ISDA Safe, Efficient Markets

June 9, 2011

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

Re: Notice of Proposed Rulemaking for Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps (76 Fed. Reg. 22833)

Dear Mr. Stawick:

The International Swaps and Derivatives Association, Inc. ("ISDA") is writing in response to the Notice of Proposed Rulemaking for Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps (the "NPR") issued by the Commodity Futures Trading Commission (the "Commission") to implement provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

Since 1985, ISDA has worked to make the global over-the-counter ("OTC") derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 800 member institutions from 56 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.

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

ISDA respectfully submits the following comments regarding the NPR. We also refer to the letter submitted to the Commission by ISDA and the Futures Industry Association in response to the Interim Final Rule for Reporting Pre-Enactment Swap Transactions (the "IFR Comment Letter")[1]. While we believe some of the comments in the IFR Comment Letter have been reflected in the NPR, there remain a number of issues that still require the Commission's

[1] See ISDA and Futures Industry Association Letter dated November 12, 2010 RE: Interim Final Rule for Reporting Pre-Enactment Swap Transactions (75 Fed. Reg. 63080)

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attention. This letter is therefore divided into two sections, first new comments and then comments relating to issues raised in the IFR Comment Letter.

I. New Issues

Compliance Date

The Commission raises an important, overarching question, requesting industry input for a proposed compliance date. After the date that the Commission issues final regulations, including final regulations for historical swaps, the industry will need a reasonable period of time to implement the requirements, including time for entities to register as swap execution facilities, designated contract markets, designated clearing organizations or swap data repositories ("SDRs"), adapt or create automated systems and revise their policies and procedures. Accordingly, the Commission suggests it may be appropriate to establish a compliance date that is later than the date the final regulations are issued (the "Compliance Date"). ISDA agrees and suggests that the Compliance Date for regulatory reporting should commence after a reasonable period of time (which should be no less than 12 months and could be longer) following the date that all final rules under Title VII of the Dodd-Frank Act are published in the Federal Register by the Commission and the Securities and Exchange Commission ("SEC"). Compliance with the rules will require a significant data "backloading" exercise, which will need time to be implemented and likely completed in phases during the period between finalization of the rules and the Compliance Date. Requirements could be phased in based on the state of readiness of each particular asset class (including, where applicable, by specific products within an asset class) and market participant type. The industry should not be required to implement costly reporting infrastructure based on *proposed* rules.

We also reiterate our support for reopening and extending the comment periods of the Commission and the SEC (together, the "Commissions") under a minimum 90-day "Post-finalization Review" beginning after the final mosaic of swap regulations are revealed[2] (June 2, 2011 ISDA letter). This 90-day comment period will afford the market time to understand the impact of interlinked rules on one another and study and comment upon the proposal as a whole, and could run concurrently with the 12 month minimum time period proposed above. We reiterate that this recommendation is in addition to, and not a substitute for, the phase-in recommendations.

The timing for the Compliance Date is also related to timing for effectiveness of other requirements. In particular, as ISDA and other trade associations have highlighted to the Commissions,[3] we strongly suggest that reporting to regulators begin prior to public reporting, to provide the Commissions with the information they require to make informed decisions to establish block trade and position limit thresholds and other rule making efforts. Following a period of time that the Commissions determine that they have collected adequate information from regulatory reporting and if technology infrastructures in the industry and at the

[2] See ISDA Letter dated June 2, 2011 RE: Reopening and Extension of Comment Periods and Request for Comment on the Order in which the CFTC Should Consider Final Rulemakings (76 Fed. Reg. 25274)
[3] See Joint Industry Letter dated May 4, 2011 RE: Phase-in Schedule for Requirements for Title VII of the Dodd-Frank Act" addressed to the Commissions.

Commissions are in place, then the Commissions may agree and select a new compliance date for real time public reporting.

The Commissions should also be afforded adequate time, in addition to the industry, to implement the technological infrastructure needed to receive and analyze swap data and to link their systems to the SDRs. Therefore, the Commissions should also consider how long is required for this purpose from the date that final rules are published and adopted.

In the absence of an SDR for an asset class, the NPR proposes that market participants provide data directly to the Commission. Once an SDR has been established for that asset class, the NPR does not specify whether continuation data for a swap originally reported to the Commission would need to be reported to the SDR or to the Commission. If continuation data should be reported to the SDR in this scenario, the swap data originally reported to the Commission would need to be backloaded into and reported to the SDR. It is unlikely that the required formats for backloading and reporting will be the same across the Commission and any SDR and hence significant additional effort in terms of resource requirements and cost will result. If continuation data is required to be reported to the Commission in this scenario, this would require a redundant build-out of infrastructure by the industry to report continuation data both to the Commission (for historical swaps) and to the SDR (for new swaps), and require the Commission to build infrastructure to receive this data solely for the limited population of historical swaps. It is therefore our recommendation that effort should be focused on the establishment of SDRs, the build-out of reporting infrastructure into those SDRs and backloading of data into the SDRs rather than diversion of resources to building direct links to the Commission.

