

# CLIENT UPDATE

## TEMPORARY NO-ACTION RELIEF FOR BESPOKE OR COMPLEX SWAPS FROM CERTAIN REPORTING REQUIREMENTS

### NEW YORK

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On November 30, 2012, the Commodity Futures Trading Commission (the “CFTC”) granted temporary no-action relief to “reporting parties”<sup>1</sup> and “reporting counterparties”<sup>2</sup> (collectively, “Reporting Parties”) from certain reporting requirements of Parts 43 and 45 of the CFTC regulations with respect to certain bespoke and complex swaps.

This no-action relief was granted in response to a letter (the “Request Letter”) from the International Swaps and Derivatives Association (“ISDA”) on behalf of its members that are Reporting Parties, asserting that: (1) for bespoke or complex products, certain operational constraints will prevent Reporting Parties from submitting specific data elements required by Appendix A to Part 43 and Appendix 1 to Part 45 and (2) Reporting Parties will be unable to report certain confirmation data for bespoke or complex swaps between affiliates that are not submitted for clearing (“uncleared inter-affiliate swaps”) because Reporting Parties do not generate paper confirmations for such swaps.<sup>3</sup>

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<sup>1</sup> Regulation 43.2 defines “reporting party” as “the party to a swap with the duty to report a publicly reportable swap transaction in accordance with [Part 43] and section 2(a)(13)(F) of the [Commodity Exchange Act].”

<sup>2</sup> Regulation 45.1 defines “reporting counterparty” as “the counterparty required to report swap data pursuant to [Part 45], selected as provided in [Regulation] 45.8.”

<sup>3</sup> Regulation 45.3 provides that, where “reporting confirmation data normalized in data fields is not yet technologically practicable,” reporting counterparties may report confirmation data through “an image of the document or documents constituting the confirmation” for 180 days following the compliance date.

In the Request Letter, ISDA sought relief until the earlier of such time that the relevant data elements can be electronically represented or July 31, 2013.

## **BACKGROUND**

Part 43 sets forth rules for the real-time public reporting (“RTPR”) of swap transaction data by reporting parties, prescribing the method and timing for reporting swap data to a swap data repository (“SDR”). Part 45 sets forth the obligations on swap counterparties to report swap creation data, including primary economic term (“PET”) data and confirmation data, to an SDR.

This no-action relief applies only to “bespoke or complex” swaps, which are defined as swaps that: (1) are not listed for trading on a designated contract market; (2) are not available to be traded on a swap execution facility; (3) are not eligible to be cleared by a derivatives clearing organization; (4) are not eligible to be confirmed through an electronic matching confirmation system; and (5) are not represented in Financial products Markup Language (“FpML”).

## **CONCERNS EXPRESSED IN ISDA REQUEST LETTER**

In the Request Letter, ISDA expressed concern that, because FpML does not currently support bespoke or complex products for all fields required in Parts 43 and 45, Reporting Parties would be unable to report these unrepresented fields to SDRs for such products by the relevant compliance dates. Specifically, ISDA asserted that FpML does not yet support the following fields required by Appendix A to Part 43 for bespoke or complex products (the “Unrepresented Part 43 Fields”):

- day count convention
- unique product identifier (“UPI”)
- payment frequency
- reset frequency
- option strike price
- option family; and
- option lockout period.

Additionally, the Request Letter states that FpML currently lacks the ability, for bespoke or complex swaps, to support the following minimum PET data fields required by Appendix 1 of Part 45 (the “Unrepresented Part 45 Fields”):

- in respect of credit and equity swaps:
  - UPI;
  - payment frequency of the reporting counterparty;
  - payment frequency of the non-reporting counterparty; and
  - any other term(s) matched or affirmed by the counterparties in verifying the swap;
- in respect of foreign exchange transactions (other than cross-currency swaps):
  - UPI;
  - delivery type;
  - any other term(s) matched or affirmed by the counterparties in verifying the swap;
- in respect of interest rate swaps (including cross-currency swaps):
  - UPI;
  - day count convention;
  - payer (fixed rate, floating rate leg 1 and floating rate leg 2);
  - direction;
  - fixed day count fraction;
  - floating rate payment frequency;
  - floating rate reset frequency; and
  - any other term(s) matched or affirmed by the counterparties in verifying the swap;
- in respect of other commodity swaps:
  - UPI;
  - quantity, quantity frequency and total quantity;
  - settlement method;
  - buyer pay index and buyer pay averaging method;
  - seller pay index and seller pay averaging method;
  - option style;
  - hours from through and hours from through time zone;
  - days of week;
  - load type; and

- any other term(s) matched or affirmed by the counterparties in verifying the swap.

**TEMPORARY NO-ACTION RELIEF GRANTED**

To address the concerns raised in the ISDA Request Letter, the no-action letter provides that the Division of Market Oversight (“DMO”) of the CFTC will not recommend that the CFTC commence an enforcement action against a reporting party for failing to report the Unrepresented Part 43 Fields for a bespoke or complex swap to an SDR as required by Regulations 43.3(a)(3), 43.4(a) and Appendix A of Part 43 until the earlier of such time that the relevant data elements can be electronically represented in FpML or June 30, 2013.

The CFTC clarified in the no-action letter that this temporary relief does not alter the responsibility of SDRs to disseminate swap transaction and pricing data described in Appendix A to Part 43 in real-time pursuant to Regulation 43.4(b), to the extent such data is reported to the SDR. However, if pursuant to the relief granted in such letter, a reporting party does not report the Unrepresented Part 43 Fields to an SDR, the SDR would not be required to disseminate those specific fields pursuant to Regulation 43.4(b).

Additionally, the no-action letter provides that, until the earlier of such time that the relevant data elements can be electronically represented in FpML or June 30, 2013, DMO will not recommend that the CFTC commence an enforcement action against a reporting counterparty for failure to report, with respect to bespoke or complex swaps to SDRs, Unrepresented Part 45 Fields of (1) PET creation data, as required by Regulations 45.3(b)(1), 45.3(c)(1)(i), 45.3(c)(2)(i), 45.3(d)(1) and Appendix 1 to Part 45 or (2) swap continuation data, as required by section 45.4(c).

Finally, the no-action letter provides that, for bespoke or complex swaps that are uncleared inter-affiliate swaps for which paper confirmations are not generated, DMO will not recommend that the CFTC commence an enforcement action against a reporting counterparty for failure to report confirmation data as required by Regulations 45.3(b)(3), 45.3(c)(1)(iii), 45.3(c)(2)(iii) and 45.3(d)(3) until the earlier of such time that the relevant data elements can be electronically represented in FpML or June 30, 2013.

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Please do not hesitate to contact us with any questions.

December 21, 2012