that the uniqueness of an LEI and the ability to use it to identify a particular counterparty remains intact regardless of the maintenance status since under the LEI standards the value will never be used to identify another party and therefore remains a valuable tool for swap transparency. We ask that the Commission accept as part of PET data a validly issued LEI for an active counterparty, regardless of whether it is in current or non-current maintenance status. The ability to consistently utilize the LEI as important tool for data aggregation and analysis should not be undermined by the associated administrative requirements.

LEIs are publicly available and can be sourced collectively from a number of unofficial sources[60], but the development of a Central Operating Unit ("COU") by the Global LEI Foundation ("GLEIF") is still in the formative stage. Market participants have witnessed instances where inactive or invalid LEIs are not being decommissioned properly, leading to multiple LEIs for one legal entity, or duplicate LEIs. Firms may see one LEI for a legal entity at the portal for a particular LOU, but a different LEI for the same legal entity elsewhere. This is exacerbated by the fact that there is currently no endorsed, centralized source of LEI/pre-LEIs, nor any target date for its establishment. Regulators

---

[59] Financial Stability Board, "Recommendation 18 - LEI Data Validation," *A Global Identifier for Financial Markets* (June 12, 2012): 46 http://www.leiroc.org/publications/gls/roc_20120608.pdf

[60] Examples include http://www.p-lei.org/, http://openleis.com/, http://www.lei-lookup.com/

could work together towards helping to ensure data integrity across LOUs and reinforcing the value of an established COU.

Individuals are currently excluded from the LEI scope[61], and therefore cannot be identified in reporting by use of an LEI. §45.6 and Appendix I should be revised to acknowledge the acceptance of a reporting counterparty's internal identifier for reporting individuals.

Finally, we do not agree that the "availability of a legal entity identifier for a swap counterparty previously identified by name or some other identifier where previously not reported" constitutes a life cycle event, as defined in §45.1. Whether or not a counterparty has an LEI does not and should not have a material effect on the execution of the swap, even though it is the required standard for party identification in reporting. If a non-reporting counterparty obtains an LEI after trades have already been reported, the record cannot be easily updated in all cases to add the LEI. This is particularly difficult for non-live trades. We propose that the Commission not require that reporting counterparties update counterparty specific static data, like the LEI, for trades which are no longer live since the effort involved does not result in a material benefit to market transparency since non-live trades do not impact current risk exposures. The volume of non-live swaps will increase greatly as time passes, and maintaining this growing population over the course of the years is not practical for either SDRs or reporting counterparties. In the unlikely event the Commission should need to analyze non-live trade populations, non-reporting counterparty identification is still available on these swap by means of an alternate party identifier (e.g. a BIC) which has been used by reporting parties when reporting the relevant data into the SDR.

54. ***What principles should the Commission consider when designating a UPI and product classification system pursuant to § 45.7?***
    a. ***Are there any commonly used taxonomies that the Commission should consider in connection with the designation process? Please respond by asset class.***

Unique Product Identifiers (UPI)

To fulfill the need for product classification for SDR reporting, ISDA worked with market participants to develop the ISDA over-the-counter ("OTC") Taxonomies[62] which are available in both human readable tabular (i.e. Excel) and machine readable FpML formats. The concatenation of the layers of taxonomy values provide a solution to UPI for data aggregation that is already used widely by reporting counterparties, SEFs, and some DCOs for reporting to the Commission. The ISDA OTC Taxonomy has an established governance model for proposing and approving changes to the taxonomy that is subject to both regulatory input and broader industry consultation.

In addition to Part 45 reporting to the CFTC, the ISDA OTC Taxonomy is also used, or approved for use in the near term, as the UPI value for reporting globally in Japan, Australia, Hong Kong, Singapore, and Canada. ISDA has requested that ESMA endorse this standard for EMIR reporting. Acceptance and collaboration by global regulators on a single product classification method is essential to global product aggregation; otherwise we risk fragmentation in global product

---

[61] ISDA et. al, "Types of Legal Entities," *Requirements for a Global Legal Entity Identifier (LEI) Solution* (May 2011): 18 http://www.gfma.org/uploadedFiles/Initiatives/Legal_Entity_Identifier_%28LEI%29/RequirementsForAGlobalLEISolution.pdf
[62] http://www2.isda.org/attachment/NTQzOQ==/ISDA%20OTC%20Derivatives%20Taxonomies%20-%20version%202012-10-22.xls

classification. Therefore, we recommend acceptance and development of the ISDA OTC Taxonomy as the designated UPI and product classification system by the Commission.

Reasons to accept the taxonomy as the CFTC and global standard:

- in use broadly for product identification in reporting already
- provides an established baseline for product identification that is publicly available
- can be built upon and developed further to meet the needs of global regulators, based on their cooperation and input

55. Please explain your experiences and any challenges associated with the creation, transmission and reporting of USIs.

Unique Swap Identifiers (USI)

Creation

The predominant issue with respect to creation of USIs is who can generate the value. From a data integrity perspective, the primary purpose of a USI Namespace is to ensure uniqueness of USIs, and therefore which party generates the USI is immaterial provided they have a unique prefix. Party identification is provided via the LEIs submitted for the parties and need not be derived from the USI.

The task of creating and transmitting USIs would be improved if there was more flexibility as to the generator. For instance, a non-SD/MSP reporting counterparty which is affiliated with an SD or MSP should be allowed to generate a USI using the USI namespace of its affiliated SD or MSP rather than being required to accept a USI from the SDR. The extra step of consuming the USI from the SDR is technologically challenging for some parties and impacts the ability of the reporting counterparty to report timely in other global jurisdictions using the USI as the trade identifier.

As similarly advised in response to Question 22, market participants who may be exempt from registration with the CFTC, such as execution platforms like electronic communication networks (“ECNs”) or middleware providers and electronic confirmation platforms that offer reporting services, do not have the ability to create a USI on behalf of the parties. Generation of a USI from a central platform that has established electronic connectivity to counterparties eliminates the challenges associated with timely transmission of the USI between the reporting counterparty and the non-reporting counterparty. Further, these limitations are likely to have a profound negative impact on global data aggregation, as further described below.

Transmission

Transmission of the USI between parties continues to be a challenge since there are countless trading scenarios and flows through which a USI may need to be exchanged. Broader use of central platforms for USI creation and transmission as suggested above would vastly reduce the scope of transactions for which USIs are exchanged via less efficient methods.

In addition, not all reporting counterparties take advantage of the available means of exchange between the parties to communicate the USI to the non-reporting counterparty. Even in cases where the USI is being consistently transmitted, the non-reporting counterparty does not always consume and retain this value to meet their recordkeeping or global trade reporting obligations,

further impeding the ability to establish a single global trade identifier. The Commission can assist in these scenarios by openly encouraging consistent transmission of USIs from reporting counterparties to non-reporting counterparties as well as consumption and retention of USIs by the non-reporting counterparties.

The opportunity to communicate the USI via electronic confirmation platforms is being wasted by some DCOs who withhold regulatory data from their tri-party confirmation submissions for cleared swaps in the credit asset class. Inclusion of the USI in electronic confirmations is extremely useful to market participants as an efficient method to consume and reconcile the USIs for their cleared swaps. We ask that the Commission encourage all parties that generate USIs to use all available methods, including confirmations, to transmit USIs.

Global impact

Beyond the USI issues that are relevant to meeting the CFTC's reporting requirements, there is a substantial and growing factor negatively affecting the accuracy and efficiency of global reporting.

Creation of a regulator specific USI construct complicates the ability to extend the approach to reporting in other jurisdictions. Whether a USI or a UTI, the expectation is the same – that the parties to the transaction recognize and utilize a mutually exclusive transaction identifier. The benefit to each regulator is evident, but there is even greater benefit to regulators from a global data aggregation perspective. Use of the same USI/UTI by all parties required to report a transaction globally is the only truly effective means for regulators to identify duplicate trade reporting and produce accurate aggregated data to meet their mutual objectives for global transparency and risk mitigation. In addition, it is inefficient and costly for reporting counterparties, SDRs, SEFs, DCOs, market infrastructure providers and others integral to meeting reporting requirements to maintain a separate USI or UTI for each jurisdiction to which a trade is reported.

Anticipating the need for a global standard for UTIs, ISDA advocated that the CFTC staff take a more global approach to USI generation by using the LEI as the USI Namespace. The approach adopted by the CFTC is not easily extendible to global reporting. So, ISDA worked with market participants to develop a best practice for the generation and communication of a single UTI[63] for global reporting that includes a key principle that the USI should be used as the UTI for reporting in other jurisdictions. ISDA advocated that global regulators accept the USI as the UTI for reporting under their regulations and many have agreed. However, there is wide gap between accepting and requiring. Since reporting counterparties are not compelled by their regulators to follow a global standard that facilitates creation and use of a single trade identifier across regimes, there are many scenarios whereby the parties cannot effectively use the USI as the UTI or choose not to do so due to additional complexity and burden. This includes the examples provide above for swaps transacted via an ECN and those for which the non-reporting counterparty is not repurposing the USI.

The CFTC could eliminate these reporting and data quality issues by proactively working with global regulators to agree a single approach to USI/UTI construct, generation and transmission and advocating the necessity to follow such standard. The UTI best practice published by ISDA is in use

[63] ISDA, *Unique Trade Identifier (UTI): Generation, Communication and Matching* (December 10, 2013) http://www2.isda.org/attachment/NjI3MQ==/2013%20Dec%2010%20UTI%20Workflow%20v8.7.8b%20clean.pdf

broadly by market participants for reporting already, so is an established baseline for a regulatory consistent approach. Market participants understand the importance and benefit of a single UTI so would be willing to work with global regulators to transition over an appropriate period of time if an alternate method is agreed and endorsed by global regulators.

In the meantime, although other regulators are willing to accept CFTC specific USIs, there is no reciprocity whereby the Commission will accept a UTI created for reporting to another jurisdiction. Reciprocity would be particularly effective when a swap is also reportable in a regime that requires reporting by both counterparties. In these cases, there is a compelling necessity to agree and exchange a UTI timely and therefore frequent use of UTI generated by platforms that are not registered with the CFTC. The difference in construct of the UTI and the party which generated it should not be an impediment to this mutual recognition since they only ensure a unique value and therefore should be secondary to the regulatory benefit of a single global transaction identifier.

The use of multiple identifiers in global reporting for a single transaction is not conducive to global data aggregation in accordance with the goals of the Financial Stability Board. We encourage the Commission to view USI from the global landscape and work with other regulators to congregate on a mutually beneficial solution.

G. Swap Dealer/Major Swap Participant Registration and Compliance: How Can the Commission Enhance Part 45 to Facilitate Oversight of Swap Dealers and Major Swap Participants?

56. Should the Commission require an SDR to aggregate the number of transactions by an entity, and the aggregate notional value of those transactions, to reflect the entity's total swap position and its total swap activity during a given period (e.g., for purposes of monitoring the SD de minimis calculation)?

SDR aggregation

The LEI is available to the Commission as a tool to aggregate data for a particular counterparty based on the aim of such analysis. Should SDRs aggregate transactions for an entity by number and notional for use by the Commission and reporting counterparties, we note that it may not provide a complete tool for monitoring an entity's de minimus threshold. However certain entities may use aggregated data as a tool in their overall de minimus monitoring framework if the aggregated information is made available to such entities and the Commission. The Commission should clarify their data aggregation needs and work with SDRs and reporting counterparties to determine the best method to use the reports they provide to achieve those objectives.

57. Should data elements be reported to the SDR to reflect whether a swap is a dealing or non-dealing swap? If so, how should this information be reflected in the SDR

Dealing vs. non-dealing

Data that indicates whether a swap is for purposes of dealing or hedging should not be required. This information is not part of trade capture and the intentions of the client may not be known; nor would it be practicable for reporting counterparties to obtain representations from counterparties on a transaction by transaction basis as to whether the swap is a dealing swap or a non-dealing

swap. Having to do so would be very burdensome and extremely difficult to implement as it would necessitate written representation from the counterparty at the time of each trade. Without clarity on how the Commission would use this information to meet its objectives, it is difficult to justify the cost of implementation.

58. Where transactions are executed in non-U.S. dollar ("USD") denominations, should the SDR data reflect USD conversion information for the notional values, as calculated by the counterparty at the time of the transaction (rather than the conversion taking place at the SDR)?

a. If so, how should the SDR data reflect this information?

b. Would this answer be different depending on the registration status of the reporting counterparty (e.g., SD/MSP)?

Currency conversion

For sake of consistent comparison and efficiency, it makes sense for the SDR to do any necessary conversions as they will be based on the same rate at same point in time. Requiring the conversions to take place at the reporting counterparty level would be costly and inefficient.

H. Risk: How Can Part 45 Better Facilitate Risk Monitoring and Surveillance?

60. Are there data elements that should be reported on a transaction basis to identify the linkage between a swap transaction and a reporting counterparty's other positions in products regulated by the Commission?

Linking counterparty positions

No additional data elements are required to link a reporting counterparty's positions in products regulated by the Commission. Data aggregation by product can be accomplished via the Unique Product Identifier and aggregation by reporting counterparty can be accomplished via LEI.

62. How can the Commission best aggregate data across multiple trade repositories (including registered SDRs)?

See response to Q63.

63. What international regulatory coordination would be necessary to facilitate such data aggregation?

Data aggregation across multiple trade repositories[64]

Data aggregation across multiple trade repositories requires data harmonization and the use of consistent data standards by the trade repositories. While a majority of trades are reported using the FpML format or a CSV format that is harmonized based on FpML, the Commission to date has

[64] This subsection responds to Questions 62 and 63.

not mandated the use of one data standard. The lack of a common data standard used by all trade repositories makes the process of aggregation more difficult, can have a negative impact on the data quality of the aggregated data and increases the risk for errors. In addition, consistent use of trade (i.e. USI/UTI) and product identifiers (e.g. UPI) are key requirements to successful data aggregation.

Data aggregation across multiple repositories is not limited to trades reported in the U.S. to the CFTC. In order to fulfill the G20 requirements around systemic risk management, data aggregation will need to happen across multiple repositories in multiple jurisdictions. Internationally the aggregation becomes even more complex. Besides the absence of a mandated data standard (FpML is also on a global basis the standard that is the basis for the majority of trade reporting but not mandated by regulators), there are differences in workflow (e.g. single party reporting versus dual party reporting or differences in reporting of trade lifecycle of cleared trades) that make the consistent use of identifiers and understanding of global workflows even more important. Data aggregation on an international level will only be successful if there is international collaboration and agreements on data standards and the use of identifiers. Absent a mandated international standard, mutual recognition of prescribed standards will be required (e.g. allow the use of an ESMA sanctioned UTI format for reporting to the CFTC). We believe that mutual recognition in the area of Unique Identifiers is the second best solution if a global solution cannot be achieved.

As far as international data aggregation is concerned, the Financial Stability Board ("FSB") is expected to come out with a set of recommendations around a global market infrastructure for data aggregation. As we have pointed out in our response to the FSB consultation[65] data aggregation on an international level needs to take data privacy and confidentiality concerns into account. Propagation of international standards supported by regulators globally will facilitate data aggregation on a national level as well.

[65] http://www2.isda.org/attachment/NjM3MA==/20140228%20FSB%20Feasibility%20study%20on%20data%20aggregation%20-vfinal.pdf

I. Ownership of Swap Data and Transfer of Data Across SDRs

64. The Commission seeks input from market participants regarding the ownership of the transactional data resulting from a swap transaction. Is the swap transaction data from a particular swap transaction owned by the counterparties to the transaction?

a. If cleared, should a DCO have preferential ownership or intellectual property rights to the data?

b. Should ownership or intellectual property rights change based on whether the particular swap transaction is executed on a SEF or DCM?

c. What would be the basis for property rights in the data for each of these scenarios?

d. What ownership interests, if any, are held by third-party service providers?

e. What are the ownership interests of non-users/non-participants of an SDR whose information is reported to the SDR by a reporting counterparty or other reporting entity

Permitted Usage[66]

As a preliminary matter, ISDA submits that Commission policymaking in the area of protecting parties' interests in swap transaction data should focus on determining appropriate uses of data, rather than on abstract and elusive questions of data ownership and property rights. The Commission should be guided by the fundamental principle that swap transaction data is received and collected by SDRs and other registered entities only by virtue of statutory mandate, which contains both express and implicit limits on the use of that data. Apart from the real-time data that is required to be publicly disseminated pursuant to Part 43, data collected and maintained by a SDR is intended for use by the Commission and certain other regulators and is accorded protections under Sections 8 and 21(c)(7) of the Commodity Exchange Act. Further use of such data inherently conflicts with that mandate.

A registered entity should be permitted to use the data submitted to it only for purposes of discharging its regulatory obligations under the Commodity Exchange Act. The sole exception to this principle should be to permit SDRs to offer value-added analysis or services to one or both counterparty(ies) to trades for which data has been reported to the SDR under relevant CFTC reporting rules based on the data reported for such trades (but not on data pertaining to trades to which such person is not a counterparty). Consistently with core principles on fair, open and equal access and on the management of conflicts of interest (including Commission regulation 49.27 in the case of SDRs), registered entities should not be permitted to condition membership or user status on the granting of consent to use data for any other purpose.

Under existing Commission regulation 49.17(g)(2), the swap dealer, counterparty or any other registered entity that submits the swap data may consent to commercial or business use of that data. ISDA recommends that the right to consent should be vested only in the counterparties to the swap (meaning the counterparties to the "original swap" in the case of a cleared swap). When data is reported to an SDR by a SEF, DCM or DCO, the fact that such other registered entity is the means of submission to the SDR should not give that registered entity the ability to consent to

[66] This subsection responds to Questions 64, 65(a) and 66

commercialization of the reported trade data. Again, impartial access and conflicts management core principles demand that a SEF, DCM or DCO not be permitted to condition membership or user status on the granting of consent to commercial use of data. Accordingly, ISDA recommends that Commission regulation 49.17(g)(2) be modified to require written consent of the swap counterparties to commercial or business use in all cases.

65. Is commercialization of swap transaction data consistent with the regulatory objective of transparency?

- ***a. In what circumstances should an SDR be permitted to commercialize the data required to be reported to it?***
- ***b. Does commercialization of swap data increase potential data fragmentation?***
- ***c. Is commercialization of swap data reported to an SDR, DCM or SEF necessary for any such entity to be economically viable? If so, what restraints or controls should be imposed on such commercialization?***

Commercialization and Transparency

The commercialization of swap transaction data would not advance the regulatory objective of transparency. Transparency goals are already addressed by the public dissemination of Part 43 data and by the Commission's weekly swaps report. Further, ISDA questions the utility and reliability of any derived information that would be produced for commercial use. First, because only the consenting sub-population's data could be considered, the representativeness of the data used to produce the derived information is open to question. Second, the soundness and statistical integrity of the derived information could only be tested by providing third party auditors with access to the raw data, which would constitute a broadening of access that is inconsistent with statutory protections.

66. Does the regulatory reporting of a swap transaction to an SDR implicitly or explicitly provide "consent" to further distribution or use of swap transaction data for commercial purpose by the SDR?

See response for Q64.

67. Even though swap data reported to an SDR must be available for public real-time reporting, should any use of such real-time data or commercialization of such data occur only with the specific consent of the counterparties to the swap

Part 43 Real-time Data

Real-time data, once publicly disseminated by the SDR, will be in the public domain, and restrictions on its further commercial or other use would not be practicable. However, further use of public data by the SDR that disseminated it (and will generally be the custodian of the non-public data pertaining to the same swaps) should be subject to firewalls and other safeguards to ensure that the SDR personnel involved in commercialization have no access to non-public data and are not advantaged relative to other persons who receive the data from public sources.

68. An ancillary issue relating to commercialization of data and legal property rights relates to the "portability" of SDR data. This issue relates to the operation of Commission regulation 45.10 (Reporting to a single SDR), which requires that all swap data for a given swap must be reported to a single SDR, specifically, the SDR to which creation data is first reported. The Commission did not, however, directly address whether the data in one SDR may be moved, transferred or "ported" to another SDR.52 The Commission seeks comment on whether § 45.10 should be re-evaluated and whether a viable alternative exists. Should portability of data be permitted? If so, should there be agreement by the counterparties to a swap prior to the data being ported

Portability of Data

The portability of swap data would be improved by consistent data standards across SDRs. The CFTC should work with global regulators to set clear and consistent technical standards for trade repositories that facilitate portability and improve data quality.

Nevertheless, in order to preserve the ability of market participants to change SDRs should circumstances warrant, Commission regulation 45.10 should be amended to permit porting of the complete data series for each ported swap at the election of the reporting counterparty.

J. Additional Comment

69. To the extent not addressed by any of the questions above, please identify any challenges regarding: (i) the accurate reporting of swap transaction data; (ii) efficient access to swap transaction data; and (iii) effective analysis of swap transaction data. Please address each issue and challenge as it pertains to reporting entities, SDRs, and others. Please also discuss how such challenges can be resolved.

a. What challenges do Commission registrants (SDs, MSPs, SEFs, DCMs, and DCOs) face as reporting entities and reporting counterparties under the swap data reporting rules? What enhancements or clarifications to the Commission's rules, if any, would help address these challenges?

b. What challenges do financial entities face as reporting counterparties and non-reporting counterparties under the swap data reporting rules? What enhancements or clarifications to the Commission's rules, if any, would help address these challenges?

c. What challenges do non-financial entities, including natural persons, face as reporting counterparties and non-reporting counterparties under the swap data reporting rules? What enhancements or clarifications to the Commission's rules, if any, would help address these challenges?

Data Privacy

Conflicts between the Commission's reporting mandate and non-U.S. bank secrecy, data privacy or similar laws (including blocking statutes) ("Privacy Laws") remain a formidable challenge in reporting cross-border transactions. Existing no-action relief under CFTC Letter No. 13-41, while appreciated by market participants, does not fully resolve these difficulties. The conditions of the

relief under CFTC Letter No. 13-41 may be impossible to satisfy in a variety of contexts. For example, the application of conflicting non-U.S. Privacy Laws may be triggered by booking location and other factors not within the scope of the no- action relief. In addition, the conditions of 13-41 prohibit its use for guaranteed affiliates and affiliate conduits. Furthermore, as preparations for reporting progress globally, additional legal analysis may reveal problems in jurisdictions that were not included as "Enumerated Jurisdictions" under CFTC Letter No. 13-41. The assumption, implicit in CFTC Letter No. 13-41, that a market-wide consensus on which jurisdictions present reporting conflicts is itself problematic. The applicability of non U.S. Privacy Laws and judgments regarding their interpretation and appropriate implementation by institutions are highly fact-specific and reflective of situational characteristics of those institutions. The Commission should not expect uniformity across reporting parties in their perception of a jurisdiction as problematical in this regard or not.

Additionally, as addressed in ISDA's no-action letter request submitted June 21**,** 2013[67], obtaining and processing counterparty consent as required under relevant Privacy Laws of some jurisdictions is a challenging process.

These challenges can only be addressed effectively through efforts by regulators to achieve international harmonization of relevant laws so that a reporting party's compliance with mandatory trade reporting obligations in itself will be recognized as a permitted act (even without counterparty consent) under all applicable Privacy Laws, a result that is unlikely to be achieved prior to June 30, 2014, the expiration date of the existing relief, or any time soon thereafter.

[67] See Appendix, "Request for No-Action Relief – Parts 20, 45 and 46," (June 21, 2013)

ISDA® Safe, Efficient Markets

IV. Summary

ISDA and its members recognize the importance of the Part 45 regulations and strongly support initiatives to increase regulatory transparency. We would like to reiterate our appreciation for the opportunity provided by the Commission to respond to the Comment Request with our feedback and proposals. We are happy to discuss our responses and provide any additional information that may assist with your consideration of these important matters. We look forward to the changes to the SDR reporting requirements that the Commission will enact as a result of the Comment Request. We anticipate that such changes will improve the ability for reporting entities to comply with the Part 45 regulations in a meaningful, consistent and cost-effective manner while improving the Commission's ability to use the data to meet the primary objectives of the regulations.

Thank you for your consideration of these very important issues to market participants. Please contact ISDA staff if you have any questions or concerns.

Sincerely,

Karel Engelen
Senior Director
Head, Data, Reporting & FpML
International Swaps and Derivatives Association, Inc.

V. Appendices

Documents referenced below are on the following pages, identified by title:

- "Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Valuation Data Reporting for Cleared Swaps (Part 45.4(b)(2)(ii))," (February 12, 2014). (Q8)
- "Request for Division of Market Oversight Staff No-Action Letter and Interpretive Letter Pursuant to CFTC Regulation 140.99: Impact of Swap Dealer and Major Swap Participant Registration Status Changes on Counterparties' Obligations under Reporting Requirements," (April 4, 2014). (Q12)
- "Revised Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Order Aggregation of Certain Permitted Transactions," (April 3, 2014). (Q14)
- "Request for No-Action Relief - Part 45: Swap Allocation Report Timing," (December 10, 2012). (Q17)
- "Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))," (February 11, 2014). (Q28)
- "Request for No-Action Relief – Parts 20, 45 and 46," (June 21, 2013). (Q69)

ISDA® Safe, Efficient Markets

17 CFR Part 45

February 12, 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: Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Valuation Data Reporting for Cleared Swaps (Part 45.4(b)(2)(ii))

Dear Mr. McGonagle:

The International Swaps and Derivatives Association, Inc. ("ISDA") and its members recognize the importance of the Part 45 regulations (the "Reporting Rules") of the Commodity Futures Trading Commission (the "Commission" or "CFTC") and strongly support initiatives to increase regulatory transparency. However, challenges remain, and therefore, ISDA, on behalf of its members that are "reporting counterparties" under Part 45[1] (collectively, "Reporting Parties"), hereby request relief from certain requirements under the Reporting Rules, 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 62 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. Background

On December 13, 2012, ISDA submitted a request to staff of the CFTC's Division of Market Oversight ("DMO") requesting no-action relief on behalf of its members, and other similarly situated market participants, from the requirements of Part 45.4(b)(2)(ii) of the Reporting Rules.

[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."

In response to ISDA's request, DMO issued CFTC Letter No.12-55[2] which granted conditional relief to Swap Dealers and Major Swap Participants from their obligations under Part 45.4(b)(2)(ii) until June 30, 2013. Subsequently, DMO extended such relief until June 30, 2014 under CFTC Letter No. 13-34[3] ("NAL 13-34").

ISDA and its members are grateful for the relief granted by Commission staff with respect to Part 45.4(b)(2)(ii). Unfortunately, the conditions that prompted the original request for relief, and the subsequent extension, remain. Reporting Parties require certainty as to (i) their obligations with respect to valuation data reporting for cleared swaps and (ii) whether any such reporting of valuation data for cleared swaps may be sent to the Swap Data Repository ("SDR") of their choice or may be required to be sent to the SDR selected by the Derivatives Clearing Organization ("DCO").

Certainty on these points is essential before Reporting Parties can commence (i) reporting valuation data to an SDR to which they are already connected or (ii) onboarding, development and testing necessary to submit valuation data to an SDR to which they are not already connected and live with reporting. Such work may be significant, especially in the event reporting to multiple additional SDRs is required. With three provisionally registered SDRs and two further applicants, parties may need to connect to as many as four additional repositories, thus multiplying the time and effort required to prepare.

Although the relief extended under NAL 13-34 is still in effect until June 30, 2014, there is no clear indication that a resolution of the outstanding legal uncertainty with respect to reporting of valuation data for cleared swaps by Reporting Parties is imminent. Depending on the outcome, Reporting Parties believe they might need at least six months to complete the necessary onboarding, development and testing. Therefore, on their behalf, ISDA is proactively seeking an extension of NAL 13-34.

II. Relief request

In consideration of the conditions described above, ISDA respectfully requests that DMO further extend the relief granted pursuant to NAL 13-34 and thereby recommend that enforcement action not be taken against a Reporting Party which does not report valuation data for cleared swaps as required by Part 45.4(b)(2)(ii) of the Reporting Rules. We request an extension of such relief until January 31, 2015 with the understanding that further relief may be necessary depending on when unambiguous clarification is made available to market participants regarding the obligations of Reporting Parties with respect to Part 45.4(b)(2)(ii) and any corresponding requirements pertaining to the selection of SDR for purposes of reporting valuation data for cleared swaps.

---

[2] http://www.cftc.gov/LawRegulation/CFTCStaffLetters/12-55

[3] http://www.cftc.gov/LawRegulation/CFTCStaffLetters/13-34

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

Sincerely,

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

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

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 February 12, 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,

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

ISDA. Safe, Efficient Markets

17 CFR Part 43
17 CFR Part 45

April 4, 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: Request for Division of Market Oversight Staff No-Action Letter and Interpretive Letter Pursuant to CFTC Regulation 140.99: Impact of Swap Dealer and Major Swap Participant Registration Status Changes on Counterparties' Obligations under Reporting Requirements

Dear Mr. McGonagle,

Changes to a registered person's status as a Swap Dealer ("SD") or Major Swap Participant ("MSP"), in particular deregistration and limited purpose designation[1], impact the operational ability of its counterparties to comply with their obligations as SDs or MSPs, including, but not limited to, Part 43 and Part 45 regulations (the "Reporting Rules") of the Commodity Futures Trading Commission (the "Commission" or "CFTC"), external business conduct, clearing, and confirmation, portfolio reconciliation and portfolio compression requirements. The current process for granting such changes to registration does not consider these implications in a manner that allows for a consistent and coordinated approach to changes or transfer of obligations, which imposes compliance challenges and, with respect to the Reporting Rules, may impact the quality of reported data and the ability for parties to comply with their obligations.

The International Swaps and Derivatives Association, Inc. ("ISDA") and its members recognize the importance of the Reporting Rules and other CFTC regulations and strongly support initiatives to increase regulatory transparency. In order to address the challenges noted above, ISDA, on behalf of its members that are "reporting parties" under Part 43[2] and "reporting counterparties" under Part 45[3] (collectively, "Reporting Parties"), hereby request relief from certain requirements under the Reporting Rules and interpretive guidance with respect to other requirements under the Reporting Rules as set forth in Sections III and IV and explained below.

[1] Though not an aspect of their registration with the Commission, we note that a change to a party's status as a guaranteed affiliate or conduit affiliate (as defined in the CFTC's Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations: Rule) will create similar challenges.

[2] 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]."

[3] 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."

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. Background

Registration Withdrawal or Termination ("Deregistration")
A SD may submit an application to the Commission to withdraw its registration[4] if it has been a SD for at least 12 months provided it qualifies for the *de minimus* exception[5]. Approval of such a withdrawal request from a SD (the "applicant") may be effective 30 days after receipt[6], even though the applicant's counterparties may be unaware of the request during this time in order to prepare. A MSP may also qualify for a termination of its status[7] (also, an "applicant") if subsequent to its registration it does not exceed any of the applicable daily average thresholds for four consecutive fiscal quarters. Though not privy to a request for withdrawal or a qualification for termination, as applicable, a SD or MSP which faces the applicant will become responsible for certain obligations under the Reporting Rules for their mutual swaps. Insufficient notification by the Commission of its intention to approve a withdrawal or termination means the change in registration may take effect before Reporting Counterparties have made the requisite changes to their static data for application to swaps entered into on or after the applicable effective date, resulting in gaps in reporting and exceptional effort to identify and correct any errors or omissions.

Limited Designation ("LD")
Under a "limited purpose designation" or "limited designation", a person can be designated by the Commission as a SD for one type, class or category of swap or activities without being considered a SD for other types, classes, categories or activities[8]. A MSP may be designated by the Commission as a MSP for one or more categories of swaps without being a MSP for all classes of swaps[9].

Though the person which requested a LD (also, the "applicant") is expected to demonstrate full compliance with respect to the requirements that apply to the type, class or category of swap or activity that fall within its limited designation, the rule does not contemplate the need for its counterparty to implement technical capabilities to consider which swaps fall inside and outside of that scope. In the case of determining the Reporting Party in accordance with Part 45.8, such clarity is necessary in order

[4] 17 C.F.R. 1.33(ggg)(4)(iv).
[5] 17 C.F.R. 1.33(ggg)(4)(i).
[6] 17 C.F.R. 3.33(f).
[7] 17 C.F.R. 1.33(hhh)(5).
[8] 17 C.F.R. 1.33(ggg)(3).
[9] 17 C.F.R. 1.33(hhh)(2).

to designate a single Reporting Party for the swap. The parameters (i.e., specific activities or specified categories) under which a LD may be granted under CFTC rules may differ from case-to-case, which means that it may not be possible for static data and reporting logic to accommodate the demarcation between the LD and the applicant's other swap activities and, in any event, Reporting Parties are unlikely to anticipate all possibilities in order to proactively build static data and reporting logic that is flexible enough to accommodate all undetermined parameters. As a result, they require lead time in each case of a LD to assess their ability to adjust their static data and reporting logic, and then, when necessary and practicable, develop and test necessary changes. Even if their systems are capable of accommodating the conditions of the LD, Reporting Counterparties will still require advance notice to make the necessary static data changes concurrent with the relevant effective date.

We further note that Reporting Parties will not have insight into whether a SD or MSP with LD has met and continues to comply with the conditions, if any, prescribed by the CFTC in the relevant Order of Limited Purpose Designation (the "LD Order"), either in general or with respect to a particular swap. Significantly, Reporting Parties may not be able to ascertain whether a particular swap is within or outside the LD due to its conditions (e.g., that the swap be a "non-dealing" swap of the LD entity).

To date, the Commission has granted two LDs and one deregistration, respectively[10]:

1. Cargill, Incorporated[11] ("Cargill"), effective October 29, 2013 (the "Cargill LD")
2. State Street Bank and Trust Company[12] ("State Street"), effective December 19, 2013 (the "State Street LD")
3. The Hong Kong & Shanghai Banking Corporation Limited ("HBAP"), effective January 16, 2014 (the "HBAP deregistration")

II. Impact statements

We request that the Commission and DMO staff consider the following impact statements and recommendations in order to (i) clarify its expectations with respect to swaps subject to the approved changes in registration listed above and (ii) establish a standard for future changes in registration approved by the Commission to ensure an orderly implementation and facilitate continuity for Reporting Parties to comply with their obligations under the Reporting Rules which prevents gaps or duplications in reporting that may impact data quality.

Notification

As a result of a change to a SD or MSP's registration status, the obligations of its counterparties will be altered with respect to new swaps, and may be altered with respect to previously reported swaps. Reporting Parties house internal static data sourced from or validated against the National Future Association's ("NFA") SD/MSP registry[13] (the "Registry") to determine which party will be the

[10] We understand that a limited designation granted to Cargill Financial Services International, Inc. is not in effect since this affiliate was not registered as a Swap Dealer by November 30, 2013 in accordance with the conditions of the LD.

[11] http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cargillorder102913.pdf

[12] http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/ssbtorder121913.pdf

[13] http://www.nfa.futures.org/NFA-swaps-information/regulatory-info-sd-and-msp/SD-MSP-registry.HTML

Reporting Counterparty in accordance with Part 45.8. Most parties track SD or MSP status at the party legal entity level (e.g. via its Legal Entity Identifier). Likewise, the Registry is currently only capable of providing SD/MSP registrant status on those grounds.

ISDA requested of staff at the NFA that changes to the Registry be implemented to include the additional data elements pertaining to a deregistration or a LD. NFA staff has advised they will enhance the Registry to include the following:

1. Deregistered firms with the date of deregistration; and
2. An indication of Limited Designation as applicable.

The target date for implementation is April 30, 2014.

However, as the NFA does not currently maintain in electronic format the effective date of a LD nor the key parameters, they are unable to provide these as part of the Registry. Both of these data elements are essential for Reporting Counterparties to determine whether specific trades fall within the scope of the LD, and therefore which party will report. Issuing conditions for a LD in terms that can be managed systematically is essential to parties' ability to comply accurately and consistently in accordance with an LD Order. Therefore we request that the Commission work with the NFA to make the effective date, parameters and conditions of a LD Order available on the Registry.

With respect to a change in registration status, parties expect that changes would apply to new swaps on a going forward basis from the effective date of the corresponding order. However, advance notice is still required to implement a change to static data for the relevant effective date. In the case of the HBAP deregistration no notice was issued by the Commission that this withdrawal from registration was approved. Rather, on the day the change in registration was effective, HBAP was removed from the Registry without explanation or an audit trail. Advance notification is essential for Reporting Parties to update their static data in a cohesive manner that prevents gaps or duplications in reporting. Such notice should not be left solely to the party seeking deregistration, but rather should be made publicly available by the Commission in order to facilitate an industry coordinated approach to requisite operational changes.

Further, Reporting Parties may also be dependent on communication and action by the applicant to facilitate a transition in reporting obligations. For instance, the applicant may need to correct its set-up with (i) third party service providers (e.g. Markitwire or DSMatch) which determine the Reporting Counterparty on behalf of the parties which use their electronic confirmation platforms or (ii) swap execution facilities. Also, additional communication on the part of the applicant may be necessary for Reporting Parties to understand how to determine which trades fall within the scope of the relevant business unit or activity for which a LD was granted.

In order to allow time to operationally facilitate the transition, we request that the Commission issue a publicly available notice with respect to its decision to approve an application for deregistration or LD a minimum of 30 days prior to the effective date of a deregistration and 60 days prior for a LD, especially in the event the conditions are unprecedented. Such notice will allow Reporting Parties to assess the impact, plan for any requisite technological changes and static data updates for the effective date of the LD or deregistration. Despite advance notice, in some cases this suggested notification

period may be insufficient depending on the difficulty of any technological changes, as further described below.

Technological Requirements

The Cargill LD and State Street LDs require parties to distinguish SD status at a business unit level and asset class level, respectively. The rules even contemplate a LD which may "split the desk" and apply solely to activity involving swaps not entered into for the purposes of hedging a physical position[14]. A SD or MSP which is granted such LD must be able to make such a distinction, but all of its counterparties may not be equally privy to activity-level considerations. Most parties' static data systems are currently not designed to track an SD/MSP registration at a level more granular than the legal entity. Reliance on a pre-trade notification from the counterparty for each single swap transaction as to which swaps fall within the scope of the LD, may not be a feasible or the most prudent solution as it would mainly involve front office personnel and manual processes. The need to report as soon as technologically practicable means that any such logic must be automated to the largest extent possible, in order to ensure timely and accurate reporting. Therefore, if the determination of the Reporting Party is to hinge on whether a transaction is within or outside the scope of the LD, it is essential that Reporting Parties are able to build robust static data and reporting logic that is capable of assessing whether the swap meets the parameters of the LD and hence whether their counterparty is considered a SD or MSP for the swap. In order to ensure they remain in compliance with Commissions rules, Reporting Parties need to have the system capability in place ahead of time, rather than addressing issues and impact after a change in registration has already occurred.[15]

In order to allow for consistent global reporting, Reporting Parties are reliant on robust static data that can be used for multi-jurisdictional reporting. Static data distinctions at a business unit, asset class or activity level complicate static data infrastructure and may impact global reporting and so need to be implemented carefully to maintain the quality and accuracy of global reporting. We request that the Commission take into consideration the technological impact on Reporting Parties to ensure that the conditions for a LD are discernible by the counterparties to the SD/MSP with LD.

Reporting Party Responsibility

Based on the LD and deregistrations approved by the Commission to date, it has become apparent that the industry requires guidance from DMO staff with respect to how these changes impact reporting of (i) swaps entered into during any period of no action relief granted to the applicant in advance of the approval and effectiveness of its change in registration status and (ii) swaps entered into prior to the effective date of the change in registration for which the applicant was previously determined to be the Reporting Counterparty and for which continuation data reporting obligations remain.

We note for your consideration that a change to the Reporting Party for a previously reported swap poses operational challenges for both Reporting Parties and market infrastructure providers who have built logic that maintains a Reporting Party determination for the life of the Unique Swap Identifier ("USI"). Consequently, an alternate approach will require technological changes and/or manual overrides.

[14] Fed Reg. 77 at 30646

[15] In the case of the Reporting Rules, any errors or omissions can be corrected, but in the case of other Commission regulations, such as the business conduct rules, it may be too late to remedy.

Summary
We acknowledge that some of the above referenced issues have impact and oversight beyond DMO, and therefore we request that DMO consult inter-divisionally within the Commission to consider these dependencies while reviewing future requests from applicants for changes in their registration status. Building in adequate notification time to market participants in advance of the effective date of the relevant change will allow Reporting Parties and market infrastructure providers, if applicable, to make the necessary changes.

We request that DMO staff consider the operational limitations of the counterparties to the applicant when a request for a change in registration is under consideration by the Commission in order to proactively issue no action relief that allows time for the remaining registrant to development and test any necessary changes to their internal static data source and reporting logic. We are happy to provide input on a case by case basis to help determine what, if any, period of time is needed. Ideally such relief should be provided in advance of the effective date of the LD or deregistration to prevent any gaps or duplications in reporting during the period of relief and to eliminate the need for either party to correct prior errors or omissions, which could be manual in nature.

III. Request for Relief

We acknowledge that Cargill and State Street have made an extraordinary effort to communicate their expectations, plans and actions with their counterparties in order to facilitate the transition of reporting obligations. However, parties may still face technological challenges and interpretive questions persist, potentially impacting the quality of reporting.

As explained above, most Reporting Parties do not currently have the technological capabilities to distinguish a Swap Dealer at the business unit level and/or asset class level in accordance with the conditions for the Cargill LD and State Street LD, respectively. As a result, they may be assigning themselves as the Reporting Party for all swaps between themselves and these counterparties, resulting in duplicate reporting in cases where either Cargill or State Street, as applicable, has assumed the Reporting Party obligation. Alternatively, the LD entity and its SD counterparty may be assigning the Reporting Party obligation in accordance with industry best practice[16], resulting in cases where neither party is reporting the swap. Reporting Parties require time to clarify which trades fall within the scope of the relevant LD and develop and test the necessary changes to their static data infrastructure and reporting logic in order to determine the Reporting Party in accordance with the stated scope of each of the Cargill LD and State Street LD.

Further, there may be uncertainty in these cases as to which party was responsible for:
(i) reporting new swaps entered into prior to the effective date of the applicable LD (but during the time that the Commission may have granted no-action relief while the application was under consideration); and
(ii) reporting swaps entered into prior to the effective date of the applicable LD for which continuation data reporting obligations remain.

