March 19, 2012

Mr. Richard Shilts
Acting Director
Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Request for Interpretative Letter: Rule 43.2 (Real-Time Public Reporting of Swap Transaction Data)

Dear Mr. Shilts:

The International Swaps and Derivatives Association, Inc. and the Securities Industry and Financial Markets Association (together, "**the Associations**"), [1] on behalf of our members with reporting obligations under Part 43 of the Regulations of the Commodity Futures Trading Commission (the "**Commission**") and other similarly situated persons, is writing to request interpretative guidance pursuant to Rule 140.99 with regard to the requirements of the Commission's Part 43 Regulations on the Real-Time Public Reporting of Swap Transaction Data (the "**Real-Time Reporting Rule**").

The Associations appreciate the consideration given to the comments expressed in our February 7, 2011 comment letter on the proposed rule.[2] We support the objective of the rule to promote and enhance price discovery and the Commission's decision to exclude certain inter-affiliate trades from the requirements of the rule. In particular, we welcome the commentary stating that the Commission "concurs that publicly disseminating swap transaction and pricing data related to certain swaps between affiliates would not enhance price discovery" and noting that the disclosure of such information could provide an inaccurate appearance of market depth. [3]

As discussed in greater detail below, the Associations are concerned, however, that the definition of "publicly reportable swap transaction", which is the basis for exempting inter-affiliate trades, is unduly vague and creates significant uncertainty for market participants that are currently expending significant resources to develop systems in order to comply with the rule. This problem is compounded by the

[1] The International Swaps and Derivatives Association's ("ISDA") 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. For more information, please visit: www.isda.org.
The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.,
[2] http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=27581&SearchText=
[3] 77 Fed. Reg. 1182, 1187.

language in footnote 44 of the final rule,[4] which could be read for the proposition that all "covered transactions" subject to Federal Reserve Act Section 23A and 23B[5] are publicly reportable. Read in this manner, footnote 44 would fundamentally conflict with the final rule text, which states by way of example that transactions between wholly-owned subsidiaries are not publicly reportable.[6]

It appears the Commission has suggested examples of transactions subject to Sections 23A and 23B because under the Federal Reserve Act, such transactions are subject to a "market terms" requirement.[7] This example, if construed as an interpretation under Title VII of the Dodd-Frank Act, however, conflates a regulation-imposed standard (under Sections 23A and 23B, in this case) with the pricing yielded by a competitive, market-based negotiation between unrelated parties. By doing so, it creates ambiguity regarding the status of many other inter-affiliate trades.

Therefore, as discussed in greater detail below, we request interpretative guidance that the definition of "publicly reportable swap transaction" should be understood to mean "any executed swap transaction that is an arm's length transaction between two parties that are not members of a consolidated affiliated group that results in a corresponding change in the market risk position between the two parties" as well as the other interpretative guidance set out in Section II below.

The interpretative guidance we request is needed to restore consistency with the Commission's statements in the adopting release for the final Part 43 rules[8] as well as Commissioner and staff statements at the open meeting at which the final rules were adopted.[9]

I. Need for Guidance

A. Vagueness of "arm's length" standard

The "arm's-length transaction" prong of the definition of "publicly reportable swap transaction" provides insufficient guidance and will create substantial compliance uncertainty for market participants engaged in inter-affiliate swaps. The single transactional example cited -- transactions between wholly-owned subsidiaries of the same parent -- does not provide adequate criteria to determine whether or not inter-affiliate trades entered into under different circumstances would give rise to a reporting obligation under Part 43.