For swaps in existence on April 25, 2011 and which require an initial data report, proposed rule 45.4(b) would require the reporting party to obtain a Unique Counterparty Identifier by the Compliance Date, in order to include that ID in its initial report. Non-reporting parties are afforded an additional 180 days from the Compliance Date within which to obtain a Unique Counterparty Identifier and to supply that ID to the reporting counterparty, who in turn must submit it to the SDR. This assumes that the implementation of Legal Entity Identifiers and conforming unique identifiers based on the Commission's proposals can be achieved within the relevant period prior to the Compliance Date, which will require finalization of the ID rules sufficiently in advance of the Compliance Date to allow the Unique Counterparty Identifier systems to be built.

Minimum Primary Economic Terms Data

With respect to pre-enactment swaps and transition swaps that have not expired prior to April 25th, 2011, the NPR proposes to require that counterparties keep records of all minimum primary economic terms data specified in the appendix to the proposed rule, and report those on the Compliance Date. As proposed, the scope and nature of those primary economic terms would lead a large number of participants to retroactively create data, as each primary economic term is not currently captured in their systems. This would be extremely challenging. As an example, the "time of trade" indicator, which is typically not recorded in the OTC market, would be in some cases impossible to recreate, as pointed out in the IFR Comment Letter. Accordingly, the Commission should consider that market participants only provide the data elements set forth in

the NPR that are currently available and provide those data elements in the form available, thereby avoiding recreation, reformatting and reorganization of past data. In addition, the Commission should allow market participants to report a legally binding electronic record (for example, a gold record), where one already exists, and not be required to supplement the primary economic terms contained in such record with additional reporting obligations.

We strongly support the Commission's recordkeeping and reporting objectives for pre-enactment and transition swaps and the ability to improve the data between the time of enactment and compliance. However, we respectfully suggest that rather than imposing a dual regime based upon a date other than the Compliance Date, the Commissions adopt a uniform regime for swaps, consisting of retaining the information and documents currently in possession of the counterparties, and reporting such data to the SDR on the Compliance Date in the format selected by the reporting counterparty.

In addition, we have comments on certain specific requirements in the minimum primary economic terms data specifications in the appendix to proposed part 46:

- An indication of whether or not a counterparty is a swap dealer ("SD") or major swap participant ("MSP") may not be necessary. If the SDRs already have this information from registration, it would be simpler and more reliable for this indication to be centrally supplied by the SDR.

- With respect to credit and equity swaps, "the equivalent notional amount in U.S. dollars" should not be a required data element; instead the notional should be submitted in the contractual currency with any conversion to U.S. dollars being performed by the SDR. Having the reporting party compute and provide the applicable conversion may result in significant inconsistencies as to how exchange rates are applied.

- With respect to credit and equity swaps, we suggest that "the data elements necessary for a person to determine the market value of the transaction" be removed, as otherwise it would subject a trader to an overly burdensome requirement to retain a variety of information irrelevant to the purposes of the proposed rules. Such information could include yield curve, trading models and other trade and market data. The extent of such information would not be consistent either across institutions or in application to individual trades. Much of this information is not retained now and any requirement to retain this type of data will likely be unworkable. In addition, much of this data is proprietary.[4]

- We request that the Commission remove the data element titled "any other primary economic term(s) of a swap matched by the counterparties in verifying the swap". The data elements that the Commission requires be reported should be identified with precision to give the reporting counterparties certainty and prevent erroneous reporting.

[4] These concerns extend beyond pre-enactment and transition credit and equity swaps. As noted in the comment letter submitted by ISDA and the Securities Industry and Financial Markets Association dated February 7, 2011 and in response to three Notices of Proposed Rulemaking: Real-Time Public Reporting of Swap Transaction Data, Swap Data Recordkeeping and Reporting Requirements, Reporting, Recordkeeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants (the "Swap Data Comment Letter"), the proposal to include "the data elements necessary for a person to determine the market value of the transaction" would require a third party to have access to proprietary market data and pricing models that would not be in the public domain.

- With respect to credit and equity swaps, as noted above, time of trade information is not readily available for those trades that are not electronically executed. We note that, as suggested in the IFR Comment Letter, the date of the trade is required to be retained and reported.[5]

Master Agreement Identifiers

In addition to the minimum primary economic terms data, proposed rule 46.3(a)(iii)(C) would require firms to report a master agreement identifier. We do not believe this data should be included in the report. We have previously suggested to the Commission an alternative method for the Commission to determine a counterparty's net exposure. Please see further the comments in section IV(b) of the Swap Data Comment Letter.

