

September 20, 2013

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

**Re: Exemptive Order regarding Compliance with Certain Swap Regulations (RIN 3038-AE05)**

The International Swaps and Derivatives Association, Inc. (“**ISDA**”) is writing in furtherance of our recommendation<sup>1</sup> that the Commodity Futures Trading Commission (the “**Commission**”) extend the 75-day phase-in period provided under the exemptive order described above (the “**Exemptive Order**”)<sup>2</sup> for implementation of certain aspects of the Commission’s cross-border guidance and policy statement (“**Cross-Border Guidance**”).<sup>3</sup>

The Cross-Border Guidance modifies the definition of “U.S. person” from that contained in the Commission’s January 2013 exemptive order<sup>4</sup> and introduces regulatory distinctions based on the newly defined categories of non-U.S. persons that are either guaranteed by or acting as conduit affiliates of a U.S. person. These changes will require efforts on the part of all market participants to determine their own and, where possible, their counterparties’ status under the new definitions, collect this information from counterparties and integrate it into compliance systems. Only after this classification and information collection phase is completed can swap dealers and their counterparties put in place the substantive mechanisms for compliance, such as establishing clearing relationships and entering into documentation (such as ISDA August 2012 and March 2013 Dodd-Frank Protocols or their equivalent) to address the swap dealer (external and internal) business conduct rules and other Commission rules.

In order to facilitate timely and efficient implementation of those aspects of the Cross-Border Guidance that depend on the new definitions, ISDA has published a Cross-Border Representation Letter (“**Representation Letter**”) and made arrangements with a technology provider to establish an electronic facility (ISDA Amend) for market participants to complete and submit the Representation Letter to swap dealers that have arranged to be recipients of ISDA Amend submissions.

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<sup>1</sup> See ISDA’s comment letter on the Exemptive Order (available at <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=59312&SearchText=>).

<sup>2</sup> 78 Fed. Reg. 43785 (July 22, 2013)

<sup>3</sup> 78 Fed. Reg. 45292 (July 26, 2013).

<sup>4</sup> 78 Fed. Reg. 858 (January 7, 2013). Although the January order was temporary, market participants seeking to be compliant had no choice but to act on the basis of the information it contained as the “best available” statement of Commission views.

Immediately after publication of the Cross-Border Guidance, ISDA convened a working group to discuss the preparation of a standard form representation letter. This effort involved distillation of relevant provisions of the Cross-Border Guidance into a series of representations and explanatory text that would be accessible by persons without detailed knowledge of the Cross-Border Guidance. ISDA published its Representation Letter on August 19, less than one month after the July 26 Federal Register publication date of the Cross-Border Guidance. Once the finalized Representation Letter was available, Markit, the provider of ISDA Amend, was able to commence building the systems needed for electronic submission of the Representation Letter. This functionality is currently expected to become available on September 21.

Based on dealer estimates provided to ISDA, the average number of counterparties from whom a dealer is seeking Representation Letter responses is approximately 24,000. The overall number of targeted respondents could be significantly larger, depending on the degree of overlap among the responding dealers' counterparties. As the Commission is aware from its experience with the swap dealer internal and external business conduct rules, obtaining counterparty agreement on this scale is a formidable challenge. The period of time available from the August 19 publication date of the Representation Letter to the scheduled October 10 compliance date is slightly under eight weeks. Assuming the September 21 start date for ISDA Amend functionality is met, the period available for submission of responses before the October 10 deadline is a mere three weeks.

For comparison, the period available for counterparty response to the ISDA March 2013 Protocol, which primarily addressed portfolio reconciliation, swap trading relationship documentation and clearing exemptions, ran from the March 22 publication date of the Protocol to the July 1 compliance date of Commission Rule 23.504 – a period slightly over three months. In that case, ISDA Amend opened on May 20, six weeks prior to the July 1 compliance date, but the vast bulk of the Protocol Questionnaire responses (approximately 21,000 Questionnaires, a number equivalent to slightly over 96% of the targeted population of actively trading legal entities) was not submitted to dealers until the four-week period prior to the July 1 compliance date.

The scale of responses observed for the ISDA March 2013 Protocol during the compressed four-week time frame was aided by factors that are not present in the current instance. The vast majority of the targeted respondents had already onboarded<sup>5</sup> to the ISDA Amend electronic facility. In contrast, an average of dealer estimates indicates that only approximately one-fifth of the counterparties from whom the Representation Letter is sought have been onboarded to ISDA Amend. Furthermore, the Cross-Border Guidance imposes a number of facts-and-circumstances judgments that parties must make in order to complete the Representation Letter. Examples include the determination of the principal place of business for collective investment vehicles, the need to look through to U.S. person ownership for certain collective investment vehicles and unlimited liability entities, examination of the “conduit” factors, analysis of the types of arrangements that might constitute a “guarantee” and determining whether an entity might be a U.S. person by operation of the introductory “including but not limited to” clause of the definition. Thus, the degree of analysis, fact gathering and

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<sup>5</sup> Onboarding means a client has set up its account on ISDA Amend (i.e., has provided basic identifying information and has received a login and password to utilize the system).

consultation with legal advisors that parties must engage in to complete the Representation Letter, and therefore the time required, is likely to be greater than in the case of the ISDA March 2013 Protocol.

In our comment letter on the Exemptive Order, ISDA recommended that the Commission adopt a more realistic, but still aspirational, phase-in period through December 21, the date specified in the Exemptive Order as the end date for relief from most of the requirements for which substituted compliance is available. Aligning the phase-in period with the targeted substituted compliance date would give the substituted compliance process a more meaningful chance to produce its intended benefits, while also bringing greater certainty and efficiency to market participants across global markets.

To the extent the Commission is concerned that an unconditional extension to December 21 would not provide sufficient structure to motivate implementation of the Cross-Border Guidance as rapidly as is feasible, the Commission could condition deferral on the exercise of diligent efforts by market participants relying on the extension to obtain counterparty representations no later than October 31. ISDA reiterates the practical necessity of a longer phase-in period and its hope that the Commission and its staff will be open to adjustments of the phase-in schedule as the industry works toward implementation of the Cross-Border Guidance while keeping the Commission apprised of progress.

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

Sincerely,



Chief Executive Officer

Cc: Commissioner Gary Gensler  
Commissioner Bart Chilton  
Commissioner Scott D. O'Malia  
Commissioner Mark Wetjen  
Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight  
Sarah Josephson, Director, Office of International Affairs