[16] http://www2.isda.org/attachment/NjE3Ng==/Reporting%20Party%20Requirements_16Dec13_Final.pdf

Therefore, there may be cases where either both or neither party has reported the swap or the most recent events on the swap or a Reporting Party may have incorrectly reported whether the non-reporting party is a SD with respect to the swap. In either case, time is needed for corrective action once it is clear which party is responsible for any duplications or omissions, as applicable.

As a result of the conditions described, ISDA respectfully requests that DMO recommend that enforcement action not be taken against a Reporting Party which either over or under reports, or incorrectly reports the Swap Dealer status with respect to its swaps with Cargill or State Street until June 30, 2014. Such date assumes a timely response to the request for interpretive guidance below. [17]

IV. Request for Interpretive Guidance

We request that DMO issue an interpretive letter which provides guidance with respect to the parties' respective obligations under the Reporting Rules in the event of a LD or deregistration, as follows:

a. The Reporting Counterparty is determined at point of execution and remains throughout the life of the swap and its USI. Therefore any change in registration status does not impact the Reporting Party for swaps entered into prior to the effective date of a LD or deregistration with respect to either Part 43 or Part 45 reporting requirements.

b. The original Reporting Party for the swap remains responsible for the continuation data requirements under Part 45 for the remaining life of the USI for a swap entered into prior to the effective date of the change in registration. In the event of a lifecycle event which changes the parties to the swap (e.g., a novation), or otherwise results in the assignment of a new USI, the parties would reassess the Reporting Party in accordance with Part 45.8[18] and issue a new USI based on the then current respective registration status of the parties.

c. The SD/MSP which is granted a change in registration status continues to be treated as a SD/MSP for purposes of meeting any reporting obligations for swaps entered into prior to the effective date of the change in registration status. To the extent such obligations were not met during a period of relief made available to the applicant while the Commission was reviewing the application for LD or deregistration, the applicant would be responsible for resolving any errors or omissions following the effective date of the change in registration.

d. Absent a notification by the Commission of change in status, and a corresponding update on the Registry, Reporting Parties may assume that a SD or MSP which has been granted a LD has complied and continues to comply with the conditions, if any, set forth in the relevant LD Order. And therefore, the Reporting Party may assume the LD is in effect and applies, as

[17] Additional time may be needed after June 30, 2014 for Reporting Parties to correct in the SDR data which previously has been incorrectly reported by the Reporting Party, as applicable.

[18] Instances where Part 45.8 permits the parties to agree on which of them is the Reporting Party would be unaffected by the requested interpretive letter.

appropriate, to their mutual swaps. In addition, a Reporting Party may reasonably rely on representations from the LD entity regarding its SD status with respect to a particular swap.

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

Sincerely,

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

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 4, 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,

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

ISDA® Safe, Efficient Markets

17 CFR Part 43

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. 13-48[1] ("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 43[4] (“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. <u>Discussion</u>

A. <u>Background</u>

Due to condition (i) on page 4[5] 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 Transactions[6] 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 Transactions[7]; 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 website[8], 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.

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 technologically 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 SEF[10] 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, 2014[12] 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.

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

Sincerely,

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

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,

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

ISDA® Safe, Efficient Markets

Request for No-Action Relief - Part 45

December 10, 2012

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

Re: Swap Allocation Report Timing

Dear Mr. Shilts:

The International Swaps and Derivatives Association, Inc. ("ISDA"), on behalf of its members that intend to register as swaps dealers ("SDs") or major swap participants ("MSPs") and other similarly situated persons, is writing to request no-action relief pursuant to Rule 140.99 with regard to the timing of reporting of allocation of swaps, as described below, under the Regulations of the Commodity Futures Trading Commission (the "Commission") contained in Part 45.

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.

Relief Requested

Rule 45.3(e) requires that an agent allocating a swap report its allocation to the reporting counterparty within 8 business hours, measured in the location of the reporting counterparty. The reporting counterparty then must report to a swap data repository as soon as technologically practicable after the agent's report. ISDA requests confirmation that the staff of the Division of Market Oversight (the "Division") will not recommend enforcement action against any agent or reporting counterparty that fails to adhere to the reporting timeframes of Rule 45.3(e)(ii), if the agent is located in a jurisdiction or time zone different from that of the reporting counterparty and (a) in the case of the agent, the agent reports its allocation as specified in Rule 45.3(e)(ii)(A) within 48 business hours next following the execution of the swap (the "Basic Allocation Period") plus an additional business day for each day of legal holiday in the agent's jurisdiction coincident with the Base Allocation Period and (b) in the case of the reporting counterparty, the reporting counterparty discharges its Rule 45.3(e)(ii)(B) further reporting obligation as soon as technologically practicable during business hours in its own location after receiving the required actual counterparty identification information from the agent. ISDA asks that the Division staff

maintain its no-action position until at least June 30, 2013 or such earlier time as the Commission, in consultation with affected market participants, shall have developed means to resolve the timing issues noted in this letter. We are not in this letter requesting relief from other requirements of Part 45 that pertain to the allocation of bunched trades.

Discussion

Rule 45.3(e) specifies that the agent with respect to a swap to be allocated inform the reporting counterparty of the identities of the actual counterparties to which the swap has been allocated as soon as technologically practicable, but not later than eight business hours after execution. Rule 45.1 makes clear that business hours are business hours in the location of the reporting counterparty.

Swaps may of course be transacted across different jurisdictions (with different business day/holiday calendars) and time zones. It is perfectly possible that an agent will be unable, as a result of those differences, to complete its task within the specified 8 business hours of the reporting counterparty.

In order to avoid situations where the agent's compliance is impossible without 24/7 staffing (including on public holidays), we urge the Division to provide no-action relief intended to create more flexibility for (i) an agent in a different jurisdiction or time zone from the reporting counterparty to report its allocation subject to holiday and time zone differences and (ii) the reporting counterparty to fulfill its following responsibilities within its own business hours.

Sincerely,

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 10, 2012 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,

ISDA® Safe, Efficient Markets

17 CFR Part 45

February 11, 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: Request for Division of Market Oversight Staff No-Action Letter Pursuant to CFTC Regulation 140.99: Reporting Requirements for International Swaps (Part 45.3(h))

Dear Mr. McGonagle:

The International Swaps and Derivatives Association, Inc. ("ISDA") and its members recognize the importance of the Part 45 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 45[1] (collectively, "Reporting Parties"), hereby request relief from certain requirements under the Reporting Rules, 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 62 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.

[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."

I. Background

Part 45.3(h) of the Commission rules requires that with respect to each international swap[2], the Reporting Party shall report (i) the identity of the non-U.S. trade repository not registered with the Commission to which the swap was also reported and (ii) the swap identifier used to identify such swap. It further provides that if necessary, this information must be obtained from the non-reporting party.[3]

We understand that the purpose of Part 45.3(h) is to provide a mechanism for the Commission and foreign regulators to identify international swaps reported to multiple repositories so that swaps are not double-counted by regulators[4]. We further acknowledge that by including the international swap reporting requirement in the Reporting Rules, the Commission has aligned with the direction of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to consult and coordinate with foreign regulatory authorities regarding establishment of a consistent international standard for the regulation of swaps[5]. Keeping these objectives in mind, we believe that a better mechanism exists to effectively meet the aims of the international swaps reporting requirement, as further described below.

Evolution of the UTI global standard

ISDA is committed to developing and promoting data standards that facilitate consistent, efficient methods for Reporting Parties to agree, implement and maintain values suitable for use in regulatory reporting. For instance, ISDA promoted the *Unique Swap Identifier (USI) Data Standard* issued by the CFTC's Office of Data and Technology[6], and worked with industry participants to build a best practice to supplement the USI requirements under the Reporting Rules. ISDA published the results of this collaboration as an industry best practice, *Unique Swap Identifier (USI): An Overview Document* [7] (the "USI standard"), which established standard process flows for treatment of USI and a convention for determining which party should generate the USI. The USI standard has been implemented by Reporting Parties for use in meeting their CFTC reporting requirements and has proven successful.

In developing an approach for global reporting, the industry leveraged the USI standard to develop a similar standard to generate and exchange Unique Trade Identifiers ("UTI") in a way that allows one Trade Identifier globally. Like USI, the goal of the UTI is to have a single trade

---

[2] 77 Fed. Reg. 2197 (January 13, 2012). Sec. 45.1 *International swap* means a swap required by U.S. law and the law of another jurisdiction to be reported both to a swap data repository and to a different trade repository registered with the other jurisdiction.

[3] We note that with respect to information relating to reporting of international swaps by non-reporting parties under non-U.S. laws, Reporting Parties are dependent on non-reporting parties providing the relevant information to the Reporting Party (as may be required under relevant agreements among the parties).

[4] 77 Fed. Reg. 2151 (January 13, 2012)

[5] Ibid.

[6] http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/usidatastandards100112.pdf

[7] http://www2.isda.org/attachment/NjE0MQ==/ISDA%20USI%20Overview%20Paper%20updated%202013%20Nov%2018%20v8%20clean.pdf

identifier known by both parties. As the commencement of reporting to Trade Repositories ("TRs") in foreign jurisdictions rapidly approaches, certain trades will be required to be reported to multiple jurisdictions. Rather than the parties to a trade agreeing a distinct UTI value for each jurisdiction to which the trade may be reportable, it would seem both efficient and prudent to leverage the technological builds developed by Swap Data Repositories ("SDRs") and Reporting Parties for CFTC reporting to allow submission of a single report with a single UTI to satisfy multiple jurisdictions' requirements[8].

Therefore, our members, through the ISDA Reference Data & Workflow Working Group, developed a standard (the "global UTI standard") for generating and exchanging a single UTI for purposes of global trade reporting. ISDA published such standards as best practices in the paper *Unique Trade Identifiers (UTI): Generation, Communication and Matching*[9]. One of the key principles provides that "If a trade requires a Unique Swap Identifier (USI), this should be used at the UTI." [10] To date, global regulators, including the European Securities and Markets Authority ("ESMA"), the Hong Kong Monetary Authority ("HKMA") and the Ontario Securities Commission ("OSC"), have specifically agreed to accept the USI as the UTI for reporting in their jurisdictions. ISDA continues to work broadly with foreign regulators and market participants, including non-ISDA members, to enhance and promote the best practice standards to address both cross-jurisdictional reporting and jurisdiction-specific considerations.

Use of this global UTI standard has been implemented by various Reporting Parties for use in EMIR[11] reporting and is expected to be implemented by other market participants with reporting obligations under EMIR in due course. Reporting Parties have committed to extending the global UTI standard best practice to meet their reporting requirements under the rules of the Australian Securities and Investments Commission, HKMA, the Monetary Authority of Singapore, OSC, Manitoba Securities Commission and the Canadian Authorité des Marches Financiers. ISDA will continue to engage in proactive dialogue with global regulators as they issue their reporting rules to promote acceptance of the global UTI standard.

Meeting the objective of Part 45.3(h)

A direct benefit of the global UTI standard is the ability for regulators to identify duplication of reported transactions between their jurisdictions and across SDRs and TRs, thus efficiently meeting the objective of Part 45.3(h). Where the global UTI standard is followed, the swap identifier used to report to the non-U.S. TR as required by Part 45.3(h) will be a global UTI. Because the UTI reported to the TR is the same as the USI reported to the SDR, there would be no need for the Reporting Party to provide an alternate trade identifier value and the identity of the relevant foreign TR. Rather, the CFTC would be able to identify duplicate reporting for an

[8] We note that in some foreign jurisdictions, parties are allowed to report directly to the regulator rather to a TR. In such scenarios, Part 45.3(h) will not apply.

[9] http://www2.isda.org/attachment/NjE4Ng==/2013%20Dec%2010%20UTI%20Workflow%20v8%207%208%20clean.pdf

[10] Id at p. 4.

[11] European Market Infrastructure Regulation. (Overview of requirements: http://www.esma.europa.eu/page/European-Market-Infrastructure-Regulation-EMIR

international swap by comparing the USI to the UTI reported to TRs authorized by foreign regulators.

We further note that to the best of our knowledge, no other foreign regulators have included a comparable data requirement in their reporting rules mandating reporting of either the identity of a TR authorized by another regulator (including the CFTC) or the relevant trade identifier. Using the global UTI as the international standard for swap data reporting and aggregation reinforces the usefulness of the USI, since foreign regulators otherwise would not know the USI reported by a Reporting Party to an SDR registered with the CFTC.

We acknowledge that further work is necessary to ensure (i) acceptance of the global UTI standard by all regulators that have issued or will issue reporting rules and (ii) implementation of the global UTI standard by all market participants that either have a reporting obligation for a swap in foreign jurisdictions or play a role in meeting the reporting obligation on behalf of such parties (e.g., middleware providers, execution platforms). Therefore there may be cases initially where the USI is not used as the UTI for purposes of reporting to a foreign TR. We believe there will be fewer of these cases over time as reporting obligations commence for additional foreign jurisdictions and as outreach by ISDA and Reporting Parties who support the global UTI standard results in consistent implementation by market participants to reuse the USI as the UTI whenever applicable.

Neither Reporting Parties nor the Commission could have foreseen the evolution of a global UTI standard when Part 45 was promulgated. But in consideration of the efficiency of this alternative method for reporting a unique identifier, we believe that the aim of Part 45.3(h) is or will be substantively met by Reporting Parties by use of the global UTI as reporting requirements in foreign jurisdictions are fulfilled. We further believe that the global UTI standard is the best way for global regulators to effectively aggregate global swap data, and that its use provides a consistent international standard for regulating swaps that effectively facilitates data aggregation and allows for information-sharing arrangements among regulators in accordance with the Dodd Frank Act [12].

II. Relief request

In consideration of the development, broad use and acceptance of the global UTI standard, ISDA respectfully requests that DMO recommend that enforcement action not be taken against a Reporting Party which does not provide the “swap identifier” or the “identity of the non-U.S. trade repository” as required by Part 45.3(h) if (i) the Reporting Party has used the USI as the UTI when reporting an international swap to a non-U.S. trade repository not registered with the Commission or (ii) in the case where the non-reporting counterparty reports the international swap to a non-U.S. trade repository not registered with the Commission, the regulator which authorized the TR or its TR accepts the USI as the UTI in the trade report.

[12] Dodd-Frank Act. SEC.752. International Harmonization. http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf

In addition, ISDA respectfully requests that DMO recommend that enforcement action not be taken against a Reporting Party which does not fulfill the requirements of Part 45.3(h) because either (i) the use of the global UTI standard is not yet accepted for reporting under the laws of the foreign jurisdiction under which the swap was also reported or (ii) the non-reporting party which reported an international swap to a non-U.S. trade repository not registered with the Commission, or the relevant market infrastructure service providers, has not yet implemented the changes necessary to reuse the USI as UTI in accordance with the global UTI standard. We currently believe that within a year reporting requirements may commence in the majority of jurisdictions which have finalized their reporting legislation and parties new to regulatory reporting will have had an opportunity to implement the necessary standards. Therefore we request relief from Part 45.3(h) under these circumstances until January 31, 2015.

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

Sincerely,

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

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

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 February 11, 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,

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

June 21, 2013

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

Re: Request for No-Action Relief – Parts 20, 45 and 46

Dear Mr. Shilts:

The International Swaps and Derivatives Association, Inc. ("**ISDA**"), on behalf of its members with reporting obligations under Part 20, Part 45 or Part 46 of the Regulations (collectively, the "**Reporting Rules**")[1] of the Commodity Futures Trading Commission (the "**Commission**") and other similarly situated persons, is writing to request, pursuant to Rule 140.99, an extension of the expiration date for the no-action relief provided under CFTC Letter No. 12-46, as described 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.

In December 2012, the Commission's Division of Market Oversight ("**DMO**") issued CFTC Letter No. 12-46 in response to a request from ISDA expressing concern regarding conflicts between the privacy laws of non-US jurisdictions and the Reporting Rules. CFTC Letter No. 12-46 granted conditional and time-limited no-action relief that permits a reporting party to omit from reports made pursuant to the Reporting Rules the non-reporting party's LEI, the identity of the non-reporting party in specifically enumerated data fields and certain other terms that the reporting party reasonably believes would identify the non-reporting party (the information that may be omitted, "**Identity Information**"). In addition, the relief permits a reporting party to temporarily withhold reporting of Rule 45.3 confirmation images that include the covered Identity Information and would otherwise need to be manually redacted. The relief granted in CFTC Letter No. 12-46 expires on the earlier of (i) the reporting party's obtaining counterparty consent or regulatory authorization, as applicable, (ii) the reporting party no longer holding the

[1] The relief requested in this letter also encompasses CFTC Rules 23.204 and 23.205 insofar as the swap entity has complied with the conditions of the no-action relief with respect to the reporting required under such rules.

requisite reasonable belief regarding the privacy law consequences of reporting or (iii) 12:01 a.m. eastern daylight time on June 30, 2013.

ISDA requests that DMO extend the expiration date for the relief granted under CFTC Letter No. 12-46 with respect to reportable transactions for which the reporting of Identity Information is subject to statutory or regulatory prohibitions of one of the non-U.S. jurisdictions listed in the Annex (each, an "**Enumerated Jurisdiction**")[2] until the earlier of (i) the reporting party no longer holding the requisite reasonable belief regarding the privacy law consequences of reporting or (ii) 12:01 a.m. eastern daylight time on June 30, 2014.[3]

Based upon advice obtained by ISDA members, the Enumerated Jurisdictions fall into two categories: (i) those for which non-reporting party consent is not a viable solution to privacy law conflicts due to the legal requirements such consent must satisfy and (ii) those for which non-reporting party consent alone is not effective and regulatory authorization that would permit the reporting of Identity Information has not been available to affected market participants.

We note that the local law advice received by various ISDA member firms is not uniform. The differences in advice underscore the complexity and novelty of the issues the industry is now facing. While consensus generally exists around a majority of the "problematic jurisdictions", even competent counsel in each jurisdiction can have differing views as to the cross-border reach of local law and the effectiveness of consent. We note also that the laws in many jurisdictions apply differently based on an institution's presence in a given jurisdiction. What is a problematic jurisdiction for one member, therefore, is not for another. The purpose of this letter is to identify and seek relief for jurisdictions in which member firms reasonably believe that a standing blanket counterparty consent is insufficient to overcome relevant local data privacy concerns.

With respect to Enumerated Jurisdictions in the first category specified above, concerns include, for example, the revocability of consents, requirements that specific consent be given for each instance of disclosure, and legal standards that expose dealers to unacceptable risk that consent may later be found to be ineffective. Although the laws of certain Enumerated Jurisdictions would recognize consent given on a transaction-by-transaction basis, this means of overcoming privacy conflicts appears to be of limited practical utility. In a voice trading environment, questions remain as to whether oral consent is legally effective and whether the trading personnel with whom a firm interacts directly are authorized to provide it. Further, reliably controlling for and cataloguing such oral consent is difficult and would expose firms to operational and legal risks. With respect to electronic trading, the industry has had insufficient time to develop

---

[2] An Annex listing the Enumerated Jurisdictions, and describing briefly the applicable privacy law restrictions, is attached hereto. The Annex descriptions should be regarded as reasoned views of the operation of the cited provisions in the novel context of SDR reporting. An analysis of conflicts questions with regard to the disclosure of counterparty information for other regulatory purposes could yield different results. Accordingly, the list should not be regarded as a final and conclusive list of problematic jurisdictions. Industry participants have prioritized their review of international jurisdictions by relevance, and this list therefore includes jurisdictions in addition to those identified as problematic in ISDA's request for the relief granted in CFTC Letter No. 12-46. While reflective of the collective knowledge to date of ISDA members that have provided information, the list is not necessarily comprehensive.

[3] ISDA expects to submit a separate request letter addressing the practical difficulties of obtaining non-reporting party consent.

functionality for obtaining "click through" consents at the time of trade. Much electronic trading occurs through third-party information and communication services, whose cooperation would be required to develop such means of consent. Moreover, click-through consents could not be utilized in the case of automated trading, where there is no human interface.

With respect to Enumerated Jurisdictions in the second category, ISDA members have not identified any practicable means of resolving the conflict of laws short of statutory or regulatory changes in those jurisdictions. The issue of conflicts with privacy laws and blocking statutes has been recognized by international regulators as one of the implementation challenges for trade reporting, and dialogue is taking place to seek a resolution.[4]

Reporting party behavior in accordance with CFTC Letter No. 12-46 achieves substantially complete compliance with the Reporting Rules even after the omission of Identity Information from Part 20, 45 and 46 reports. Unless the relief with respect to Enumerated Jurisdictions is extended beyond June 30, registered swap dealers may not be able to continue participating in these markets, with concomitant negative impact on both the local markets and Commission registrants. Deferring the expiration date of the relief as requested would avoid this undesirable outcome and allow time for the affected jurisdictions to resolve cross-border conflicts associated with swap data reporting, an issue now prominently on the international regulatory agenda, as they implement their own data reporting frameworks. Accordingly, the requested relief is an appropriate extension of comity to these non-US jurisdictions, without detracting from the Commission's ability to achieve its objectives under the Reporting Rules.

For the foregoing reasons, ISDA requests that the staff of the Division of Market Oversight issue the no-action relief described above.

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

Sincerely,

Robert Pickel

---

[4] See, e.g., OTC Derivatives Market Reforms – Fifth Progress Report, Financial Stability Board (April 2013), pp.48-49 ("authorities reported that plans to adopt legislation and/or regulation that would allow for such reporting are underway ") (available at http://www.financialstabilityboard.org/publications/r_130415.pdf).

ANNEX

Enumerated Jurisdictions – summary of privacy restrictions

i. France

Trade Participants may only disclose Trade Data involving a counterparty if the disclosure is made: (i) pursuant to a list of statutory exemptions or (ii) the counterparty delivers its consent to the disclosing Trade Participant each time the latter intends to make a disclosure. Relevant provisions of French law include: (i) Article L. 511-33 et seq. of the French Code monétaire et financier for credit institutions and (ii) Article L. 531-12 et seq. of the same code for investment firms.

Trade Data reporting to SDRs may not qualify for any statutory exemption and transaction-by-transaction consent is not a feasible solution for high-volume activity and would certainly result in delayed reporting. Consent that is to be obtained via an industry protocol such as the ISDA August 2012 Dodd Frank Protocol or via a single side letter may not be sufficient for this reason. Requests for disclosure by foreign legal or regulatory authorities—without instruction from a French authority—are similarly insufficient. Potential liabilities for violations of local privacy law in France include fines of up to €75,000 for legal persons and €15,000 for natural persons, action for damages, suspension of operations, withdrawal of business licenses and, for natural persons involved in a violation, imprisonment of up to one year.

The French blocking statute (Law 68-678 of 26 July 1968) applies to any person / entity located in France, or even located outside of France, when there is an action taken with the purpose to obtain from a French company or individual any information which is economic, commercial, industrial, financial or technical nature tending to constitute evidence in view of foreign judicial or administrative proceedings or in the framework of such proceedings, even if such disclosure is made with the approval of the relevant counterparty.

ii. Korea

Trade Participants may not be able to disclose any Trade Data about their respective counterparties unless the disclosures in question are made at the order of Korean regulators, the Financial Services Commission or Governor of the Financial Supervisory Service or otherwise qualify for an exemption under the Real Name Act. Relevant provisions of the Real Name Act include: (i) Article 3 and (ii) Article 4.1. Disclosures which include personal data relating to natural persons are also governed by the Personal Information Protection Law.

Written consent may also need to be obtained each time disclosure is sought. Accordingly, the use of an industry protocol to report Trade Data, or consent via a side letter, would not satisfy the statute's requirements. Members have been informed that the Financial Services Commission has indicated that broad consent provisions granting consent for all future transactions would not meet the requirements of the Real Names Act. Further the obligations of confidentiality under the Real Names Act cannot be excluded through contractual terms. There are limited exceptions to the Real Names Act which permit disclosure in the absence of client consent but these are not applicable. Disclosures made upon the request of foreign legal or regulatory authorities would

similarly be in violation of local law. Violations of local law in Korea under the Real Name Act can trigger fines of up to 100 million Korean won and, for natural persons, imprisonment of up to five years. Under the Capital Market Act, fines can range up to 200 million Korean won and imprisonment of natural persons for five years. The Personal Information Protection Law has very specific consent requirements which include an obligation to inform the data subject of the disadvantages of granting consent, and failure to comply with the statute may result in imprisonment of up to five years or a fine.

iii. Luxembourg

Trade Participants may not be able to disclose Trade Data unless the relevant disclosure requirement is under applicable local law. Luxembourg requires that any consent delivered by a counterparty must satisfy the standards set forth by Luxembourg's Comité des juristes (the "**CODEJU**"), which is an advising committee of the Luxembourg finance sector regulator, the Commission de Surveillance du Secteur Financier. Relevant provisions of Luxembourg law include: (i) Articles 37-1(1), 41(1) through (5bis) of the Luxembourg law of 5 April 1993 on the financial sector and (ii) Articles 111-1(2) to 111-1(8) of the law of 6 December 1991 on the insurance sector.

A counterparty's consent to disclosure of Trade Data to an SDR may not be covered by a statutory exemption and the use of an industry protocol to deliver consent may not satisfy the CODEJU's standards. Disclosures made upon the request of foreign legal or regulatory authorities may also not qualify for a statutory exemption nor satisfy the CODEJU standards. The CODEJU's standards may include the requirement for such consent to be revocable (as a matter of public policy) and to relate to a disclosure which is in the best interests of the consenting party. Furthermore, the consent must be specific as to the information that may be disclosed, the identity of the person to whom the information may be disclosed, the intended aim of the disclosure, and the time period for which the consent is valid. Violations of Luxembourg law can trigger a range of penalties, including fines of up to €5,000 for natural persons and €10,000 for legal persons, contractual damages, injunction orders, withdrawal of licenses, suspension or prohibition of business activities, professional bans and imprisonment of natural persons for a period of up to six months.

iv. People's Republic of China

Trade Participants may disclose Trade Data at the instruction of the Chinese regulatory authorities pursuant to the state's Regulations on Financial Institutions" Anti-money Laundering. Trade Participants may also make disclosures as required by a foreign legal or regulatory authority, *provided* that local law permits the disclosure or the disclosure requirement is otherwise consistent with local law—which arguably would not be the case for disclosure of Trade Data under the Reporting Rules as there is no direct local equivalent. To the extent that Chinese law does not authorize disclosure of Trade Data, Trade Participants subject to such law would not be permitted to make any disclosures, regardless of a foreign law requirement or the consent of a counterparty. Potential liabilities for violation of Chinese privacy law include fines of up to RMB 500,000, suspension of operations and withdrawal of business licenses.

There is a prohibition on the disclosure of State Secrets (Law of the PRC on the Preservation of State Secrets effective October 1st 2010) and the definition of State Secrets is wide: " any information concerning national security and interest which, once disclosed, may impair the security and interest in the areas of politics, economy and national defence". Consent of a client will not overcome this prohibition.

Additionally, the Notice on Protection of Personal Financial Information by Banking Financial Institutions published by the Peoples Bank of China prohibits the disclosure of Personal Financial Information to foreign institutions. Personal Financial Information includes any information regarding an individual's identification, assets, credit status, financial transactions and even information derived from processing or analysing the individual's consumption habits or investment intention. The only exception to this is where the local banking branch needs to provide the Personal Financial Information to overseas affiliates in order to provide the services and further that the client has consented to the disclosure. Such exception does not apply in the present circumstances.

v. Switzerland

Swiss privacy rules, such as Article 47 of the Swiss Federal Act on Banks and Saving Institutions of 8 November 1934 (the "**Swiss Banking Act**"), prohibit banks from disclosing any client information to any third party. Additionally, under Swiss data protection law, the transfer of any personal data of third parties abroad is closely restricted and requires, inter alia, the relevant person's consent. This prohibition includes client and employee information. Under Article 271, any action undertaken for a foreign authority is prohibited if the action undertaken in Switzerland is by its nature an official or sovereign act whose performance is reserved to a Swiss authority and is performed without the involvement or authorization of the competent Swiss authority, irrespective of whether the action is undertaken by a private person or directly by the foreign authority.

Article 271 separately prohibits the facilitation of any action, such as disclosure of restricted information, undertaken in the interest of a foreign authority, if such action is considered under Swiss law an act that would have to be undertaken by a competent Swiss authority. In relation to financial institutions, the Federal Finance Department ("**FFD**") is authorized to provide an exemption under Article 271 to permit disclosure of client information. The FFD may submit the case to the Swiss Federal Government. In taking its decision, the Swiss Federal Government will weigh the public and private interests involved, particularly the protection and safeguarding of the rights of third parties (e.g., clients and employees). Penalties for violations of Article 271 include significant fines and imprisonment of up to three years for any natural person violating the law.

vi. Taiwan

Under Article 48 of the Taiwan Banking Act, licensed banks in Taiwan must keep counterparties' information confidential unless the disclosure is permitted by the laws or regulations of Taiwan or is otherwise "stipulated" by the Taiwan Financial Supervisory Commission ("**Taiwan FSC**"). Guidance issued by the Taiwan FSC expressly permits banks to release the counterparty data to (i) Taiwanese agencies (e.g., tax authorities, prosecutor offices),

(ii) home country regulators of a Taiwan branch of a foreign bank pursuant to home country regulation or (iii) approved outsourcing service providers. Thus, for a non-U.S. bank branch, swap data reporting to a CFTC-registered SDR does not fall into any of the current exemptions. Penalties for violations may include administrative fines, damages, and potential criminal liability if the disclosed information is considered a "business secret."

vii. Belgium

To the extent that Identity Information includes Personal Data (meaning any information relating to an identified or identifiable natural person), consent of the data subject will not be effective to overcome the restrictions. The Act of December 8, 1992 on Privacy Protection in relation to the Processing of Personal Data, as amended by the Act of 11 December 1998 and the Act of 29 February 2003, as well as supplemented by the Royal Decree of 13 February 2001 (the "**Data Protection Act**") governs the disclosure of such personal data.

The Data Protection Act prohibits transfer of data to U.S authorities and the view is that such a transfer is illegal and cannot be legalized by consent of the data subject (Article 29 Working Party Opinion 15/2011 of 13 July 2011 and also Council Decision 2010/412/EU of 13 July 2010).

viii. India

The Reserve Bank of India ("**RBI**") sets out confidentiality obligations of a bank toward its clients in its Master Circular on Customer Service in Banks, which provides that:

The scope of the secrecy law in India has generally followed the common law principles based on implied contract. The bankers' obligation to maintain secrecy arises out of the contractual relationship between the banker and customer, and as such no information should be divulged to third parties except under circumstances which are well defined. The following exceptions to the said rule are normally accepted:

(i) Where disclosure is under compulsion of Indian law;
(ii) Where there is duty to the public to disclose;
(iii) Where interest of bank requires disclosure; and
(iv) Where the disclosure is made with the express or implied consent of the customer.

However, there is no specific provision in the RBI's regulatory circulars permitting reporting of data pertaining to Indian banks or branches to non-Indian regulators. In a circular relating to retention of data offshore, the RBI has stated that non-Indian regulators should not have access to Indian branch data stored overseas. The RBI has advised member firms operating in India that prior approval must be obtained from the RBI in order to report or disclose branch information to the CFTC. The RBI's position prohibits any reporting of transactions booked in a firm's Mumbai branch to an SDR located outside of India, notwithstanding clauses (i) and (iii) referenced immediately above.

Thus, absent affirmative consent from the RBI and customer consent, a firm cannot report swaps booked in its Mumbai branch, even with counterparty-identifying information redacted.

ix. Algeria

Reporting to an SDR may implicate Algerian bank secrecy rules under Article 117 of Ordinance 03-11 of 26 August 2003 on the currency and credit.

Professional secrecy obligations under penalty of sanctions under the criminal code are binding on:

- any member of a Board of Directors, any external auditor and any person who participates or has participated to the management of a bank or financial institution or who is or was employed by them; and
- any person who participates or who participated in the control of banks and financial institutions.

Subject to the express provisions of law, the bank secrecy is enforceable against all authorities except:

- towards the public authorities which appoint administrators of banks and financial institutions
- towards the judicial authority acting in the framework of criminal procedures;
- towards the public authorities required to communicate information to international institutions entitled, particularly in the context of the fight against corruption, money-laundering and the financing of terrorism;
- towards the Bank of Algeria or the banking committee at the bank of Algeria, which may transmit information to the authorities responsible for the supervision of banks and financial institutions in other countries, subject to reciprocity and provided that these authorities are subject to the professional secrecy with the same guarantees as in Algeria.

x. Singapore

Trade Participants may only be entitled to disclose Trade Data to local regulatory authorities as required by Singapore law. Under Regulation 47(2) of the Securities and Futures (Licensing and Conduct of Business) statute (the "**SFR**"), Trade Data may only be able to be disclosed at the instruction of the Monetary Authority of Singapore (the "**MAS**"). Therefore, many Trade Participants may not be able to disclose Trade Data at the request or demand for disclosure by a foreign authority or an SDR unless such disclosure has been otherwise authorized by the MAS—even upon the consent of the applicable counterparty. Trade Participants' accession to an industry protocol that contains provisions to obtain consent to disclose Trade Data may not be effective absent approval of the MAS. Although firms have received indications that such approval may be forthcoming, some firms are continuing to redact Identity Information until such time as the MAS may make an official public announcement.

Violations of Singapore privacy law can trigger civil and criminal liabilities, including fines (up to $S125,000 for natural persons and $S250,000 for legal persons), damages in tort, revocations of licenses and imprisonment of up to three years for natural persons.

xi. Bahrain

If a firm has a local office or presence or conducts data collection in Bahrain, consent is not effective. If no swap dealer office or presence in the jurisdiction, reporting is permitted. In the former instance, exploitation or misuse of personal information is governed by Art.l58 of the Civil Code of Bahrain. If a reporting party was considered negligent in transferring data and if the individual suffered damage as a result of the transfer damages apply.

xii. Argentina

Local laws should not apply if the reporting party has no Local Presence. The Financial Entities Law 21,526 (the "**FEL**") applies to activities performed in Argentina. In addition, the Personal Data Protection Law 25,326, as amended (the "**PDPL**"), applies to databases or registries that include personal data. Although the law makes no express reference to location, provisions in principle apply to databases located in Argentina.

Data Regulations which prohibit or restrict the disclosure of Data to an SDR.

(i) the FEL, and

(ii) the PDPL.

The FEL prohibits Financial Entities to disclose information on transactions carried out for, or data received from, their customers. This prohibition is, however, limited to transactions that are registered as "Liabilities" in the financial statements of the Financial Entity. Additionally, the Financial Entities have no duty of confidentiality regarding those operations registered as "off-balance sheet" activities, such as securities custody services. Despite the foregoing, certain government agencies, including the tax authorities, anti-money laundering agencies and the Central Bank of the Republic of Argentina (the "**CBRA**"), may require Financial Entities to disclose such information. The above mentioned prohibition does not apply to customers of a Financial Entity, who have full access to their own information, nor to the agents or representatives of the customers in their relationship with the Financial Entity. Legal commentators also include within this exception the employees of a customer, acting in the course of their employment for the customer. On the other hand, the PDPL provides that any information relating to and identified or identifiable individual –natural person or legal entity– is considered personal data ("**Personal Data**"). In addition, the PDPL states that Personal Data is subject to confidentiality obligations on the holder of such data.

Disclosure to the SDR or the CFTC-express consent of the swap counterparty.

The consent of the data owner is not included in the FEL among the exceptions to the confidentiality/secrecy obligation. Basically, exceptions relate to petition made by courts, tax

authorities and the CBRA. We understand however that if we were to assume that the confidentiality/secrecy obligation is aimed to protect the data owner's privacy right; then, as beneficiary of such right, the data owner should be able to waive it. On the contrary, it could be argued that the waiver of the confidentiality/secrecy obligation made by the data owner does not release the obligation imposed by the FEL. In this regard, the BCRA may not be opened to accept that the data owner has the authority to modify the content of the FEL; in other words, the BCRA may resolve that the Financial Institution is not released from the confidentiality/secrecy obligation even when the customer has authorized it to disclose information. Counsel not aware of judicial precedents, therefore it is difficult to predict how a court will resolve this conflict of different rights/obligations.

One of the exceptions to the confidentiality/secrecy obligation is where the Financial Entity obtained previous authorization from the BCRA to disclose certain information. Counsel believe that the Financial Entity could inform the BCRA the reasons why it needs to disclose certain information, explain that it has obtained the authorization of the data owner to disclose such information, and request the BCRA´s authorization. Under this scenario, BCRA may be willing to authorize the Financial Entity to disclose the information.

Potential criminal and civil penalties for non-compliance.

The Criminal Code, in Section 157 bis, provides that it shall be subject to imprisonment from one (1) month to two (2) years, the person which (i) knowingly or unlawfully, or in violation of confidentiality and data security systems, has access, in any way, to a personal database; or (ii) reveals to a third party information recorded in a personal database whose secrecy should be preserved as provided by law. In the event that the author is a public officer, an additional sentence of one (1) to four (4) years special disqualification shall apply. The FEL provides for different sanctions that may be applicable by the CBRA, including (a) warning, (b) fines, (c) suspension, or (d) revocation of the corresponding license. The PDPL in turn, provides for a number of sanctions of different types and degrees according to the seriousness of the offense incurred by the controllers or users of the databases. The Data Protection Authority, through its Regulation 1/2003 defined the offenses as serious and very serious. Administrative sanctions may include (a) warning, (b) suspension, (c) fines ranging between AR$1,000 (equivalent to US$200), and AR$100,000 (US$20,000); and (d) closure or cancellation of the file, register or database.

xiii. Hungary

Consent is not effective for Natural Person ECPs; Consent is effective for Corporate ECPs. Disclosure for Natural Person ECPs is not permissible without consent with full probative force as demonstrated by notary certifications and other formalities. Presence or local office implicates local statute and common law. Certain provisions of Act CXXXVIII of 2007 on Investment Firms and Commodity Dealers and on the Regulations Governing their Activities (the "**Investment Services Act**") may be applicable to investment service providers which provide investment services in Hungary on a cross-border basis, even if such investment service provider does not have an office, or license, or personnel or representatives physically present in Hungary. Investment service providers that are registered in one of the European Economic

Community ("**EEC**") countries are entitled to provide investment services in Hungary on a cross border basis in accordance with the provisions of the Investment Services Act (based on Directive 2004/39/EC). In all other cases, a foreign investment service provider is entitled to provide investment services in Hungary only through its Hungarian registered and licensed subsidiary or branch office. Restrictions apply to disclosure of Data to the SDR.

Pursuant to Section *4 paragraph (2) and point 27 of the Investment Services Act,* "securities secrets" mean and includes all data and information that is at the disposal of an investment firm, an operator of multilateral trading facilities or a commodity dealer, concerning each specific client relating to its/his/her personal information, financial standing, business operations or investments, ownership or business relations, or its/his/her contracts or agreements with any investment firm or commodity dealer, or to the balance or money movements on its/his/her accounts. Said information qualifies as a "securities secret" irrespective of whether that information relates to (i) a human being, "Eligible Contract Participant ("**ECP**")", or (ii) an Institution, Corporation, Partnership, Hedge Fund or other type of non-human person.

Pursuant to *Section 118 (1) of the Investment Services Act,* investment firms and commodity dealers, and the executive officers and employees of investment firms and commodity dealers, and any other person affected, must keep confidential any securities secrets made known to them in any way, without any limitation in time.

Pursuant to *Section 118 (2) of the Investment Services Act*, investment firms and commodity dealers may disclose securities secrets to third parties, notifying the client affected, only if:

a) so requested by the client to whom the information pertains, or his legitimate representative, in an authentic instrument or in a private document with full probative force, expressly indicating the particular data, which are considered securities secrets, to be disclosed;
b) the regulations contained in Subsections (3)-(4) and (7) of section 118 the Investment Services Act, provide an exemption from the requirement of confidentiality concerning securities secrets; or
c) the disclosure is deemed necessary in light of the interests of the investment service provider or commodity dealer in selling its receivables due from the client or for the enforcement of its outstanding receivables.

Pursuant to *Section 118 (3) of the Investment Services Act,* the confidentiality requirement under *Section 118 (1) of the Investment Services Act* shall not apply to:

a) the Hungarian Financial Supervisory Authority, the Investor Protection Fund of Hungary, the National Deposit Insurance Fund of Hungary, the Hungarian National Bank, the State Audit Office and the Economic Competition Office of Hungary when acting within the scope of their powers and duties;
b) operators on the regulated markets, operators of multilateral trading facilities, bodies providing clearing or settlement services, the central depository, the Government oversight agency exercising its supervisory competence specified in Subsection (1) of Section 63 of the Act on State Budged Management, and the

European Anti-Fraud Office ("**OLAF**") monitoring the protection of the European Community's financial interests, when the above are acting within the scope of their duties conferred by law;

c) notaries public in connection with probate proceedings, and the guardian authority acting in an official capacity;
d) bankruptcy trustees, liquidators, financial trustees, bailiffs and receivers, in connection with bankruptcy proceedings, liquidation proceedings, judicial enforcement procedures, local government debt consolidation procedures, and in connection with a voluntary dissolution proceeding;
e) investigating authorities acting within the scope of criminal procedures in progress and when investigating charges, and the public prosecutor acting in an official capacity;
f) the court acting in criminal or civil cases, bankruptcy and liquidation proceedings and in the framework of local government debt consolidation procedures;
g) the agencies authorized to use secret service means and to conduct covert investigations if the conditions prescribed in specific other legislation are provided for;
h) the national security service acting within the scope of duties conferred upon it by law, based upon the special permission of the director-general;
i) tax authorities and the customs authorities in the framework of their procedures to monitor compliance with tax, customs and social security payment obligations, and for the implementation of an enforcement order issued for such debts;
j) the commissioner of fundamental rights when acting in an official capacity;
k) the Nemzeti Adatvédelmi és Információszabadság Hatóság (*National Authority for Data Protection and Freedom of Information*) acting in an official capacity;

when these bodies make written requests to the investment firm or commodity dealer concerned.