Reporting Party

Proposed rule 46.5(a)(3) provides that where both counterparties are SDs, MSPs or non-SD/MSP counterparties, they shall agree as one term of their swap transaction which counterparty shall fulfill reporting obligations with respect to that swap. This is a concern because the reporting rules were not finalized before April 25, 2011 and have not been finalized as of April 25, 2011, since the CFTC has not yet issued final rules to this effect. Furthermore, the SD and MSP rules and designations have not been finalized. The proposal therefore seems to impose a requirement on counterparties to go back and re-negotiate their swap agreements in order to designate a reporting party. This is an unreasonable requirement. Reporting counterparty selection can alternatively be achieved using less onerous means, for example by having the parties determine who among them will report depending on their status on the Compliance Date, based on the proposed hierarchy (i.e., as between a SD and MSP, the SD reports, etc.). Another possibility that could be explored could be to create a rule based on the existing terms of parties' contracts, such as, for example, which party is the Calculation Agent for the relevant transaction. We therefore suggest that the Commission work with the industry to determine the best way of implementing the reporting party requirement once the above rules are finalized.

Where only one of the parties is a U.S. person, proposed rule 46.5(a)(4) would require the U.S. person to report. Given that end-users are unlikely to have the internal systems and processes necessary to support this reporting, we are concerned that the practical result would be an inadvertent exclusion of foreign SDs from the U.S. market, which could decrease liquidity, further concentrate the U.S. swap market and thereby increase systemic risk. For further comment on this point, please see section V(b) of the Swap Data Comment Letter.

Proposed rule 46.5(c) applies the tests in paragraph (a) by reference to the counterparties as of the date of expiration or termination of the swap. We request that this clarify how the tests in (a) should be applied, for example as of what date the parties should determine whether they are or were SDs or MSPs. We suggest that this test be run as of the Compliance Date, as it may be impossible to determine whether a party was an SD or MSP as of an earlier date, particularly

[5] These concerns extend beyond pre-enactment and transition credit and equity swaps. As noted in the Swap Data Comment Letter, the proposal to include "time of trade" would prove extremely challenging and even invasive in the case of voice trades, for which the "time of trade" is not typically provided in the participants' systems.

prior to the registration system going into effect. This rule should also contemplate the possibility that one or both parties to the swap when it expired or was terminated may no longer be in existence, for example due to liquidation or merger.

Extraterritoriality

Harmonization among U.S. and international rules is required, with deference to comparable international rules designed to promote customer protection. If a non-U.S. person trades with a non-U.S. SD those trades should not be reportable to the U.S. regulators even if the non-U.S. person or SD is a subsidiary of a U.S. person. If non-U.S. entities (including non-U.S. affiliates or branches of a U.S. bank) become subject to reporting requirements in relation to transactions with non-U.S. counterparties they will be at a competitive disadvantage as compared to local competitors. There will also be conflicts of entity-level regulation where they are already subject to regulation in their home jurisdiction and conflicts between local and U.S. regulation.

Recordkeeping for Swaps Expired Prior to April 25, 2011

Proposed rules 46.2(b)(1) and (2) provide that parties are not required to alter the format, i.e. the method by which the information is organized and stored, in respect of swaps expired prior to April 25, 2011. However, proposed rule 46.2(c) would require records to be kept in a form and manner acceptable to the Commission, and proposed rule 46.2(d) prescribes minimum information retrieval requirements for such information (including real time electronic access for records maintained by SDs/MSPs). These requirements do not appear to be consistent. We request that the final rules clarify that these requirements are subject to the general rule that parties are not required to alter the format in which the information is organized and stored. In addition, with respect to rule 46.2(c), the final rule should be clarified to mean that electronic form, if available, or any other format in which the information or document currently exists will be acceptable to the Commission. In reliance upon the Commission's prior proposals that reporting parties are simply required to retain records in the format in which they were originally retained without modification, we request confirmation (a) that the new language in Part 46 referring to "a form and manner acceptable to the Commission" refers to the Commission's prior proposals for reporting parties under Dodd-Frank Sections 728, 729, 731 (parts 43, 44 and 45) and does not impose any new requirements and (b) that the form in which data and records were retained for historical swaps is the manner that remains acceptable to the Commission.