B. Clarification regarding footnote 44 is necessary

Footnote 44 could be read to suggest that all Section 23A/B "covered transactions" are publicly reportable. This interpretation, however, would create further uncertainty for banks and their subsidiaries, and possibly other market participants, by suggesting, without adequate explanation or attention to the terminology of Section 23A/B or the characteristics of covered transactions, that the requirements of Section 23B are somehow relevant to the CFTC's "arm's length" standard.[10]

---

[4] Id.
[5] 12 U.S.C. §§ 371c and 371c-1.
[6] Rule 43.2, clause (2)(i) of the definition of "publicly reportable swap transaction."
[7] 12 U.S.C. § 371c-1; 12 C.F.R. § 223.51.
[8] See note 3, supra, and accompanying text.
[9] Transcript of December 20, 2011 Commission Meeting, pages 129-131.
[10] Section 608 of the Dodd-Frank Act amends Section 23A's definition of "covered transaction" to include a derivative transaction with an affiliate --- but only to the extent that the transaction causes a member bank or a subsidiary to have "*credit exposure*" to the affiliate. The Federal Reserve, however, has yet to define "credit exposure" for purposes of Section 608 of the Dodd-Frank Act. Linking public reporting to an undefined Section 23A/B concept not only compounds the compliance uncertainty facing market participants but also illustrates why status as a 23A/B "covered transaction" is inapposite to public reporting. The purpose of any forthcoming Federal Reserve definition of "credit exposure" would be to define the amount by

C. Unintended Consequences

An over-inclusive definition of "reportable transactions" will distort the publicly reported price of many swap transactions by suggesting liquidity is available to third parties when in fact, the reported transaction is merely a transfer of risk between affiliated entities. This will (a) subvert the Dodd-Frank Act's and the CFTC's objectives of implementing rules that enhance price discovery, (b) exaggerate market depth and (c) impose additional reporting costs on market participants with no corresponding market benefit. Ambiguity in the rule will result in inconsistent determinations among market participants regarding which transactions are reportable, which will hinder implementation of and compliance with the rule.

Finally, from the standpoint of regulatory oversight, reporting back-to-back, internal risk management transactions will not accurately inform the Commission or market participants in connection with monitoring position limits, analyzing open interest, determining block trade thresholds or performing other important regulatory functions that require the Commission to accurately assess the swap market.

II. Interpretation Requested

A. The definition of "publicly reportable swap transaction" should be understood to mean "any executed swap transaction that is an arm's length transaction between two parties that are not members of a consolidated affiliated group that results in a corresponding change in the market risk position between the two parties." A "consolidated affiliated group" means a group of entities under common control that reports information or prepares its financial statements on a consolidated basis.

B. Confirmation that parties to a 23A/B "covered transaction" may rely on the definition of "publicly reportable swap transaction", as interpreted under the requested guidance, and that status as a covered transaction does not create a presumption that a swap is reportable. Further, the guidance should clarify that the text of the definition of "publicly reportable swap transaction" in Rule 43.2, as interpreted under the requested guidance, is the sole basis on which a transaction may deemed reportable, notwithstanding the statement in the Adopting Release[11] which prefaces that definition with the words "among other things" or any other statements in the Adopting Release.

C. Prong (1)(ii) of the definition of "publicly reportable swap transaction" (referring to any termination, assignment, novation, exchange, transfer, amendment, conveyance or extinguishing of rights or obligations …) would not apply so long as the swap transaction remains within the consolidated affiliated group. A novation or other transfer outside the consolidated affiliated group would be reportable under Part 43 when it takes effect, but only if there is a contemporaneous amendment to economic terms that materially affect the pricing of the swap.

III. Rationale

In the Adopting Release, the CFTC recognized that reporting certain inter-affiliate swaps would not enhance price discovery. As the separately reportable market-facing swap transaction will be entered into with a counterparty outside the affiliated group, duplicative reporting of the related inter-affiliate trades "may give an inaccurate appearance of market depth".[12] An additional factor, which may have been

---

which a derivative transaction must be counted toward the aggregate limits set forth in Section 23A (12 U.S.C. § 371c). These Federal Reserve Act provisions are not aimed at enhancing public price discovery.

[11] 77 Fed. Reg. at 1187.