Pursuant to *Section 118 (4) of the Investment Services Act,* the confidentiality requirement under *Section 118 (1) of the Investment Services Act* shall not apply:

a) where the state tax authority makes a written request for information from an investment firm or commodity dealer on the strength of a written request made by a foreign tax authority pursuant to an international agreement, provided that the request contains a confidentiality clause signed by the foreign authority;
b) where the Hungarian Financial Supervisory Authority requests or supplies information in accordance with a cooperation agreement with a foreign supervisory authority, provided that the cooperation agreement or the foreign supervisory authority's request contains a signed confidentiality clause;
c) where the Hungarian law enforcement agency makes a written request for information from an investment firm or commodity dealer in order to fulfill the written requests made by a foreign law enforcement agency, provided that the request contains a confidentiality clause signed by that foreign law enforcement agency;
d) with respect to data supplied by the Investor Protection Fund of Hungary to foreign investor protection schemes and foreign supervisory authorities in the

manner specified in cooperation agreements if they guarantee equivalent or better legal protection for the processing and use of such data than the protection afforded under Hungarian law;

e) in respect of information provided by an investment firm or commodity dealer the Act on Tax Administration in relation to deceased persons.

Pursuant to *Section 118 (7) of the Investment Services Act,* the confidentiality requirement under *Section 118 (1) of the Investment Services Act* shall not apply where an investment firm or commodity dealer complies with the obligation of notification prescribed in the Act on the Implementation of Restrictive Measures Imposed by the European Union Relating to Liquid Assets and Other Financial Interests.

Disclosure to the SDR or the CFTC or other US regulator IS permissible with the express consent of the swap counterparty if the consent is provided in the appropriate form and is specific as to the information to be disclosed. Pursuant to Section 118 (2) of the Investment Services Act, investment firms and commodity dealers may disclose securities secrets to third parties, upon notifying the client affected, only if so requested by the client to whom the information pertains, or its/his/her legitimate representative in an authentic instrument or in a private document with full probative force, expressly indicating the particular data which is considered as a securities secrets and which may be disclosed.

Consent language is *not* sufficient to constitute express consent. Pursuant to Section 118 (2) of the Investment Services Act, the consent to disclose a securities secret(s) must expressly indicate the particular scope of the data which may be provided to the third party. Discussions with the relevant Hungarian regulators (the Hungarian Financial Supervisory Authority and the Data Protection Authority) would be required to determine whether the language contained in the 2012 ISDA Protocol would be considered as fulfilling the statutory requirement that the consent "expressly indicates the particular scope of the data" which otherwise constitutes a securities secret(s) and which may be disclosed. The express consent must be in an authentic instrument or in a private document with full probative force. Pursuant to Hungarian international private law and the Act III of 1952 on the Code of Civil Procedure (the "Civil Procedure Code"), if the ISDA agreement is duly signed by two legal entities, such agreement will qualify as a private document with full probative force. Pursuant to Civil Procedure Code, if the ISDA agreement is signed by an "Eligible Contract Participant (ECP)", such agreement will qualify as a private document with full probative force if:

a) the document is signed by two witnesses to verify that the document was transcribed by others and signed by the ECP in front of them, or that the signatory declared in front of the witnesses that the signature appearing on the document was the signatory's own. Said document must indicate the witnesses' permanent residence (home address) and signed and printed name as well;
b) the ECP's signature or initial has been certified on the document by a court or by a notary public;
c) an attorney (legal counsel) provides a document - duly signed by the attorney - to verify that the document was transcribed by others and signed by the ECP in front of him, or that the signatory declared the signature in front of the witness as being

the signatory's own, or that the electronic document executed by the ECP's certified electronic signature contains the same information as the electronic document made by the attorney;

d) the electronic document is executed by the ECP's certified electronic signature or advanced electronic signature attested by a qualified certificate.

Pursuant to Section 195 of the Civil Procedure Code, a paper-based or electronic document qualifies as an authentic instrument, if such document has been issued by a court, a notary public or another authority, or an administrative body within its sphere of authority, and in the prescribed form. Furthermore, a document recognized by another regulation as an authentic instrument shall also be deemed to have probative force.

- Potential criminal and civil penalties, where applicable, for non-compliance with each Data Regulation and/or common law obligation identified in 3(a) above (e.g., fines of [X] amount; imprisonment for [X] months, etc.).

  - fines from HUF 100,000 up to HUF 2,000,000,000 may be imposed by the Hungarian Financial Supervisory Authority;
  - imprisonment up to three years by the Hungarian criminal courts if the committing the crime of "breach of trade secret" (Criminal Code Section 300) is proved (in accordance with Hungarian criminal law / criminal procedure law);
  - civil law claim by the counterparty for damages and other legal remedy(ies) may be pursued before Hungarian civil courts on the basis of unpermitted discourse of data provided that the unpermitted disclosure and the amount of the damages caused by such disclosure are proved (in accordance with Hungarian civil law / civil procedure law); and
  - the Data Protection Authority my impose a fine of up to HUF 10 million if an inadequate level of information is provided to the data subject about the occurrence of the processing of his/her/its personal data. Both Hungarian Financial Supervisory Authority and Data Protection Authority are entitled to impose fines (based on different legal ground) and one authority imposing a fine does not prohibit the other authority to do the same. The above amounts of fines are the maximum amounts and the authorities have the right to determine the amount of the fine in each case based on their free evaluation of the facts and circumstances of the specific infringement.

xiv. Samoa

Data Regulations prohibit or restrict disclosure of Data to the SDR. The International Companies Act 1988, International Trusts Act 1988, International Partnership and Limited Partnership Act 1998 (ie legislation governing entities in Samoa's offshore or tax haven jurisdiction which can only operate outside of Samoa). Of these entities, by far the most common is an international company. There are very few international trusts, international partnerships and limited partnerships created in Samoa. There are no applicable Data Regulations for any other "domestic" (ie non-tax haven) entities incorporated and doing business in Samoa, or individuals

resident in Samoa. Disclosure is permitted for international companies, international partnerships and limited partnerships with express consent of an officer of the entity, subject to the proviso that the disclosure is not for compliance with a demand for information by a government, court or tribunal that will or is likely to result in the payment of any tax, penalty or fine. Disclosure is not permitted for international trusts. Potential criminal and civil penalties for non-compliance with each Data Regulation- For non-permitted disclosures relating to:

- International companies: criminal offence punishable by a maximum fine of WST50,000 (approx USD22,700) and/or 2 years imprisonment for the 1st offence; each of the 2nd and subsequent offences penalized by a maximum fine of WST100,000 (approx USD45,400) and/or 5 years imprisonment.
- International partnerships/limited partnerships: criminal offence punishable by a maximum fine of WST50,000 (approx USD22,700) and/or 5 years imprisonment.
- International trusts: criminal offence punishable by a maximum fine of WST50,000 (approx USD22,700) and/or 5 years imprisonment.

xv. Austria

Local laws should not apply if the reporting party has no Local Presence, and has not pass ported its license into Austria for purposes of the swap transactions. If there is activity or presence in Austria, the Austrian Data Protection Act 2000 applies to an entity (1) established in Austria; or (2) processing personal data is carried out in Austria or (3) in the case that the entity has no establishment in the EU, the reporting party uses processing equipment, e.g. a data center, located in Austria.

(a) Austrian Banking Act- banking secrecy obligation as stipulated in the Austrian Banking Act applies if:

- it is an Austrian credit institution (including investment management companies) licensed under the Austrian Banking Act;
- it is an Austrian branch of a non-EEA credit institution licensed under the Austrian Banking Act;
- it is a licensed EEA credit or financial institution (including investment management companies) or a licensed EEA investment firm that has pass ported its license into Austria in accordance with Section 9, 11 or 12 of the Austrian Banking Act or in accordance with Section 12 of the Austrian Securities Supervision Act; in this case, the licensed entity has to observe Section 38 Austrian Banking Act to the extent that it is conducting its services cross-border into Austria or through an Austrian branch.

Banking secrecy is not restricted to the licensed entity itself but also has to be observed by its shareholder(s), members of governing bodies, employees or by other persons/entities acting on behalf of such licensed entities (e.g. tax advisors, tied agents or third parties to which activities have been outsourced).

(b) Other Laws- Austrian Securities Supervision Act, the Austrian Payment Services Act and the Austrian E-Money Act contain secrecy obligations in relation to customer data. These provisions will apply to an entity that is established in Austria and that is:

- licensed as an investment firm (*Wertpapierfirma*) or an investment services provider (*Wertpapierdienstleistungsunternehmen*) in accordance with Section 3 or 4 of the Securities Supervision Act;
- licensed as a payment institution (*Zahlungsinstitut*) pursuant to the provisions of the Austrian Payment Services Act or
- licensed as an e-money institution (*E-Geld Institut*) pursuant to the provisions of the E-Money Act.

Secrecy obligations under these laws are not restricted to the licensed entity itself but also have to be observed by its employees or by other persons/entities acting on behalf of such licensed entities (e.g. tied agents or third parties to which activities have been outsourced).

The relevant regulations are:

- Austrian Data Protection Act 2000 (hereinafter "**DPA**"),
- Austrian Banking Act (hereinafter "**BWG**"), Section 38,
- Austrian Securities Supervision Act (hereinafter "**WAG**"), Section 7,
- Austrian Payment Services Act (hereinafter "**ZaDiG**"), Section 19 Para 4,
- Austrian E-Money Act (hereinafter "**E-GeldG**"), Section 13 Para 2.

For obtaining consent under the respective laws, the following has to be observed: The BWG requires that the entity bound by Section 38 BWG has to obtain the express and written consent of the customer to the disclosure of data protected by banking secrecy (Section 38 Para 2 Item 5 BWG). The WAG, the ZaDiG and the E-GeldG require that the entity bound the respective secrecy obligation needs to obtain written consent of the customer to the disclosure of the protected data.

- For consent to be sufficient, consent must b clear regarding the country to which the swap counterparty's personal data will be exported. Unless the receiving Swap Data Repository has obtained a certification under the Safe Harbor agreement (see http://safeharbor.export.gov/list.aspx) – the data export to the U.S. would require the prior approval of the Austrian Data Protection Commission which typically takes many months to obtain. An express consent language that would eliminate the prior approval requirement under the DPA would have to specifically refer to the fact that the receiving legal or regulatory authority or the trade repository are located in the United States. For obtaining consent under the BWG, the WAG, the ZaDiG or the E-GeldG, protocol consent language is not sufficiently clear. Consequently, there is the risk that this language will be unenforceable in Austria due to a lack of transparency. Language should explicitly state that the party whose data have

to be reported waives its right to secrecy under the BWG, the WAG, the ZaDiG or the E-GeldG, respectively, to the extent that parties have to meet reporting obligations to the SDR in accordance with the Dodd-Frank Act.

- Potential criminal and civil penalties for non-compliance-
  - Under the DPA, a data export without the prior approval of the Austrian Data Protection Commission (or the data subject's consent regarding the country in question) is subject to an administrative fine of up to EUR 10,000 (DPA § 52(2)(2)). This penalty would, in principle, be imposed on the members of management board of the reporting party entity in question, while the entity would be jointly and severally liable for any such fines (§ 9 of the Austrian Administrative Criminal Code).
  - Violations of Section 38 BWG (banking secrecy) constitute criminal offenses and are punishable with imprisonment of up to one year or a monetary fine of up to 360 daily rates. A daily rate is calculated on the basis of the personal and economical background of the offender at the time the judgment is passed. The judge may determine the daily rate in a range between EUR 4 and EUR 5,000 (Section 19 Austrian Penal Code). Further, the offender may become subject to damage claims.

Violations of Section 7 WAG, Section 19 Para 4 ZaDiG or Section 13 Para 2 E-GeldG constitute criminal offenses and are punishable with imprisonment of up to six months or a monetary fine of up to 360 daily rates. Further, the offender may become subject to damage claims.

xvi. Pakistan

Trade Participants may not be able to disclose any Trade Data about their respective counterparties unless (i) the prior written permission of the State Bank of Pakistan (the "**SBP**") has been obtained; or (ii) it is required by Pakistan law. The relevant provisions of Pakistan law include (a) Section 12 of the Banking Companies Ordinance, 1962 (the "BCO"); and (b) Section 33 of the BCO.

Accordingly, the use of an industry protocol to report Trade Data, or consent via a side letter, would not satisfy the statute's requirements. Disclosures made upon the request of foreign legal or regulatory authorities would similarly be in violation of local law. Potential liabilities for breaching Pakistan data privacy laws include damages, injunctive relief, action taken by the SBP (including cancellation of banking licence, penalties, removal of managerial personnel and prosecution of key officers) and criminal proceedings.

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 June 21, 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,

Robert Pickel

Appendix C
Attachment 5

ISDA. Safe, Efficient Markets

Request for Interpretative Letter - Commission Regulations Part 43 and Part 45

December 3, 2012

Richard Shilts
Director, Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Request for Interpretative Letter for Post-priced Swaps

Dear Mr. Shilts:

The International Swaps and Derivatives Association, Inc. ("**ISDA**"), on behalf of its members with reporting obligations under Part 43 and Part 45 of the Regulations ("**Reporting Rules**")[1] of the Commodity Futures Trading Commission (the "**Commission**") and other similarly situated persons, is seeking an interpretative letter from the Commission regarding the reporting of certain "post-priced" swaps.

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 Commission 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.

Many Equity Swaps are different in nature versus Interest Rate or Credit Default Swaps whereby they have both an "equity delta" and a "funding" component, and in many structures these components are determined at one or more times different than the client's transaction request. Accordingly, we are concerned that an interpretation of the rules regarding the reporting of post-

[1] See, 17 CFR Part 45 Swap Data Recordkeeping and Reporting Requirements, and 17 CFR Part 43 Real-Time Public Reporting of Swap Transaction Data.

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 F 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

priced equity swaps before the related market activity or observation period on the underlying "equity delta" is completed would have a negative impact on market participants – money managers, insurance companies, hedge funds, pension plans, etc. – which trade these products as it relates to the price they receive on that equity delta. Specifically, our concern is that reporting post-priced equity swaps prior to price and size being finally determined is equivalent to reporting open unfilled "orders," and thus we recommend that, for purposes of Parts 43 and 45, post-priced swap transactions should be deemed "executed" (and hence reportable) only when the price and size are finally determined.

We discuss these concerns in detail below and include a request for an interpretative letter clarifying the requirements applicable to such swaps.

I. Introduction

A post-priced swap is a transaction in which the price and/or its size is determined by reference to market activity or an observation period that occurs after the client places its order. As the Commission staff is undoubtedly aware, for swap transaction categories that are not post-priced, a swap dealer ("**SD**") and its client have agreed on all terms of the transaction, including price, funding, bid/offer, transaction costs and size, at the point of execution. In these situations, the SD is committing capital and is therefore at risk on the position. While the SD may or may not hedge that transaction, all Rule 43 and 45 terms are known at the point of execution and thus can be fully and meaningfully reported to the market with no additional risk to the client.

Post-priced swaps, which occur across asset classes but most commonly in the delta-one equity space, work differently. In these situations, the client makes a transaction request (either by phone or electronically) for a swap with the SD. For equity swaps, the pricing typically involves two primary components: the funding leg (LIBOR +/- a spread) and the strike price on the underlying equity (the "equity delta"). Furthermore, in the case of a "best efforts" client order (as described below), there is no agreement as to quantity of the swap. The nature of the client's order will depend on their objectives and the market environment. Examples of post-priced client order types are: (1) a "guaranteed" price (e.g., MOO, MOC or a market observable volume weighted average price or "VWAP" published on Bloomberg) with or without a set notional size, or (2) "best efforts" price based on the prices of the SD's hedge executions with or without a benchmark ("Execution Pricing") whereby executions could be subject to a price or volume limit (e.g., "Limit Pricing"), or even a combination of some or all of the above, as clients often modify their order throughout the day in reaction to price movements and/or market developments.

Regardless of the combination of variables, in all of these scenarios, the ultimate size and/or price is not known at the time the client makes the transaction request,[2] and market activity subsequent to the client's transaction request will impact the price received by the client and the actual size of the swap. Accordingly, exposing that client request before the subsequent market activity in the underlying equity delta is complete will be harmful to the client. On some occasions, clients do request a "risk" price on an equity swap whereby the SD (as mentioned

[2] We note that this discussion does not purport to portray the complete spectrum of client activity in this market segment.

above) is committing capital and is at risk on the position. These risk price situations are similar to interest rate and credit default swaps, and thus this request for relief does not apply to risk-priced equity swaps.

We outline some of the order types more specifically below along with the potential concerns related to disclosing the order to the market BEFORE the equity delta has been traded in the market:

Order Type for which Relief is Requested	**Funding Leg Price**	**Equity Delta Strike Price**	**Considerations:**
Guaranteed	Agreed up front either for the specific trade or based on prenegotiated defaults	A price determined after order placement (not known at the time of order); Examples: • Guaranteed VWAP • Guaranteed Closing Price (MOC) • Guaranteed TWAP • Guaranteed Opening Price (MOO)	The underlying equity delta is traded based on the order type in the cash market. As the equity delta is executed, those cash executions are being printed/ disclosed in accordance with applicable existing regulations; having to pre-advise the market of the order type/ size before those executions have been completed allows for other market participants to trade in advance of that and ultimately negatively effects the Open, VWAP, TWAP or Closing price on the corresponding underlier for the SD and thus a worse fill price on the swap for the end user/client
Best Efforts	Agreed up front either for the specific trade or based on prenegotiated defaults	Price determined by price SD achieves on equity delta (not known up front how much will get done and at what level); Client instructions can vary and often do change frequently throughout the day; Typical order types include : • Target VWAP • Target TWAP • Limit orders (price/ volume) • Target Volume % • Contingent (e.g., if the price of A hits $B, then sell C units of D Index)	The client instructions inform how the SD hedges the underling equity delta; As the equity delta is executed, those cash executions are being printed/ disclosed in accordance with applicable existing regulations; having to pre-advise the market of the order type/ size before those executions have been done allow for other market participants to trade in advance of that and ultimately negatively effects the fill on the corresponding underlier for the SD and thus a worse fill price on the swap for the end user/client
Risk Orders	Agreed up front	Agreed up front	There is no concerns with immediate reporting of Risk Orders because they are not Post Priced Swaps

To reiterate some of the considerations mentioned with regards to specific order types above, we also outline some of the challenges on the particular component parts to be reported below:

- Size **-** While it may be that the size specified by the client in the initial transaction request will be the ultimate size of the transaction, the SD does not guarantee execution of the size requested for all types of orders (e.g., best efforts orders) and may reduce the size of the transaction to reflect the SD's ability to execute its hedge at the specified pricing methodology. For example, if an early closure, trading halt or other market disruption event occurs that affects positions that would be established to hedge a transaction, or if the pricing methodology specified in the transaction request includes pricing conditions (e.g., Limit Pricing) that could not be met because market prices in underliers that would have been used to establish a hedge transaction were not within the relevant parameters, the size of the transaction will be reduced to reflect the portion, if any, of the transaction the SD was able to hedge. If the SD could not establish any hedge, the transaction request will not result in a swap transaction.

- Price – In addition and more critically, the price of a post-priced swap is not known until after the SD has completed its hedge or the observation period has occurred in the cases of MOO, MOC, Limit, guaranteed VWAP, TWAP or Best Efforts orders. For "best efforts" pricing methodologies, such as Execution Pricing with a target of VWAP, the price of the transaction will be the price of the SD's hedges. Even for "guaranteed" benchmark transactions, the price will not be determined until that benchmark is known. Accordingly, in both cases – "best efforts" pricing and "guarantee" pricing – transactions in the swap underlier, components of the swap underlier or related securities/futures by other market participants during the hedging period will impact the price of the client's transaction. If the client's transaction request is known to the market at the time it is made rather than after the market activity or observation period has occurred, other market participants, knowing that there will likely be market activity corresponding to positions that would be established to hedge the transaction, will be able to take advantage of this information to the detriment of the client.

II. Request for Interpretative Letter

ISDA requests that, for the reasons discussed below, the Commission's Division of Market Oversight issue a Interpretative Letter, for purposes of Parts 43 and 45, that post-priced swap transactions should be deemed "executed" (and hence reportable) only when the underlying equity delta is fully executed, the relevant observation period has occurred or both parties agree on the equity strike price such that price and size are finally determined.

Under Part 43, "execution" is defined both as (a) agreement by the parties to the terms of a swap that legally binds the parties under applicable law and (b) occurring simultaneously with or immediately following "affirmation" of the transaction. The rule defines "affirmation" to mean the process by which the parties verify that they agree on all the Primary Economic Terms

("**PETs**") of the swap. Although Part 45 does not provide an express definition of "execution," the preamble states that execution only occurs after all of a swap's PETs have been agreed.[3]

In the case of post-priced swaps, while some PETs for a particular trade may be agreed at the time of the transaction request for a swap, the actual price and size of the transaction, if any, will be determined at some point later as a result of the specified pricing methodology and availability of the SD's hedge.

For example, a swap priced using a volume-weighted average price, time-weighted average price, market on open, market on close, or other pricing formula based on subsequent cash market transactions will not have a price until the relevant pricing period for that pricing methodology is complete. Further, if the SD is unable to execute a hedge for the full size specified in the client's transaction request, then the size of the swap transaction between the SD and its client will be reduced to that amount which the SD actually was able to hedge using the pricing methodology specified in the transaction request.

ISDA believes that the requested interpretative letter is consistent with the approach that currently applies to analogous cash market trades that are priced by reference to a formula, i.e., the way that VWAP trades are reporting in the U.S. equities market only when the final price and size are known. This is done for exactly the same reason that ISDA seeks relief here, i.e., exposing the order to the market prior to price and size being finalized would be harmful to the terms ultimately obtained by the client. Another good example would be in the listed futures market whereby a client might advise their broker at 2pm that they're looking to buy 10,000 S&P500 futures contracts at the closing price. In such a case, it would be harmful to that client to have to divulge the order to the general market in advance of that transaction being completed.

The requested interpretation will not adversely affect overall market transparency, as the underlying markets that are the basis for the pricing are completely transparent, so reporting of the swap prior to finalization of the pricing terms will not perform a price discovery function. As the underlying equity delta is traded in the various cash markets (stocks, futures), those trades would be transparently reported to the market as per normal course in those regulated markets already.

III. Conclusion

As set forth above, reporting post-priced swaps before the underlying equity delta is traded and the final price and quantity are established is equivalent of disclosing an "order" prior to its execution. If such disclosure of an order were required, the information prematurely in the market would negatively impact the price ultimately obtained by the client. The effect of this would be to add a material transaction cost to trading a post-priced swap as compared to cash, listed options or future markets. These costs would not be offset with any additional transparency to the marketplace since the SD's corresponding hedges in the cash markets already are subject to transaction reporting.

[3] 77 Fed. Reg. 2148 (January 13, 2012).

* * *

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

****

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, 2012 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.

Appendix C
Attachment 6

ISDA® Safe, Efficient Markets

Request for No-action Letter - Commission Regulations Part 43 and Part 45

March 26, 2013

Richard Shilts
Director, Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Request for No-action Relief for Post-priced Swaps

Dear Mr. Shilts:

The International Swaps and Derivatives Association, Inc. ("**ISDA**"), on behalf of its members with reporting obligations under Part 43 and Part 45 of the Regulations ("**Reporting Rules**")[1] of the Commodity Futures Trading Commission (the "**Commission**") and other similarly situated persons, is seeking time-limited no-action relief from the Commission regarding the reporting of certain "post-priced" equity swaps.

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 Commission 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.

Over the course of these preparations, however, we have identified issues with the reporting of equity swaps where certain Primary Economic Terms ("**PETs**") may be unknown at the time at which the swap dealer ("**SD**") accepts the client's request to enter into the swap transaction. As

[1] See, 17 CFR Part 45 Swap Data Recordkeeping and Reporting Requirements, and 17 CFR Part 43 Real-Time Public Reporting of Swap Transaction Data.

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 **F** 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

discussed in greater detail below, ISDA requests no-action relief regarding the reporting of such "post-priced" transactions.[2]

I. Introduction

A post-priced swap is a transaction in which the price and/or its size is determined by reference to market activity or an observation period that occurs after the SD accepts a client request.

In a swap transaction that is not post-priced, a SD and its client will agree on all terms of the transaction, including price, funding, bid/offer, transaction costs and size, when the client's order is accepted. In these situations, the SD is committing capital and is therefore at risk on the position. While the SD may or may not hedge that transaction, all Rule 43 and 45 terms are set and thus can be fully reported to the market with no risk to the client.

In contrast, post-priced swaps work differently. Here, the price (and often size) of a swap is not finalized until either the SD has completed its hedge to the swap or the agreed-upon observation period, which may be at an agreed-upon point in time or over a defined period of one or more days, has occurred. As described below, if a post-priced swap is publicly reported in accordance with reporting obligations under Part 43 before the SD's hedge is completed or the agreed-upon observation period has occurred, as the case may be, then other market participants may be able to anticipate certain future trades in the SD's hedge and use that publicly-reported information in its trading activity, and, as a result, the price received by the client (and perhaps the size) for the swap may be negatively impacted.

For equity swaps, the pricing typically involves two primary components: the funding leg (e.g., LIBOR +/- a spread) and the strike price on the underlying equity (the "equity delta"). Further, in the case of a "best efforts" order type (as described below), there is no agreement as to the size of the swap. The nature of the client's order will depend on their objectives and the market environment. Examples of post-priced client order types are: (1) "guaranteed" order [3] with or without a set notional size, or (2) "best efforts" order based on the prices of the SD's hedge executions with or without a benchmark whereby executions could be subject to a price or volume limit.

We describe these examples in detail below, along with the potential concerns related to disclosing the order to the market before the equity delta has been traded in the market:

---

[2] For purposes of this letter, we are assuming that absent relief, an equity swap may be considered by the Commission to be "executed" and "affirmed" and hence reportable prior to the time a numerical amount is known for one or more primary economic terms for which a numerical amount will be ultimately determined. ISDA separately plans to request an interpretative letter regarding the permanent requirements applicable to such transactions and, if temporary relief is granted, will use the period of relief to engage in further discussions on this issue. ISDA is also considering requesting no-action relief related to post-priced swaps involving other asset classes (e.g., rates).

[3] E.g., Market–On-Open ("**MOO**"), Market-On-Close ("**MOC**") or a market observable volume weighted average price ("**VWAP**") or time weighted average price **("TWAP")** published on Bloomberg.

Order Type	Funding Leg Price	Equity Delta Strike Price	Considerations
Guaranteed	Agreed up front either for the specific trade or based on prenegotiated defaults	Swap price determined after order placement (not known at the time of order); examples include: • Guaranteed VWAP • Guaranteed MOC • Guaranteed TWAP • Guaranteed MOO	The underlying equity delta is traded in the cash market based on the order type. As the equity delta is executed, those cash executions are being printed/disclosed in accordance with applicable existing regulations; having to pre-advise the market of the order type/size before those executions have been completed would allow other market participants to trade in advance of the SD's hedge executions and could ultimately negatively impact the MOO, VWAP, TWAP or MOC price on the corresponding underlier with respect to the SD generating a worse fill price on the swap for the end user/client.
Best Efforts	Agreed up front either for the specific trade or based on prenegotiated defaults	Swap price determined by price SD achieves on equity delta (price and size not known at the time of the order). Client instructions can vary and often do change frequently throughout the day. Examples include : • Target VWAP • Target TWAP • Limit orders (price/ volume) • Target Volume % • Contingent (e.g., if the price of A hits $B, then sell C units of D Index)	The client instructions inform how the SD hedges the underling equity delta. As the equity delta is executed, those cash executions are being printed/disclosed in accordance with applicable existing regulations; having to pre-advise the market of the order type/size before those executions have been done would allow other market participants to trade in advance of SD's hedge executions and could ultimately negatively impact the price on the corresponding underlier for the SD generating a worse fill price on the swap for the end user/client.

Separately, as explained in greater detail below, individual SDs have technological issues with reporting post-priced swaps to the SDR at the point in time that a client's order is accepted but the price and/or size of the swap are not known. As a result, we request relief from both Parts 43 and 45 to enable SDs and SDRs to develop the technology to allow for reporting of these trades in compliance with the rule.

II. Request for No-action Relief

ISDA requests that, for the reasons discussed herein, the Commission's Division of Market Oversight issue a No-action Letter, for purposes of Parts 43 and 45, clarifying that post-priced equity swap transactions may be reported only when the numeric values of the price and size are known following the establishment of the SD's hedge or the relevant benchmark index value is available to the SD, as the case may be. ISDA requests this relief for purposes of Parts 43 and 45 until the earlier of:

- six months from Compliance Date 3 ("**CD3**"); and
- the date SDs/SDRs can develop the technology to allow for reporting of a post-priced swap when a client's order is accepted by the SD.

This relief request will be conditioned on (1) the SDs' compliance with their obligations to make and maintain records in accordance with the Commission's recordkeeping rules for swaps dealers,[4] and, for guaranteed swap orders linked to a benchmark index, a record of the final benchmark index value, and (2) a prohibition on the SD entering proprietary trades for its own benefit based on actual knowledge of a client order for a post-priced swap, provided that the SD will be permitted to trade in the same underlier and/or components underlying the client swap order, as well as swaps and other instruments linked to such underlier and/or components, in order to hedge and risk manage the execution of the client's swap, any new swap order or request received by the SD, or the SD's existing book of positions.

The requested relief would expire not later than six months from CD3[5] and – since the underlying markets that are the basis for pricing these transactions are completely transparent and thus reporting prior to finalization of pricing and/or size terms will not perform a price discovery function – the relief would not adversely affect overall market transparency. As the underlying equity delta is traded by the SD in the various cash markets (stocks, futures, etc.), those trades would already be transparently reported to the market in the ordinary course.

III. Conclusion

With respect to Part 43, as set forth above, if real-time public disclosure of post-priced swaps data were required before the underlying equity delta has been traded by the SD and the price and/or size have been established, displaying this information prematurely to the market would ultimately negatively impact the price (and sometimes the size) obtained by the client. The effect of this would be to add a material transaction cost to trading a post-priced swap as compared with trading in the cash, listed options or futures markets. This cost will not be offset by any benefit since there would be no additional transparency.

With respect to Part 45, individual SDs have technological issues with reporting to the SDR at the point in time that a post-priced swap order is accepted by the SD but the price and/or size of the swap are not known.

---

[4] See, 17 CFR Part 23.200-206

[5] April 10, 2013.

SDs have developed reporting technology to report when all PET terms, including the numerical values of price and size, are known. This technology sits in a specific place in the life-cycle of a transaction and pulls certain information types from specific data sources, at which point the transaction is reported. To report post-priced swaps under Part 45 at the time a SD receives a client order but prior to the numerical values of price and size being known, SDs would have to make changes to capture different types of pricing information (i.e., "VWAP" rather than a specific price), as well as changes as to where in the life-cycle of a transaction the reporting technology needs to sit. These fundamental technology changes are needed to collect the different types of information and to access that information from systems which would not have been needed if the swap were only reportable after all PETs were known.

Specifically, SDs will need to make changes to systems relating to swap creation, order and execution management, allocations and reporting, as well as databases storing this information, and the gateway to and connectivity with SDRs. Not all firms will need to make the same changes, but all firms will need to make substantial changes. Further, while we understand that one SDR has indicated it can support the different information needed for this reporting, even if that is the case, other SDRs will need to alter their technology and SDs will need time to test with all SDRs before going live. Accordingly, we request time-limited relief to expire no later than six months from CD3 to allow SDs and SDRs time to plan, analyze, implement and test these systems and connectivity changes.

* * *

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

****

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 March 26, 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.

Appendix D
Attachment 1

ISDA® Safe, Efficient Markets

July 7, 2017

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("ISDA")[1] appreciates the opportunity to submit these comments on the proposed revisions to the Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants ("Proposal") published by the U.S. Commodity Futures Trading Commission ("CFTC" or "Commission") on May 8, 2017.[2]

We recognize the Commission's efforts to promote accountability and a more effective compliance and control framework by aligning responsibilities to the personnel best suited to carry out these obligations, in line with well-established business practices and other regulatory requirements. We support the Commission's proposed revisions to the

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 66 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, clearing houses 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 website: www.isda.org.

[2] Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments 82 Fed. Reg. 21330 (May 8, 2017) [hereinafter Proposed Rule].

International Swaps and Derivatives Association, Inc.
600 13th Street, NW
Suite 320
Washington, DC 20004
P 202 638 9330 F 202 683 9329
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

content of the Annual Compliance Report. The current requirements encourage a "check-the-box" approach to compliance, rather than promoting a more proactive, on-going self-assessment focused on the risks identified by each firm. We believe that the proposed revisions would strike a proper balance between providing the Commission with meaningful analyses of firms' compliance programs and conserving the time and resources of both the Commission and firms.

While we commend the Commission's efforts to harmonize its rules with the U.S. Securities and Exchange Commission ("SEC") CCO rules for security-based swap dealers and major security-based swap participants, we believe that the Commission's Proposal, in certain instances, pursues harmonization absent a consideration of whether the SEC's approach imposes regulatory burdens without achieving associated risk-reducing benefits. [3] Additionally, we note that complete harmonization with the SEC rules may not always be the best approach, given the different nature of swap dealers and security-based swap dealers.

As discussed more fully below, we believe that adopting the following recommendations will further refine and balance the Commission's goals of simplification and harmonization, while recognizing aspects of the current framework that have not presented any issues since the enactment of the rule in 2012:[4]

- Clarify in the rule or preamble that the Commission understands the duty to "administer" the registrant's policies and procedures to mean reviewing, evaluating, and advising the registrant with respect to the development and implementation of its policies and procedures.
- Add a materiality qualifier to the duty to take reasonable steps to minimize conflicts of interest in order to further harmonize with the SEC rule and properly limit the CCO's role to addressing only those conflicts that have the potential to pose significant risk to the registrant.
- Abandon the proposed requirement to furnish the Annual Compliance Report to the senior officer, board of directors, and audit committee. Alternatively, require the registrant to submit the Annual Compliance Report to the senior officer[5] <u>or</u>

[3] 17 C.F.R. § 240.15Fk-1.

[4] Consistent with the proposed recommendations, we ask that the CFTC incorporate the above noted suggestions and make conforming changes to related sections in Staff Advisory No. 14-153. *See* CFTC Staff Advisory No. 14-153 (Dec. 22, 2014), available at http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-153.pdf.

[5] We appreciate the Commission's efforts to further clarify that "senior officer" means "the chief executive officer or other equivalent officer of the registrant." In this regard, we ask that the CFTC

the board of directors or the audit committee. At a minimum, allow the registrant to provide the Annual Compliance Report to the audit committee and board of directors at the next committee meeting and board meeting respectively, after the deadline to file the Annual Compliance Report with the Commission.[6]

- Further revise the requirement to disclose and quantify compliance resources in the Annual Compliance Report to require, instead, a qualitative assessment of the sufficiency of the registrant's resources to comply with the requirements of the Commodity Exchange Act ("CEA") and Commission regulations related to its business as a futures commission merchant ("FCM"), swap dealer ("SD"), or major swap participant ("MSP").[7]

Critically, and distinctly, we ask that the Commission further review its existing CCO rules and Proposal to ensure that it is in line with the objectives of Acting Chairman Giancarlo's project KISS—an initiative to apply the Commission's rules in ways that are more straightforward and cost-effective. In light of this effort, we have identified other areas in which the CCO rules impose unnecessary and unduly burdensome requirements on firms and, accordingly, request that the Commission, in its final rulemaking:

- Amend the Commission's current certification requirement[8] to require the CCO or CEO to certify that the Annual Compliance Report is complete and accurate "in all material respects."

---

clarify in the rule or preamble that the registrant has the flexibility to determine which individual would qualify as an "equivalent officer."

[6] We appreciate that the Commission recognizes that a registrant may not have a board of directors and, in that case, the registrant would only be obligated to furnish its annual report to the senior officer and audit committee. *See* Proposed Rule, *supra* note 2, at 21334 n. 47. However, we note that an FCM, SD, or MSP may, under certain circumstances, not have an audit committee. Thus, if the Commission decides to proceed with its revisions to § 3.3(f) we ask the Commission to further clarify in its final rulemaking that if the registrant does not have an audit committee, it should provide the Annual Compliance Report to the independent senior level audit personnel of the registrant.

[7] Additionally, we note that § 3.3(d)(4) of the Proposal would require that CCOs establish, maintain, and revise written policies and procedures reasonably designed to remediate noncompliance issues identified by the CCO through, among other things, a complaint that can be validated. In an effort to provide legal certainty to registrants, we ask that the Commission clarify the term "complaint that can be validated" to mean a written complaint that can be supported upon a reasonable investigation. These clarifications would help to better align the Commission's rules with the SEC CCO rules and would give registrants legal certainty by providing them with an objective test of the types of noncompliance issues that require escalation to the CCO.

[8] 17 C.F.R. § 3.3(f)(2).

- Acknowledge that the Annual Compliance Report need not address a firm's compliance with respect to the Volcker rule given that it would be duplicative of the Volcker rule's provisions for compliance program requirements.

I. Chief Compliance Officer Duties

A. The Duty to Administer the Registrant's Compliance Policies and Procedures Should be Assigned to Senior Officers Based on their Experience.

We appreciate the Commission's clarification that the CCO duty to administer each of the registrant's compliance policies and procedures is limited to those policies and procedures relating to the registrant's business as an FCM, SD, or MSP. However, we believe that such duty remains impracticable and places an undue burden on CCOs. CCOs do not necessarily "administer" or execute each and every policy and/or procedure relating to an applicable CFTC rule. For example, business units and other control functions within a firm, such as Operations, Technology, Risk, Finance, Compliance, Legal, and Human Resources, establish policies and procedures for their respective areas of responsibility. Ultimately, the chief executive officer or other senior officer has the ultimate supervisory authority to enforce compliance with these policies and procedures.

As a result, the proposed rule may have the unintended consequence of shifting certain regulatory responsibilities from other senior officers, who have direct knowledge, expertise, and accountability with respect to a particular matter. Thus, we believe that proposed § 3.3(d)(1) should be changed to clarify and align the CCO's duties with well-established internal practices and other regulatory frameworks. We propose that the Commission adopt the following language:

> Reviewing, evaluating, and advising the registrant on the development, implementation, and monitoring ~~Administering each~~ of the registrant's policies and procedures relating to its business as a futures commission merchant, swap dealer, or major swap participant that are required to be established pursuant to the Act and Commission regulations.

If the Commission decides to keep the term "administering" in § 3.3(d)(1) then the Commission should clarify that, consistent with the preamble to the SEC rule,[9] the duty to "administer" the registrant's policies and procedures means reviewing, evaluating, and

[9] Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants; Final Rule, 81 Fed. Reg. 29960, 30057 (May 13, 2016) [hereinafter SEC Final CCO Rule].

advising the registrant with respect to the registrant's CEA compliance policies and procedures.

In sum, absent further revisions, the proposed changes do not accurately reflect the CCO's duties and responsibilities and promote accountability across the internal operations of firms. If left unchanged, the proposed language would inadvertently reduce the direct involvement of other senior officers with more direct knowledge, expertise and responsibilities for various regulatory requirements.

B. Duty to Resolve Conflicts of Interest Should be Further Clarified

We fully support the Commission's proposed revisions to § 3.3(d)(2), clarifying that the CCO's duty with respect to resolving conflicts of interest is limited to taking "reasonable steps" to resolve conflicts of interest. We agree with the Commission that this duty "should not be interpreted to require the CCO to personally resolve every potential conflict of interest that may arise or require consultation with the board of directors."[10] We believe that the Commission should further clarify § 3.3(d)(2) to state that the CCO's duty is limited to resolving *material* conflicts of interest, as opposed to *any* conflicts of interest. Adding a materiality qualifier to § 3.3(d)(2) is consistent with the Commission's intent to require the CCO to get involved with issues of significant importance and not day-to-day matters that do not require escalation. Moreover, adding a materiality qualifier would further harmonize the Commission's CCO rules with the SEC CCO rules.[11]

Additionally, consistent with the SEC's view,[12] the Commission should explicitly state that the primary responsibility to "resolve" conflicts of interest ultimately falls on the registrant—not the CCO—and that the CCO's role would include identifying, advising and escalating, as appropriate, matters involving material conflicts of interest to senior officers. Further, the Commission should recognize that processes for addressing conflicts of interest should be tailored to the size, scope, structure, and risks of a particular firm, rather than imposing full responsibility on the CCO, as other personnel in the firm may also have responsibilities with respect to the handling and management of conflicts of interest. While the Commission acknowledges this notion in its Proposal,[13]

[10] Proposed Rule, *supra* note 2, at 21332.

[11] 17 C.F.R. § 240.15Fk-1.

[12] SEC Final CCO Rule, *supra* note 9, at 30057.

[13] *See* Proposed Rule, *supra* note 2, at 21332 ("Similarly, the SEC in its adopting release noted that the CCO's role in resolving conflicts of interest would likely include the recommendation of actions to resolve the conflict, as well as the escalation and reporting of issues related to resolution, but not executing the business decision").

the proposed rule's use of the word "resolve", without further clarification, does not seem to reflect this intent. Accordingly, we ask that the Commission provide further guidance in its final rulemaking that the term "resolve" means escalating to senior officers, and advising the registrant on, matters involving material conflicts of interest. Alternatively, we ask that the Commission change the term "resolve" to "minimize" to reflect the nature of conflicts of interest.

C. The Duty to Ensure Compliance Should be Further Aligned with the SEC Rule

We appreciate that the Commission recognizes, under the current rules, that CCOs are assigned a challenging responsibility to ensure full compliance with virtually each and every obligation under the CEA, making CCOs potentially liable for activities over which they have no knowledge or control.

We remain concerned, however, that the proposed revisions still impose a heavy burden on CCOs and, therefore, recommend that the Commission further refine its Proposal to require the CCO to "take reasonable steps to ensure that the registrant establishes, maintains, and reviews written policies and procedures reasonably designed to achieve compliance." This requested change would further align the Commission's rule with the SEC's rule[14] and is consistent with the Commission's intent to address industry concerns that ensuring full compliance with the CEA is an impracticable standard for CCOs.[15]

II. Annual Compliance Report

A. Furnishing the Annual Compliance Report to the Board and Audit Committee Prior to Filing the Annual Compliance Report with the Commission is Impracticable and Unnecessary

We are troubled by the Commission's proposed revisions to § 3.3(f) which would require a registrant to provide its Annual Compliance Report to its audit committee, board of directors, and senior officer prior to furnishing the report to the Commission. The Commission did not identify any concerns with the current requirements in § 3.3(f) to warrant the adoption of a stricter requirement, other than the intent to harmonize its rule with the SEC rule. We note that regulatory harmonization does not mean replacing more efficient rules with more burdensome requirements for harmonization's sake. Rather, it requires a thorough review of current rules to determine the most efficient approach and then harmonizing that approach, where appropriate. Accordingly, we recommend that the

[14] 17 C.F.R. § 240.15Fk-1(b)(2).