Proposed rule 46.2(d) would require an SD or MSP to maintain the specified records in a manner that is readily accessible via real time electronic access throughout the life of the swap and for two years following final termination (and be retrievable within three business days thereafter until the end of the retention period). We agree that the requirement to retain this data in the form and manner that it is currently maintained is an objective that can be satisfied without undue burden and cost, however to transform the data and retain it via real time access over the life of a trade will impose undue burdens and is seemingly duplicative if the data will have been submitted to an SDR, to the extent that the SDR will retain the data in readily accessible form via real time electronic access. In particular, storing data to be accessible in real time after final maturity or termination (i.e. after all settlements have completed and all market and credit risks for the swap have been closed out) is of limited value over and above storing the data to be retrievable within a

reasonable time frame. Furthermore, the costs and related security and propriety data concerns make this unwieldy. In lieu of this, we believe it is reasonable for market participants to maintain data and make it available to the Commission as a snapshot, on Commission request.

Mixed Swaps

The NPR requests comment concerning how mixed swaps should be treated with respect to swap data reporting for historical swaps, and concerning the category or categories under which swap data for such swaps should be reported to SDRs and maintained by SDRs. This is an issue today in the repositories for credit, rates and equity. We believe that the market should have some input into these decisions as to come up with best practices for consistency.

II. Outstanding Issues

The following comments reflect points raised in the IFR Comment Letter that have not been addressed as part of the discussion above. Please refer to the IFR Comment Letter for further details on these points, which are presented in the same order in which they appear in the IFR Comment Letter.

Reporting Protocols

The IFR Comment Letter recommended that the Commission leverage existing reporting structures, such as the copper record submissions in the credit default swap market, or trade repository reporting requirements for interest rate swaps. Proposed rule 46.3(a) would require the relevant party to report at least the relevant minimum primary economic terms data, which as noted above currently include a generic data element titled “any other primary economic term(s) of a swap matched by the counterparties in verifying the swap”. This would prevent the use of some existing reporting standards as they do not contain this level of data. There is a trade-off to be considered by the Commission in that either existing reports that do not supply all required data elements could be used and additional data added over time with a relatively fast initial implementation timeline or new feeds could be built to meet the required data elements but with a longer dated implementation. It should be noted that as a certain level of complexity is reached, data standards for minimum primary economic terms cease to exist meaning that it will not be possible to meet this requirement with electronically held data, instead a term sheet or non-electronic confirmation will be required.

We also reiterate the points made in the IFR Comment Letter regarding the establishment of an electronic data standard and the importance of having a single SDR per asset class. A single SDR globally per asset class would provide the Commission and market participants with valuable efficiencies. In particular, there would be no redundancy of platforms, no need for additional levels of data aggregation for each asset class and reduced risk of errors and greater transparency (because a single SDR per asset class would avoid the risk of errors associated with transmitting, aggregating and analyzing multiple sources of potentially incompatible and duplicative trade data). A single global SDR would also reduce the risk of reporting to multiple SDRs in different jurisdictions.

Risk of Presentation of Distorted Information

We reiterate our request for clarification that only the trades embodying the end result of netting or compression need be reported, and that inter-affiliate swaps should not be subject to reporting. Where a dealer enters into a swap with a client, the legal entity that faces the client may also enter into a back-to-back inter-affiliate transaction to transfer the risk of that transaction to another affiliate. In this case, only the client-facing trade should be reported. If all legs of this trade were reported, the trade would be double counted and the risk on the underlying asset would not be correctly represented. In addition, for internal trades between entities, firms may not retain physical confirmations, but instead utilize system functionality (to mirror the trades) and/or robust reconciliations. For these purposes, "affiliates" should include all entities of an organization, not just entities that report up to the same parent.

We also recommend that the Commission consider establishing a "record" or "as of date" for the reporting of pre-enactment and transition swaps. This would help to avoid redundancies and confused last-minute reporting of changing positions and create a fixed snapshot of the pre-enactment and transition markets.

No Impact on Legal Certainty

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

Confidentiality

Confidentiality remains a concern. The NPR does not distinguish between domestic and cross-border swap transactions and as such conflicts with various confidentiality obligations and restrictions. We request that the Commission clarify that the requirements of Part 46 would safeguard the confidentiality of trade, position and counterparty identifying information.

Protocol for Security-Based Swaps

The Commissions should adopt consistent requirements with respect to reporting and recordkeeping, which would remove inefficiencies and simplify compliance. For example, the effective date under the SEC's proposed rule for pre-enactment security-based swaps provides for compliance by January 12th, 2012 and for transitional security-based swaps compliance six months following security-based swap data repository registration, while the equivalent effective dates under the Commission's proposed rule have not been announced. We propose that the Commissions adopt the same Compliance Date for reporting.

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ISDA appreciates the ability to provide comments on the NPR and looks forward to working with the Commission as you continue the rulemaking process. Please feel free to contact me or my staff at your convenience.

Sincerely,

Robert Pickel
Executive Vice Chairman