[12] "The Commission agrees with the comments regarding the public dissemination of certain swaps between affiliates and portfolio compression exercises. The Commission concurs that publicly disseminating swap transaction and pricing data related to certain swaps between affiliates would not enhance price discovery, as such swap transaction and pricing data would already

implicit in the choice of an "arm's length" standard but which was not explicitly discussed in the adopting release, is that both parties to an inter-affiliate swap are under common control and, consequently, a competitive, market-based price discovery process may not be operative. [13]

The proposed standard can be readily and consistently applied by market participants, and defines reportable swaps in a manner that relates directly to their value in enhancing price discovery.

The accounting basis for consolidation is that the assets and liabilities of consolidated entities are managed in a unified manner. Accordingly, neither the necessity nor the incentive to use a competitive, market-based price formation mechanism is present, producing inherently inferior pricing information. Centralized risk management is a frequent feature of large consolidated groups. Although practices will vary regarding whether risks are offset to the market on a portfolio or a transition-by-transaction basis, the "affiliated group" standard will more effectively filter out duplicative reporting than will an unelaborated "arm's length" standard.

If not clarified, footnote 44 could be read to impose real-time reporting of all 23A/B "covered transactions." Reporting all 23A/B transactions is inconsistent with the objectives of the rule. Specifically, a trade's status as a covered transaction is a poor proxy for the existence of a competitive, market-based price discovery process. Although 23B uses a "market terms" standard, it only requires that transactions be on terms that are "*at least as favorable*" to the member bank as those prevailing at the time.[14] It is important to note that the "market terms" standard, though sometimes referenced as "arm's length", is not intended by the Federal Reserve to replicate trades between unaffiliated parties and is not a measure of the public reporting value of the transaction. In fact, the core principle of Sections 23A/23B is to protect the bank – indeed, the "market-terms" requirement would permit derivative trades between the bank and an affiliate that are on terms more favorable to the bank than market. Thus, banking organizations may err on the side of favoring the bank with respect to marks and other valuations. In other words, the "market terms" requirement of 23A/B does not assure transaction pricing that shows competitive market activity.

Market participants, moreover, should be entitled to rely on the text of the definition of "publicly reportable swap transaction", which is prefaced with the phrase "unless otherwise provided in this part…." No further provision is made in Part 43 regarding Section 23A/B transactions.

As noted above, market participants are currently in a position of having to make decisions with respect to how to deploy significant resources in order to develop systems to be in compliance with Part 43 when it becomes effective. Accordingly, we urge the Commission to act quickly in providing the needed clarity described in this letter so that these resource allocation decisions may be made at the earliest possible time.

---

have been publicly disseminated in the form of the related market-facing swap. This information may create an inaccurate appearance of market depth. Notably, there is a very high volume of swaps between affiliates in certain asset classes (*e.g.*, foreign exchange). To require public dissemination of all such transactions could be very costly for market participants. Where there are no price discovery benefits to publicly disseminating such transactions, the Commission has determined not to require the public dissemination of these transactions at this time. Accordingly, the Commission is adopting a definition in § 43.2 for the term "publicly reportable swap transaction'' that does not presently require the public dissemination of internal swaps. Specifically, a publicly reportable swap transaction means, among other things, any executed swap that is an arm's length transaction between two parties that results in a corresponding change in the market risk position between the two parties. As adopted, the definition of a publicly reportable swap transaction also provides, by way of example, that internal transactions to move risk between wholly-owned subsidiaries of the same parent, without having credit exposure to the other party would not presently require public dissemination because such swaps are not arm's-length transactions". 77 Fed. Reg. at 1187

[13] See 77 Fed. Reg. at 1236, n. 518 (describing some of the vagaries of "internal" swaps).

[14] 12 C.F.R § 223.51(a).

* * *

Thank you for your consideration of this request. Please contact the undersigned or our staff if you have any questions or concerns.

Sincerely,

Robert Pickel
Chief Executive Officer
ISDA

Kenneth E. Bentsen, Jr.
EVP, Public Policy and Advocacy
SIFMA