[15] *See* Proposed Rule, *supra* note 2, at 21332-33.

Commission abandon the proposed revisions to § 3.3(f) as it would create more regulatory burdens and added costs given that the relevant audit committee(s) and board of directors do not necessarily meet prior to the deadline to file the Annual Compliance Report with the Commission. Alternatively, we ask that the Commission require the registrant to submit the Annual Compliance Report to the senior officer or the board of directors or the audit committee.[16]

Should the Commission decide to proceed with its proposed revisions, we ask that the Commission, at a minimum, allow the registrant to provide the Annual Compliance Report to the audit committee and board of directors at the next committee meeting and board meeting respectively, after the deadline to file the Annual Compliance Report with the Commission.

B. Burdensome Compliance Resource Allocation Disclosure Requirements

We appreciate the Commission's acknowledgment that the Annual Compliance Report should only be required to discuss the registrant's resources allocated for compliance with respect to its business as an FCM, SD, or MSP. We remain concerned, however, that the requirement is still unduly burdensome as the registrant is expected to quantify, in a significantly detailed manner, its resource allocation in the Annual Compliance Report as a result of Staff Advisory No. 14-153.[17] We note, however, that any exercise in quantifying resources is always an educated guess at best, and the varying methodologies that may be employed by registrants to quantify resources prevent the Commission from engaging in an "apples to apples" comparison.

A better approach would be to require the registrant to perform an assessment of the sufficiency of its resources dedicated to compliance. In other words, the Commission should require the Annual Compliance Report to provide a narrative that describes the registrant's assessment of the sufficiency of its resources dedicated to compliance, in lieu of quantifying its resources or providing the Commission with hard numbers.

[16] We further note that non-U.S. swap dealers have business models, corporate forms, and organizational structures that may be different from their U.S. counterparts. As a result, we request that the Commission enable registrants to submit the Annual Compliance Report to either the senior officer, the board of directors, or the audit committee. This requested change is pertinent to the ability of numerous non-U.S. swap dealers to comply with the rule and would account for their varying organizational structures. If this change is not made, the Commission would subject these firms to additional costs and regulatory burdens, putting these firms at a competitive disadvantage with their U.S. counterparts.

[17] CFTC Staff Advisory No. 14-153 (Dec. 22, 2014), available at http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-153.pdf.

Accordingly, we suggest that the Commission consider the following revisions to proposed § 3.3(e)(4):

> The annual report shall, at a minimum, contain a description of the sufficiency of the registrant's financial, managerial, operational, and staffing resources set aside for compliance with respect to the Act and Commission regulations relating to its business as a futures commission merchant, swap dealer or major swap participant, including any material deficiencies in such resources.

We believe that requiring a qualitative, rather than quantitative, assessment of resources will provide the Commission with a more meaningful understanding of a firm's compliance program. Moreover, our proposed revision is consistent with the Commission's goal to encourage a qualitative, substantive analysis of compliance issues.[18]

III. Other Concerns

A. Liability for Certification

Current § 3.3(f)(3) requires the registrant's CCO or CEO to certify that the Annual Compliance Report is accurate and complete under penalty of law. The Commission has stated that, under such provision, "administrative, civil, and/or criminal liability could be imposed on the registrant or the certifying officer or both, either directly or vicariously."[19] We note that in other contexts where certifications "under penalty of law" have been required, the phrase has been interpreted to impose criminal liability only where the certifier has been informed of inaccuracies and nonetheless certifies the accuracy of the document, and not merely where the information within the document is later determined to be inaccurate.[20] Accordingly, we ask the Commission add a materiality qualifier to the certification requirement, so that the CCO or CEO would only certify that the Annual Compliance Report is accurate and complete in all material respects.

---

[18] *See* Proposed Rule at 21333-34 (noting that the proposed revisions to the contents of the CCO Annual Report are intended to encourage a qualitative, substantive discussion regarding areas of improvement and recommended changes to compliance programs, among other things).

[19] 77 Fed. Reg. 20163 (2012).

[20] *See* United States v. Hopkins, 53 F.3d 533, 542 (2d Cir. 1995) (affirming conviction where certifier was presented with information that reports were false).

We believe that the requested change will appropriately address concerns that the CCO or CEO should not be held criminally liable for immaterial misstatements, omissions, or other inaccuracies in the Annual Compliance Report. Additionally, this requested change will further align the Commission's rule with the SEC's rule and is consistent with the Commission's overall objective of achieving rule harmonization.[21]

B. Volcker Rule

We appreciate the Commission's efforts to reduce compliance burdens and provide more efficient regulatory oversight. We believe there is an opportunity for the Commission to further streamline its CCO rules and address concerns regarding the footnote in the Commission's Volcker rule that requires SDs to incorporate their Volcker compliance program requirements[22] into the Commission's CCO duties and Annual Compliance Report requirements.[23] To further alleviate CCO compliance challenges, we ask that the Commission remove the requirement in the current rules that SDs or FCMs address Volcker compliance program requirements under § 3.3.[24]

By way of background, we note that the public was not provided with the opportunity to comment on this specific application of the Volcker rule. Additionally, following the adoption of the Volcker rule, CFTC staff issued an advisory[25] expanding this requirement to include FCMs that are banking entities.

The practical effect of this requirement is that firms are now expected to establish policies and procedures related to compliance with the Volcker rule under both the CCO compliance regime (§ 3.3) and the Volcker compliance regime (§ 75.20). Duplicative Volcker compliance obligations imposed at the firm-wide level and the registrant-level (which is only a part of the firm) lead to increased compliance costs and decreased efficiencies.

---

[21] 17 C.F.R. § 240.15Fk-1(c)(2)(ii)(D).

[22] Subpart D of Part 75 of the Commission's Regulations.

[23] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Final Rule, 79 Fed. Reg. 5808, 6020 n. 2521 (Jan. 31, 2014).

[24] Alternatively, we ask the Commission to provide staff guidance determining that complying with the Volcker rule's compliance program requirements would satisfy the Commission's footnote.

[25] DSIO Staff Advisory (not available on the CFTC website, but available at https://www.bridgingtheweek.com/ckfinder/userfiles/files/DSIO%20CCO%20Volcker%20Advisory.pdf).

Removing this requirement would be consistent with the Acting Chairman's goals under Project KISS and the Commission's intent to revise the contents of the Annual Compliance Report in order to reduce costs and regulatory burdens.[26] We therefore request that the Commission acknowledge in its final rulemaking that the Annual Compliance Report should not include or address the registrant's compliance with respect to the Volcker rule.[27]

C. Comparability Determination

We also seek clarification that the Commission's proposed changes to the CCO rules will not impact the Commission's foreign jurisdiction comparability determinations with respect to the requirements under § 3.3. Specifically, in December 2013, the Commission determined that certain laws and regulations of Australia, Canada, the EU, Hong Kong, Japan, and Switzerland were sufficiently comparable to the Commission's CCO rules and, as a result, the Commission made substituted compliance available for foreign SDs and MSPs located in those jurisdictions with certain exceptions.[28] Thus, we ask that the Commission confirm in its final rulemaking that its changes to the CCO rules will not cause the Commission to revisit its comparability determinations. We trust that the Commission will not revisit this comparability determination and expect that SDs and MSPs operating in the aforementioned jurisdictions can continue to rely on these comparability determinations.

[26] Proposed Rule, *supra* note 2, at 21332.

[27] However, if the Commission decides to maintain the Volcker rule incorporation into the CCO rules, we ask that the Commission provide guidance within its final rulemaking for firms not subject to the Volcker rule, stating that their Annual Compliance Report does not have to provide an extensive and lengthy explanation as to why their firm is not subject to the Volcker rule.

[28] *See* 78 Fed. Reg. 78864 (Dec. 27, 2013); 78 Fed. Reg. 78839 (Dec. 27, 2013); 78 Fed. Reg. 78932 (Dec. 27, 2013); 78 Fed. Reg. 78852 (Dec. 27, 2013); 78 Fed. Reg. 78910 (Dec. 27, 2013); 78 Fed. Reg. 78899 (Dec. 27, 2013).

IV. Conclusion

We appreciate the opportunity to submit our comments on the Proposal. We commend the Commission for its efforts to simplify and harmonize its rules with the SEC rules and look forward to working with the Commission as it continues to consider these important issues. Our members are strongly committed to maintaining robust and effective compliance programs and hope that the Commission will consider our suggestions, as they reflect the extensive knowledge and experience of compliance professionals within our membership.

Please feel free to contact me should you have any questions or seek any further clarifications.

Sincerely,

Katherine T. Darras
General Counsel
International Swaps & Derivatives Association, Inc.

Appendix E
Attachment 1

ISDA® Safe, Efficient Markets

February 12, 2016

Department of the Treasury/Office of the Comptroller of the Currency
Docket No. OCC-2011-0008/RIN 1557-AD43s

Farm Credit Administration
RIN 3052-AC69

Board of Governors of the Federal Reserve System
Docket No. R-1415/RIN 7100 AD74

Federal Housing Finance Agency
RIN 2590-AA45

Federal Deposit Insurance Corporation
RIN 3064-AE21

Commodity Futures Trading Commission
RIN 3038-AC97

Addresses listed in Annex I

Re: Docket No. OCC-2011-0008/RIN 1557-AD43s; Docket No. R-1415 /RIN 7100 AD74; RIN 3064-AE21; RIN 3052-AC69; RIN 2590-AA45; RIN 3038-AC97

PRODUCT SET FOR VARIATION MARGIN UNDER MARGIN REQUIREMENTS FOR NON-CLEARED SWAPS

Ladies and Gentlemen,

The members of the International Swaps and Derivatives Association[1] ("**ISDA**") are in the process of creating and updating systems and designing new documentation to implement the margin rules issued on uncleared derivatives by the September 1, 2016 effective date. We believe it is appropriate to update you on how our members may choose to calculate variation margin ("**VM**") when two counterparties have entered into (i) transactions that are subject to the VM requirements under the margin rules of the Prudential Regulators ("**PRs**") or the Commodity Futures Trading Commission ("**CFTC**") and (ii) transactions that are subject to VM requirements under *another*

[1] 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.

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 F 202 756 0271
www.isda.org

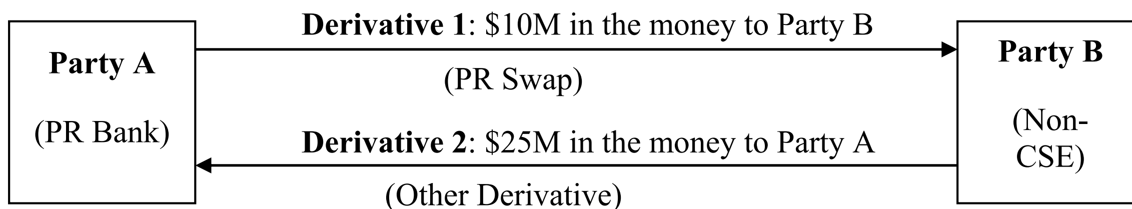
NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

margin regulation (issued by a US regulator or a non-U.S. regulator) or *contractually agreed* variation margin requirements.

As explained in more detail below, we believe it is consistent with the intent of the PR and CFTC margin rules for the two counterparties to choose to **run a single VM calculation across both product groups (i.e., the two groups of transactions described in (i) and (ii) in the previous paragraph) and issue a single VM call.**

Multiple narrow product sets: no decrease of credit risk. Using multiple narrower product sets for VM would not provide any additional credit risk mitigation and could raise significant operational risks caused by gross, multiple margin movements. VM need not be segregated and the outcome following the settlement of all margin movements for the multiple, narrow product sets would be identical to the outcome for a single VM calculation on a broad product set with a single movement of VM.

Illustrative Example. The following is an example to demonstrate the point. Two counterparties are executing two derivatives with each other. Party A is a US bank regulated by the PRs and Party B is not a covered swap entity ("**CSE**") under the margin rules of the PRs or of the CFTC. Derivative 1 is a swap subject to the PR margin rules ("**PR Swap**") and is in the money to Party B. Derivative 2 is *not* subject to the PR margin rules ("**Other Derivative**"), but is either subject to another regulator's margin rules (the CFTC, the Securities and Exchange Commission or a non-US regulator) or subject to a contractual VM requirement, and is in the money to Party A.

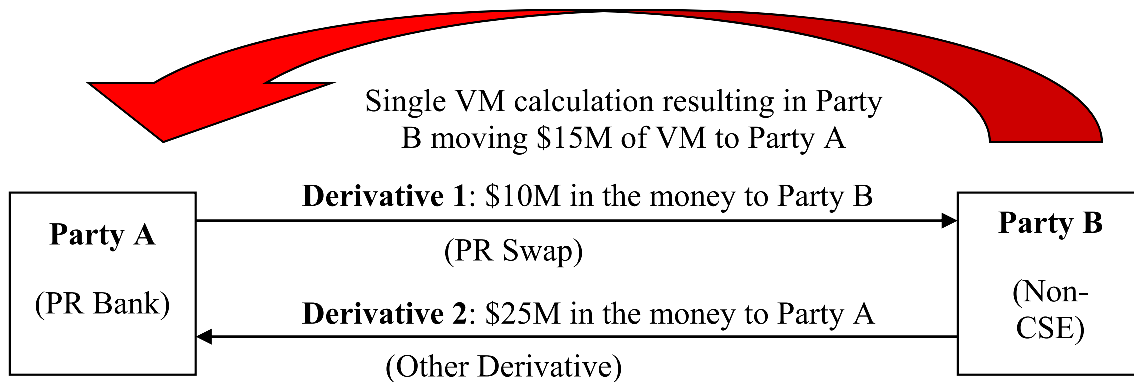


The "Other Derivative" could be, for example, equity options, physically settled foreign exchange forwards and swaps and any legacy positions executed prior to the effective dates for the mandatory exchange of VM. Any transactions without a regulatory or contractual VM requirement would be excluded from this VM calculation.

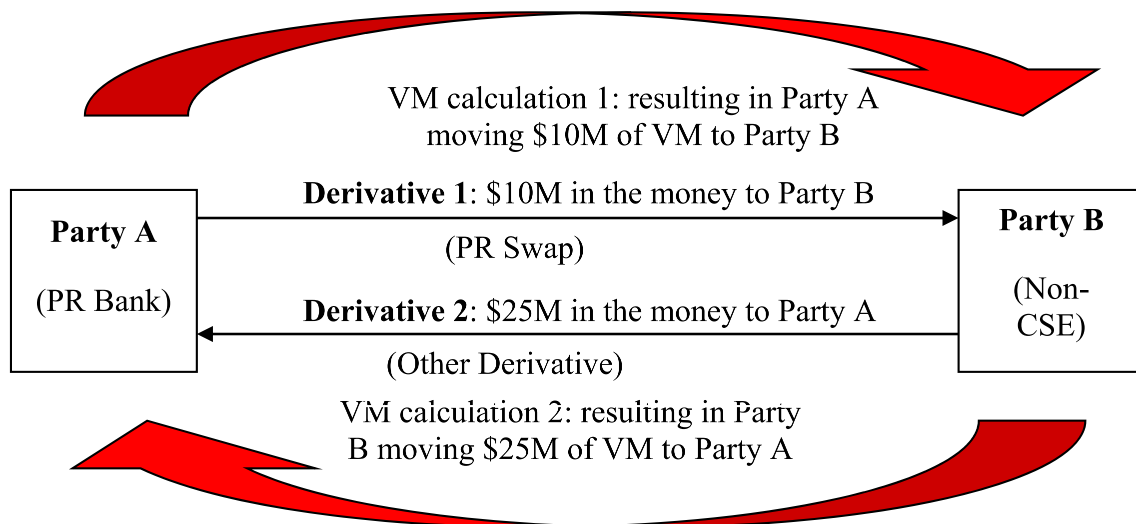
International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 F 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

ISDA members are implementing the margin rules to allow netting of exposures so that a single VM payment may be made between the counterparties. In our example, a single collateral movement would be made from Party B to Party A for $15M.



If these two positions were not included in the same product set, then the parties would be forced to create two separate netting sets that would each drive a margin obligation and collateral movement. The overall net amount of VM exchanged however would be identical (i.e. Party A will be a net receiver of $15M of collateral from Party B).



As illustrated by the example above, use of narrow sets of products for a VM call would result in (i) significantly increased operational and settlement risk, particularly across different time zones; (ii) significantly increased resource requirements (systems and personnel required to issue, agree and satisfy margin calls); (iii) more complex documentation; and (iv) increased liquidity requirements.

Conflicting Regulations. Use of narrow product sets raises difficult issues if the two parties are subject to two different margin rules with different VM product sets. For example, in inter-affiliate transactions between a CFTC-regulated swap dealer and a PR-regulated swap dealer, security-based swaps ("**SBS**") would be included in the VM set for one dealer but not the other. Another example arises in transactions between a US swap dealer and an EU financial counterparty: the EU proposal for uncleared swap margin[2] includes certain products in the VM product set, such as equity options and physically settled foreign exchange swaps, that are excluded from the PR and CFTC VM product sets. The PR and CFTC rules do not provide a way to resolve such a regulatory conflict between two different VM product sets. We submit that the appropriate calculation of VM for purposes of credit risk mitigation is based on the broad product set including products subject to VM requirements under any of the applicable margin rules (or subject to contractually agreed VM requirements.)

Consistent with the PR and CFTC Margin Rules. The Preamble to the PR and the CFTC rules explains that the regulators do "not believe that it would be appropriate for margin requirements for [uncleared swaps] to be offset by netting other products or exposures across markets against other products that may present different concerns about safety and soundness or financial stability, or that are not subject to similar associated margin requirements." [3] However, many out-of-scope products that are traded under ISDA Masters raise very similar concerns about safety and soundness as the concerns raised by swaps and are subject to similar margin requirements. For example, for purposes of the CFTC's rules, SBS are out of scope but raise many of the same risks and are subject to the same statutory margin requirements as swaps. Another example is physically settled foreign exchange swaps and forwards, which are also out of scope for the margin rules but are subject to supervisory guidance requirements for margin and have a similar risk profile as certain other swaps. Therefore, we do not believe this rationale should prevent the use of a broad product set.

Also, the use of a broad product set for VM is consistent with the purpose of the margin rules. The Preamble to the PR Rules states that the margin standards imposed under Dodd-Frank "are intended to offset the greater risk to the swap entity and the financial system arising from non-cleared swaps".[4] If they use a broad product set, swap entities would impose VM and netting arrangements on out-of-scope products as well as on swaps, thereby reducing risk to the swap entities and the financial system.

The rule itself does not explicitly prohibit the netting of products other than swaps for purposes of determining VM.[5] We submit that the rule should be interpreted to mean that other products can

---

[2] Second Consultation Paper on the draft regulatory technical standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP, issued by various EU regulators (June 10, 2015).

[3] CFTC: 81 FR 651; PRs: 80 FR 74 868, 9.

[4] PRs: 80 FR 74 841.

[5] CFTC: Sec. 23.153(d); PRs: Sec. _.5(a).

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 F 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

be netted against swaps and SBS for purposes of calculating VM if those products are subject to the same VM requirements as swaps (or SBS) and are documented under an eligible master netting agreement.

Prior Discussion. In previous discussions, ISDA raised the issue of using a broad product set for IM and VM. This letter focuses solely on the applicable product set for VM. As our members implement the margin rules, they have become increasingly aware of the issues described above in determining VM solely on the basis of a a narrow product set.

Conclusion. We therefore respectfully advise you that ISDA members may choose to follow the procedure described above to determine the product set for VM calculations for a counterparty pair under the applicable margin rules. We emphasize that, for the reasons stated above, for ISDA members that choose to use a broad product set, any change which would require such members to use narrow product sets will result in much greater complexity of implementation and therefore will require significant amounts of time and coordination to implement.

* * *

ISDA appreciates the opportunity to submit this letter.

Sincerely,

Mary P. Johannes
Senior Director and Head of ISDA WGMR Initiative
International Swaps and Derivatives Association, Inc. (ISDA)
1101 Pennsylvania Avenue, NW, Suite 600, Washington, DC 20004
+1 202-756-4541 (o)
+1 646-732-6625 (m)
mjohannes@isda.org

Annex I

ADDRESSES

Legislative and Regulatory Activities Division Office of the Comptroller of the Currency 400 7th St, SW, Suite 3E-218 Mail Stop 9W-11 Washington, D.C. 20219 cc: Jamey Basham	Barry F. Mardock, Deputy Director Office of Regulatory Policy Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090
Robert deV. Frierson, Secretary Board of Governors of the Federal Reserve System 20th Street and Constitution Avenue, NW Washington, DC 20551 cc: Sean D. Campbell	Alfred M. Pollard, General Counsel Federal Housing Finance Agency Constitution Center (OGC Eighth Floor) 400 7th St, SW Washington, DC 20024
Robert E. Feldman, Executive Secretary Federal Deposit Insurance Corporation 550 17th Street, NW Washington, DC 20429 cc: Bobby Bean	Commodity Futures Trading Commission Christopher Kirkpatrick, Secretary Three Lafayette Center 155 21st Street, NW Washington, DC 20581 CC: John Lawton

Appendix E
Attachment 2

ISDA® Safe, Efficient Markets

May 15, 2015

Addressees listed in Annex I attached

Basel Committee on Banking Supervision Bank for International Settlements	Department of the Treasury/Office of the Comptroller of the Currency: **Docket No. OCC-2011-0008/RIN 1557-AD43**
International Organization of Securities Commissions	Board of Governors of The Federal Reserve System: **Docket No. R-1415/RIN 7100 AD74**
The European Securities and Markets Authority	Federal Deposit Insurance Corporation: **RIN 3064-AE21**
The European Banking Authority	Federal Housing Finance Agency: **RIN 2590-AA45**
The European Insurance and the Occupational Pensions Authority	Farm Credit Administration: **RIN 3052-AC69**
Commodity Futures Trading Commission: **RIN 3038-AC97**	Securities and Exchange Commission: **RIN 3235-AL12**
Financial Services Agency	

Re: Broad product set for swap margin calculation

Ladies and Gentlemen,

The International Swaps and Derivatives Association[1] ("**ISDA**") hereby writes to apprise you that, in making swap margin calculations, ISDA's members may choose to use a

[1] 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

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 F 202 756 0271
www.isda.org

NEW YORK WASHINGTON
BRUSSELS LONDON
HONG KONG SINGAPORE
TOKYO

product set that is broader than the minimum product set required by regulation. ISDA and its members are using the broad product set as part of their implementation of the margin rules, including for purposes of developing models and supporting systems. Absent substituted compliance, we will apply the new margin rules to a set of trades that includes the various definitions of derivatives that apply to each counterparty in its respective jurisdiction.

We will use a broad product set because it is not possible, in the time frames available, to build systems that can determine margin based on a different product set for each party to a swap.

Discussion:

The authorizing statutes for the margin requirements, in both the US and the EU, do not prohibit the use of a broad product set. In the US, the provisions under the Dodd–Frank Wall Street Reform and Consumer Protection Act [2] require the regulators to adopt initial margin ("**IM**") and variation margin ("**VM**") requirements for uncleared swaps and security-based swaps. In the EU, the EMIR provision[3] states that financial counterparties and certain non-financial counterparties must have risk management procedures that require exchange of collateral with respect to OTC derivatives. These provisions are consistent with a product set that includes all products subject to the applicable margin rules and also includes other products as well.

Having a broad product set as an option will allow parties to reduce risk while simplifying the margin process. For example, supervisory guidance encourages US banks to collect and post VM for physically settled foreign exchange ("**FX**") forwards and swaps.[4] For US swap dealers, including such FX swaps and forwards in a broad product set will allow for a single calculation of VM.

Flexibility in choosing a broader product set will greatly facilitate the process of margin collection by allowing each counterparty pair to choose the set that is best suited to the calculation of margin and management of risk for the portfolio of trades between that counterparty pair. This flexibility is completely consistent with the risk-reduction goals of the margin rules because all regulated products would remain subject to the margin requirements. The broad product set available to the parties will therefore potentially include a wide set of bilaterally traded products, even if such products are not swaps or derivatives under the applicable margin rules.

---

firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

[2] §4s(e) of the Commodity Exchange Act; and §15F(e) of the Securities Exchange Act.

[3] Art. 11(3) of Regulation (EU) No 648/12 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories ("**EMIR**").

[4] Basel Committee on Banking Supervision, Supervisory guidance for managing risks associated with the settlement of foreign exchange transactions, Feb. 2013.

Differences in Scope. The scope of products subject to the proposed margin requirements is not consistent across the EU, Japan and the US. Among other differences, equity options are outside the scope of the US swap margin rules entirely, although they are subject to both IM and VM requirements under the EU and Japanese proposals. Physically-settled FX swaps and forwards are subject to VM under the EU proposal but not under the US or Japanese proposal. Annex II, attached, shows the product scope of proposed margin rules in the EU, Japan and the US.

For cross border swaps, using different regulatory product sets for the same swap will not be possible as a practical matter. For example, consider a US swap dealer (located in the US) entering into a swap with an EU financial counterparty (that is not a US-registered swap dealer). The US swap dealer will be required to post and collect VM and IM (assuming the relevant thresholds are met) under the US rules.[5] The EU financial counterparty will be required to collect VM and IM from the US counterparty (again assuming the thresholds are met).

For VM, the calculation by the US counterparty will differ from the VM calculation by the EU party because the product set is different. The US counterparty may determine that it is owed VM and the European counterparty may determine that it is also owed VM. Because VM is a single net number based on the overall exposure, and because the two parties are using different product sets, these two determinations cannot be reconciled.

For IM, both the EU and US parties will be required to collect IM and the US party will be required to post IM as well. Because the product sets are different, the IM that must be posted to the EU party will differ under the US and EU parties' respective determinations. Given the complexity and scale of IM calculations for dealers with a significant volume of swaps, it is not feasible, in the time frames available for implementation, for dealers to develop systems that could simultaneously run two sets of IM calculations based on two different product sets. The practical problems are exacerbated by the need to calculate IM on a daily basis.

The inconsistency in the margin product set raises problems in other cross-border situations. For example, if the same dealer is subject to both EU and US margin requirements, then the dealer would need to calculate IM and VM for two different sets of products. (Such dual requirements could arise, for example, for a US branch of an EU bank that is registered as a US swap dealer.) Such dual calculations would encounter the same inconsistency and operational issues discussed above.

These same issues also arise within one jurisdiction if two different sets of margin rules regulations apply. For example, a US entity that is dual registered as a swap dealer and a security-based swap dealer will be subject to the swap margin rules of the CFTC and the

---

[5] The US dealer would be required to post and collect margin in this situation under the cross-border approach proposed by the Prudential Regulators and two of the three approaches proposed by the Commodity Futures Trading Commission ("**CFTC**"). One of the three of the CFTC's proposed cross-border approaches, the entity-level approach, would give relief from posting IM in this situation if a substituted compliance determination is made.

Securities and Exchange Commission ("**SEC**").[6] Unless such an entity can use a broad product set, it must run two different sets of margin calculations with its counterparties.

If the parties to a swap elect to use a broad product set, then netting will occur within the broad product set to the same extent as permitted for swaps/security-based swaps/OTC derivatives under the swap margin rules. This netting treatment will be similar to the treatment of legacy swaps under the EU and US proposals.

The Broad Product Set Option:

We therefore respectfully advise you that ISDA members will follow the following procedure to determine the product set for margin calculations for a counterparty pair under the applicable margin rules.

For any counterparty pair, the parties may choose to use a broader product set than the set required by either party's applicable regulation. Netting within this broad product set will be permitted to the same extent, and under the same conditions, that would apply to netting of products subject to the margin rules. The broad product set will be used for VM and/or IM and will include derivatives as defined by the rules applicable to each counterparty in its respective jurisdiction.

* * *

ISDA would welcome a chance to discuss this further. Please feel free to contact me at your convenience.

Sincerely,

Mary P. Johannes

Senior Director and Head of ISDA WGMR Initiative

ISDA

[6] The SEC and CFTC recognized the issues of dual-registration in the rule on mixed swaps (CFTC Rule 1.9(b) and Exchange Act Rule 3a68-4.)

Annex I

ADDRESSEES

Secretariat Basel Committee on Banking Supervision Bank for International Settlements Centralbahnplatz 2, CH-4002 Basel, SWITZERLAND	Legislative and Regulatory Activities Division Office of the Comptroller of the Currency 400 7th St, SW, Suite 3E-218 Mail Stop 9W-11 Washington, D.C. 20219
Secretariat International Organization of Securities Commissions C/ Oquendo 12, 28006 Madrid, SPAIN	Robert deV. Frierson, Secretary Board of Governors of the Federal Reserve System 20th Street and Constitution Avenue, NW Washington, DC 20551
The European Securities and Markets Authority CS 60747 103 rue de Grenelle 75345 Paris Cedex 07, France Attention: Steven Maijoor, Chair	Robert E. Feldman, Executive Secretary Federal Deposit Insurance Corporation 550 17th Street, NW Washington, DC 20429
The European Banking Authority Tower 42 (level 18) 25 Old Broad Street London EC2N 1HQ[UK Attention: Andrea Enria, Chairperson	Alfred M. Pollard, General Counsel Federal Housing Finance Agency Constitution Center (OGC Eighth Floor) 400 7th St, SW Washington, DC 20024
The European Insurance and the Occupational Pensions Authority Westhafenplatz 1 60327 Frankfurt am Main Germany Attention: Gabriel Bernardino, Chairman	Barry F. Mardock, Deputy Director Office of Regulatory Policy Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090
Christopher Kirkpatrick Secretary of the Commission Commodity Futures Trading Commission Three Lafayette Centre, 1155 21st Street NW. Washington, DC 20581	Elizabeth M. Murphy Secretary Securities and Exchange Commission 100 F Street, NE Washington, D.C. 20549-1090
Financial Services Agency 3-2-1 Kasumigaseki Chiyodaku Tokyo, 100-8967 Japan	

Annex II

DERIVATIVES SUBJECT TO PROPOSED MARGIN RULES

(INITIAL AND VARIATION MARGIN)

Instrument Type	CFTC	Prudential Regulators	EMIR	Japan
Interest Rate	Yes	Yes	Yes	Yes
Foreign Exchange ("FX"), except:	Yes	Yes	Yes	Yes
- FX spot[7]	No	No	No	No
- physically settled FX swaps	No [8]	No [9]	VM, not IM	No [10]
- physically settled FX forwards	No [11]	No [12]	VM, not IM	No [13]
- principal payments on cross-currency swaps	No	No[14]	VM, not IM	VM, not IM
Equity				
- swap based on securities [15]	N/A[16]	Yes	Yes	Yes
- swap based on broad index [17]	Yes	Yes	Yes	Yes
- option based on securities	No	No	Yes	Yes
- option based on broad index	No	No	Yes	Yes
- forward based on securities	No	No	Yes	Yes
- forward based on broad index	No[18]	No[19]	Yes	Yes
Commodities, except:	Yes	Yes	Yes	Yes (not JFSA)[20]

7 US and EU definitions of "spot" are not identical.

8 Supervisory guidelines provide that banks should exchange variation margin for physically settled swaps and forwards.

9 See footnote 8.

10 Currently out of scope from the definition of "OTC Derivatives" under the Financial Instruments and Exchange Act (FIEA).

11 See footnote 8.

12 See footnote 8.

13 See footnote 10.

14 It is not clear under the Prudential Regulators' release whether VM requirements apply to these principal payments.

15 "Securities" for this purpose excludes a broad index. Also, (1) a swap linked to an exempted security (other than a municipal security) is a CFTC-regulated swap; (2) a swap based on a single security with a composite FX feature is a mixed swap and will be subject to CFTC margin rules only to the extent that SEC regulation does not apply.

16 A swap based on securities is a security-based swap and therefore subject to the SEC's jurisdiction rather than the CFTC's jurisdiction.

17 Broad index refers to a product with more than 9 components that satisfies certain other conditions, including weighting requirements (only relevant for US rules).

18 The classification of forwards based on broad indexes is not explicitly addressed in the regulations.

19 The classification of forwards based on broad indexes is not explicitly addressed in the regulations.

20 Currently, commodity derivatives are not subject to the margin rules of the JFSA but may be subject to the margin rules of other regulators.

Instrument Type	CFTC	Prudential Regulators	EMIR	Japan
- physically settled forwards	No	No	Some[21]	**No**
- trade options	Yes	Yes	Some	**No**
Credit				Yes
- based on single name	N/A[22]	Yes	Yes	Yes
- based on index	Yes	Yes	Yes	Yes
Other (e.g. weather)	Yes	Yes	Certain classes only	Yes [23]
Security linked to any asset	No	No	No	**No**

In addition, the following exclusions also apply:

Cleared and Exchanged Traded	CFTC	Prudential Regulators	EMIR [24]	Japan
Derivatives traded on a futures exchange[25]	No	No	No	No
Derivatives cleared on a recognized CCP	No	No	No	No
Derivatives cleared on a unrecognized CCP	**Subject to margin** [26]	**Subject to margin**	No	**Subject to margin** [27]

[21] The margin obligation under EMIR will only apply to physically settled commodity contracts if additional conditions are met e.g. that it is traded on a regulated market or MTF.

[22] A credit swap based on a single name is a security-based swap and therefore subject to the SEC's jurisdiction rather than the CFTC's.

[23] To the extent that the products fall into the definition of "OTC Derivatives" under the FIEA.

[24] Even though Article 11(3) EMIR only refers to OTC derivatives, it is expected that the EMIR margin rules will only apply to OTC derivatives not cleared by a CCP (in line with the heading to Article 11) and, on this basis, the margin rules should not apply to OTC derivatives cleared by a CCP even if that CCP is not recognized under EMIR (see ESMA OTC Question 11(j)). However, the margin rules may apply to uncleared derivatives traded on a non-EU futures exchange if that exchange has not been found to be "equivalent" by the European Commission".

[25] The definition of swap excludes "any contract of sale of a commodity for future delivery ... [or] securities future product" Commodity Exchange Act §1a(47)(B)(i).

[26] Unless the foreign CCP is exempted by the CFTC.

[27] Unless the unrecognized CCP is licensed by the JFSA.

Appendix E

Attachment 3

ISDA® | Safe, Efficient Markets

May 15, 2017

Submitted Electronically

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 201581

Re: Capital Requirements for Swap Dealers and Major Swap Participants (RIN 3038-AD54)

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. (ISDA)[1] appreciates the opportunity to comment on the above-referenced notice of proposed rulemaking (the Proposal) published by the Commodity Futures Trading Commission (the CFTC), which would implement capital requirements for swap dealers and major swap participants (MSPs) that are not subject to capital rules of a U.S. prudential regulator[2] (referred to herein as "covered entities"), as well as financial reporting and recordkeeping requirements for all swap dealers and MSPs.

ISDA and its members welcome the opportunity to comment on the Proposal and support the CFTC's goals of protecting the safety and soundness of swap dealers and MSPs, while also taking into account the diverse nature of entities participating in the swaps market and the existing capital regimes that apply to these entities and/or their financial group.

Our comments below address the following key issues:

- Several aspects of the Proposal, including in particular the proposed processes for substituted compliance and model approval, would likely pose logistical issues that could affect covered entities' ability to comply with new capital requirements. As discussed

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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, clearing houses and depositories, as well as law firms, accounting firms and other service providers. Additional information on ISDA is available at www.isda.org.
[2] The U.S. prudential regulators include the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

below, we support a presumption of substituted compliance for Basel Committee on Banking Supervision (BCBS) jurisdictions and a streamlined process for model approval that leverages approval by other regulators and that allows for sufficient time to review all models submitted.
- We commend the CFTC for proposing different requirements for different types of covered entities. However, we believe that even as drafted, the Proposal could result in competitive disadvantages among covered entities and would likely result in competitive disadvantages between covered entities and other swap dealers. Accordingly, we urge the CFTC to harmonize, to the maximum extent appropriate, capital requirements for covered entities with final capital requirements established by other domestic and foreign regulators of swap dealers and MSPs.
- As discussed below, several aspects of the Proposal, including in particular the requirement to hold capital for 8% of initial margin requirements for uncleared and cleared swaps, could result in a concentration of exposure among fewer counterparties and disincentivize central clearing for derivatives in contradiction of the 2009 G20 commitment. We therefore urge the CFTC to reconsider whether a flat 8% calculation is appropriate and also reconsider whether any such calculation should apply to cleared swaps.
- The Proposal's reporting requirements raise a number of logistical and technical compliance issues and apply to an overly broad data set. As noted below, ISDA and its members would welcome the opportunity to learn more about the CFTC's objectives in proposing these requirements and engage with the CFTC to best determine how swap dealers and MSPs could satisfy such objectives in a way that is less burdensome.

Substituted Compliance

ISDA is very focused on ensuring appropriate substituted compliance across all aspects of derivatives regulatory reform efforts in all relevant jurisdictions.[3] Of all derivatives reforms, substituted compliance for capital requirements may be most important. Reforms at the BCBS level are meant to establish global capital standards so that compliance in multiple jurisdictions is unnecessary. ISDA and its members therefore strongly support the substituted compliance contemplated by §23.106 of the Proposal.

ISDA does have concerns, however, regarding whether the Proposal's process for determining substituted compliance is appropriately streamlined and efficient. We believe that any final rulemaking should include a presumption that capital regimes in jurisdictions that are BCBS members are comparable for purposes of determining "whether a foreign jurisdiction's capital adequacy and financial reporting requirements and related financial recordkeeping and reporting requirements for swap dealing financial intermediaries are comparable to the CFTC's corresponding capital adequacy and financial recordkeeping and reporting requirements" under §23.106(a)(3). §23.106 of the Proposal sets out several factors for the CFTC to consider when

[3] *See e.g.,* Letter from ISDA to the CFTC dated December 19, 2016 regarding Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants.

making substituted compliance determinations, including the scope and objectives of the requirements, comparability to BCBS standards and other standards applicable to securities brokers or dealers, comparability of outcomes achieved by the requirements, the ability of relevant regulatory authorities to supervise and enforce compliance with the requirements and anything else the CFTC deems relevant. We maintain that such an analysis would be redundant and unnecessary for BCBS jurisdictions because one of the primary purposes of negotiating capital requirements at the BCBS level is to ensure consistent objectives, outcomes and enforcement of such requirements. Accordingly, as stated above, substituted compliance should be presumed for covered entities subject to capital requirements in BCBS jurisdictions unless the CFTC determines that the requirements are not in fact comparable.

In addition, if the CFTC does have to undertake a detailed review of the capital requirements in a foreign jurisdiction, covered entities subject to such capital requirements should not be penalized because of the time required for the CFTC's review. Substituted compliance should be presumed until the CFTC's review is complete to avoid unnecessary duplication of regulatory requirements and unnecessary burdens on covered entities.

Model Approval

As part of its capital advocacy globally, ISDA has consistently supported appropriate use of risk-based internal models. Accordingly, we strongly support the Proposal's inclusion of a model-based approach and the CFTC's statement in the preamble that internal models "can provide a more effective means of measuring economic risk from complex trading strategies involving uncleared swaps and other investment instruments."

As a result of the relatively punitive nature of the Proposal's standardized rules-based approach, we estimate that most, if not all, covered entities will elect to use internal models. Due to the varying nature of currently registered swap dealers and the complexity of capital models, we have serious concerns regarding whether the National Futures Association (NFA)[4] has the resources that would be required to approve potentially 50 or more different models in accordance with the requirements in §23.102 of the Proposal.

In the preamble to the Proposal, the CFTC notes that it expects a prudential regulator's or foreign regulator's review and approval of capital models that are used throughout the corporate family to be a significant factor in the NFA's determination of the scope of its review, provided that appropriate information would be available to the CFTC and the NFA. We support this deference to previously-approved models but strongly believe that any final rulemakings should go further. Specifically, we believe that any final rulemakings should provide for recognition of models used throughout corporate families if such models have been approved by the U.S. prudential regulators, the U.S. Securities and Exchange Commission (SEC) or foreign regulators

[4] In the Proposal the CFTC permits use of internal models that have been approved by the NFA or another registered futures association of which the covered entity is a member.

in BCBS jurisdictions,[5] provided that the relevant regulator has ongoing periodic assessment power with regard to the model and provides the CFTC and the NFA with appropriate information.[6] Additional approval by the NFA of these models would be redundant and overly time consuming without furthering the Proposal's policy objectives of protecting the safety and soundness of swap dealers and MSPs.

In addition, we believe that the model approval process for models that the NFA does have to review should be significantly streamlined in any final rulemakings. Based on experience with model approval for capital models in the U.S. and in foreign jurisdictions, as well as with model approval for the initial margin model used for uncleared swaps, model approval could require the full-time attention of multiple staff over multiple years. We therefore believe that Appendix A to §23.102 should be amended to ensure that the NFA's model approval process is outcome based and focused strictly on the model's ability to accurately account for relevant risks and achieve the Proposal's objectives.

Finally, we believe that it is crucial for the effective date of any final regulations to account for the time that NFA will require to approve models, which, as discussed above, will likely involve unprecedented resources and complexity. In the alternative, all models submitted should be deemed "provisionally approved" while under review by the NFA. In no event should covered entities be required to use the Proposal's standardized rules-based approach while awaiting model approval.

Harmonization with the SEC

Harmonization between any final capital requirements imposed by the CFTC for covered entities and the SEC's *final* capital requirements for security-based swap dealers is crucial. Such harmonization must be with respect to both the substance and effective dates of the two sets of requirements. ISDA is highly engaged in advocating for consistency between the CFTC's and the SEC's derivatives reforms generally. While we maintain that such consistency across all aspects of derivatives regulatory reform is vital to a functioning derivatives market in the United States, harmonization across capital requirements may be most crucial. It is hard to envision any material benefits of subjecting a domestic entity to two different sets of capital requirements by two domestic regulators.

We commend the CFTC for considering the SEC's proposed capital requirements but we note that the industry submitted a number of material comments to the SEC's proposal, none of which the CFTC incorporated in the Proposal. We hope that both the SEC and the CFTC will incorporate these comments in any final rulemakings. In order to do so, we believe the CFTC must re-propose at least the Net Liquid Assets Approach portion of the Proposal once the SEC

[5] This would include both a covered entity's internal models that have been reviewed and approved, and are currently subject to supervision, by the U.S. prudential regulators, the SEC or foreign regulators in BCBS jurisdictions, as well as internal models used by a member of the covered entity's affiliated banking group if such models have been reviewed and approved, and are currently subject to supervision, by the U.S. prudential regulators, the SEC or foreign regulators in BCBS jurisdictions.
[6] Such information would include copies of regulatory approvals evidencing review, approval and supervision of the internal models, to the extent permitted by applicable law.

finalizes its capital requirements. Otherwise, covered entities would not have a meaningful opportunity to comment on the applicable requirements. As a general matter, we urge the CFTC to work with the SEC to ensure harmonization of final capital requirements. It would be hugely problematic for capital requirements to result in competitive disadvantages between security-based swap dealers and swap dealers.

In addition to the foregoing, we urge the CFTC to coordinate with the SEC to establish a clear and transparent plan that would avoid duplicative regulation of covered entities that are dually registered with both the CFTC and SEC. As noted above, such duplication would be costly, confusing and operationally challenging without advancing the Proposal's policy objectives or the safety and soundness of U.S. derivatives markets.

Coordination with the U.S. Prudential Regulators

Reliance on prudential regulators' RWA standards. Per statute, any capital requirements promulgated by the CFTC would not apply to swap dealers or MSPs that are subject to capital requirements of a U.S. prudential regulator. Under § 101(a)(1)(i)(B) of the Proposal, swap dealers not subject to such capital requirements could elect to be governed by the U.S. prudential regulators' risk-based capital standards. We support this approach, which would advance the statutory mandate of adopting "comparable" regulatory capital requirements "to the maximum extent practicable."[7]

The U.S. prudential regulators' risk-based capital standards, which are grounded in BCBS standards, may evolve in the coming years in response to changes in BCBS standards and implementation of such revised standards in the United States.[8] To ensure harmonization, we recommend that the CFTC's capital rule incorporate by reference the risk-weighted assets (RWA) methodologies contained in the Board of Governors of the Federal Reserve System's Regulation Q (Regulation Q) without any modifications by the CFTC.

This approach has several clear advantages. First, it would ensure comparability in RWA calculations between swap dealers that are subject to capital requirements of a U.S. prudential regulator and swap dealers that are not. Second, it provides the CFTC with immediately available RWA methodologies, avoiding the need for the CFTC to engage in further detailed technical rulemakings that would necessarily delay adoption of capital requirements. Third, it would ensure that the CFTC's RWA standards remain consistent with those of the U.S. prudential regulators in the future, because any revisions to RWA methodologies in Regulation Q would automatically flow through.

CET1 requirement. The Proposal would require swap dealers to meet an effective regulatory capital requirement of 9.6% CET1, which results from application of the 120% early warning standard to an 8% CET1 minimum. The Proposal includes no analysis to justify or explain this calibration, which is well in excess of risk-based capital standards imposed by the

[7] 7 U.S.C. § 4s(e)(3)(D)(ii).
[8] See BCBS, Press Release: "The Chairman of the Basel Committee reaffirms commitment to finalise post-crisis Basel III reforms" (Mar. 2, 2017).

U.S. prudential regulators. Recognizing that the CFTC may wish to include an "early warning" threshold in its capital rules for swap dealers, we recommend that the CFTC set the CET1 requirements for swap dealers at 6.5% (early warning) and 4.5% (regulatory minimum), which would align the CFTC's standards with the "well capitalized" and "adequately capitalized" standards in the U.S. prudential regulators' risk-based capital rules.[9] On these issues, we support Section IV.E. of the comment letter dated May 15, 2017, submitted in response to the Proposal from the Securities Industry and Financial Markets Association (SIFMA).

8% Initial Margin Minimum Capital Requirements Generally

ISDA urges the CFTC to reconsider the Proposal's requirements to hold capital against 8% of aggregate initial margin requirements for cleared and uncleared swaps. We question this calculation from a policy perspective, as it is not based on principles of prudential regulation and could in fact incentivize market behavior that is contrary to sound risk management. In particular, aggregate initial margin does not account for the offset in market risk between different counterparties. Requiring covered entities to hold capital based on such a calculation could therefore incentivize covered entities to limit the number of counterparties with whom they transact, which could in turn result in significant exposure concentrations among a few large counterparties.

We assume that the 8% of aggregate initial margin requirement is based on the requirement applicable to futures commission merchants (FCMs). However, we believe that the risks that such a requirement is intended to address are less applicable to other covered entities that do not clear swaps for customers and, to the extent such risks are applicable to these covered entities, we believe that other aspects of the CFTC's proposed capital requirements account for the risks. In particular, we believe that the 8% margin standard plays no role under the Proposal's bank approach, which is based on bank-style RWA calculations.

Treatment of Cleared Swaps

To the extent that the CFTC maintains capital requirements based on a covered entity's initial margin requirements, ISDA urges the CFTC to reconsider whether it is appropriate for such requirements to apply to cleared swaps. Applying the same calculation to initial margin for cleared and uncleared swaps ignores the risk mitigation aspects of derivatives clearing and, in turn, does not advance the 2009 G20 commitment to central clearing. Moreover, we note that the CFTC's statutory mandate is limited to setting capital requirements to address the risk of *uncleared* swaps.[10]

---

[9] 12 C.F.R. §§ 6.4(c)(1)(iii), 6.4(c)(2)(iii) (OCC); 12 C.F.R. §§ 208.43(b)(1)(iii), 208.43(b)(2)(iii) (Federal Reserve); 12 C.F.R. § 324.403(b)(1)(iii) (FDIC).

[10] Then Commissioner (now Acting Chairman) Giancarlo emphasized this point in his statement in Appendix 3 to the Proposal and also noted that in its final swap dealer definition rule, the CFTC said it will "in connection with the promulgation of final rules relating to capital requirements for swap dealers and major swap participants, consider institution of reduced capital requirements for entities or individuals that fall within the swap dealer definition and that execute swaps only on exchanges, using only proprietary funds."

Additionally, we believe that the CFTC should reconsider whether the Proposal's market risk charges for cleared swaps are appropriately calibrated to recognize the risk mitigation benefits of central derivatives clearing. Among other things, we believe that market risk charges for cleared swaps should be computed based on related CCP initial margin requirements as opposed to notional amounts.

Liquidity Requirements

On liquidity issues, we support Section IV.H. of the SIFMA comment letter dated May 15, 2017, submitted in response to the Proposal.

Implications for Smaller Swap Dealers if the *De Minimis* Threshold Level Falls to $3 Billion

As noted in previous comments to the CFTC, ISDA does not support a lower *de minimis* threshold for swap dealers. At this time, it is extremely difficult, if not impossible, to predict what the Proposal's implications would be for smaller swap dealers. Therefore, in the event that the CFTC does lower the *de minimis* threshold, we maintain that the CFTC must reexamine its regulations applicable to swap dealers, including capital requirements, and make appropriate adjustments.

Recordkeeping, Reporting and Notification Requirements

ISDA and its members have a number of concerns regarding the financial recordkeeping, reporting and notification requirements in §23.105 of the Proposal. In general, we find these requirements duplicative of requirements under other regulations, including the reporting requirements set by U.S. prudential regulators and foreign prudential regulators. To address this duplication, we believe that §23.105(p) of the Proposal should be revised to allow prudentially regulated swap dealers to submit to the CFTC the financial reports that they currently submit to their primary regulator, as and when they submit such reports. Requiring these swap dealers to follow different reporting requirements and/or submit financial reports to the CFTC earlier than they submit such reports to their primary regulators would be extremely disruptive without providing any material benefit to the CFTC.

If the CFTC does not accept the substituted compliance approach described above, we believe that at a minimum, the CFTC should allow prudentially regulated non-U.S. swap dealers to provide an unaudited "convenience" translation of the consolidated financial reports that they deliver to their home jurisdiction primary regulator, at the time they provide such reports. These translations would maintain the applicable local accounting standard (*e.g.,* IFRS) and not require conversion to GAAP, as such a conversion would impose significant costs on non-U.S. swap dealers without providing a material benefit to the CFTC. In preparing the translations, non-U.S. SDs could convert local currency into U.S. dollars based on an agreed upon exchange rate on a specific date, which could be consistent across all non-U.S. swap dears.

Separately, we do not think that any reporting requirements should apply to legacy swaps or uncleared swaps that are not subject to margin requirements set by either the CFTC or the U.S. prudential regulators because any such requirements would be contrary to the policy

objectives underlying the exemptions and exceptions to the uncleared margin requirements. We also have several technical concerns regarding the Proposal's recordkeeping, reporting and notification requirements, including in particular how to differentiate between specific transactions for purposes of the required margin reporting. This is because the defined calculations in the Proposal are solely mapped onto trades included in initial margin calculations, which we believe would be problematic for all swap dealers and major swap participants, including in particular, smaller swap dealers that likely do not have processes in place to extract such information. To address this concern, we believe that such reporting requirements should apply only to transactions related to initial margin requirements.

Finally, we note that the reporting requirements cover information about specific counterparties, which raises privacy concerns in a number of non-U.S. jurisdictions, including non-U.S. jurisdictions in which registered swap dealers currently do business. In these jurisdictions, swap dealers would be precluded legally from providing the requisite information.

To address the foregoing more holistically, ISDA would welcome the opportunity to learn more about the CFTC's objectives in proposing the new recordkeeping, reporting and notification requirements and engage with CFTC staff to determine how the industry could satisfy such requirements in a less duplicative and burdensome way. One plausible alternative may be a streamlined set of reporting requirements that are specific to initial margin for uncleared swaps and only apply to entities required to collect such initial margin.

*****

We appreciate the opportunity to comment on the Proposal and look forward to working with the CFTC as it continues to consider appropriate capital requirements for covered entities. Please contact me, Assistant General Counsel Ann Battle (202-683-9333) or Head of U.S. Public Policy Chris Young (202-683-9339) if you have any questions.

Steven Kennedy
Global Head of Public Policy

Appendix E
Attachment 4

September 2017

ISDA®

Whitepaper

CROSS-BORDER HARMONIZATION OF DERIVATIVES REGULATORY REGIMES: A risk-based framework for substituted compliance via cross-border principles

CONTENTS

Executive Summary **03**

Introduction **04**

- The CFTC's Broad Jurisdictional Reach 05
- The CFTC's Burdensome Substituted Compliance Approach 05

The Risk-based Approach to Comparability Determinations **07**

- The CFTC Legal Framework 07
- Criteria for Making Comparability Determinations 08
- The Cross-border Principles Should Address Risk 10

Comparability Assessments Using the Cross-border Principles **11**

Notification Process to the CFTC **30**

Conclusion **30**

Appendix A **31**

Appendix B **45**

EXECUTIVE SUMMARY

The importance of cross-border harmonization is something that was recognized by regulators at the very start of the post-crisis regulatory reform effort. According to the Group of 20 (G-20), regulators should implement global standards to reform derivatives markets "consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage".

While significant progress has been made by the industry and regulators to implement changes to improve the resilience of financial markets, the hoped-for march towards global consistency and cross-border harmonization has been much slower. This has resulted in duplication, complexity and unnecessary compliance challenges for derivatives users.

Given the progress made in implementation at the national level, ISDA believes the time is now ripe to relook at the cross-border framework, with the objective of developing a process for comparability determinations that is risk-centered and principles-based.

This whitepaper:

- Proposes a risk-based framework for the evaluation and recognition of the comparability of derivatives regulatory regimes of foreign jurisdictions;
- Establishes a set of risk-based principles that may be used as a tool in the assessment of derivatives regulatory regimes of foreign jurisdictions; and
- Analyzes the derivatives regulatory frameworks of representative G-20 nations against the proposed risk-based principles.

ISDA believes the proposed framework strikes the proper balance by focusing on risk and its cross-border implications, rather attempting to align each and every regulatory requirement between jurisdictions. This approach will allow for substituted compliance determinations, while reducing the chances of protracted negotiations that could lead to diminished liquidity and market fragmentation.

The proposed principles could be deployed globally, but this paper focuses on the cross-border framework introduced by the US Commodity Futures Trading Commission (CFTC). ISDA believes the proposed approach is more consistent with the intent of the Dodd-Frank Act by allowing for appropriate regulatory oversight of derivatives trading – specifically, the activities that contributed to the financial crisis – while giving deference to foreign rules that are not intended to address risk.

INTRODUCTION

The expectation of a global derivatives framework that can be applied across jurisdictions has not materialized

The G-20 leaders committed to undertake the following measures at a national level:

- Mandating clearing for standardized derivatives;
- Imposing a trading obligation to ensure certain derivatives are traded on exchanges or electronic platforms (where appropriate);
- Requiring reporting of all derivatives to trade repositories; and
- Subjecting non-centrally cleared derivatives to higher capital and margin requirements[1].

As many G-20 nations have progressed towards the fulfillment of their G-20 commitments[2] and have put in place the legal capacity to defer to another jurisdiction's regulatory framework[3], global regulators are now well positioned to assess other foreign regulatory regimes and issue comparability determinations, as appropriate.

Currently, the expectation of flexible global standards across multiple jurisdictions has not materialized. The CFTC has imposed regulatory requirements in a manner that has extended the extraterritorial reach of US derivatives regulations beyond US shores and in ways that conflict with foreign national-level regulations in many instances. Over the past several years, ISDA members have identified a number of issues with the CFTC's Cross-Border Guidance[4], primarily arising from the CFTC's unnecessarily broad jurisdictional reach and its overly burdensome substituted compliance approach.

[1] G-20 Leaders, Leaders' Statement The Pittsburgh Summit 9 (September 24-25, 2009), available at http://www.g20.org/documents. Margin requirements for non-cleared derivatives were endorsed at the G-20 Cannes meeting in November 2011. See Cannes Summit Declaration ¶ 24, available at http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html

[2] It is important to note that when the CFTC first issued its Cross-Border Guidance, most jurisdictions had not implemented their full derivatives reform regulations. Therefore, given that significant time has passed and most reforms have been or are nearly implemented, the CFTC and other regulators are well positioned to achieve substituted compliance. Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45,292 (July 26, 2013) (Cross-Border Guidance)

[3] The June 2017 Financial Stability Board (FSB) report identifies equivalence and substituted compliance determinations as an acceptable legal means to provide deference. The report emphasizes the importance of effective international cooperation and deference mechanisms to help minimize the potential for regulatory arbitrage and facilitate full and consistent implementation of the G-20 commitments. FSB Review of OTC Derivatives Market Reforms Effectiveness and Broader Effects of the Reforms 38, (June 29, 2017), available at http://www.fsb.org/2017/06/review-of-otc-derivatives-market-reform-effectiveness-and-broader-effects-of-the-reforms/

[4] See Cross-Border Guidance, supra note 2

The CFTC's Broad Jurisdictional Reach

The CFTC has taken a sweeping approach to its jurisdiction outside the US by effectively requiring firms all over the globe to register with the agency and comply with most CFTC requirements, regardless of whether these firms have a US nexus. This approach is inconsistent with the intent of Congress to only regulate derivatives activities that have a direct and significant impact on the US[5].

For example, the CFTC's current approach imposes numerous CFTC rules on derivatives transactions between two non-US entities if they use personnel located in the US to arrange, negotiate, or execute these trades. These transactions do not pose a risk to the US, as they are booked to entities located overseas.

The CFTC's Burdensome Substituted Compliance Approach

Although the CFTC has issued substituted compliance determinations under the Cross-Border Guidance for certain rules, it has done so on a rule-by-rule basis, rather than by applying an outcomes-based approach. This often results in the CFTC approving only portions of a foreign regulatory regime, putting participants in the position of running duplicative and (in many cases) conflicting compliance programs in order to meet various US and non-US requirements.

This approach has led to non-US firms ceasing to transact in US markets, thereby causing market fragmentation and diminished liquidity. There has also been a decrease in the competitiveness of US entities when compared to foreign firms. Additionally, non-US firms that are required to comply with the CFTC rules have become less competitive in foreign markets.

In sum, the CFTC has established a burdensome US regulatory framework that is not reflective of the global nature of the derivatives markets.

ISDA agrees with CFTC Chairman J. Christopher Giancarlo's observation of the current status of cross-border harmonization of the derivatives rules:

> *[While the agency has] made some progress . . . the CFTC's cross-border approach too often has been over-expansive, unduly complex and operationally impractical. And, its substituted compliance regime remains a somewhat arbitrary, rule-by-rule analysis of CFTC and foreign rules under which a transaction may be subject to a patchwork of US and foreign regulation*[6].

[5] Commodity Exchange Act § 2(i), 7 U.S.C. § 2(i), provides that:

> The provisions of [Title VII of the Dodd-Frank Act] (including any rule prescribed or regulation promulgated under the Act), shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [Title VII of the Dodd-Frank Act]

[6] Keynote Address of CFTC Commissioner J. Christopher Giancarlo Before SEFCON VII (Jan. 18, 2017), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-19

A reevaluation and recalibration of the CFTC's approach to the cross-border regulation of derivatives is necessary and timely, especially given the recent Presidential Executive Order to rationalize the Federal financial regulatory framework, further American interests in international financial regulatory negotiations, and make regulation efficient, effective and appropriately tailored[7].

This whitepaper proposes a more effective framework for comparability determinations. When assessing foreign regulatory regimes for comparability, ISDA believes that regulators should focus only on whether the regime has sufficient mechanisms in place to address or mitigate systemic risk. This can be achieved by the establishment of broad regulatory principles that focus on risk-based measures (the cross-border principles).

As discussed more fully below, these cross-border principles can be used by US prudential regulators, the CFTC, the Securities and Exchange Commission (SEC), and, more broadly, by foreign regulators as a tool to assess the comparability of foreign regulations. In doing so, the CFTC and other regulators should bear in mind that the specific risk-related regulatory requirements of a particular jurisdiction may reflect that jurisdiction's supervisory and/or industry practices. To the extent there is variability in the approaches of the respective jurisdictions to address risk, it should not be viewed as a gap in regulatory oversight or as a barrier to substituted compliance[8].

The outcome of ISDA's proposed approach is to grant substituted compliance or equivalence to comparable (not necessarily identical) regulatory regimes[9], and to allow firms that operate in jurisdictions that are deemed comparable to de-register with the CFTC and conduct their derivatives activities under local regulations, regardless of their organizational structure[10]. In all circumstances, these derivatives activities will still be regulated. However, there will be an opportunity for regulation through substituted compliance.

This whitepaper first reviews the CFTC's legal framework for comparability determinations, proceeds with a discussion of criteria for making comparability determinations, and then provides an assessment of foreign jurisdictions' regulatory frameworks against the cross-border principles[11]. The paper also provides an overview of a proposed notification (self-certification) process to the CFTC where there has been a comparability determination.

[7] See Exec. Order No. 13772, Presidential Executive Order on Core Principles for Regulating the United States Financial System (Feb. 3, 2017), available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states

[8] See Keynote Address of CFTC Commissioner J. Christopher Giancarlo, supra note 6 (noting that that the CFTC "cannot expect to achieve cross-border harmonization if we continue to follow an identical, rule-by-rule substituted compliance analysis")

[9] While this whitepaper supports the proposition that when a foreign jurisdiction satisfies the cross-border principles, it should be granted substituted compliance in full, ISDA recognizes there may be instances where a regulator may find a foreign jurisdiction comparable in some (but not all) categories of the cross-border principles. For example, as referenced in Appendix B, a regulator may find Brazil comparable with respect to its record-keeping requirements (cross-border principle 3), but not comparable with respect to its risk management requirements (cross-border principle 2) as these rules have not yet been implemented. Under these circumstances, it may be appropriate to grant substituted compliance on a category-by-category basis. See Appendix B (providing a high-level analysis of Brazil's derivatives regulatory regime against the cross-border principles)

[10] For transactions between a swap dealer located in the US and a firm located outside of the US, regulators should allow the swap dealer to choose, or rely on protocols or industry best practices, to determine which of the two local regulatory frameworks to follow, provided the foreign jurisdiction's rule set is determined comparable and satisfies the cross-border principles

[11] This whitepaper is not intended to be exhaustive. It should be considered as a work in progress and could be complemented by consideration of additional principles and/or inclusion of additional regulations

THE RISK-BASED APPROACH TO COMPARABILITY DETERMINATIONS

ISDA believes comparability assessments should focus only on those rules that relate to risk

This whitepaper focuses on issues relating to substituted compliance and comparability determinations, and should not be taken as a complete statement by ISDA or its member firms on Dodd-Frank Title VII extraterritorial issues generally. Although the next section briefly discusses the jurisdictional limits of the CFTC's cross-border authority, the primary goal of this paper is to propose a risk-based approach to substituted compliance.

The CFTC Legal Framework

Section 2(i) of the Commodity Exchange Act (CEA) operates as a limitation on the CFTC's extraterritorial jurisdiction – not as a mandate to regulate all global derivatives transactions with any nexus to the US[12]. For example, ISDA does not believe that a swap transaction between two swap dealers (SDs) operating outside the US that is arranged and negotiated by personnel located in the US, but executed, cleared and reported outside the US, has a direct connection to US commerce. Such a transaction should be outside the scope of CFTC jurisdiction.

Under its current approach, the CFTC Cross-Border Guidance captures almost all cross-border transactions and then applies the entire Title VII framework to those transactions. The result is that almost every entity around the globe engaged in derivatives trading must consider registration with the CFTC and the US regulatory implications of most derivatives transactions[13]. Although the CFTC has issued substituted compliance determinations for certain transactions, these determinations are based on a rule-by-rule analysis and are subject to various conditions.

When the US regulatory regime is unnecessarily extended, the competitiveness of US institutions and US markets is threatened, with no commensurate risk-reducing benefits. As the CFTC continues to review its rules to improve its oversight, it should do so with a view to recalibrating its cross-border regulatory regime and fulfilling its international commitments[14]. This can be achieved by providing recognition to foreign regulatory regimes that have implemented risk-related rules that meet similar regulatory outcomes[15].

In sum, only cross-border swap transactions that directly impact the CFTC's regulatory interests should be within the scope of its jurisdiction. For these transactions, the CFTC should adopt a substituted compliance regime that is based on an assessment of the risk-related rules of a foreign jurisdiction against the risk-based cross-border principles.

[12] 7 U.S.C. § 2(i)

[13] See Cross-Border Guidance, supra note 2

[14] The CFTC's commitment to international cooperation and coordination was reinforced in the Path Forward agreement, in which the CFTC and European Union (EU) regulators pledged to "not seek to apply the rules [of their jurisdiction] (unreasonably) in the other jurisdiction, but … rely on the application and enforcement of the rules by the other jurisdiction." See Cross-border Regulation of Swaps/Derivatives Discussions Between the Commodity Futures Trading Commission and the European Union – a Path Forward (July 11, 2013), available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/jointdiscussionscftc_europeanu.pdf

[15] The Dodd-Frank Act requires the CFTC to "consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation... of swaps ... [and] swap entities. . . ." Dodd-Frank Wall Street Reform and Consumer Protection Act § 752

Criteria for Making Comparability Determinations

To be deemed comparable, a foreign jurisdiction should have rules that are intended to address the risks associated with derivatives and a supervisory authority that conducts regulatory oversight and enforces the law. This is consistent with the goals of the G-20 commitments.

Notably, 'comparable' does not mean 'identical'. Comparability simply means regulations achieve the same overarching goals[16]. An assessment of the rules of a foreign jurisdiction can be performed based on functional groupings of rules that are geared to address risk. This assessment should isolate the objectives of each rule category (or grouping) and evaluate the rules of a foreign jurisdiction in light of these objectives. The result of this approach is a framework that provides concrete regulatory guidance that will allow for greater objectivity and transparency in the evaluation process, while retaining a principles-based approach[17].

Our proposed comparability determination framework is based on the following considerations:

- Recalibrate the current US cross-border regulatory regime so that only firms that fall within the scope of CEA § 2(i) are required to comply with CFTC rules that primarily address risk (through substituted compliance), as opposed to the entire set of the Dodd-Frank Act's Title VII derivatives rules.
    - Currently, non-US firms are expected to comply with the entire set of Dodd-Frank rules, some of which are not primarily designed to address risk to the US financial system. These CFTC rules include: (1) real-time public reporting (aimed at providing post-trade price transparency); (2) swap trading relationship documentation and trade confirmation requirements (aimed at ensuring the adequate on-boarding of swap counterparties for required disclosure purposes and that the terms of a swap are negotiated and properly recorded prior to the execution of a swap); (3) large trader reporting requirements (intended to be interim reporting requirements and expected to sunset once the CFTC fully implemented its swap data repository-related rules); (4) external business conduct requirements (aimed at prescribing business practices involving counterparties); (5) mandatory swap execution facility execution (intended to provide counterparties with a sufficient level of pre-trade price transparency)[18]; and (6) position limits (designed to address excessive speculation and prevent market manipulation, not address risk).
    - While these rules achieve important policy goals, such as ensuring customer protection, improving market structure and preventing market abuses, those goals are more appropriately left within the remit of regulators in the jurisdiction where that activity is taking place.
    - When assessing foreign regulatory regimes for equivalency or comparability, US regulators should focus on whether the regime has sufficient regulatory mechanisms in place to address or mitigate systemic risk. Should a regulator decide that a foreign regulatory regime is comparable (based on the assessment of risk-related rules), then the regulator should allow counterparties to operate in compliance with the rules of a local regulator, including non-risk based requirements.

[16] As the EU equivalence assessment notes: "The implementation of these provisions involves in many cases an outcomes-based process. It is the equivalence of regulatory and supervisory results that is being assessed, not a word-for-word sameness of legal texts." Commission Staff Working Document, EU Equivalence Decisions in Financial Services Policy: An Assessment (SWD(2017) 102 final) at 4 (Feb. 27, 2017), available at https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf (the EU equivalence assessment)

[17] As discussed above, while this paper discusses these criteria in the context of the CFTC regulatory framework, ISDA believes they may also be utilized by US prudential regulators and the SEC in making comparability determinations

[18] In February 2016, ISDA published Principles for US/EU Trading Platform Recognition that proposes a framework for finding comparability of foreign trading regimes

- Assume comparability in the review of the laws of the G-20 jurisdictions[19]. The comparability review should not look for disparities or variations in the minutiae of a foreign regulatory regime. The manner in which foreign regulators achieve compliance with the G-20 commitments and the objectives of the cross-border principles should be left to the front-line decision-makers (ie, foreign regulatory authorities).

- Consider the totality of risk-related regulations – specific derivatives regulations and general regulatory requirements, including regulatory guidance – in making comparability determinations. Some jurisdictions have not created the 'swap dealer' category as a defined regulated entity, which is a primary focal point of the CFTC's derivatives regime. In instances where there is no one-to-one correlation, other relevant laws and regulation may apply and satisfy the risk-based cross-border principles.

- In cases of regulatory gaps, a comparability determination may be further achieved through various information-sharing agreements[20]. At a minimum, partial or category-by-category substituted compliance should be considered, particularly in G-20 emerging market jurisdictions[21].

- For US-based firms located outside of the US (whether trading through an overseas branch or overseas subsidiary), it should be permissible for the counterparties to conduct trading activity under local, foreign regulations, as long as that jurisdiction has been determined comparable ((or where such activity across all non-comparable jurisdictions is below some threshold percentage of a swap dealer's total global activity, as per the CFTC's cross-border guidance). For transactions between an SD located in the US and a firm located outside of the US, regulators should allow the SD to choose, or rely on protocols or industry best practices, to determine which of the two local regulatory frameworks to follow, provided the foreign jurisdiction's rule set is determined to be comparable[22].

In light of these considerations, the cross-border principles that may be evaluated for a comparability determination are listed below.

---

[19] Similarly, Hong Kong's regulatory framework also contemplates a presumption of equivalence where a foreign regulatory regime has implemented rules pursuant to the G-20 commitments. For example, in the context of margin rules, the Hong Kong Monetary Authority (HKMA) has determined that "[t]he margin and risk mitigation standards of [the Working Group on Margin Requirements] member jurisdictions are deemed as [sic] comparable from the day the respective standards have entered into force in such jurisdictions until the [Hong Kong Monetary Authority] has completed a comparability assessment." See HKMA Margin Rules 2.3.2

[20] See International Organization of Securities Commissions (IOSCO) Task Force on Cross-border Regulation (Final Report) 11, (September 2015) ("[A] bilateral supervisory memorandum of understanding (MoU) also may be used to facilitate information sharing between or among regulators in supervisory matters or to undertake cross-border inspections or examinations of globally-active entities that are regulated in more than one jurisdiction")

[21] See supra note 9 and accompanying text ("While this whitepaper supports the proposition that when a foreign jurisdiction satisfies the cross-border principles, that jurisdiction should be granted substituted compliance in full, ISDA recognizes that there may be instances where a regulator may find a foreign jurisdiction comparable in some (but not all) categories of the cross-border principles. . . . Under such circumstances, it may be appropriate to grant substituted compliance on a category-by-category basis")

[22] This would allow US SDs to more effectively compete globally and would allow US SDs to transact as dictated by liquidity and business needs, not as dictated by artificial barriers. This is consistent with previous ISDA comments in its cross-border submissions to the CFTC. For example, see Letter from ISDA to the CFTC, Re: Proposed Interpretive Guidance and Policy Statement: Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57); Notice of Proposed Exemptive Order and Request for Comment (RIN 3038-AD85) (August 10, 2012), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=58356&SearchText=ISDA (asserting that the CFTC should permit US swap dealers transacting (either directly or through a branch or affiliate) in a non-US jurisdiction to comply only with local requirements in their transactions with non-US counterparties)

The Cross-border Principles Should Address Risk

The cross-border principles are consistent with the G-20 commitments to reduce risk associated with derivatives transactions, and the intent of the Dodd-Frank Act to establish a cross-border approach that is consistent. They are also in line with international standards for the regulation of derivatives to mitigate or reduce systemic risk. For each cross-border principle, we have provided the underlying policy goals that demonstrate comparability.

1. Foreign regulations that require firms to establish capital and margin requirements pursuant to the G-20 commitments demonstrate comparability.
    - Policy goal 1: Regulations should require firms to be capitalized pursuant to the Basel III framework.
    - Policy goal 2: Margin requirements should be compliant with the Basel Committee on Banking Supervision (BCBS) and International Organization of Securities Commissions (IOSCO) framework.
2. Foreign regulations that require firms to establish sound risk management policies to address risks posed by derivatives business demonstrate comparability.
    - Policy goal 1: Firms should establish risk management policies and procedures and an effective governance structure.
    - Policy goal 2: Firms should establish policies that address business continuity agreements.
    - Policy goal 3: Firms should conduct portfolio reconciliation.
3. Foreign regulations that require firms to maintain an effective and accurate system of records demonstrate comparability.
    - Policy goal 1: Swap data records should be kept for an extended period of time.
    - Policy goal 2: Swap data records should be sufficiently comprehensive to enable regulators to conduct trade reconstruction.
    - Policy goal 3: Regulators should have access to swap data records.
4. Foreign regulations that require firms to make swap data available to regulators demonstrate comparability.
    - Policy goal 1: Trade repositories (TRs) should meet the standards set out in the Principles for Financial Market Infrastructures (PFMIs)[23].
    - Policy goal 2: Reportable data should provide regulators sufficient information regarding a firm's derivatives exposure.

[23] Committee on Payment and Settlement Systems (CPSS), Principles for Financial Market Infrastructures (April 2012), available at http://www.bis.org/cpmi/publ/d101a.pdf

5. Foreign jurisdictions that have clearing and settlement services that comply with the Bank for International Settlements (BIS)/IOSCO principles and that have similar clearing mandates should be deemed comparable.

   - Policy goal 1: Central counterparties (CCPs) should be PFMI-compliant.
   - Policy goal 2: Mandatory clearing obligations should achieve similar objectives.

COMPARABILITY ASSESSMENTS USING THE CROSS-BORDER PRINCIPLES

Comparability assessments can be made using ISDA's proposed cross-border principles

In this section, ISDA analyzes the cross-border principles and compares the regulatory frameworks of several G-20 jurisdictions (the EU, Australia, Canada, Hong Kong and Japan) and Singapore[24] against the cross-border principles, illustrating the similarities of the regimes and highlighting regulatory gaps[25]. As noted earlier, the cross-border principles focus only on laws and regulations designed to address or mitigate systemic risk.

Although based on the US framework, our assessment of the cross-border principles will be relevant to EU and other foreign supervisory authorities when making comparability determinations. That's because any assessment of foreign regulatory regimes, per the G-20 commitments, should be based on whether foreign regulators have sufficient regulatory mechanisms in place to address and mitigate systemic risk. With respect to the EU, equivalence provisions of EU directives and regulations focus on ensuring that, to the extent there is equivalency, it ultimately should lead to financial stability and should not contribute to systemic risk[26]. As noted by the European Commission (EC), an assessment of equivalence is guided by a risk-based approach:

> *[T]he Commission identifies risks to the EU financial system which may be arising as a result of an increased exposure to a specific third-country framework. It then specifically addresses those risks when verifying third countries' compliance with the equivalence criteria. In that way, it applies the criteria in a way which is proportionate to the risks identified. Those risks to the EU financial system are the primary focus of such assessment, but other aspects may need to be taken into consideration in accordance with the relevant EU legislation*[27].

[24] While Singapore is not a G-20 nation, ISDA believes Singapore's derivatives regulatory regime is sufficiently in line with the G-20 commitments to warrant consideration for a comparability determination analysis

[25] A table illustrating the status of derivatives regulations in G-20 emerging markets is included in Appendix B, using Brazil and Mexico as examples. The table provides a high-level analysis of the status of implementation of derivatives regulations in Brazil and Mexico. The table shows that while certain G-20 emerging markets jurisdictions may not be fully comparable to other G-20 nations, progress is being made towards full comparability. Under these circumstances, it may be appropriate to grant substituted compliance on a category-by-category basis. See supra note 9

[26] The EU equivalence assessment notes that "equivalence provisions require verification by means of an assessment that a third-country framework demonstrates equivalence with the EU regime in some or all of the following aspects, depending on the actual scope of the equivalence provision under consideration: the comparable requirements being assessed are legally binding, they are subject to effective supervision for compliance and enforcement by domestic authorities, and they achieve the same results as the corresponding EU legal provisions and supervision"
EU equivalence assessment, supra note 16, at 7

[27] Id. at 7 (emphasis supplied)

While the EC has yet to assess equivalence with regard to US SDs conducting business in the EU, it would appear that the risk-based approach of EU law should lead to equivalency decisions that maintain "open and globally integrated" EU financial markets with the US and "reduce or even eliminate overlaps in compliance" and allow for "a less burdensome prudential regime", while providing "EU firms and investors with a wider range of services, instruments and investment choices"[28].

Principle 1: Foreign regulations that require firms to establish capital and margin requirements pursuant to the G-20 commitments demonstrate comparability.

Policy goal 1: Regulations should require firms to be capitalized pursuant to the Basel III framework.

The BCBS has established global capital standards and a streamlined process for margin model approval so that compliance in multiple jurisdictions is unnecessary. Therefore, general compliance with the BCBS standards should lead to a presumption of substituted compliance. Any additional analysis (eg, review and approval of models) would be redundant and unnecessary for BCBS jurisdictions because one of the primary purposes of negotiating capital requirements at the BCBS level is to ensure consistent outcomes and enforcement of such requirements. Cross-border counterparties to non-cleared derivatives should be able to comply with one of their respective regimes if it is in compliance with BCBS-IOSCO standards.

Policy goal 2: Margin requirements should be BCBS-IOSCO compliant.

Global regulators have agreed on consistent global margin standards implemented by the BCBS and IOSCO that reflect standard market practice and represent the consensus view of regulators across multiple jurisdictions. Therefore, rather than engage in a rule-by-rule analysis, ISDA proposes that the CFTC determine that the margin regime of a foreign jurisdiction is comparable to the CFTC's margin rules as long as the foreign jurisdiction is in compliance with the BCBS-IOSCO standards.

[28] Id. at 5

Principle 1 Assessment

Principle 1[29]	Policy Goal 1: Regulations Should Require Firms to be Capitalized Pursuant to the Basel III Framework			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable capital requirements that are generally consistent with the Basel III framework (see footnote 31).	>BCBS has determined that US capital requirements are largely consistent with the Basel III framework. >The US capital rules incorporate Basel III capital adequacy requirements for provisionally registered SDs. Source: BCBS, Assessment of Basel III regulations – United States of America (Dec. 2014); Regulatory Capital Rules, 78 Fed. Reg. 62018 (Oct. 11, 2013)[30].	>With respect to the standards that define the eligible components of regulatory capital, as well as certain credit risk and market risk standards, the EU is considered largely Basel III compliant. With respect to the capital conservation buffer established by Basel III, the EU framework is compliant. Overall, the EU is therefore consistent in large part with the Basel III framework[31]. >The EU has implemented minimum capital requirements largely in line with the Basel framework that apply to investment firms and credit institutions[32]. Sources: BCBS, Assessment of Basel III regulations—European Union (Dec. 2014); Regulation (EU) No 575/2013 (CRR) and CRD IV Directive (2013/36/EU) (CRD), Part 3 (together, CRD IV, which applies to credit institutions and to investment firms).	>BCBS has determined that Australia's capital requirements are consistent with the Basel III framework. >Authorized deposit-taking institutions (ADIs) are required to adhere to capital adequacy rules and standards for measuring capital[33]. Sources: BCBS, Assessment of Basel III regulations – Australia (March 2014); Banking Act § 11AF; Prudential Standard APS 110; Prudential Standard APS 111.	>BCBS has determined that Canada's capital requirements are consistent with the Basel III framework. >The Office of the Superintendent of Financial Institutions (OSFI) requires banks (including federal credit unions), bank holding companies, federally regulated trust companies, federally regulated loan companies and cooperative retail associations to maintain adequate capital[34]. Sources: BCBS, Assessment of Basel III Regulations: Canada (June 2014); OSFI Guideline, Capital Adequacy Requirements; 484.1 of the Bank Act.

[29] The laws and regulations of foreign jurisdictions discussed in this whitepaper are not intended to provide an exhaustive list of the full scope of foreign laws or regulations that may be comparable to CFTC rules. Instead, these laws and regulations of foreign jurisdictions provide a roadmap for the CFTC to create a substituted compliance regime. Web links to the foreign laws and regulations cited here are listed in Appendix A

[30] While the CFTC's swap dealer capital rules have yet to be finalized, ISDA believes firms that adopt the Basel III capital approach should only have to comply with the Basel III requirements and not also calculate capital based on a margin-based measure. Additionally, the CFTC should offer substituted compliance with respect to capital models if such models have been approved by prudential regulators or the SEC

[31] Amendments to the EU Capital Requirements Directive (CRD V), the Capital Requirements Regulation (CRR II), the EU Bank Recovery and Resolution Directive and the Single Resolution Mechanism are under way and are expected to come into force no earlier than 2019. The proposed changes include a number of modifications to capital and liquidity requirements that would make the EU largely compliant with Basel III. For a high-level summary see Frequently Asked Questions: Capital requirements (CRR/CRD IV) and resolution framework (BRRD/SRM) amendments, available at http://europa.eu/rapid/press-release_MEMO-16-3840_en.htm

[32] Under EU law, there is no direct equivalent to a 'swap dealer'. As a result, this chart outlines the regulatory framework implemented by the EU that applies to 'credit institutions' and 'investment firms' A credit institution is defined, in pertinent part, as "an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account"; while an investment firm is defined, in pertinent part, as "any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis". See Regulation (EU) No. 575/2013 Article 4(1)(1); MIFID II Article 4(1)(1)

[33] Under Australian law, there is no direct equivalent to a 'swap dealer'. This chart outlines the regulatory framework implemented by the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investment Commission (ASIC), which applies to ADIs and Australian financial services (AFS) licensees. An ADI is an entity that carries out state banking authorized by parliament under the Australian constitution or a body corporate authorized by APRA to carry on banking business in Australia. Corporations Act 2001, § 9; Banking Act 1959, §§ 5, 9(3); Australian Constitution, ¶ 51(xiii). ADIs include: banks; building societies; and credit unions. ADIs are primarily regulated by the APRA, which is the prudential regulator of the Australian financial services industry. AFS licensees, on the other hand, are generally entities that carry on a business of providing financial services. AFS licensees are regulated by ASIC, which is Australia's corporate, markets and financial services regulator. An entity that offers, sells or makes a market in swaps, but is not a bank, would likely be regulated as an AFS licensee by ASIC

[34] In Canada, the responsibility to oversee the derivatives markets is divided between OSFI, Canada's prudential regulator, and the individual regulators of Canada's provinces, like the Ontario Securities Commission (OSC). Accordingly, this chart analyzes regulations implemented at both the national and provincial level, using OSC regulations as an exemplar. We note that other Canadian provinces have all adopted regulations that are similar to OSC regulations

Principle 1	Policy Goal 1: Regulations Should Require Firms to be Capitalized Pursuant to the Basel III Framework		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable capital requirements that are generally consistent with the Basel III framework.	>BCBS has determined that Hong Kong's capital requirements are consistent with the Basel III framework. >Authorized institutions (AIs) are required to adhere to capital requirements[35]. Sources: BCBS, Assessment of Basel III risk-based capital regulations – Hong Kong SAR (March 2015); Banking Ordinance, Part XVIA.	>BCBS has determined that Japan's capital requirements are consistent with the Basel III framework. >Japan has implemented capital requirements for banks and certain financial instruments business operators (FIBOs) on a consolidated basis[36]. Sources: BCBS, Follow-up assessment of Basel III risk-based capital regulations – Japan (Dec. 2016); 金融商品取引法代五十七条の五及び五十七条の十七 (Financial Instruments and Exchange Act, Articles 57-5 and 57-17); 銀行法第14条の2及び第52条の25 (Banking Act, Articles 14-2 and 52-25).	>BCBS has determined that Singapore's capital requirements are consistent with the Basel III framework. >Banks incorporated in Singapore (reporting banks) are required by the Monetary Authority of Singapore (MAS) to adhere to group and standalone capital adequacy ratio requirements[37]. Sources: BCBS, Assessment of Basel III regulations – Singapore (March 2013); Banking Act § 10; MAS Notice 637 3-1.

Principle 1	Policy Goal 2: Margin Requirements Should be BCBS-IOSCO Compliant			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable margin requirements that are consistent with BCBS-IOSCO standards.	>Margin requirements are consistent with BCBS-IOSCO standards. >The US has implemented requirements for the collection and posting of initial and variation margin on non-cleared swaps. Sources: BCBS, Twelfth progress report on adoption of the Basel regulatory framework (April 2017); CEA § 4s(e); 17 C.F.R. §§ 23.150-23.161; Margin and Capital Requirements for Covered Swap Entities, 80 Fed. Reg. 74840 (Nov. 30, 2015).	>Margin requirements are consistent with BCBS-IOSCO standards. >The EU has established initial and variation margin standards for OTC derivatives not cleared by a central counterparty. Sources: BCBS, Twelfth progress report on adoption of the Basel regulatory framework (April 2017); Regulation EU No 648/2012 (EMIR), Article 11; Commission Delegated Regulation (EU) 2016/2251 (Regulatory Technical Standard).	>Margin requirements are consistent with BCBS-IOSCO standards. >Australia has established initial and variation margin requirements for non-centrally cleared derivatives transactions. Sources: BCBS, Twelfth progress report on adoption of the Basel regulatory framework (April 2017); Banking Act § 11AF; Prudential Standard CPS 226.	>Margin requirements are consistent with BCBS-IOSCO standards. >OSFI requires all federally regulated financial institutions (FRFIs)[38] to post initial and variation margin for non-centrally cleared derivatives. Sources: BCBS, Twelfth progress report on adoption of the Basel regulatory framework (April 2017); OSFI Guidelines: Margin Requirements for Non-Centrally Cleared Derivatives, No. E-22.

[35] Under Hong Kong law, there is no direct equivalent to a 'swap dealer'. In Hong Kong, the derivatives market and derivatives market participants are regulated by the Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission of Hong Kong (SFC). The HKMA regulates and supervises AIs), which are institutions authorized under the Hong Kong Banking Ordinance to carry out the business of taking deposits, and generally comprise banks, restricted license banks and deposit-taking companies. See definition in § 2 of the Hong Kong Banking Ordinance (Cap. 155). The SFC regulates Hong Kong's securities and futures markets. Entities that sell, offer or make a market in swaps, except for AIs, would be subject to regulation by the SFC. These entities are generally referred to as licensed corporations (LCs). Hong Kong is expected to undertake further rule-making pertaining over-the-counter (OTC) derivatives trading in due course

[36] While there is no direct equivalent to a 'swap dealer' in Japan, the Japanese Financial Services Agency (JFSA) regulates both banks and non-banks that offer, sell or make a market in swaps. Banks are regulated as registered financial institutions (RFIs), while non-banks are regulated as FIBOs

[37] Under Singapore law, there is no direct equivalent to a 'swap dealer'. As a result, this chart outlines the regulatory framework that applies to 'financial institutions'. The MAS regulates all of Singapore's financial institutions. The term 'financial institution' is defined to include any: (a) bank licensed under the Banking Act (Cap. 19); (b) merchant bank approved as a financial institution under the Monetary Authority of Singapore Act (Cap. 186); or (c) finance company licensed under the Finance Companies Act (Cap. 108). SFA, Second Schedule, Part II. Singapore is expected to undertake further rule-making pertaining OTC derivatives trading in due course

[38] FRFIs refer to banks, foreign bank branches, bank holding companies, trust and loan companies, cooperative credit associations, cooperative retail associations, life insurance companies, property and casualty insurance companies and insurance holding companies

Principle 1	Policy Goal 2: Margin Requirements Should Be BCBS-IOSCO Compliant		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable margin requirements that are consistent with BCBS-IOSCO standards.	>Margin requirements are consistent with BCBS-IOSCO standards. >Hong Kong has established initial and variation margin standards for AIs in connection with non-centrally cleared OTC derivatives transactions with certain covered entities[39]. Sources: BCBS, Twelfth progress report on adoption of the Basel regulatory framework (April 2017); Banking Ordinance § 7(3); Hong Kong Monetary Authority (HKMA) Supervisory Policy Manual CR-G-14.	>Margin requirements are consistent with BCBS-IOSCO standards. >Japan's regulations require FIBOs and registered financial institutions (RFIs)[40] to post minimum margin for non-centrally cleared OTC derivatives transactions, specify the type of transactions applicable to non-centrally cleared transactions and specify calculation methods of variation margin deposit and initial margin deposit by type of asset. Sources: BCBS, Twelfth progress report on adoption of the Basel regulatory framework (April 2017); 金融商品取引業等に関する内閣府令第百二十三条第一項第二十一号の五及び第二十一号の六, 第七項, 第八項, 第九項, 第十項, 及び第十一 (Cabinet Office Ordinance on Financial Instruments Business etc, Article 123(1) (xxi-v) and (xxi-vi); Article 123(7); Article 123(8); Article 123(9); Article 123(10); Article 123(11)).	>Margin requirements are consistent with BCBS-IOSCO standards. >Singapore has established initial and variation margin requirements for 'MAS covered entities'[41] in connection with non-centrally cleared derivatives transactions. Sources: BCBS, Twelfth progress report on adoption of the Basel regulatory framework (April 2017); Securities and Futures Act (SFA) §§ 34(2)(i), (3)(a), 81S(2)(d); Guidelines on Margin Requirements for Non-Centrally Cleared OTC Derivatives Contracts.

Principle 2: Foreign regulators that require firms to establish sound risk management practices to address the risks posed by derivatives business demonstrate comparability.

Rules requiring firms to establish sound risk management practices constitute an important element of effective market oversight. Requiring firms to establish procedures for monitoring risk reduces the likelihood of significant losses, which in turn may reduce the risk that spreading losses would cause defaults by multiple firms, thereby increasing the safety and soundness of the derivatives market as a whole.

In order to find a foreign jurisdiction's risk management regulatory regime comparable to that of the US, the foreign jurisdiction should have policies that require firms to establish: (1) risk management procedures and governance; (2) business continuity agreements; and (3) portfolio reconciliation.

[39] A 'covered entity' is defined as including a financial counterparty, significant non-financial counterparty or another entity designated by the HKMA, but excludes a sovereign, central bank, public sector entity, multilateral development bank and the BIS. A 'financial counterparty' in turn may refer to: (i) an AI; or (ii) a corporation licensed by the SFC under the Securities and Futures Ordinance (Cap 571). For a full list of entities that may be covered entities, please refer to paragraph 1 of Supervisory Policy Manual CR-G-14

[40] A 'registered financial institution' means a bank, cooperative structured financial institution or other financial institution specified by a cabinet order that is registered under Article 33-2 of the Financial Instruments and Exchange Act. See Financial Instruments and Exchange Act, Article 2(11). The financial institutions specified by the relevant cabinet order are: (i) the Shoko Chukin Bank Limited; (ii) an insurance company; (iii) a mutual loan company; (iv) a securities finance company; and (v) among the persons who mainly make call loans or act as intermediaries for the lending and borrowing of such call money in the course of trade, those designated by the commissioner of the Financial Services Agency. See Order for Enforcement of the Financial Instruments and Exchange Act, Article 1-9

[41] 'MAS covered entity' means a person who is exempt from holding a capital markets services license under SFA § 99(1)(a) or (b) (ie, licensed banks and merchant banks)

Policy goal 1: Firms should establish risk management policies and procedures and effective governance structures.

Effective regulatory oversight should allow firms sufficient flexibility to account for the types of risks specific to their business operations. Consistent with prevailing business practices and existing supervisory expectations, firms should be expected to implement model risk management policies that coincide with their business activities and overall organizational structure. Regulatory policies should also encourage model testing[42] and active assessment of different types of risks, including market, liquidity and credit risks. As part of its overall governance structure, a firm's board and senior management should also be responsible for establishing and implementing adequate risk management policies and procedures that ensure its overall compliance.

Policy goal 2: Firms should establish practices that address business continuity agreements.

The interconnectedness of the global derivatives markets requires firms to be prepared for unanticipated and potentially disruptive market events. Foreign jurisdictions should therefore require firms to establish and maintain a business continuity and disaster recovery plan designed to effectively respond to crises, minimize unanticipated market disruptions, and resume essential business operations in a timely manner.

Policy goal 3: Firms should conduct portfolio reconciliation

Regular participation in portfolio reconciliation and portfolio compression reduces risk exposure and improves systemic stability by minimizing the volatility of portfolio values. This reduces disputes caused by differing portfolio valuations, minimizes the impact of default and increases the efficient use of capital.

ISDA believes the specifics of how these services are performed should be dictated by the requirements of local jurisdictions, which are in a better position to assess the operational challenges of individual firms.

[42] Risk models and related systems, processes and controls are used extensively by financial institutions both for capital adequacy and risk management purposes. To be effective, risk management and capital adequacy rules should be implemented on an integrated basis by a consistent set of supervisory standards. Inconsistencies in supervisory standards only create inefficiency, confusion and opportunities for control failures. Many firms are subject to both the CFTC's and the prudential regulators' risk management requirements. To avoid redundancy and to minimize compliance costs, the CFTC should permit US and non-US swap dealers to comply with the CFTC's risk management practices on a substituted compliance basis, through compliance with the risk management requirements of their prudential regulator. ISDA plans to explore domestic regulatory efficiencies in other advocacy efforts

Principle 2 Assessment

Principle 2	Policy Goal 1: Firms Should Establish Risk Management Policies and Procedures and Effective Governance Structures			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable requirements for the establishment of risk management policies and procedures.	>Requires SDs and major swap participants (MSPs) to establish, document, maintain and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with the swaps activities of the SD or MSP (ie, establish a 'risk management program'). >The risk management program should identify risks and risk tolerance limits, and take into account market, credit, liquidity, foreign currency, legal, operational, settlement and any other applicable risks. >Requires the governing body of the SD to approve, in writing, the SD or MSP's risk management program. Sources: CEA § 4s(j)(2); 17 C.F.R. § 23.600.	>Requires credit institutions and investment firms to: (1) establish, implement and maintain adequate risk management policies and procedures that identify the risks relating to the firm's activities, processes and systems and, where appropriate, set the level of risk tolerated by the firm; and (2) adopt effective arrangements, processes and mechanisms to manage the risks relating to the firm's activities, processes and systems in light of that level of risk tolerance. >Requires investment firms and credit institutions to monitor their risk management policies and procedures in order to ensure they continue to adequately and effectively address the firm's risks. >Requires senior management of investment firms and credit institutions to assess and periodically review the effectiveness of policies, arrangements and procedures designed to address risk. Sources: Directive 2004/39/EC (MIFID), Article 13(5) and 13(6)[43]; Directive 2014/65/EC (MIFID II), Articles 16(5), 16(2); Commission Directive 2006/73/EC (MIFID-ID), Articles 7, 9; Commission Delegated Regulation (EU) 2017/565 (MIFID II-SR), Articles 23, 25; CRD Articles 76, 88(1).	>The Australian Prudential Regulation Authority (APRA) requires ADIs to maintain a risk management framework that is appropriate to the size, business mix and complexity of the institution. This risk management framework must have policies and procedures that address: credit risk; market and investment risk; liquidity risk; insurance risk; operational risk; risks arising from the strategic objectives and business plans; and other risks that, singly or in combination with different risks, may have a material impact on the institution. >The Australian Securities and Investments Commission (ASIC) guidelines encourage Australian financial services (AFS) licensees[44] to maintain documented risk management systems that include clearly defined roles and responsibilities and policies and procedures for identifying, assessing and understanding each of the material risks of the responsible entity's business and schemes operated, among other things. >Requires ADIs and AFS licensees to consider adoption of governance-related risk management policies. >Requires the board of an ADI to approve the institution's risk management strategy, and requires senior management to monitor and manage all material risks consistent with the institution's board-approved risk management policies and procedures. Sources: Banking Act § 11AF; Prudential Standard APS 310 Paragraphs 23-29; Corporations Act, § 912A(1)(h); ASIC Regulatory Guide 259.	>Guidelines provide that FRFIs should be in a position to identify the material risks (including, but not limited to, market, credit, liquidity and operational risks) they face with respect to derivatives activities, assess their potential impact, and have policies and controls in place to manage risk effectively. >Guidelines also provide that an FRFI should subject its derivatives activities to risk limits approved by the institution's board of directors. Source: OSFI's Guidelines: Sound Derivatives Practices – Risk Management, No. B-7.

[44] A person who carries out a financial services business in Australia must hold an Australian financial services license covering the provision of the financial services. See Corporations Act, § 911A

Principle 2	Policy Goal 1: Firms Should Establish Risk Management Policies and Procedures and Effective Governance Structures		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable requirements for the establishment of risk management policies and procedures.	>Requires AIs to adopt policies and procedures that enable firm-wide risks to be managed in a proactive manner with emphasis on achieving: (1) objective and consistent risk identification and measurement approaches; (2) comprehensive and rigorous risk assessment and reporting systems; (3) sound valuation and stress-testing practices; and (4) effective risk monitoring measures and controls. >Requires AIs to put in place a set of risk limits in order to control exposure to credit, market, interest rate and liquidity risk. >Firms licensed by or registered with the Securities and Futures Commission (SFC) and engaging in derivatives activities, such as licensed corporations (LCs), must have written policies and procedures related to risk management. These firms must also have an independent market risk management function that monitors the application of risk limits and an independent credit risk management function that monitors credit limits and reviews leverage, among other things. >AIs and LCs are expected to establish firm-wide risk management framework requirements, including with respect to governance. Sources: Banking Ordinance § 7(3); HKMA Supervisory Policy Manual IC-1; Core Operational and Financial Risk Management Controls For Over-the-Counter Derivatives Activities of Persons Licensed by or Registered with the Securities and Futures Commission (SFC guidelines).	>Requires FIBOs and RFIs to establish risk management systems for managing administrative risk, information technology risk, market risk, counterparty risk, liquidity risk and specific risks related to currency linked or securities-related OTC derivatives transactions. >Requires a FIBO's board of directors to establish compliance and risk management policies and implement risk management practices. >Requires a bank's board of directors to establish risk management policies and implement risk management practices. Sources: 金融商品取引業者等向けの総合的な監督指針 III-2-7, III-2-8, IV-2-3, IV-2-4, IV-2-5, IV-3-3-5, 及び IV-3-3-6 (Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc, III-2-7, III-2-8, IV-2-3, IV-2-4; IV-2-5; IV-3-3-5; IV-3-3-6); 金融商品取引業者等向けの総合的な監督指針III-1 (Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc, III-1); 主要行等向けの総合的な監督指針 III-2-3-1-3 (Comprehensive Guidelines for Supervision of Major Banks, etc, III-2-3-1-3).	>MAS guidelines provide that risk management policies and processes should provide a comprehensive institution-wide view of the financial institution's exposures to material risks, such as credit, market, underwriting, liquidity, country and transfer, interest rate, legal, compliance, fraud, reputational, strategic, regulatory and operational risks. >MAS guidelines provide that risk assessments should review risks arising from the macroeconomic environment that affect relevant markets. >MAS guidelines provide that the board of a financial institution should ensure that senior management establishes a risk management system for identifying, measuring, evaluating, monitoring, reporting and controlling or mitigating risks regularly. The risk management function should also be independent. Source: MAS Guidelines on Risk Management Practices.

Principle 2	Policy Goal 2: Firms Should Establish Policies that Address Business Continuity Agreements			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable requirements for the establishment of business continuity agreements.	>SDs and MSPs must have business continuity and disaster recovery plans that outline the procedures to be followed in the event of an emergency or other disruption of its normal business activities. >Business continuity and disaster recovery plans should be designed to enable the SD or MSP to continue or resume any operations by the next business day with minimal disturbance to its counterparties and the market. >CFTC rules also require periodic testing of business continuity and disaster recovery plans. Sources: CEA § 4s(j); 17 C.F.R. § 23.603.	>Requires investment firms and credit institutions to establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of investment services and activities; or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their investment services and activities. >Investment firms and credit institutions must conduct periodic testing of back-up facilities. Sources: MIFID, Article 13(4); MIFID II, Article 16(4); MIFID-ID, Articles 5(3), 14(2)(k); MIFID II-SR, Articles 21(3), 31(2)(k).	>Requires ADIs to develop and maintain a business continuity plan that documents policies, standards and procedures for ensuring that critical business operations can be maintained or recovered in a timely fashion in the event of a disruption. Further requires ADIs to review and test their business continuity plans annually. >ASIC guidance requires AFS licensees to consider the implementation of potential risk treatments in their risk management systems, including business continuity plans. Sources: Banking Act § 11AF; Prudential Standard CPS 232; Corporations Act, §912A(1); ASIC Regulatory Guide 259.89.	>OSFI requires FRFI applicants to submit, for OSFI's approval, a proposed business continuity management policy, business impact analysis, and plans for business continuity and disaster recovery. In particular, the FRFI's business continuity plan should ensure that the proposed FRFI has in its possession, or can readily access, all records necessary to allow it to sustain business operations, meet its regulatory obligations, and provide all information as may be required by OSFI. Source: OSFI's Guide for Incorporating Banks and Federally Regulated Trust and Loan Companies (Revised June 2015).

Principle 2	Policy Goal 2: Firms Should Establish Policies that Address Business Continuity Agreements		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable requirements for the establishment of business continuity agreements.	>Guidance for AIs provides that senior management should establish policies, standards and processes for business continuity planning, which should be endorsed by the board. >Guidance for AIs states that business continuity plans should provide detailed guidance and procedures to respond to and manage a crisis in order to resume and continue critical business services and functions identified in business impact analysis and ultimately to return to business as usual. Additionally, business continuity plans should be periodically tested. >LCs are expected to develop and maintain business continuity plans and establish and maintain appropriate internal controls and risk management measures to protect their key business functions and recover them in a timely fashion in the event of operational disruptions. Sources: HKMA Supervisory Policy Manual TM-G-2; Circular to Licensed Corporations concerning Effective Business Continuity Plans.	>Requires FIBOs and RFIs engaging in securities business to have business continuity management (BCM) and business continuity plan (BCP) processes in place. This was included in the CFTC's entity level comparability determination for Japan[45]. >Guidelines provide that management should actively manage and improve BCM and BCP constantly. Additionally, business continuity plans should be periodically tested. Sources: 金融商品取引業者等向けの総合的な監督指針 IV-3-1-6 (Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc, IV-3-1-6); 事業継続ガイドライン 第三版、内閣府 (Business Continuity Guidelines 3rd ed., Cabinet Office).	>MAS guidelines encourage financial institutions to adhere to business continuity principles including board oversight of business continuity management, regular testing, and certain recovery strategies and objectives[46]. >All components of a business process should be meaningfully tested (eg, from front-line through to supporting and processing components, etc). Source: MAS Guidelines on Risk Management Practices – Business Continuity Management.

[45] See Comparability Determination for Japan: Certain Entity-Level Requirements, 78 Fed. Reg. 78910 (Dec. 27, 2013), available at http://www.cftc.gov/LawRegulation/FederalRegister/OrdersandOtherAnnouncements/2013-30976a

[46] While these are guidelines, MAS reviews business continuity plans implemented by financial institutions in the course of its supervision of institutions, taking into consideration the extent to which the institution has observed such guidelines and its risk profile

Principle 2	Policy Goal 3: Firms Should Conduct Portfolio Reconciliation			
	US	**EU**	**Australia**	**Canada**
Most jurisdictions appear to set out comparable portfolio reconciliation requirements.	>Requires SDs and MSPs to engage in periodic portfolio reconciliation with respect to their non-cleared swaps. >Requires SDs and MSPs to have policies and procedures in place for portfolio compression with respect to their non-cleared swaps, when appropriate. Sources: CEA § 4s(i); 17 C.F.R. §§ 23.502, 23.503.	>Requires financial counterparties and non-financial counterparties to engage in periodic portfolio reconciliation with respect to their non-cleared derivatives[47]. >Requires financial counterparties and non-financial counterparties that have 500 or more OTC derivatives contracts outstanding with a given counterparty to have policies and procedures in place that would enable counterparties to analyze the possibility of conducting a portfolio compression exercise in order to reduce their counterparty credit risk and engage in such a portfolio compression exercise. Sources: Commission Delegated Regulation (EU) No 149/2013 (EMIR RTS), Article 13-14 supplementing EMIR; Regulation (EU) 600/2014 Article 31 (MIFIR)[48].	>ADIs must have policies and procedures in place to: (i) ensure their non-cleared derivatives portfolios are reconciled at regular intervals; and (ii) regularly assess and conduct portfolio compression to the extent appropriate. >Portfolio reconciliation and compression is consistent in principle with risk management practices set out in ASIC regulatory guidance. Sources: Banking Act § 11AF; Prudential Standard CPS 226; ASIC Regulatory Guide 259.	>Guidelines provide that an FRFI should seek to periodically engage in portfolio reconciliation of non-cleared derivatives with counterparties with which it has a material number of derivatives outstanding in order to identify and facilitate resolution of discrepancies, particularly with respect to the valuation of OTC derivatives transactions. Additionally, procedures should be in place to resolve any discrepancies or disputes with respect to material terms and valuations in a timely manner. >For portfolios with large numbers of non-cleared derivatives contracts containing substantially similar economic terms, guidelines state that an FRFI should periodically assess the potential for portfolio compression and, where appropriate, engage in portfolio compression on a bilateral and multilateral basis to reduce the risk, cost and inefficiency of maintaining redundant transactions on the counterparties' books. Source: OSFI's Guidelines: Sound Derivatives Practices – Portfolio Reconciliation & Compression, No. B-7 (Nov. 2014).

Principle 2	Policy Goal 3: Firms Should Conduct Portfolio Reconciliation		
	Hong Kong	**Japan**	**Singapore**
Most jurisdictions appear to set out comparable portfolio reconciliation requirements.	>AIs must have policies and procedures in place to ensure that their non-cleared derivatives portfolios are reconciled at regular intervals; AIs should also have policies and procedures in place to regularly assess the need for (and, if appropriate, engage in) portfolio compression. >SFC guidelines encourage portfolio reconciliation. Sources: Banking Ordinance § 7(3); HKMA Supervisory Policy Manual CR-G-14, §§ 4.4, 4.5; SFC guidelines.	>Japan does not yet have a specific rule requiring portfolio reconciliation and compression. However, risk management procedures applicable to RFIs and FIBOs may in practice achieve satisfaction with this principle (cross-border principle 2).	>While the MAS does not yet have a specific regulation on portfolio reconciliation and compression, risk management procedures may in practice achieve satisfaction with this principle. >Additionally, rules for portfolio reconciliation and compression are being proposed in the latest amendments to the Securities and Futures (Licensing and Conduct of Business) Regulations[49].

[47] The term 'financial counterparty' includes both investment firms and credit institutions, among other things. The term 'non-financial counterparty' refers to an entity that is not an investment firm, credit institution or other financial entity (eg, insurance undertaking). See Regulation (EU) No. 648/2012, Article 2(8)-(9)

[48] MIFIR applies to credit institutions "when providing one or more investment services and/or performing investment activities". MIFIR, Article 1(2)

[49] See MAS, Consultation Paper II on Draft Regulations Pursuant to the Securities and Futures Act, available at http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2017/Consultation-Paper-II-on-Draft-Regulations-Pursuant-to-the-Securities-and-Futures-Act.aspx

Principle 3: Foreign regulations that require firms to maintain an effective and accurate system of records demonstrate comparability.

Swap data record-keeping is an important component of an effective internal risk management process. Timely, accurate and comprehensive record-keeping of a swap transaction enhances a firm's internal supervision, as well as a regulator's ability to detect and address market or regulatory abuses. Effective record-keeping requirements should allow regulators and firms to conduct trade reconstructions in the event of market disruptions, disputes between counterparties or significant market losses.

Notably, records required to be kept by a foreign jurisdiction should not have to match the records required to be kept under CFTC rules. To be comparable, foreign regulations should instead require SDs to keep records of their trading to enable trade reconstruction and allow regulators access to this information.

To that end, foreign jurisdictions should have regulations in place that meet the policy goals set out below.

Principle 3 Assessment

Principle 3	Policy Goal 1: Swap Data Records Should be Kept for an Extended Period of Time			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable records requirements.	>SDs and MSPs must keep records of a transaction during the life of a swap and for five years after the termination of the swap. Sources: CEA § 4s(f)-(g); 17 C.F.R. §§ 23.202, 23.203.	>Requires investment firms and credit institutions to keep and maintain records of all services and transactions undertaken for a period of not less than five years. Sources: MIFID, Articles 13(6), 25(2); MIFID II, Articles 16(6)-(7); MIFID-ID, Articles 5.1(f), 51; Commission Regulation (EC) No. 1287/2006 (MIFID-IR); MIFIR Article 25; MIFID II-SR, Articles 72 to 76.	>Certain entities, including 'Australian entities'[50], are required to comply with a five-year record-keeping obligation for OTC derivatives transactions (measured from the date the record is made or amended)[51]. Sources: Corporations Act § 901A(3)(h); Derivative Transaction Rules (Reporting) Rules, Part 2.3.	>Ontario Securities Commission (OSC) requires reporting counterparties[52] to maintain records of transactional data for at least seven years after the date on which the derivatives transaction expires or terminates. Source: OSC Trade Reporting Rules Part 3, S. 36(1).

[50] 'Australian entity' means an entity (including a corporation, partnership, managed investment scheme or trust) that is incorporated or formed in Australia. ASIC Derivative Transaction Rules (Reporting) 2013, Rule 1.2.3

[51] Note that entities subject to the record-keeping requirements are not required to keep the records where such entities have arrangements in place to access those records in a licensed repository or prescribed repository, either directly or through another person for the aforementioned five-year period. ASIC Derivative Transaction Rules (Reporting) 2013, Rule 2.3.1(4)

[52] 'Reporting counterparty' means the counterparty to a derivatives transaction as determined under § 25 of the OSC Trade Reporting Rules that is required to report derivatives data under § 26 of the OSC Trade Reporting Rules

Principle 3	Policy Goal 1: Swap Data Records Should be Kept for an Extended Period of Time		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable records requirements.	>'Prescribed persons'[53] are subject to a five-year record-keeping obligation (from date of termination) for certain OTC derivatives transactions. Sources: SFO § 101E; Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules, Part 3.	>Requires preservation of data of transactions by FIBOs and RFIs, unless FIBOs or RFIs provide TRs with data of transactions. >Rules require data of OTC derivatives transactions to be preserved by FIBOs or RFIs unless TRs preserve the data. Sources: 金融商品取引法第百五十六条の六十四 (Financial Instruments and Exchange Act, Article 156-64); 店頭デリバティブ取引等の規制に関する内閣府令第四条第一項、第七条及び第十条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Articles 4(1); 7; 10); 店頭デリバティブ取引等の規制に関する内閣府令第七条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 7); 店頭デリバティブ取引等の規制に関する内閣府令第四条第一項 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 4(1)).	>'Specified persons'[54] are required to retain records of all relevant books and all transaction information and other information as may be required by the MAS for the purposes of the SFA for five years. Sources: SFA §§ 125 and 129; Reporting of Derivatives Contracts Regulations, Part 1, Regulation 4.

Principle 3	Policy Goal 2: Swap Data Records Should be Sufficiently Comprehensive to Enable Regulators to Conduct Trade Reconstruction			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable requirements that would enable regulators to conduct trade reconstructions.	>Requires each SD or MSP to keep daily trading records and ensure its records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each of its swap transactions. Sources: CEA § 4s(f)-(g); 17 C.F.R. §§ 23.202, 23.203.	>Requires investment firms and credit institutions to maintain records in a form and manner to enable regulators to reconstitute each key stage of the processing of each transaction. Sources: MIFID, Articles 13(6), 25(2); MIFID II, Articles 16(6)-(7); MIFID-ID, Articles 5.1(f), 51; Commission Regulation (EC) No. 1287/2006 (MIFID-IR); MIFIR Article 25; MIFID II-SR, Articles 72 to 76.	>ASIC rules appear to facilitate trade reconstruction[55]. Sources: Corporations Act § 901A(3)(h); Derivative Transaction Rules (Reporting) Rules, Part 2.3.	>Requires firms that engage in derivatives transactions to keep records of all transactional data for their derivatives transactions. Source: OSC Rule 91-507 S.36(1) and S.18(2).

[53] 'Prescribed persons' in this context includes (but is not limited to) an: (i) authorized financial institution; (ii) approved money broker; and (iii) an LC. Note that Schedule 1 of the SFO defines an 'authorized financial institution' as an AI. SFO § 101A

[54] 'Specified persons' includes any: (a) bank in Singapore licensed under the Banking Act; (b) subsidiary of a bank incorporated in Singapore; (c) merchant bank approved as a financial institution under the Monetary Authority of Singapore Act (Cap. 186); (d) finance company licensed under the Finance Companies Act (Cap. 108); (e) insurer licensed under the Insurance Act (Cap. 142); (f) approved trustee referred to in § 289; (g) holder of a capital markets services license; or (h) other person who is, or who belongs to a class of persons which is, prescribed by the MAS by regulations made under SFA § 129 for the purposes of this definition. SFA § 124

[55] For example, ASIC requires ADIs and AFS licensees to maintain records in a manner that would enable ASIC to determine such entity's compliance with ASIC rules. See Derivative Transaction Rules (Reporting) Rules, Part 2.3

Principle 3	Policy Goal 2: Swap Data Records Should be Sufficiently Comprehensive to Enable Regulators to Conduct Trade Reconstruction		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable requirements that would enable regulators to conduct trade reconstructions.	>Records required to be kept under SFC rules appear to be sufficiently comprehensive to enable regulators to conduct trade reconstructions[56]. Sources: SFO § 101E; Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules, Part 3.	>Records required to be kept under Japan's rules appear to be sufficiently comprehensive to enable regulators to conduct trade reconstructions[57]. Sources: 金融商品取引法第百五十六条の六十四 (Financial Instruments and Exchange Act, Article 156-64); 店頭デリバティブ取引等の規制に関する内閣府令第四条第一項、第七条及び第十条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Articles 4(1); 7; 10); 店頭デリバティブ取引等の規制に関する内閣府令第七条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 7); 店頭デリバティブ取引等の規制に関する内閣府令第四条第一項 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 4(1)).	>Records required to be kept under MAS's rules appear to be sufficiently comprehensive to enable regulators to conduct trade reconstructions[58]. Sources: SFA §§ 125 and 129; Reporting of Derivatives Contracts Regulations, Part 1, Regulation 4.

Principle 3	Policy Goal 3: Regulators Should Have Access to Swap Data Records			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable requirements for accessing of swap data records.	>The records that SDs and MSPs are required to maintain must be made available for disclosure to and inspection by the CFTC and their prudential regulator, promptly upon request. Sources: CEA § 4s(f); 17 C.F.R. § 23.606.	>Requires that investment firms and credit institutions maintain records in a form and manner that would enable local regulators to readily access such records. Sources: MIFID, Articles 13(6), 25(2); MIFID II, Articles 16(6)-(7); MIFID-ID, Articles 5.1(f), 51; Commission Regulation (EC) No. 1287/2006 (MIFID-IR); MIFIR Article 25; MIFID II-SR, Articles 72 to 76.	>ASIC rules compel release of records to ASIC, APRA and the Reserve Bank of Australia upon request. Sources: ASIC Act §§ 29-33; Derivative Transaction Rules (Reporting) Rule 2.3.2; ASIC Derivative Trade Repository Rules § 2.3.4(5).	>OSFI requires FRFIs to disclose transactional data to OSFI periodically. Source: OSFI Guidelines, Derivatives Disclosures, No. D-6 (Revised July 2010).

Principle 3	Policy Goal 3: Regulators Should Have Access to Swap Data Records		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable requirements for accessing of swap data records.	>Prescribed persons must provide to the SFC or HKMA access to its records upon the SFC's or HKMA's request. Sources: SFO § 101E(7)-(8); SFO §186A.	>When necessary, the prime minister may order a FIBO, RFI, a subsidiary of FIBO or a holding company of a FIBO or RFI to submit reports or materials as a reference with regard to its business or assets, and may have the relevant officials inspect the state of its business or assets, documents, and other objects. Source: 金融商品取引法第五十六条の二 (Financial Instruments and Exchange Act, Article 56-2).	>MAS has the authority to require any person to furnish information or documents relating to derivatives contracts or transactions. Sources: SFA § 126; SFA § 150B.

[56] Specifically, the records required to be kept include: records evidencing the existence and purpose of the specified OTC derivatives transaction, including all agreements relating to the transaction; records showing particulars of the execution of the specified OTC derivatives transaction, including orders, ledgers and confirmations of the transaction; and records showing particulars of the terms and conditions of the specified OTC derivatives transaction, including particulars relating to all payments and margin requirements relating to the transaction

[57] Data required to be kept includes: identity of FIBOs or RFIs; type and date of contract; date when transaction entered into effect or extinguished; and other matters related to transactions, including date of delivery, whether the transaction is for selling or purchasing and agreed price

[58] Requires entities to keep all transactional information

Principle 4: Foreign regulations that require firms to make swap data available to regulators demonstrate comparability.

To be comparable, foreign jurisdictions should have TRs in place that are PFMI-compliant. Also, reportable (both foreign and domestic) data should be sufficiently detailed to allow regulators to assess systemic risk and conduct market surveillance and enforcement.

Policy goal 1: TRs should meet the standards set out in the PFMIs.

To have a comparable reporting regime, a foreign jurisdiction should have a TR that meets the standards of systems integrity, security and resiliency consistent with the standards set out in the PFMIs.

Policy goal 2: Reportable data should provide regulators sufficient information regarding a firm's derivatives exposure.

Foreign regulators should be able to examine the entire global network of derivatives transactions at a detailed level. Reportable data should provide sufficient information regarding the nature and magnitude of derivatives exposures, the interconnections among firms, the formation of transactions and any material changes in such transactions.

Consistent with the IOSCO report[59], data stored in TRs should be available to regulators in three dimensions: depth, breadth and identity[60].

Depth specifies the granularity of information that should be accessible to regulators on a transaction level (contract terms, counterparties' execution price, economic terms that are material to determining valuation), position level (a snapshot of all positions for a particular product) or aggregate level (gross notional amount outstanding for an underlier) basis.

Breadth refers to the access to data at various levels of depth in terms of counterparty or underlying product.

Identity refers to whether the reported data identifies counterparty information (at the transaction or position level) or contains only anonymized data[61]. A common understanding among regulators on what constitutes sufficient information would facilitate the aggregation of data maintained in multiple trade repositories.

For the purposes of assessing comparability of a foreign reporting regime, the inquiry should be focused on whether the foreign reporting regime makes reporting data available to the regulators in the three dimensions set out above.

[59] See IOSCO report, Authorities' Access to Trade Repository Data (August 2013), available at http://www.bis.org/cpmi/publ/d110.htm

[60] While IOSCO has evaluated and determined the extent to which foreign jurisdictions' TRs are able to provide local regulators with position-, aggregate-, and transactional-level swap data, IOSCO has to date not released standardized data sets for TRs. Once IOSCO releases standardized data sets for TRs, G-20 jurisdictions are expected to demonstrate that their TRs are compliant with such data sets. For the purposes of this paper, foreign jurisdictions' TRs that are able to provide local regulators with position-, aggregate-, and transactional-level swap data should be determined comparable

[61] Identification of participants will be facilitated by the use of legal entity identifiers (LEIs)

Principle 4 Assessment

Principle 4	Policy Goal 1: TRs Should Meet the Standards Set Out in the PFMIs			
	US	EU	Australia	Canada
Jurisdictions appear to set out comparable requirements for the establishment of PFMI-compliant trade repositories.	>Swap data repositories (SDRs) are largely consistent with the PFMI standards. >CFTC requires SDs to report transactional and positional data to SDRs. >CFTC has rules in place that provide for the registration, establishment, and supervision of SDRs. Sources: Committee on Payments and Market Infrastructures (CPMI), Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); CEA § 21; 17 C.F.R. 43, 17 C.F.R. 45, 17 C.F.R. 49.	>TRs are consistent with the PFMI standards. >Requires financial counterparties and non-financial counterparties[62] to ensure that the details of any derivatives contract they have concluded and of any modification or termination of the contract are reported to a registered or authorized TR. >The EU has implemented rules regarding establishment and registration of trade repositories. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); EMIR, Article 9, Title VI.	>TRs are consistent with the PFMI standards. >ASIC requires ADIs and AFS licensees to report certain transactional and positional information to derivative TRs. >Australia has regulations related to the establishment and operation of trade repositories. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); Corporations Act § 903A; Derivative Trade Repository Rules 2013.	>TRs are consistent with the PFMI standards. >OSC requires counterparties to derivatives transactions to report specified derivatives data to TRs. >OSC has implemented rules relating to the establishment and operation of TRs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); OSC's Trade Reporting Rules, Annex D.

Principle 4	Policy Goal 1: TRs Should Meet the Standards Set Out in the PFMIs		
	Hong Kong	Japan	Singapore
Jurisdictions appear to set out comparable requirements for the establishment of PFMI-compliant trade repositories.	>TRs are consistent with the PFMI standards. >Requires that prescribed persons report certain OTC derivatives transactions to HKMA; the information is reported to the Hong Kong Trade Repository (HKTR), established by the HKMA. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); SFO § 101B.	>TRs are consistent with the PFMI standards. >Japan has regulations in place relating to the establishment and designation of TRs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); 金融商品取引法第百五十六条の六十七から第百五十六条の八十四 (Financial Instruments and Exchange Act, Articles 156-67 to 156-84).	>TRs are consistent with the PFMI standards. >MAS requires specified persons to report certain transactional data for interest rate derivatives and credit derivatives to a licensed TR or licensed foreign TR. >MAS has implemented regulations related to the licensing and supervision of TRs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); SFA Part IIA; Trade Repositories Regulations.

[62] The term 'financial counterparty' includes both investment firms and credit institutions, among other things. The term 'non-financial counterparty' refers to an entity that is not an investment firm, credit institution or other financial entity (eg, insurance undertaking). See Regulation (EU) No. 648/2012, Article 2(8)-(9)

Principle 4	Policy Goal 2: Reportable Data Should Provide Regulators Sufficient Information Regarding a Firm's Derivatives Exposure			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to set out comparable requirements that provide regulators with sufficient exposure information.	>TRs appear to have transaction-, position- and aggregate-level data. Sources: CEA §§ 2(a)(13), 21(b); 17 C.F.R. 43, 17 C.F.R. 45, 17 C.F.R. 49.	>TRs appear to have transaction-, position- and aggregate-level data. Sources: Commission Delegated Regulation (EU) No. 148/2013 (EMIR RTS); Commission Delegated Regulation (EU) No. 1247/2012 (EMIR ITS); MIFIR Article 26.	>TRs appear to have transaction-, position- and aggregate-level data. Sources: Corporations Act § 901A; ASIC Derivative Transaction Rules (Reporting) 2013, Schedule 2.	>TRs appear to have transaction-, position- and aggregate-level data. Source: OSC Trade Reporting Rules, Appendix A.

Principle 4	Policy Goal 2: Reportable Data Should Provide Regulators Sufficient Information Regarding a Firm's Derivatives Exposure		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions appear to set out comparable requirements that provide regulators with sufficient exposure information.	>HKTR appears to have transaction-, position- and aggregate-level data. Sources: Reporting and Record Keeping Rules, Schedule 1, Part 4.	>TRs appear to have transaction-, position- and aggregate-level data. Sources: 金融商品取引法第百五十六条の六十四第三項 (Financial Instruments and Exchange Act, Articles 156-64(3)); 店頭デリバティブ取引等の規制に関する内閣府令第四条第一項及び第九条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Articles 4(1) and (9)).	>TRs appear to have transaction-, position- and aggregate-level data. Sources: SFA Part VIA; Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013 (No. S 668/2013), First Schedule.

Principle 5: Foreign jurisdictions that have clearing and settlement services that comply with the BIS/IOSCO principles and have similar clearing mandates should be deemed comparable.

Policy goal 1: CCPs should be PFMI compliant.

The PFMIs provide an appropriate framework for determining comparability of CCPs. The PFMIs represent a comprehensive set of key considerations that address organization, governance, credit and liquidity risk management, settlement, default management, general business and operational risk management, access, efficiency and transparency, among other things. A foreign CCP should therefore be deemed comparable to a US CCP[63] if such CCP is subject to supervision by an appropriate regulator in its home country and is in compliance with the PFMIs[64].

[63] CEA § 5b(h), 7 U.S.C. § 7a-1(h) allows the CFTC to exempt a CCP from registration for clearing of swaps if the CFTC determines that the CCP is "subject to comparable, comprehensive supervision and regulation by . . . the appropriate government authorities in the home country of the organization". Four exemptions have been granted so far – to ASX Clear, Korea Exchange, Inc, Japan Securities Clearing Corporation and OTC Clearing Hong Kong for purposes of clearing proprietary swap positions of US clearing members

[64] In the context of clearing (and as indicated in this section), most jurisdictions have established CCPs that comply with the PFMI standards and have established agency oversight over clearing activities. These agencies are charged with specific duties to regulate clearing activities and other goals (eg, ensuring that CCPs operate in a safe and efficient manner and reducing systemic risk through central clearing)

Policy goal 2: Mandatory clearing obligations should achieve similar objectives.

Substituted compliance standards for the clearing mandate should permit application of another jurisdiction's clearing exceptions where the exceptions are based on fundamentally shared policy objectives. These exceptions should prevail over any tendency on the part of any regulator to apply its rules in cases of some differences. In other words, variations in the scope or the application of the clearing mandate were anticipated by the G-20 leaders, and should be respected as long as they remain subordinate to the overall policy objectives[65].

The end-user exception is a prime example of the above noted premise. Commercial end users use derivatives to hedge the risk of their commercial activities through unrestricted access to the derivatives markets. The derivatives regulations in the US recognize that commercial end users do not pose significant systemic risk to the markets. The Dodd-Frank Act exempts SDs and buy-side firms from the clearing mandate for transactions with a commercial end user that is hedging or mitigating commercial risk[66].

In line with the same policy objectives, the EU clearing mandate provides a partial exemption for non-financial counterparties where their positions (exclusive of hedging transactions) fall below a certain clearing threshold determined by the European Securities and Markets Authority. Since the scope and specifics of the exemption are based on particular characteristics of the EU market, the CFTC should recognize such exemptions because the clearing policy objectives in these two jurisdictions are aligned.

Another example is the clearing exception provided by certain foreign jurisdictions to smaller financial institutions. The primary benefit of clearing is the reduction of counterparty risk. Small financial institutions present significantly less risk to the derivatives markets given their market positions and activity, even if a small financial institution fails to perform under the terms of a cleared product. The exception is appropriate for US firms executing a transaction subject to mandatory clearing with a small financial institution located in a foreign jurisdiction, if such transaction is not yet subject to a mandatory clearing obligation in that foreign jurisdiction. To preserve the competitive advantage of US firms, the Dodd-Frank Act allowed the CFTC to exempt certain transactions from the mandatory clearing obligation[67]. Such an exception will ensure US firms can continue to expand their business activities and invest in the US economy.

The examples above reinforce the overarching point that even if the scope of the clearing obligation in a foreign jurisdiction does not precisely align with the US clearing mandate, the two jurisdictions can still be comparable when assessing the risk the counterparty poses to the system and the potential it has to affect other parties in the system and the derivatives markets in general.

[65] With respect to the US, the CEA's anti-evasion provision permits the CFTC to prevent abuse of the clearing exception if the CFTC determines that a transaction is structured to evade the mandate. CEA § 2(h)(7)(F), 7 U.S.C. § 2(h)(7)(F)

[66] CEA § 2(h)(7)(A)(ii), 7 U.S.C. § 2(h)(7)(A)(ii)

[67] CEA § 4(c)(1), 7 U.S.C. § 6(c)(1) provides in relevant part that "[i]n order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation or order . . . may . . . exempt any agreement contract or transaction (or class thereof) . . . either unconditionally or on stated terms or conditions … from any requirements of this Act"

Principle 5 Assessment

Principle 5	Policy Goal 1: CCPs Should be PFMI Compliant			
	US	**EU**	**Australia**	**Canada**
Jurisdictions have CCPs that have been established and operate in a manner that is consistent with PFMI standards.	>CCPs are established consistent with PFMI standards. >The US has implemented rules related to the establishment and operation of CCPs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); 17 C.F.R. 39; CEA § 2(h); 17 C.F.R. 50.	>CCPs are established consistent with PFMI standards. >The EU has implemented rules related to the establishment and operation of CCPs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); Commission Delegated Regulation (EU) No. 153/2013; Commission Delegated Regulation (EU) No. 152/2013; EMIR, Articles 4-6.	>CCPs are established consistent with PFMI standards. >Australia has implemented rules related to the establishment and operation of CCPs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); Corporations Act Part 7.3, § 901A(2)(c); Derivative Transaction Rules (Clearing) 2015.	>CCPs are established largely consistent with PFMI standards. >Canada has implemented rules related to the establishment and operation of CCPs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); National Instrument 24-102 Clearing Agency Requirements.

Principle 5	Policy Goal 1: CCPs Should be PFMI Compliant		
	Hong Kong	**Japan**	**Singapore**
Jurisdictions have CCPs that have been established and operate in a manner that is consistent with PFMI standards.	>CCPs are established consistent with PFMI standards. >Hong Kong has implemented rules related to the establishment and operation of CCPs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); SFO § 399(1); SFC Guidelines on the Application of the CPSS-IOSCO Principles for Financial Market Infrastructures; Securities and Futures (OTC Derivative Transactions – Clearing and Record Keeping Obligations and Designation of Central Counterparties) Rules.	>CCPs are established consistent with PFMI standards. >Japan has implemented rules related to the establishment and operation of CCPs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); 金融商品取引法第百五十六条の六十二 (Financial Instruments and Exchange Act, Article 156-62); 店頭デリバティブ取引等の規制に関する内閣府令第二条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 2); 金融庁告示第六十号(平成二十四年七月十一日) (Public Notice No. 60 (July 11, 2012)).	>CCPs are established consistent with PFMI standards. >Singapore has implemented rules related to the establishment and operation of CCPs. Sources: CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017); SFA Part II, §§ 129C, 129G; Securities and Futures (Clearing Facilities) Regulations; SFA Part VIB.

Principle 5	Policy Goal 2: Mandatory Clearing Obligations Should Achieve Similar Objectives			
	US	**EU**	**Australia**	**Canada**
Jurisdictions appear to have comparable clearing objectives and exemptions.	>The US clearing mandate currently covers certain interest rate and credit default swaps. Exemptions from the clearing mandate include end users entering into such transactions for hedging purposes, as well as inter-affiliate swap transactions. Sources: 17 C.F.R. 39; CEA § 2(h); 17 C.F.R. 50.	>Requires mandatory clearing of interest rate derivatives and credit derivatives (ie, index credit default swaps) by financial counterparties and non-financial counterparties[68] that exceed certain thresholds. Certain types of intra-group transactions are also exempt from the clearing obligation. Sources: Commission Delegated Regulation (EU) No. 153/2013; Commission Delegated Regulation (EU) No. 152/2013; EMIR, Articles 4-6[69].	>Requires ADIs and AFS licensees that exceed certain thresholds for gross notional outstanding positions held to clear certain types of interest rate derivatives. Sources: Corporations Act Part 7.3, § 901A(2)(c); Derivative Transaction Rules (Clearing) 2015.	>Requires mandatory clearing of certain interest rate derivatives by counterparties that exceed certain trading thresholds. Source: National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Related Companion Policy (Jan. 2017).

Principle 5	Policy Goal 2: Mandatory Clearing Obligations Should Achieve Similar Objectives		
	Hong Kong	**Japan**	**Singapore**
Some jurisdictions appear to have comparable clearing objectives and exemptions.	>Hong Kong's clearing obligation covers basis swaps, overnight index swaps and interest rate swaps between an AI or licensed corporation and an AI, licensed corporation or financial service provider, provided such institutions exceed predetermined trading thresholds. Sources: SFO § 399(1); SFC Guidelines on the Application of the CPSS-IOSCO Principles for Financial Market Infrastructures; Securities and Futures (OTC Derivative Transactions – Clearing and Record Keeping Obligations and Designation of Central Counterparties) Rules.	>Certain types of interest rate swaps and credit default swaps are required to be cleared. >Clearing requirement generally applies to FIBOs or RFIs. Sources: 金融商品取引法第百五十六条の六十二 (Financial Instruments and Exchange Act, Article 156-62); 店頭デリバティブ取引等の規制に関する内閣府令第二条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 2); 金融庁告示第六十号(平成二十四年七月十一日) (Public Notice No. 60 (July 11, 2012)).	>The clearing obligation will cover derivatives entered into by a 'specified person'[70]. Regulations that will provide more details, including with respect to which products must be cleared, have not yet been finalized. Sources: SFA Part II, §§ 129C, 129G; Securities and Futures (Clearing Facilities) Regulations; SFA Part VIB.

[68] The term 'financial counterparty' includes both investment firms and credit institutions, among other things. The term 'non-financial counterparty' refers to an entity that is not an investment firm, credit institution or other financial entity (eg, insurance undertaking). See Regulation (EU) No. 648/2012, Article 2(8)-(9), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=GA

[69] Clearing determinations appear as regulatory technical standards, available at https://www.esma.europa.eu/regulation/post-trading/otc-derivatives-and-clearing-obligation

[70] 'Specified person' in this context means any: (a) bank in Singapore licensed under the Banking Act; (b) merchant bank approved as a financial institution under the Monetary Authority of Singapore Act (Cap. 186); (c) finance company licensed under the Finance Companies Act (Cap. 108); (d) insurer licensed under the Insurance Act (Cap. 142); (e) approved trustee referred to in § 289 (a category of regulated entity being expanded to cover dealing in OTC derivative products); (f) holder of a capital markets services license; or (g) other person who is, or who belongs to a class of persons which is, prescribed by the MAS by regulations made under SFA § 129G for the purposes of this definition. See SFA § 129B, available at http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6

NOTIFICATION PROCESS TO THE CFTC

The CFTC could consider allowing any swap dealer located in a comparable jurisdiction to de-register as an SD, removing duplicative compliance burdens

Where the CFTC has determined that a foreign regulatory regime is comparable to the US regulatory regime based on an analysis of the foreign jurisdiction's risk-based rules, the CFTC may consider allowing any SD located in that jurisdiction to file a notice of de-registration if it is currently registered with the CFTC. A notice of de-registration should include a self-certification that the firm is located in a jurisdiction that has been determined comparable and is subject to its home country's supervisory oversight.

If the CFTC has determined that a foreign regulatory regime is partially comparable, the CFTC may consider providing limited registration designation.

CONCLUSION

The opportunity to make meaningful changes in the CFTC's cross-border determinations comes at a time when the current approach has resulted in a fragmented global derivatives market with unnecessary costs that provide little benefit in terms of overall risk reduction. This whitepaper has set out a substituted compliance framework based on risk-centered cross-border principles that the CFTC and other regulators could deploy in their substituted compliance determinations. ISDA stands ready to assist the CFTC and other regulators in their efforts to harmonize cross-border regulatory regimes.

APPENDIX A

United States

Principle 1: Capital and Margin Requirements

BCBS, Assessment of Basel III regulations – http://www.bis.org/bcbs/implementation.htm

United States of America (Dec. 2014) (http://www.bis.org/bcbs/publ/d301.pdf)

Regulatory Capital Rules, 78 Fed. Reg. 62018 (Oct. 11, 2013) (https://www.gpo.gov/fdsys/pkg/FR-2013-10-11/pdf/2013-21653.pdf)

BCBS, Twelfth progress report on adoption of the Basel regulatory framework (Apr. 2017) (https://www.bis.org/bcbs/publ/d404.pdf)

CEA § 4s(e), 7 U.S.C. § 6s(e) (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap1-sec6s.pdf)

17 C.F.R. §§ 23.150-23.161 (https://www.gpo.gov/fdsys/pkg/CFR-2016-title17-vol1/pdf/CFR-2016-title17-vol1-part23-subpartE.pdf)

Margin and Capital Requirements for Covered Swap Entities, 80 Fed. Reg. 74840 (Nov. 30, 2015) (https://www.gpo.gov/ fdsys/pkg/FR-2015-11-30/pdf/2015-28671.pdf)

Principle 2: Risk Management Requirements

CEA § 4s(j), 7 U.S.C. § 6s(j) (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap1-sec6s.pdf)

17 C.F.R. § 23.600 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol1/pdf/CFR-2014-title17-vol1-sec23-600.pdf)

17 C.F.R. § 23.603 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol1/pdf/CFR-2014-title17-vol1-sec23-603.pdf)

CEA § 4s(i), 7 U.S.C. § 6s(i) (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap1-sec6s.pdf)

17 C.F.R. § 23.502 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol1/pdf/CFR-2014-title17-vol1-sec23-502.pdf)

17 C.F.R. § 23.503 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol1/pdf/CFR-2014-title17-vol1-sec23-503.pdf)

Principle 3: Record-keeping Requirements

CEA § 4s(f)-(g), 7 U.S.C. § 6s(f)-(g) (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap1-sec6s.pdf)

17 C.F.R. § 23.202 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol1/pdf/CFR-2014-title17-vol1-sec23-202.pdf)

17 C.F.R. § 23.203 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol1/pdf/CFR-2014-title17-vol1-sec23-203.pdf)

17 C.F.R. § 23.606 (https://www.gpo.gov/fdsys/pkg/CFR-2015-title17-vol1/pdf/CFR-2015-title17-vol1-sec23-606.pdf)

Principle 4: Reporting Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

CEA § 21, 7 U.S.C. § 24a (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap1-sec24a.pdf)

17 C.F.R. 43 (https://www.gpo.gov/fdsys/pkg/CFR-2012-title17-vol1/pdf/CFR-2012-title17-vol1-part43.pdf)

17 C.F.R. 45 (https://www.gpo.gov/fdsys/pkg/CFR-2012-title17-vol1/pdf/CFR-2012-title17-vol1-part45.pdf)

17 C.F.R. 49 (https://www.gpo.gov/fdsys/pkg/CFR-2012-title17-vol1/pdf/CFR-2012-title17-vol1-part49.pdf)

CEA § 2(a)(13), 7 U.S.C. § 2(a)(13) (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap1-sec2.pdf)

Principle 5: Clearing Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

17 C.F.R. 39 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol1/pdf/CFR-2014-title17-vol1-part39.pdf)

CEA § 2(h), 7 U.S.C. § 2(h) (https://www.gpo.gov/fdsys/pkg/USCODE-2011-title7/pdf/USCODE-2011-title7-chap1-sec2.pdf)

17 C.F.R. 50 (https://www.gpo.gov/fdsys/pkg/CFR-2014-title17-vol2/pdf/CFR-2014-title17-vol2-part50.pdf)

European Union

Principle 1: Capital and Margin Requirements

BCBS, Assessment of Basel III regulations – European Union (Dec. 2014) (http://www.bis.org/bcbs/publ/d300.pdf)

Regulation (EU) No. 575/2013 (CRR) and CRD IV Directive (2013/36/EU) (CRD), Part 3 (together, CRD IV, which applies to credit institutions and to investment firms) (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0575&from=EN)

BCBS, Twelfth progress report on adoption of the Basel regulatory framework (Apr. 2017) (https://www.bis.org/bcbs/publ/d404.pdf)

Regulation EU No. 648/2012 (EMIR), Article 11 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=GA)

Commission Delegated Regulation (EU) 2016/2251 (Regulatory Technical Standard) (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R2251&from=EN)

Principle 2: Risk Management Requirements

Directive 2004/39/EC (MIFID), Article 13(5) and 13(6) (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0039&from=EN)

Directive 2014/65/EC (MIFID II), Articles 16(5), 16(2) (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0065)

Commission Directive 2006/73/EC (MIFID-ID), Articles 7, 9 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:241:0026:0058:EN:PDF)

Commission Delegated Regulation (EU) 2017/565 (MIFID II-SR), Articles 23, 25 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0565&from=DE)

CRD, Articles 76, 88(1) (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0338:0436:En:PDF)

MIFID, Article 13(4) (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0039&from=EN)

MIFID II, Article 16(4) (http://www.hba.gr/UplDocs/MiFID II - Directive 2004 65.pdf)

MIFID-ID, Articles 5(3), 14(2)(k) (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:241:0026:0058:EN:PDF)

MIFID II-SR, Articles 21(3), 31(2)(k) (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0565&from=DE)

Commission Delegated Regulation (EU) No. 149/2013, Article 13-14 (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0149&from=EN) supplementing EMIR (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2012:201:FULL&from=EN)

Regulation (EU) 600/2014 Article 31 (MIFIR) (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN)

Principle 3: Record-keeping Requirements

MIFID, Articles 13(6), 25(2) (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0039&from=EN)

MIFID II, Articles 16(6)-(7) (http://www.hba.gr/UplDocs/MiFID%20II%20-%20Directive%202004%2065.pdf)

MIFID-ID, Articles 5.1(f), 51 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:241:0026:0058:EN:PDF)

Commission Regulation (EC) No. 1287/2006 (MIFID-IR) (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:241:0001:0025:EN:PDF)

MIFIR, Article 25 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN)

MIFID II-SR, Articles 72-76 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0565&from=DE)

Principle 4: Reporting Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

EMIR, Article 9, Title VI (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2012:201:FULL&from=EN)

Commission Delegated Regulation (EU) No. 148/2013 (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0148&from=EN)

Commission Delegated Regulation (EU) No. 1247/2012 (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1247&from=EN)

MIFIR, Article 26 (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN)

Principle 5: Clearing Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

Commission Delegated Regulation (EU) No. 153/2013 (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0153&from=en)

Commission Delegated Regulation (EU) No. 152/2013 (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0152&from=EN)

EMIR, Articles 4-6 (http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2012:201:FULL&from=EN)

Australia

Principle 1: Capital and Margin Requirements

BCBS, Assessment of Basel III regulations—Australia (March 2014) (http://www.bis.org/bcbs/implementation/l2_au.pdf)

Banking Act § 11AF (https://www.legislation.gov.au/Details/C2017C00067)

Prudential Standard APS 110 (http://www.apra.gov.au/adi/documents/150507-aps-110-capital-adequacy.pdf)

Prudential Standard APS 111 (https://www.legislation.gov.au/Details/F2014L00416)

BCBS, Twelfth progress report on adoption of the Basel regulatory framework (Apr. 2017) (https://www.bis.org/bcbs/publ/d404.pdf)

Prudential Standard CPS 226 (http://www.apra.gov.au/CrossIndustry/Documents/160225-DRAFT-CPS-226-FINAL.pdf)

Principle 2: Risk Management Requirements

Banking Act § 11AF (https://www.legislation.gov.au/Details/C2017C00067)

Prudential Standard APS 310, Paragraphs 23-29 (http://www.apra.gov.au/adi/Documents/Draft-APS-310-November-2008.pdf)

Corporations Act § 912A(1) (http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s912a.html)

ASIC Regulatory Guide 259 (http://download.asic.gov.au/media/4196472/rg259-published-27-march-2017.pdf)

Prudential Standard CPS 232 (http://www.apra.gov.au/CrossIndustry/Documents/CPS-232-Business-Continuity-Management-August-2014.pdf)

Prudential Standard CPS 226 (http://www.apra.gov.au/CrossIndustry/Documents/161206-Final-CPS-226-implementation-timetable.pdf)

Principle 3: Record-keeping Requirements

Corporations Act § 901A(3)(h) (http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s901a.html)

ASIC Derivative Transaction Rules (Reporting) Rules 2013, Part 2.3 (https://www.legislation.gov.au/Details/F2013L01345)

ASIC Act §§ 29-33 (http://www.austlii.edu.au/au/legis/cth/consol_act/asaica2001529/)

ASIC Derivative Trade Repository Rules 2013, Part 2.3.4(5) (https://www.legislation.gov.au/Details/F2013L01344)

Principle 4: Reporting Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

Corporations Act § 903A (http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s903a.html)

ASIC Derivative Trade Repository Rules 2013 (https://www.legislation.gov.au/Details/F2013L01344)

Corporations Act § 901A (http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s901a.html)

ASIC Derivative Transaction Rules (Reporting) 2013, Schedule 2 (https://www.legislation.gov.au/Details/F2015C00262)

Principle 5: Clearing Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

Corporations Act Part 7.3 (http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/)

Corporations Act § 901A(2)(c) (http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s901a.html)

ASIC Derivative Transaction Rules (Clearing) 2015 (https://www.legislation.gov.au/Details/F2015L01960)

Canada

Principle 1: Capital and Margin Requirements

BCBS, Assessment of Basel III Regulations: Canada (June 2014) (http://www.bis.org/bcbs/implementation/l2_ca.pdf)

Canada Bank Act § 484.1 (http://laws-lois.justice.gc.ca/eng/acts/B-1.01/)

OSFI Guideline, Capital Adequacy Requirements (Dec. 2016) (http://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/CAR17_chpt1.aspx)

BCBS, Twelfth progress report on adoption of the Basel regulatory framework (Apr. 2017) (https://www.bis.org/bcbs/publ/d404.pdf)

OSFI Guidelines: Margin Requirements for Non-Centrally Cleared Derivatives, No. E-22 (June 2017) (http://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/e22.aspx#fnb1)

Principle 2: Risk Management Requirements

OSFI Guidelines: Sound Derivatives Practices – Risk Management, No. B-7 (Nov. 2014) (http://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/b7.aspx#toc5)

OSFI's Guide for Incorporating Banks and Federally Regulated Trust and Loan Companies (Revised June 2015) (http://www.osfi-bsif.gc.ca/Eng/Docs/instguide.pdf)

OSFI's Guidelines: Sound Derivatives Practices – Portfolio Reconciliation & Compression, No. B-7 (Nov. 2014) (http://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/b7.aspx#toc5)

Principle 3: Record-keeping Requirements

OSC Trade Reporting Rules Part 3, S. 36(1) (http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20160512_91-507_derivatives-data-reporting.pdf)

OSFI Guidelines, Derivatives Disclosures, No. D-6 (Revised July 2010) (http://www.osfi-bsif.gc.ca/Eng/Docs/d6_ifrs.pdf)

OSC Rule 91-507 S.36(1) and S.18(2) (http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20160512_91-507_derivatives-data-reporting.pdf)

Principle 4: Reporting Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

OSC Trade Reporting Rules, Annex D (http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20160512_91-507_derivatives-data-reporting.pdf)

OSC Trade Reporting Rules, Appendix A (http://www.osc.gov.on.ca/documents/en/Securities-Category9/rule_20160512_91-507_derivatives-data-reporting.pdf)

Principle 5: Clearing Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

National Instrument 24-102 Clearing Agency Requirements (http://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20160218_24-102_clearing-agency-requirements-forms-companion.htm)

National Instrument 94-101 Mandatory Central Counterparty Clearing of Derivatives and Related Companion Policy (Jan. 2017) (http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20170119_94-101_derivatives.pdf)

Hong Kong

Principle 1: Capital and Margin Requirements

BCBS, Assessment of Basel III risk-based capital regulations—Hong Kong SAR (March 2015) (http://www.bis.org/bcbs/publ/d313.pdf)

Banking Ordinance, Part XVIA (http://www.blis.gov.hk/blis_pdf.nsf/CurEngOrd/5A827AA51F496D08482575EE004568BC/$FILE/CAP_155_e_b5.pdf)

BCBS, Twelfth progress report on adoption of the Basel regulatory framework (Apr. 2017) (https://www.bis.org/bcbs/publ/d404.pdf)

Banking Ordinance § 7(3) (http://www.hklii.hk/eng/hk/legis/ord/155/s7.html)

HKMA Supervisory Policy Manual CR-G-14 (http://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/CR-G-14.pdf)

Principle 2: Risk Management Requirements

Banking Ordinance § 7(3) (http://www.hklii.org/eng/hk/legis/ord/155/s7.html)

HKMA Supervisory Policy Manual IC-1 (http://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2010/20101231e1.pdf)

Core Operational and Financial Risk Management Controls For Over-the-Counter Derivatives Activities of Persons Licensed by or Registered with SFC (http://www.sfc.hk/web/EN/assets/components/codes/files-current/web//core-operational-and-financial-risk-management/core-operational-and-financial-risk-management.pdf)

HKMA Supervisory Policy Manual TM-G-2 (http://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/TM-G-2.pdf)

Circular to Licensed Corporations concerning Effective Business Continuity Plans (http://www.sfc.hk/edistributionWeb/gateway/EN/circular/intermediaries/licensing/openFile?refNo=14EC32)

HKMA Supervisory Policy Manual CR-G-14, §§ 4.4, 4.5 (http://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/CR-G-14.pdf)

SFC Guidelines, § 1 (http://www.sfc.hk/web/EN/assets/components/codes/files-current/web//core-operational-and-financial-risk-management/core-operational-and-financial-risk-management.pdf)

HKMA Supervisory Policy Manual CG-3, 2.4 (http://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/CG-3.pdf)

SFC Code of Conduct, GP6, 16.7 (http://www.sfc.hk/web/EN/assets/components/codes/files-current/web/codes/code-of-conduct-for-persons-licensed-by-or-registered-with-the-securities-and-futures-commission/Code%20of%20Conduct%20for%20Persons%20Licensed%20by%20or%20Registered%20with%20the%20Securities%20and%20Futures%20Commission.pdf)

Principle 3: Record-keeping Requirements

SFO § 101E (http://www.blis.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/5167961DDC96C3B7482575EF001C7C2D/$FILE/CAP_571_e_b5.pdf)

Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules , Part 3 (http://www.blis.gov.hk /blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/993676A01EFCF23948257E45005A0777/$FILE/CAP_571AL_e_b5.pdf)

SFO § 101E(7)-(8) (http://www.blis.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/5167961DDC96C3B7482575EF001C7C2D/$FILE/CAP_571_e_b5.pdf)

SFO § 186A (http://www.blis.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/5167961DDC96C3B7482575EF001C7C2D/$FILE/CAP_571_e_b5.pdf)

Principle 4: Reporting Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

SFO § 101B (http://www.blis.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/5167961DDC96C3B7482575EF001C7C2D/$FILE/CAP_571_e_b5.pdf)

Reporting and Record Keeping Rules, Schedule 1, Part 4 (http://www.blis.gov.hk/ blis_pdf.nsf/CurAllEngDoc/993676A01EFCF23948257E45005A0777/$FILE/CAP_571AL_e_b5.pdf)

Principle 5: Clearing Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

SFO § 399(1) (http://www.legco.gov.hk/yr01-02/english/ord/ord005-02-e.pdf)

SFC Guidelines on the Application of the CPSS-IOSCO Principles for Financial Market Infrastructures (http://www.sfc.hk/web/EN/assets/components/codes/files-current/web/guidelines/guidelines-on-the-application-of-the-cpss-iosco-principles-for-financial-market-infrastructures/Guidelines%20on%20the%20Application%20of%20the%20CPMI-IOSCO%20Principles%20for%20Financial%20Market%20Infrastructures%20May%202016%20onwards.pdf)

Securities and Futures (OTC Derivative Transactions – Clearing and Record Keeping Obligations and Designation of Central Counterparties) Rules (http://www.blis.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/12C2E6F2B34D47D048257F4F0056B5E9/$FILE/CAP_571AN_e_b5.pdf)

Japan[71]

Principle 1: Capital and Margin Requirements

BCBS, Follow-up assessment of Basel III risk-based capital regulations – Japan (Dec. 2016) (http://www.bis.org/bcbs/publ/d392.pdf)

金融商品取引法代五十七条の五及び五十七条の十七(Financial Instruments and Exchange Act, Articles 57-5 and 57-17) (http://law.e-gov.go.jp/htmldata/S23/S23HO025.html) (Last revision: Sept. 4, 2015)

銀行法第14条の2及び第52条の25 (Banking Act, Articles 14-2 and 52-25) (http://law.e-gov.go.jp/htmldata/S56/S56HO059.html) (Last revision: June 3, 2016)

BCBS, Twelfth progress report on adoption of the Basel regulatory framework (Apr. 2017) (https://www.bis.org/bcbs/publ/d404.pdf)

金融商品取引業等に関する内閣府令第百二十三条第一項第二十一号の五及び第二十一号の六, 第七項, 第八項, 第九項, 第十項, 及び第十一 (Cabinet Office Ordinance on Financial Instruments Business, etc., Article 123(1) (xxi-v) and (xxi-vi); Article 123(7); Article 123(8); Article 123(9); Article 123(10); Article 123(11)) (http://law.e-gov.go.jp/htmldata/H19/H19F10001000052.html) (Last revision: Aug. 31, 2016)

[71] ISDA cites to weblinks that provide the reader with Japan's derivatives regulations in the Japanese language, not the English language, because available English translations are not always up to date

Principle 2: Risk Management Requirements

金融商品取引業者等向けの総合的な監督指針III-2-7, III-2-8, IV-2-3, IV-2-4, IV-2-5, IV-3-3-5, 及び IV-3-3-6 (Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc, III-2-7, III-2-8, IV-2-3, IV-2-4; IV-2-5; IV-3-3-5; IV-3-3-6) (http://www.fsa.go.jp/common/law/guide/kinyushohin/guideline_20170410.pdf) (Last revision: Apr. 2017)

金融商品取引業者等向けの総合的な監督指針III-1 (Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc, III-1) (http://www.fsa.go.jp/common/law/guide/kinyushohin/guideline_20170410.pdf) (Last revision: Apr. 2017)

金融商品取引業者等向けの総合的な監督指針IV-3-1-6 (Comprehensive Guidelines for Supervision of Financial Instruments Business Operators, etc, IV-3-1-6) (http://www.fsa.go.jp/common/law/guide/kinyushohin/guideline_20170410.pdf) (Last revision: Apr. 2017)

事業継続ガイドライン 第三版、内閣府 (Business Continuity Guidelines 3rd ed., Cabinet Office) (http://www.bousai.go.jp/kyoiku/kigyou/keizoku/pdf/guideline03.pdf) (Last revision: Aug. 2013)

Principle 3: Record-keeping Requirements

金融商品取引法第百五十六条の六十四 (Financial Instruments and Exchange Act, Article 156-64) (http://law.e-gov.go.jp/htmldata/S23/S23HO025.html) (Last revision: Sept. 4, 2015)

店頭デリバティブ取引等の規制に関する内閣府令第四条第一項、第七条及び第十条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Articles 4(1); 7; 10) (http://law.e-gov.go.jp/htmldata/H24/H24F10001000048.html) (Last revision: March 1, 2016)

店頭デリバティブ取引等の規制に関する内閣府令第七条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 7) (http://law.e-gov.go.jp/htmldata/H24/H24F10001000048.html) (Last revision: March 1, 2016)

店頭デリバティブ取引等の規制に関する内閣府令第四条第一項 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 4(1)) (http://law.e-gov.go.jp/htmldata/H24/H24F10001000048.html) (Last revision: March 1, 2016)

金融商品取引法第五十六条の二 (Financial Instruments and Exchange Act, Article 56-2) (http://law.e-gov.go.jp/htmldata/S23/S23HO025.html) (Last revision: Sept. 4, 2015)

Principle 4: Reporting Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

金融商品取引法第百五十六条の六十七から第百五十六条の八十四 (Financial Instruments and Exchange Act, Articles 156-67 to 156-84) (http://law.e-gov.go.jp/htmldata/S23/S23HO025.html) (Last revision: Sept. 4, 2015)

金融商品取引法第百五十六条の六十四第三項 (Financial Instruments and Exchange Act, Articles 156-64(3)) (http://law.e-gov.go.jp/htmldata/S23/S23HO025.html) (Last revision: Sept. 4, 2015)

店頭デリバティブ取引等の規制に関する内閣府令第四条第一項及び第九条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Articles 4(1) and (9)) (http://law.e-gov.go.jp/htmldata/H24/H24F10001000048.html) (Last revision: March 1, 2016)

Principle 5: Clearing Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

金融商品取引法第百五十六条の六十二 (Financial Instruments and Exchange Act, Article 156-62) (http://law.e-gov.go.jp/htmldata/S23/S23HO025.html) (Last revision: Sept. 4, 2015)

店頭デリバティブ取引等の規制に関する内閣府令第二条 (Cabinet Office Ordinance on the Regulation of Over-the-Counter Derivatives Transactions, Article 2) (http://law.e-gov.go.jp/htmldata/H24/H24F10001000048.html) (Last revision: March 1, 2016)

金融庁告示第六十号(平成二十四年七月十一日 (Public Notice No. 60 (July 11, 2012)) (http://www.fsa.go.jp/common/law/kokuji/20120711kin60.pdf)

Singapore

Principle 1: Capital and Margin Requirements

BCBS, Assessment of Basel III regulations – Singapore (March 2013) (http://www.bis.org/bcbs/implementation/l2_sg.pdf)

Banking Act § 10 (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:af119fb0-b122-41e3-8a03-b7709fd2f5fd)

MAS Notice 637 3-1 (MAS Notice 20637 Effective Jan 20 2017.pdf)

BCBS, Twelfth progress report on adoption of the Basel regulatory framework (Apr. 2017) (https://www.bis.org/bcbs/publ/d404.pdf)

SFA §§ 34(2)(i),(3)(a), 81S(2)(d) (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

Guidelines on Margin Requirements for Non-Centrally Cleared OTC Derivatives Contracts (http://www.mas.gov.sg/~/media/MAS/Regulations%20and%20Financial%20Stability/Regulations%20Guidance%20and%20Licensing/Securities%20Futures%20and%20Fund%20Management/Regulations%20Guidance%20and%20Licensing/Guidelines/Guidelines%20on%20Margin%20Requirements%20for%20NonCentrally%20Cleared%20OTC%20Derivatives%20Contracts.pdf)

Principle 2: Risk Management Requirements

Guidelines on Risk Management Practices (http://www.mas.gov.sg/~/media/MAS/Regulations%20and%20Financial%20Stability/Regulatory%20and%20Supervisory%20Framework/Risk%20Management/Board%20and%20Senior%20Mgmt_1%20Apr%202013.pdf)

Guidelines on Risk Management Practices – Business Continuity Management (http://www.mas.gov.sg/~/media/MAS/Regulations%20and%20Financial%20Stability/Regulatory%20and%20Supervisory%20Framework/Risk%20Management/BCMGuidelines.pdf)

Principle 3: Record-keeping Requirements

SFA §§ 125, 129 (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

Reporting of Derivatives Contracts Regulations, Part 1, Regulation 4 (Reporting of Derivatives Contracts Regulations, Part 1, Regulation 4)

SFA § 126 (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

SFA § 150B (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

Principle 4: Reporting Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

SFA Part IIA (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

Trade Repositories Regulations (http://www.mas.gov.sg/~/media/resource/legislation_guidelines/securities_futures/sub_legislation/sfa_reg/SFTR%20Regulations%202013.pdf)

SFA Part VIA (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013 (No. S 668/2013), First Schedule (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:064f9826-1939-4a89-96f9-04e7c1ffce9c)

Principle 5: Clearing Requirements

CPMI, Implementation Monitoring of PFMIs: Fourth Update to Level 1 Assessment Report (July 2017) (http://www.bis.org/cpmi/publ/d166.pdf)

SFA Part II, §§ 129C, 129G (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

Securities and Futures (Clearing Facilities) Regulations (http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A47295b9f-a88c-4d56-8ab0-28ec3c7db202%20Depth%3A0%20Status%3Ainforce;rec=0;whole=yes)

SFA Part VIB (http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4cfe0106-a826-4adc-a05a-847ad3cff1c6)

APPENDIX B

Assessment of G-20 Emerging Market Nations

Key: (green) Regulations established appear to fulfill the relevant policy goal

(yellow) Progress is being made toward establishing regulations in order to fulfill the relevant policy goal (ie, proposed regulations)

(red) No regulations have been established that would fulfill the relevant policy goal

Principles and Policy Goals	Brazil	Mexico
Regulations Should Require Firms to be Capitalized Pursuant to the Basel III Framework	>Brazilian monetary authorities are in the process of implementing Basel III capital requirements.	>Mexican regulators have established capital requirements in line with the Basel III framework. Sources: Disposiciones de Caracter General Aplicables a las Instituciones de Crédito (the Banking Rules) issued by the National Banking and Securities Commission (CNBV); Disposiciones de Carácter General Aplicables a las Casas de Bolsa (the Broker Dealer Rules) issued by the CNBV.
Margin Requirements Should be BCBS-IOSCO Compliant	>N/A	>Expected to have proposed margin rules by the end of 2017, which are intended to be BCBS-IOSCO compliant.
Firms Should Establish Risk Management Policies and Procedures and an Effective Governance Structure	>N/A	>Regulators require banks and broker-dealers (collectively, 'firms') to adopt policies and procedures related to risk management and establish effective governance structures. Sources: Circular 4/2012 issued by Banco de México; Rules for Market Participants in the Derivatives Market (Reglas a las que Habran de Sujetarse los Participantes del Mercado de Contratos de Derivados; the Listed Derivatives Rules) issuedby the CNBV, Banco de México and the Ministry of Finance (Secretaría de Hacienda y Crédito Público); Prudential Regulations to Which Market Participants of Listed Derivatives Should be Subject (Disposiciones de Caracter Prudencial a que se Sujetarán en sus Operaciones los Participantes del Mercado de Contratos de Derivados Listados en Bolsa; Listed Derivatives Regulations) issuedbythe CNBV.
Firms Should Establish Policies that Address Business Continuity Agreements	>N/A	>Regulators require firms to establish business continuity plans. Sources: Circular 4/2012 issued by Banco de México; Listed Derivatives Rules; Listed Derivatives Regulations.
Firms Should Conduct Portfolio Reconciliation	>N/A	>Regulators require firms to have policies and procedures related to portfolio reconciliation and compression. Source: Circular 4/2012 of Banco de México.
Swap Data Records Should be Kept for an Extended Period of Time	>Central Bank of Brazil (BCB) requires that all financial institutions keep records of their swap transactions for a period of five years. Source: Articles 6 and 11, II, of Circular 3,461, issued by the BCB (July 24, 2009)[72].	>Regulators require firms to maintain records of all transactions for a period of at least five years after the termination of such transaction. Sources: Banking Rules; Broker-Dealer Rules.
Swap Data Records Should be Sufficiently Comprehensive to Enable Regulators to Conduct Trade Reconstruction	> Swap data records that are required to be kept by firms appear to be sufficiently comprehensive to enable trade reconstruction. Source: Articles 6 and 11, II, of Circular 3,461, issued by the BCB (July 24, 2009).	>Swap data records that are required to be kept by firms appear to be sufficiently comprehensive to enable trade reconstruction. Sources: Banking Rules; Broker Dealer Rules; Circular 4/2012; Listed Derivatives Rules; Listed Derivatives Regulations.

[72] Swap transactions qualify under the general rule of articles 6 and 11, II, of Circular 3,461

Regulators Should Have Access to Swap Data Records	>BCB and the Brazilian Securities and Exchange Commission (CVM) can request for swap data records registered at CETIP[73] and BM&FBovespa[74] at any moment[75]. We note, however, that this authority is not prescribed by any law or regulation. Rather, the above statement is a conclusion drawn from the fact that CETIP and BM&FBovespa render registration and depository services comprised within the so-called 'systemically important' settlement systems (authorized to operate under Law 10,214/01). One of the purposes of such systems is to allow the regulators (ie, BCB and CVM) to exercise their surveillance over market participants and transactions. Accordingly, CVM and BCB may request swap data records registered at CETIP and BM&FBovespa at any moment.	>All books and records of firms are subject to inspection and audit by the CNBV and other regulators. Sources: Banking Rules; Broker Dealer Rules.
A Trade Repository Should Meet the Standards Set Out in the PFMIs	> TRs are established consistent with PFMI standards. Source: CPMI, Implementation monitoring of PFMIs: Second update to Level 1 assessment Report (June 2015).	>Largely PFMI compliant; progress being made towards full PFMI compliance. Source: CPMI, Implementation monitoring of PFMIs: Second update to Level 1 assessment Report (June 2015).
Reportable Data Should Provide Regulators Sufficient Information Regarding a Firm's Derivatives Exposure	>Information reported to TRs provide regulators with sufficient information regarding a firm's derivatives exposure[76].	> Information reported to Banco de Mexico provides regulators with sufficient information regarding a firm's derivatives exposure.
CCPs Should Be PFMI Compliant	> CCPs are established consistent with PFMI standards. Source: CPMI, Implementation monitoring of PFMIs: Second update to Level 1 assessment Report (June 2015).	>CCPs are established consistent with PFMI standards. Source: CPMI, Implementation monitoring of PFMIs: Second update to Level 1 assessment Report (June 2015).
Mandatory Clearing Obligations Should Achieve Similar Objectives	>No mandatory clearing requirements. On March 31, 2017, however, CVM provided updates on the research of the working group created to study the feasibility and advisability of adopting mandatory settlement by central counterparties of transactions carried out in the Brazilian derivatives market. The report established methodologies for determining whether certain derivatives contracts should be mandatorily cleared by a CCP. In principle, the working group decided not to impose mandatory clearing at this time, and stated the need for a permanent evaluation of the market. Source: CVM Memorandum No. 4/2017 (March 31, 2017).	> Mandatory clearing of 28 day-TIIE swap contracts. Source: Circular 4/2012 of Banco de México.

[73] CETIP is largest central depository for OTC and private securities and derivatives in Latin America

[74] BM&FBovespa is an exchange in Brazil and the leading exchange in Latin America

[75] CETIP and BM&FBovespa have been merged and, as of March 29, 2017, the adopted corporate name is B3 S.A. - Brasil, Bolsa, Balcão

[76] Generally, the information to be reported for CETIP and BM&FBovespa registration purposes will encompass the nature of the transaction, underlying assets and indexes, amounts, currency, terms, parties and methods for settlement, among other relevant information that may be required by the registration systems to accurately describe the transaction

Appendix E
Attachment 5

ISDA® Safe, Efficient Markets

March 16, 2016

Mr. Christopher Kirkpatrick,
Secretary of the Commission,
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St, N.W.
Washington, DC 20581

Re: Regulation Automated Trading; Proposed Rule: 17 CFR Parts 1, 38, 40 et al.

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("ISDA")[1] appreciates the opportunity to submit these comments on the Commodity Futures Trading Commission's (the "Commission") Proposed Rule, Regulation Automated Trading ("Proposed Rule").

ISDA fully supports the goal of reducing risk in the financial markets, ensuring reliable and orderly price discovery and preventing market abuses. To that end, we believe that proper risk controls and monitoring requirements are important mechanisms for furthering that goal. Our members have invested substantial human and technological resources to enhance the reliability of financial markets. We support the Commission's efforts to ensure continued implementation of the necessary risk controls to minimize the risk of market disruption. With that in mind, ISDA members believe that the Commission should strike the necessary balance between the regulatory goal of

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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, clearing houses 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 website: www.isda.org.

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 F 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

preventing market disruptions and adopting flexible approaches that account for new and evolving technologies.

As we discuss in more detail below, it is important that the Commission requires implementation of risk controls that are appropriately tailored to the role of the market participant and/or the manner in which such participant operates in the market. We caution the Commission against imposing impractical and prescriptive requirements that could deter market participants from improving their risk control systems for fear of being in violation of an ambiguous or unworkable rule.

To avoid unnecessary complexity or duplication, the Commission should consider its existing regulatory authority, including the authority over disruptive trading practices and prohibition against price manipulation and the use of manipulative and deceptive devices.[2] The Commission should also conduct a thorough cost-benefit analysis, taking into account the full impact of the Proposed Rule in conjunction with other regulations, including the upcoming rules that will be phased in over time through 2019. Any new requirements, specifically those relating to new software system development and reporting will incur significant implementation and compliance costs for many market participants, but would be especially burdensome for smaller entities, putting them at a competitive disadvantage.

Lastly, the implementation of the Dodd-Frank Act in the U.S. and MiFID II/MiFIR in Europe has highlighted the importance of consistent regulatory approaches to issues arising from different jurisdictions. Adopting regulations in isolation poses the risk of creating regulatory arbitrage and duplicative compliance obligations. We urge the Commission to consider aligning the overarching concepts inherent in MiFID II when finalizing the Proposed Rule to ensure proper oversight and a more level playing field between the U.S. and EU.

We would like to emphasize the following themes in our letter.

Definition of Algorithmic Trading

As currently drafted, the proposed definition applies indistinguishably to "black box trading" (a proprietary trading system that utilizes pre-programmed logic to both generate and route orders to the Designated Contract Market ("DCM") without any human interaction) and to standardized execution algorithms where the order is

[2] Antidisruptive Practices Authority, 78 Fed. Reg. 31890 (May 28, 2013); Prohibition against Manipulation, 17 C.F.R. Part 180 (2015).

initiated by a natural person and the algorithm is utilized to route the order to the DCM. These two models do not pose the same level of risk. The proposed definition only exempts orders whose "every parameter or attribute is manually entered into a front-end system by a natural person" prior to its electronic submission for processing to a DCM. We believe that the definition should be more nuanced and reflect the level of human judgment that is involved in trade execution.

The Commission should make a clear distinction between order routing 'automation' (an electronic system where users set certain parameters, provide manual instruction, and direct the system to execute a trade) and 'algorithmic' trading (a trading system programmed to follow a defined set of instructions to both generate and route orders).[3] This would allow the Commission to establish more effective supervision and risk management standards over the type of trading activity that the proposal is intended to cover.

In response to the Commission's question regarding potentially expanding the proposed definition of Algorithmic Trading to include orders that are generated using algorithmic methods but are then manually entered into a front-end system, ISDA does not believe that such activity should be included within the definition of Algorithmic Trading. As described above, the Commission should make clear that its definition of Algorithmic Trading is intended to cover only those algorithms that both automatically initiate, modify or cancel orders and subsequently route such orders to the DCM for execution without any element of human intervention. This definition would be consistent with ESMA's approach, as well as the approaches of the CME and ICE.

Finally, consistent with the requirements in MiFID II,[4] we recommend that the Commission exclude order routing and/or order processing algorithms from the proposed definition of Algorithmic Trading. Errors in these forms of automation do not put the trading entity at risk of insolvency or otherwise create a material market impact because the initial order has been inputted by a natural person.

Application of the Proposed Rule to AT Persons

The Proposed Rule applies to all AT Persons that are either registered or required to be registered with the Commission regardless of whether such Persons use direct or indirect access, whereas Floor Traders with indirect access fall outside the scope of the

[3] See e.g., CME's definition of Automated Trading Systems, Operator Identification for Automated Trading Systems, available at https://www.cmegroup.com/rulebook/files/CME_Group_RA0908-5.pdf.

[4] European Commission, "Updated rules for markets in financial instruments: MiFID 2" (June 12, 2014), available at http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm.

Proposed Rule. We note that indirect electronic access provides an effective safeguard against market failures arising from a fully automated trade. Futures Commission Merchants ("FCMs") pre-trade limit checks prevent DCM trades from being executed once the applicable limit is reached.

ISDA members firmly believe that the application of this proposal is too broad in terms of persons to which it would apply. There is no regulatory benefit from requiring AT Persons with indirect access to comply with most aspects of the Proposed Rule, especially when it does not apply to Floor Traders with indirect access. For example, certain AT Persons with indirect access exclusively utilize standardized algorithms that are developed and maintained by independent third-party algorithm providers. AT Persons do not have access to the source code for standardized third-party algorithms, which resides on the algorithm providers' servers, and therefore, do not have the ability to modify, control or access the algorithm's programmed risk controls, such as maximum order message frequency.

Definition of Algorithmic Trading Compliance Issue

We believe that the broad reach of the proposed definition of Algorithmic Trading Compliance Issue ("ATCI") extends far beyond the intended regulatory objectives and overall public policy goals of the Proposed Rule. It encompasses any violation of the Commodity Exchange Act or the Commission's rules. We recommend that the Commission revise the definition to limit its application to non-compliance with the Proposed Rule and DCM or FCM rules specific to Algorithmic Trading.

In addition, the proposed definition of ATCI covers violations of AT Persons' own internal policies. The goal of internal control and reporting policies should be to identify compliance risks and potential problems and respond by investigating and resolving these problems. However, it is our view that making non-compliance with internal policies a regulatory violation may create a disincentive for firms to detect violations and evaluate possible internal corrective actions for fear of the Commission's enforcement actions, thus creating a less effective system of internal compliance policies.

Policies and Procedures for the Development and Testing of Automated Trading Systems

It is important that the Commission maintains a principles-based approach to oversight and testing of Automated Trading Systems and allows market participants to determine and allocate responsibility for, among other things, conducting testing of their trading algorithms.

While we support the implementation of additional safeguards for those participants that develop algorithmic trading strategies, we caution the Commission against adopting duplicative and overly prescriptive rules that would place certain participants in the position of having to comply with a requirement that is not within their direct control.

To that end, the Commission should distinguish between firms that develop (and potentially use) algorithms and entities that license algorithms from third-party algorithm providers. Specifically, the Commission should consider exempting from certain requirements of the Proposed Rule participants that only utilize algorithms that are developed by third-party algorithm providers, especially where such algorithm providers are also registered with the Commission (i.e., FCMs, Introducing Brokers, Floor Traders, Swap Dealers, etc.). The application of certain of the proposed requirements, including testing of algorithms and source code retention, to both the algorithm providers (who create the algorithms) and the market participants who license the same algorithms from the algorithm providers (i.e., Commodity Trading Advisors or Commodity Pool Operators) is duplicative, impractical, and would result in additional costs to market participants without commensurate regulatory benefits.

AT Persons that do not develop Automated Trading Systems but simply access algorithms of third-party providers do not have access to the proprietary source code, and therefore, rely on the algorithm providers that develop their algorithms to test the algorithms, meet the audit requirements, make the code available to regulators, and facilitate compliance with certain pre-trade risk controls. Third-party providers that develop their own automated trading tools should have the responsibility for testing their systems against DCM trading systems. For operating models and trading software to stand up to scrutiny from market participants and regulators, these systems should be tested and supervised by persons who design these systems.

Thus, the Commission should allow a participant that is in the best position to perform the necessary testing to fulfill this requirement on behalf of the other participant. As discussed further below, market participants that develop their own algorithms have significant interest in protecting their valuable intellectual property and typically do not make the source code available to third-party users. The Proposed Rule would put such third-party users in the untenable position of having to maintain audit records and make available source code that they do not possess or have any right to access. If the Commission determines to use the current proposed definition, which would require third-party users to comply with the same requirements as those entities that develop algorithms, we urge the Commission to create an exception that would allow third-party

users who do not have direct electronic access to rely on the algorithm developer, to the extent such developer is also an FCM, to satisfy the testing and source code requirements under the rule.

We note that the Commission has previously allowed for one party to perform specific regulatory requirements where the performance of such obligations by another party would be duplicative or impractical.[5] We recommend that the Commission allow this practice for testing of licensed algorithms as well.

Source Code Audit Trail and Inspection

The requirement to maintain a source code repository in accordance with the Commission's recordkeeping requirements raises a number of serious concerns surrounding protections of intellectual property and privacy. AT Persons invest significant resources into developing the software and maintaining its confidentiality; it is the firm's lifeblood and the most important intellectual property. It is completely different from traditional "books and records."

We share the concern that the proposed requirement to retain a source code repository and make it available for inspection by the Commission or the Justice Department without a subpoena would allow the government unprecedented access to a future business strategy of a commercial enterprise.[6]

In addition, as we discussed above, market participants who license algorithms from third-party algorithm providers do not have access to the source code. These entities should not be required to obtain such source code as it would require such entities to maintain third-party proprietary information, which imposes significant liability and risk and makes this software more vulnerable to the risk of inadvertent disclosure or hacking.[7]

Thus, we recommend firms safeguard source code information according to their internal standards and produce it to the government upon the issuance of a subpoena.

---

[5] *See e.g.*, 17 C.F.R. § 45.8 (Swap Data Recordkeeping and Reporting Requirements, Determination of which counterparty must report).
[6] Statement of Commissioner J. Christopher Giancarlo Regarding Notice of Proposed Rulemaking on Regulation Automated Trading, November 24, 2015 ("Commissioner Giancarlo Statement"), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement112415.
[7] *Id.*

Compliance Reports

We believe the requirement that each registrant provide annual compliance reports to each DCM is overly burdensome and costly both for registrants and DCMs that will be responsible for maintaining these records. This requirement should be treated like any other rule with respect to compliance and auditing, where registrants keep their own records and produce them in response to exams and audits.[8] A more effective way of verifying compliance with the proposed regulation is to require certification of compliance signed by senior management and making such certification available for inspection by DCMs or the Commission upon request.

NFA's New Responsibilities

We are concerned that the Proposed Rule requires NFA to create an additional layer of the regulatory compliance regime, without identifying any policy or regulatory benefit. We especially question the benefit of NFA's involvement given DCMs' leading role in monitoring algorithmic trading.

DCMs have long been leaders in the innovation, design, and implementation of various risk management functionalities. They employ significant human and technological resources to ensure resiliency of trading systems and adherence by their members to the established and well tested risk management standards.[9]

Any new measures should add regulatory value and not duplicate, and certainly not conflict with what has been successfully adopted by DCMs. Where standards already exist, any additional layer can cause confusion, unnecessary complexity and costs. If a regulatory gap is identified, regulation can establish guidance as to best practices. In our view, the Commission has not identified such a regulatory gap.

In any event, if NFA is required to impose additional regulatory obligations, it is important that the Commission provide all market participants with adequate time to put any new systems and standards in place. If market participants are not given sufficient time to develop and implement new compliance programs and system

---

[8] *See e.g.*, 17 C.F.R. § 38.254, Availability to Obtain Information (each DCM "must have rules that require traders . . . to keep records of their trading . . . and make such records available, upon request," to the DCM).

[9] Commissioner Giancarlo Statement, available at http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement112415.

functionality, the Commission will increase the very risks of system failures the Proposed Rule is intended to prevent.

We appreciate the opportunity to comment on the Proposed Rule. Please contact me at 202-756-1972 or via email at brozenberg@isda.org with any questions the Commission might have with respect to the comments contained in this letter.

Sincerely,

Bella Rozenberg
Senior Counsel
Head of Regulatory and Legal Practice Group

Appendix E
Attachment 6

ISDA Safe, Efficient Markets

May 1, 2017

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St, N.W.
Washington, DC 20581

Re: Regulation Automated Trading; Proposed Rule: 17 CFR Parts 1, 38, 40 et al Supplemental Notice of Proposed Rulemaking, RIN 3038–AD52

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("ISDA")[1] appreciates the opportunity to submit these comments on the Supplemental Notice of Proposed Rulemaking for Regulation AT ("Supplemental Notice)[2] published by the U.S. Commodity Futures Trading Commission ("CFTC" or "Commission").

We reiterate our full support of the Commission's goal to reduce risk in the financial markets, ensure reliable and orderly price discovery and prevent market abuses. As we noted in our prior submission, we believe that proper risk controls and monitoring requirements are important mechanisms for furthering that goal. To that end, any final

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 66 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, clearing houses 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 website: www.isda.org.

[2] CFTC Supplemental Notice of Proposed Rulemaking, *Regulation Automated Trading*, 81 Fed. Reg. 85334 (Nov. 25, 2016).

International Swaps and Derivatives Association, Inc.
600 13th Street, NW
Suite 320
Washington, DC 20004
P 202 638 9330 F 202 683 9329
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

regulation should fully account for the effectiveness of the existing industry mechanisms and best practices, as well as the continuing self-regulatory efforts to minimize the risk of market disruption, and seek to minimize the impact of the final regulations on market participants to the extent necessary to achieve the Commission's stated goals.

In this regard, we ask that the Commission review both the Regulation Automated Trading Proposal[3] and the Supplemental Notice to ensure that it is in line with the objectives of Acting-Chairman Giancarlo's project KISS—an initiative to apply the Commission's rules in ways that are more straightforward and cost-effective. In light of the Acting-Chairman's goals, we urge the Commission to reconsider its current approach under both the Regulation Automated Trading Proposal and the Supplemental Notice and take a principles-based approach toward automated trading, rather than implementing a set of impracticable and prescriptive rules. We believe that a principles-based approach will enable the Commission to achieve its goals of reducing risk and/or preventing market disruptions while, at the same time, minimizing excessive burdens and costs to market participants.

We appreciate the Commission's decision to issue this Supplemental Notice to address the feedback it received in response to its initial Proposal.[4] We support certain aspects of the Supplemental Notice, including allowing market participants greater discretion regarding compliance with the pre-trade risk control requirements and proposing a risk control framework at two, rather than three levels AT Person or Futures Commission Merchant ("FCM") and Designated Contract Market ("DCM")).

We are troubled, however, by the Commission's unexpected expansion of the Proposal's scope through the Supplemental Notice. Specifically, the proposed definition of Direct Electronic Access ("DEA") now includes all *electronic* orders originating from clients that are processed in any manner through an FCM's electronic order handling infrastructure—even if an algorithm is not utilized or they are not routed directly by a client to a DCM. This change represents a significant departure from the position taken by the Commission in the NPRM and does not address the risks related to automated trading on DCMs.[5] Rather, we believe a more appropriate approach would be to amend the AT Person definition to capture those Commission registrants who have DEA and whose trades do not flow through an FCM's risk controls before reaching the DCM.

We also are concerned that the Commission's proposed compliance alternative for AT Persons using third-party Automated Trading Systems ("ATSs") does not relieve AT

---

[3] CFTC Notice of Proposed Rulemaking, *Regulation Automated Trading*, 81 Fed. Reg. 78824 (Dec. 17, 2015).
[4] Proposed Rule, *Regulation Automated Trading*, 80 Fed. Reg. 78837 (Dec. 17, 2015) (to be codified at 17 C.F.R. §§ 1, 38, 40, and 170).
[5] *Id*. at 78827.

Persons from the responsibility to test and maintain the source code that they do not possess or have any right to access. Further, consistent with Acting-Chairman Giancarlo's dissenting statement in the Supplemental Notice, this requirement places AT Persons who use third-party ATSs in the untenable position of having to compel compliance by its service providers with the Supplemental Notice's testing and recordkeeping requirements.

Finally, we remain concerned that the Commission continues to insist on circumventing the due process procedures by proposing to have the ability to access the ATS source code without obtaining a subpoena. In lieu of the due process protections, the Commission proposes to utilize a "special call" procedure, an internal agency process that is authorized by the Commission itself and executed by the Director of the Division of Market Oversight ("DMO").

The discussion below focuses on the three areas of concern.

1. Unsubstantiated Expansion of the Scope of the Proposal

Absent a significant material change in the markets, the Commission has not explained why it has determined to change course and expand the scope of the Proposal. Under the new proposed definition, DEA includes any arrangement where a market participant electronically transmits an order, modification or cancellation to a DCM. The Commission intends to address concerns regarding market disruptions by simply casting a wide net without explaining why the newly captured market participants now pose the type of risk that could lead to market disruptions.

Further, in an attempt to limit the registration requirements to firms that can cause significant market disruptions, the Commission proposes to set a minimum volumetric trading threshold as a pre-requisite to the registration requirement. While an aggregate volume threshold may exclude smaller firms from the CFTC regulations, these firms would still fall within CFTC jurisdiction due to the re-proposed expanded definition of DEA and the overly expansive reach of the volume threshold test, which applies to the volume of all *electronic* trading. To that end, it is not apparent to ISDA why the Commission has concluded that the proposal will reduce the number of participants affected by the proposed regulation to 120 firms.

We believe that, at a time when market participants continue to work tirelessly to comply with other new and forthcoming regulatory requirements, the Commission should fully consider the impact that an unexpected expansion of the Proposal would have on the compliance costs for smaller firms and firms that do not engage in the activity in which the Proposal is focused. These firms will be expected to yet again allocate scarce resources in the form of personnel, time and capital to comply with the costly registration and compliance requirements and to overhaul or modify their existing risk control

mechanisms and other operations. Moreover, due to the breadth of the definition, some smaller firms would have no experience with the CFTC regulatory regime, which is likely to exacerbate their compliance costs. All of these changes still would not address the essence of the Commission's fundamental concern—prevention or reduction of risk to the market caused by firms engaged in black box and high frequency trading directly on the DCM.

Separately, requiring firms that execute trades through an FCM to register as AT Persons would be another example of regulatory overreach with significant costs and potentially conflicting compliance requirements with no associated benefit. A better approach would be to limit the definition of DEA to trading activity that does not flow through an FCM's risk controls. We believe that our proposed alternative aligns with the Commission's stated goals and would accurately limit the scope of the rule to capture only those participants that do not have the necessary risk controls in place and that may pose the type of risk that could lead to market disruptions.

As we noted in our March 16, 2016 letter, prior to establishing any automated trading regulatory framework, it is essential to distinguish between two categories of AT Persons: (1) market participants that use a pre-programmed computer algorithm that involves no human involvement and (2) market participants that utilize some form of electronic trading system to execute their orders. Undoubtedly, the latter category does not remotely present a similar level of threat to the market to warrant the imposition of the same regulatory framework. Instead of subjecting more market participants to the burdensome regulatory requirements, the Commission, together with market participants who utilized pre-programmed trading algorithms, should first and foremost focus on establishing properly-tailored risk control mechanisms to be able to quickly and effectively respond to possible disruptive events caused by large algorithmic traders. Alternatively, the Commission should refine the definition of DEA and narrowly tailor the scope of the AT Person definition to focus on market participants that use a pre-programmed algorithm that involves no human involvement and where such orders are transmitted directly to the DCM without passing through the FCM's risk controls.

2. Unworkable Alternative Compliance Regime for Third-Party Systems

The Commission proposes an alternative framework for AT Persons to comply with their obligations related to monitoring and testing of ATSs. Under the Supplemental Notice, AT Persons who, due solely to their use of third-party systems, are unable to comply with a particular development or testing requirements, may comply with the obligations by satisfying two requirements: (i) obtaining a certification that the third party is complying with the obligation and (ii) conducting due diligence regarding the accuracy of the certification. This approach is untenable as it requires an AT Person to cause an independent third-party ATS to comply with the relevant regulations, while the AT

Person remains responsible for the third-party's compliance with the relevant recordkeeping obligations, including the third-party's willingness to provide the Commission access to the third-party's proprietary source code.

Although the Proposal theoretically permits an AT Person to rely on certification by the third-party of its compliance with the rules, including testing and recordkeeping, this approach is unworkable in practice because the third-party ATS provider is not legally obligated to provide such a certification and an AT Person does not have the authority to cause an independent third party to turn over their proprietary source code. Rather, the scope of any testing, certification or due diligence undertaken by the third-party is subject to a bilateral negotiation, which will likely entail increased costs for third-party users due to the regulatory and operational complexities attendant to using third-party ATSs under the Proposal.

In addition to an initial certification and an annual certification, the Proposal requires AT Persons to obtain a new certification from the third-party ATS provider in the event of any material changes to the ATS. This requirement is overly burdensome and will result in increased costs and administrative obstacles, particularly in light of the requirement to provide an initial certification and annual certification covering all existing and future changes. These certifications, particularly to the extent the AT Person is separately required to conduct due diligence (discussed below), amounts to regulatory overkill.

With regards to the proposed requirement that AT Persons, despite obtaining the certifications demonstrating that the ATS complies with the CFTC required system development and testing requirements, must still conduct due diligence to verify the accuracy of the certification, it is important to note that the third-party ATS provider may refuse the AT Person's request to provide access to the requisite information since the third-party does not have a legal obligation to honor the request. Finally, the third-party may also refuse to provide the relevant source code upon the AT Person's request, based on a CFTC subpoena or special call request to the AT Person, in which event the AT Person would remain liable for such an omission by a third-party over which the AT Person has no control. The net result of this alternative compliance regime would leave AT Persons with the same untenable responsibility to monitor and test ATSs that was proposed in the NPRM and that was vehemently opposed by the majority of market participants.

Notably, the Commission acknowledges that "obtaining certification and conducting due diligence may still be challenging for some AT Persons," but nevertheless decides to go forward with the proposal. Setting out an unworkable regulatory framework would only lead to more enforcement reviews and would disincentivize market participants to provide liquidity and price discovery.

We firmly believe that FCMs and third-party providers are in a better position to perform the necessary testing and requisite certification to fulfill the regulatory requirements.

3. **Supplemental Notice Continues to Place Firms' Source Code at Unnecessary Risk**

We are concerned that the Commission continues to insist on making the source code available for inspection by the Commission without a subpoena despite fervent objections by market participants. The internal procedural safeguards offered by the Commission do not remedy the problem. We agree with Acting-Chairman Giancarlo that "the special call process provides the CFTC an end-run-around the subpoena process" and that although the Commission states it will "use the special call process to obtain source code in carrying out its market oversight responsibilities, there is no limit in the proposed rule on DMO staff from sharing source code with staff of the Division of Enforcement."[6] To reiterate, the fact that the Commission will have unprecedented access to firms' intellectual property by forgoing the requisite due process protections cannot be justified by any policy objective. We echo Acting-Chairman Giancarlo's concerns that this requirement would "give[] unchecked power to the CFTC to decide if, when and how property owners must turn over their source code."[7]

Accordingly, we strongly believe that the Commission should be allowed to obtain the source code only upon issuance of a subpoena.

****

We appreciate the opportunity to comment on the Supplemental Notice. Please contact me at (212) 901-6031 or via email at kdarras@isda.org with any questions the Commission might have with respect to the comments contained in this letter.

Sincerely,

Katherine T. Darras
General Counsel
International Swaps & Derivatives Association, Inc.

[6] Statement of Dissent by Commissioner J. Christopher Giancarlo Regarding Supplemental Notice of Proposed Rulemaking on Regulation Automated Trading (Nov. 4, 2016), available at http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement110416.
[7] *Id.*

Appendix E
Attachment 7

ISDA Safe, Efficient Markets

February 23, 2017

Submitted Electronically

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Position Limits for Derivatives: Re-Proposal (RIN 3038-AD99)

Dear Mr. Kirkpatrick:

The International Swaps and Derivatives Association, Inc. ("ISDA")[1] appreciates the opportunity to submit these comments with respect to the notice of proposed rulemaking (the "Proposal")[2] published by the Commodity Futures Trading Commission ("CFTC" or the "Commission") regarding re-proposed rules governing position limits of physical commodities and related derivatives.

As the trade association for the global derivatives market, ISDA monitors regulatory developments that could affect the ability of market participants to use derivatives to,

---

1 Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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, clearing houses 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.

2 Position Limits for Derivatives, 81 Fed. Reg. 96704 (Dec. 30, 2016).

International Swaps and Derivatives Association, Inc.
600 13th Street, NW
Suite 320
Washington, DC 20004
P 202 638 9330 **F** 202 683 9329
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

among other things, execute hedging and risk management strategies. ISDA, either on its own or jointly with fellow trade associations, has previously submitted a series of comment letters addressing the CFTC's various proposed position limits rules,[3] each of which we also incorporate herein. We believe many of the points raised and extensive analysis in those pervious comment letters remain applicable to the Proposal.

Although ISDA is supportive of the incremental changes the CFTC has made to the proposed position limits framework in response to commenters on the prior releases, ISDA and its members continue to have a number of concerns about several aspects of the re-proposed position limits rules, both from a practical and logistical perspective as well as substantively:

- ISDA continues to believe that there is no statutory authority for the imposition of position limits as currently proposed. The implementation of position limits could significantly harm market liquidity and reduce the ability of commercial market participants to engage in hedging and risk management activities, without any commensurate market protection or benefits. The current Proposal structure should be abandoned in favor of a principles based and incremental approach.

- If the Commission does pursue a positions limits rulemaking in a form similar to the Proposal, the structure of the ruleset should be significantly revised. For example:

  - Position limits should not apply to derivatives held outside of the spot month.

  - Position limits should not apply to financially settled futures contracts.

  - Position limits should not apply to swap positions.

  - The Proposal should include a risk management exemption.

---

[3] Those comments include, among others, the following: ISDA/SIFMA Comment Letter re Proposed Regulations Regarding Position Limits for Derivatives, January 11, 2011; ISDA/SIFMA Comment Letter re Notice of Proposed Rulemaking – Position Limits for Derivatives (RIN 3038 AD15 and 3038-AD16), March 28, 2011; ISDA/SIFMA Comment Letter re Position Limits for Futures and Swaps (RIN 3038- AD17), January 17, 2012; ISDA Comment Letter re Notice of Proposed Rulemaking – Position Limits for Derivatives (RIN 3038-AD99), February 10, 2014; ISDA/SIFMA Comment Letter re Reopening of Comment Periods – Position Limits for Derivatives (RIN 3038-AD99) (the "2014 letter") and Aggregation of Positions (RIN 3038-82), July 7, 2014; ISDA Comment Letter re: Aggregation of Positions; Supplemental Notice of Proposed Rulemaking (RIN 3038-AD82), November 12, 2015; and ISDA Comment Letter re: Position Limits for Derivatives: Certain Exemptions and Guidance (RIN 3038-AD99), July 13, 2016 (the "2016 Letter").

- In addition, multiple technical changes to the proposed rules are required in order to mitigate the risk of significant market dislocation and disruption in the event the CFTC does adopt the Proposal as a final rule. For example:
  - The proposed exemptions for bona fide hedging should be expanded.
  - The delegation of exemptive authority to exchanges should be clarified.
  - The spread exemption guidance requiring exchanges to certify that any exchange approval of a spread exemption would increase liquidity should be eliminated.
  - The framework for required reporting of positions is burdensome and unworkable and should be modified or eliminated.
  - Cross-commodity netting should be broadly permitted to recognize prevailing market practice.
  - The calculation of estimated deliverable supply should be revised and specified.
  - Any final rule that is adopted should be phased-in over at least 12-months and should include clear and express "grandfathering" provisions.
  - The CFTC should collaborate with foreign regulators to ensure cross-border harmonization.

I. The CFTC must re-approach its position limits rulemaking efforts with a fresh perspective.

A. There continues to be no statutory authority for the position limits proposal in its current form.

While ISDA does appreciate the fact that the CFTC has made an effort to be responsive to industry and commenter concerns and has included changes in the Proposal reflecting several comments received on prior proposals, the CFTC continues to rely on its incorrect conclusion that the Dodd-Frank amendments to CEA section 4a(a) amounted to an unqualified mandate that the Commission impose position limits.[4] This is not supported by the statute, which unambiguously identifies standards that the CFTC must follow when it purports to exercise its position limits authority.

[4] For further analysis, *see generally* 2014 Letter at page 4; 2016 Letter at page 4.

The Commodity Exchange Act (the "CEA") provides that the CFTC may adopt position limits "as the Commission finds are necessary to diminish, eliminate, or prevent [the] burden" of "[e]xcessive speculation[,] . . . as appropriate."[5] Instead of attempting to fulfill this statutory requirement, the current Proposal attempts to salvage a rule structure that has already been overturned by the courts in one instance and that has now been re-proposed, supplemented and re-proposed again through a cumulative body of releases that span thousands of pages. Despite the serial proposals and re-proposals, the current proposal continues to fail to demonstrate that position limits are a necessary and appropriate solution for or response to any specific risk, problem or inefficiency in the commodity derivatives markets. The Commission has not provided empirical or data driven support for position limits, nor has the CFTC been able to point to any instance of trading misconduct or market inefficiency that would justify the use of the position limits as proposed. Continuing to ignore the clear instruction from Congress, the Proposal recycles the same irrelevant case study discussions[6] that were included in its 2013 release. The Proposal also, and consistent with the previous position limit proposals, refuses to attempt to provide any definition of "excessive speculation," the key statutory purpose for which the CFTC could justify position limits. In order to reach a finding of both the necessity and appropriateness of any position limits rule proposal, the Commission must determine that excessive speculation exists and that such limits would in some way curb or diminish the effects thereof.

B. The CFTC should abandon the Proposal in favor of a principles based incremental approach to position limits.

ISDA believes that if the Commission intends to pursue a position limits rulemaking that complies with the requirements of the CEA, the CFTC should first develop a practical and principles based framework for position limits that is supported by the statute. Specifically, as will be discussed further below, ISDA believes that the CFTC should first consider solely whether to expand its existing federal position limits program for agricultural commodity futures contracts to other physically delivered commodity futures contracts – and to the extent it does so, it should delegate the administration of limits for non-agricultural commodities to the exchanges. The CFTC has identified no factual or regulatory basis from which it could support imposing limits on financially settled contracts, whether that is futures or swaps, or on contracts that are beyond the spot month. Starting with only physically delivered commodity futures contracts in the spot month would allow the Commission to address the only actual area where excessively large positions present a potential risk of commodity price volatility or manipulation while gaining valuable data on market benefits and impact. In contrast, the wider scope of limits proposed in each of the CFTC's prior proposals, amendments and re-proposals

[5] *See* CEA section 4a; 7 U.S.C. § 4a. (emphasis added)

[6] See generally, Proposal at n. 158 and 187 (discussing the Hunt Brothers and Amaranth cases).

related to position limits for swaps have been met by overwhelming public comment indicating that the rules are impractical, unworkable, and unnecessary. Similarly, the comments have also made clear that such limits would present their own systemic risk to markets by impairing liquidity and ultimately limiting the ability of commercial market participants and end-users to hedge and manage risks – thus limiting their ability to make efficient capital allocation decisions and impairing their ability to make the long-term investments that create economic growth and jobs.

The CFTC has also failed to explain why accountability levels, rather than fixed position limits, would not appropriately allow it to manage and monitor traders with large positions. On this point, ISDA again observes that the CEA does not prohibit accountability levels; instead, the CEA authorizes the Commission to set limits on positions in contracts on physical, non-excluded commodities only as necessary and appropriate to prevent "excessive speculation." Accountability levels will permit the Commission to achieve the same purpose as position limits, but without imposing undue costs on market participants that will accompany fixed limits, and ISDA continues to encourage the Commission to consider where and how accountability limits may be used to mitigate the cost and burden impact of its positions limits proposals. Exchanges have used accountability limits as a successful surveillance and market monitoring tool for many years, and the Commission should embrace rather than reject that experience and learning.

The principles based approach adopted by the CFTC should also broadly empower exchanges to administer a hedging and risk management exemption program. The CFTC must recognize its role, as it is expressly articulated in the CEA, as overseeing "a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals."[7] The CEA did not contemplate that the CFTC (and not the exchanges) would be managing the technical details of market regulation, such as the precise terms, limits, and conditions that will apply when seeking a hedging or risk management exemption from position limits. To that end, a successful CFTC positon limits rule will provide a practical, principles based and common sense definition of both hedging and risk management that is to be interpreted and applied by the exchanges, using their experience and expertise, for the purposes of recognizing hedging and risk management exemptions from position limits. To the extent the exchanges require data or information from market participants to support claiming or relying on a hedging or risk management exemption, the exchanges should be empowered to request and obtain such data. This approach should also recognize, from the CFTC's perspective, the extensive breadth of existing tools the CFTC has at its disposal including large trader position reporting rules, enhanced market surveillance authority, broad special call authority and as discussed above, exchange-based limits.

[7] 7 U.S. Code § 5.

II. If the Commission does pursue a positions limits rulemaking in a form similar to the Proposal, the structure of the ruleset should be significantly revised.

A. Non-spot-month position limits are not necessary.

ISDA continues to urge the Commission to withdraw in its entirety any aspect of the Proposal that would impose position limits outside of the spot month (*i.e.*, non-spot month limits). The Commission has failed to establish that non-spot month limits are necessary or appropriate, or justified by any data or empirical evidence presented in the Proposal. As a result, the proposed position limits, to the extent they would apply in the non-spot month, are arbitrary and capricious and thus cannot be lawfully adopted as a final rule.

Non-spot month limits could have significant impact, and could result in a shift in market structure. Out-the-curve liquidity could disappear, along with the ability to hedge for market participants, as a direct result of the imposition of inappropriate non-spot month position limits. Similarly, markets could become further fragmented, as they have in response to other of the CFTC's Dodd-Frank rulemakings, including the swap execution facility rules. Moreover, and more importantly, nothing in the Proposal, like the prior proposals, provides any support for the proposition that these negative effects will be offset by greater protections to the market and market participants from these limits. They are therefore very likely to harm market participants without any corresponding benefits. Similarly, the Proposal fails to undertake a cost benefit analysis that sufficiently assesses the impact and cost of non-spot month limits on markets. At a minimum, the CFTC should refrain from regulating non-spot-month positions until it can establish a clear record of empirical support for such regulatory action.

B. Limits should not apply to financially settled futures contracts.

Like non-spot month limits, if position limits apply to financially settled contracts, the traders that provide the liquidity against which hedgers and commercial market participants trade may be forced to exit the market or to curtail their trading. A structural market shift could result wherein the futures and swaps markets fail to serve as a venue for price discovery and managing and hedging commercial risk.

Additionally, the Commission has not demonstrated that financially or cash-settled contracts are either disruptive to the markets or that position limits on these contracts would be useful in combatting excessive speculation or effective at limiting price distortion. Because a cash-settled contract does not, by definition, result in any activity in the underlying physical commodity (these contracts are, instead, dependent upon and generally price based on a reference to the physical market), the potential for a position in a cash-settled contract to disrupt or distort the price of a physical commodity is essentially non-existent. There is no evidence, nor does the Commission offer any evidence, that trading in cash-settled contracts influences the prices of either physically settled contracts or of physical commodities, generally.

Rather, these markets are used by both commercial and financial hedgers alike in the process of managing risks resulting from activity in the physical markets. Position limits on cash-settled commodities will reduce market liquidity and increase transaction costs for hedgers, while attaining no identified related benefits.

C. Limits should not apply to swaps positions.

As with non-spot month limits and financially settled contracts, the CFTC has not undertaken any meaningful effort to demonstrate that market participants are using swap transactions to engage in excessive speculation.

The Commission itself admits that its swaps data collection efforts remain a substantial work in progress, even following the implementation of the Dodd-Frank swap reporting program.[8] Imposing position limits on swaps, in the absence of valid data available to even define that market, has the potential for significant market disruption. The release does not indicate how or whether positon limits on swaps would solve for a market problem – in large part because the release does not identify or define any "market problem" that position limits for swaps are intended to address. Just like position limits on contracts outside the spot-month and financially settled contracts, the primary impact of position limits on cash-settled commodity swaps will be to reduce market liquidity and increase transaction costs for commercial market participants, thus reducing their ability to hedge commercial risks, with no related benefit.

D. The Proposal should include a risk management exemption.

Any position limits rule adopted should include an express "Risk Management Exemption", which is different than a hedge exemption and is meant to permit market participants to enter into futures and swaps positions to manage financial and other risks. The CFTC and the exchanges have recognized risk management exemptions, without incident, for decades. The CFTC should affirm that its positon limit rules will permit

[8] "The Commission is expending significant, agency-wide efforts to improve data collection and to analyze the data it receives." Proposal at 96721. While the Commission notes that it is "satisfied with the quality of the data on which it bases [this Proposal]" (*ibid*), it does not reconcile that observation with the fact that the Commission only recently (on June 27, 2016) finalized amendments to its reporting requirements for cleared swaps and the compliance date for those changes was not until December 27, 2016, after the date of the Proposal. More generally, the Proposal does not address Acting-Chairman Giancarlo's statements, made in a January 2017 speech, that: "The CFTC has faced many challenges in optimizing swaps data ranging from data field standardization and data validation to analysis automation and cross-border data aggregation and sharing. Market participants vary significantly in how they report the same data field to SDRs. Those same SDRs vary in how they report the data to the CFTC." Available at: http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-19#P31_7549.

market participants to engage in risk management activities. In light of the complete absence of actual market problems or inefficiencies associated with or attributable to legitimate risk management practices, the CFTC's rules should include a robust risk management exemption that encourages these prudent and traditional risk management activities.

III. Multiple technical changes to the proposed rules are required in order to mitigate the risk of significant market dislocation and disruption in the event the CFTC does move to a final rule.

A. The proposed exemptions for bona fide hedging should be expanded.

Any position limits final rule should expand the availability of thed bona fide hedging exemption to include all positions commonly used by market participants to hedge their physical commodity risk. More generally, the bona fide hedging definition must not be overly restrictive in its application of the economically appropriate test such that it fails to recognize that firms may measure and hedge or manage risk at any of the enterprise, legal entity, desk, book, trader or asset level. The bona fide hedging definition should not be formulated so as to dictate the specific business model and methodology that a commercial market participant must follow in hedging and risk managing their activities.

In addition to the exchange administered process for recognizing non-enumerated bona fide hedging positions, the Commission should include in any final rule a general process, with appropriate authority delegated to the exchanges, though which they may also exempt a traders' particular position from limits on a case-by-case basis pursuant to the authority under CEA Section 4a(a)(7).

B. The delegation of exemptive authority to exchanges should be clarified.

While ISDA appreciates the proposed rule's delegation of authority to exchanges in connection with granting exemptions for non-enumerated bona fide hedging positions, the Commission should further clarify the deferential nature of any subsequent review of an exemptive grant. ISDA greatly supports the recognition by the Commission of both (i) the experience and expertise that the exchanges are able to offer to this aspect of the position limits rules and (ii) the practical cost and logistical limitations that the Commission would face if attempting to administer the exemption process on its own. However, in order to ensure realization of these objectives, ISDA strongly encourages the Commission to clarify, to the maximum extent possible, its intention to delegate these functions to the exchange. Market participants are concerned that, absent an express commitment from the CFTC to defer to exchange decisions, the process could itself become disruptive to the markets and market participants. The Commission should similarly evaluate the benefits of extending to the exchanges authority to grant bona fide hedge or risk management exemptions outright (and without CFTC review, other than the authority of the CFTC to review generally an exchange's exercise of this authority).

Additionally, ISDA continues to be concerned about the lack of clarity on the expected level of coordination that is to occur among different exchanges with respect to limits and exemptions across markets. Each individual exchange should have the authority to determine, using its particular market expertise, the appropriate exemptions for its markets. However, the exchanges should not be subject to different review determinations by the CFTC with respect to exemptions granted from the limits on contracts for the same or related commodities. This goal would be furthered by the establishment of standards applicable to all exchanges, so that actions by different exchanges are dealt with in a consistent manner.

C. The spread exemption guidance should be modified or eliminated.

The Proposal continues to require that before granting a spread exemption, an exchange must certify that the specific exemption increases liquidity. No requirement in the CEA or any other statutory authority implicates such a requirement, and such requirement actually misplaces the liquidity requirements in the CEA, which says that the burden is on the CFTC to confirm that position limits, if adopted, will continue to ensure sufficient liquidity for bona fide hedgers.[9] In contrast, the Proposal would place the liquidity burden on the exchanges or market participants seeking an exemption. This requirement is inconsistent with the Commission's statutory mandate and logically inconsistent: the purpose of the spread exemption is to recognize the more limited speculative opportunities afforded by such positions, because in a spread, a long on one contract is offset by a short on another contract – a spread is a position in the basis between two contracts rather than a view on the contracts themselves. The primary purpose of a spread is not to increase liquidity but to create the exposure to this basis.

D. The framework for required reporting of positions is unworkable and should be modified or eliminated.

The various reporting conditions applicable to both market participants and exchanges in connection with seeking, obtaining and maintaining a valid exemption from position limits are overly broad and completely unworkable. In our view, market participants should not be required to update a report every time they change/modify their position, which would not add value to either the exchange's or the Commission's oversight. More importantly, neither exchanges nor the Commission are likely to have resources available to meaningfully review these reports. ISDA observes that the CFTC always retains the ability to obtain this information, as needed, for example via a special call, and ISDA encourages the Commission not to finalize rules that would impose impractical and unnecessary reporting requirements.

[9] *See* CEA Section 4a(a)(3).

E. Cross-commodity netting should be permitted to recognize prevailing market practice.

Given the strong correlative relationships of certain commodities, permitting cross-commodity netting is vital in recognizing the current prevailing market practice. While ISDA understands the difficulty of setting and calculating a requisite level of correlation sufficient to permit such netting, we believe that permitting a market participant to demonstrate that a particular commodity pair reaches a threshold level is a pragmatic approach. Alternatively, cross-commodity netting (and cross-commodity hedging) could be permitted by the CFTC within a framework of recognizing those cross-commodity relationships that are in wide use by market convention and practice. The conditions applicable to cross-commodity netting must not unreasonably restrict these risk management and hedging practices by requiring, for example, an artificial quantitative threshold correlation factor.

F. The calculation of estimated deliverable supply should be revised and specified.

The "estimated deliverable supply" methodology that is proposed remains ambiguous and unreliable. ISDA's concern is that this definition could become a tool the CFTC uses effectively to lower position limits without going through a formal notice and comment process. If the CFTC were to specify how it intends to develop its own estimates of deliverable supply, the definition would be less susceptible to arbitrary interpretation. For that reason, the Commission should always publish its estimates of deliverable supply for public review and comment – and the CFTC should always identify the data that it uses to reach its estimates. Moreover, the CFTC should permit challenges to the CFTC's estimated levels by demonstrating that they do not accurately reflect all sources and levels of actual market supplies.

G. Any final rule on position limits should be phased-in.

To the extent the Commission finalizes positon limits, there must be at least a 12-month phase-in as well as clear and express "grandfathering" provisions that ensure any preexisting positions may be held and rolled even after the final rules go into effect. This grandfathering of current holdings and a phase-in period is essential for the technology system builds, new compliance procedures and monitoring programs which will be required by market participants prior to complying with a new rule program

H. The Commission should address cross-border harmonization.

To the extent that the Commission does move forward to finalize any aspect of the position limits rules, we continue to request that the Commission collaborate with foreign regulators to avoid a multiplicity of differing compliance regimes, each with their own requirements and timelines, affecting the same market participants. Specifically, for market participants that transact in multiple jurisdictions, the Commission must provide clear rules and guidance addressing its plans to harmonize its position limits efforts with

those of its fellow global regulators. This was and remains a major area of uncertainty and ambiguity for market participants as they seek to comply with the broader set of the Commission's Dodd-Frank swaps rulemakings. International collaboration has been highlighted as a priority by Acting Chairman Giancarlo[10] and ISDA and its members hope to avoid a position limits implementation process that could independently disrupt domestic and global markets if done without careful cooperation among and between global regulators.

* * * *

[10] *See* Keynote Address of Commissioner J. Christopher Giancarlo, SEFCON VII, January 18, 2017 ("Regulators must set limits on the cross-border application of swaps rules to achieve the ends of market reform in a spirit of cooperation and deference.").

ISDA appreciates the opportunity to provide these comments. If we may provide further information, please do not hesitate to contact the undersigned or ISDA staff.

Sincerely,

Steven Kennedy
Global Head of Public Policy

cc: J. Christopher Giancarlo, Acting-Chairman

Sharon Y. Bowen, Commissioner

Stephen Sherrod, Senior Economist, Division of Market Oversight

Riva Spear Adriance, Senior Special Counsel

Hannah Ropp, Surveillance Analyst

Lee Ann Duffy, Assistant General Counsel, Office of General Counsel

Steven Benton, Industry Economist, Division of Market Oversight

Kenneth M. Raisler, Sullivan & Cromwell LLP