

# Coalition for Derivatives End-Users

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August 21, 2017

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

**Re: Comments in Response to the Division of Market Oversight’s Review of the U.S. Commodity Futures Trading Commission’s Swap Reporting Rules in Parts 43, 45 and 49 of the Commission’s Regulations**

Dear Mr. Kirkpatrick:

The Coalition for Derivatives End-Users (the “Coalition”) is pleased to provide comments to the Division of Market Oversight (the “Division”) of the U.S. Commodity Futures Trading Commission (the “CFTC” or “Commission”) in response to the Division’s *Roadmap to Achieve High Quality Swaps Data* (the “Roadmap”).<sup>1</sup> The Roadmap was prepared in connection with the CFTC’s comprehensive review of its swap data reporting regulations found in Parts 43, 45 and 49 of the CFTC’s regulations (collectively, the “Reporting Rules”).<sup>2</sup> As discussed in more detail below, the Coalition is supportive of the goals of the Commission’s comprehensive review and provides specific comments for the Division and the Commission to consider in connection with the Commission’s plans to adopt final rules amending the Reporting Rules.

## I. THE COALITION FOR DERIVATIVES END-USERS

The Coalition represents end-user companies that employ derivatives and derivatives strategies primarily to manage risks, enhance their competitiveness and provide stable pricing to their customers. Hundreds of companies and industry trade associations have been active in the Coalition on both legislative and regulatory matters, and our message is straightforward: financial regulatory reform measures should promote economic stability and transparency without imposing undue burdens on end-users, which are the engines of the U.S. economy. Imposing unnecessary regulation on end-users—parties that did not contribute to the 2008-2009 financial crisis—would fuel economic instability, restrict job growth, decrease productive investment and hamper U.S. competitiveness in the global economy.

When Congress enacted the sweeping derivatives reforms contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) in 2010, among

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<sup>1</sup> Division of Market Oversight, *Roadmap to Achieve High Quality Swaps Data*, U.S. Commodity Futures Trading Commission, July 10, 2017, available at [http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/dmo\\_swapdataplan071017.pdf](http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf).

<sup>2</sup> 17 C.F.R. Parts 43, 45, and 49 (2017).

other things, Congress sought to increase transparency without imposing burdens on end-users.<sup>3</sup> In this regard, Dodd-Frank created a single-sided swap reporting regime in which the burdens to report data generally fall on the swap dealer or financial entity counterparty to the swap transaction. Accordingly, most end-users are not “reporting counterparties” under the Commission’s Reporting Rules and, thus, typically do not have any direct reporting obligations with respect to their external swaps.<sup>4</sup> End-users would be considered “reporting counterparties” with direct reporting burdens for their inter-affiliate swap transactions; however, the Commission has provided conditional no-action relief to alleviate such reporting burdens.<sup>5</sup> Although end-users do not generally have direct reporting obligations under current rules, the Coalition is providing these comments to the Roadmap in order to ensure that any amendments that are contemplated and ultimately incorporated into the Reporting Rules do not result in any undue burdens on end-users.

## **II. THE COALITION GENERALLY SUPPORTS THE TWIN GOALS OF THE COMMISSION’S COMPREHENSIVE REVIEW AND ITS PLAN TO AMEND THE REPORTING RULES**

The Coalition fully supports both the twin goals of the Commission’s comprehensive review of its Reporting Rules, and the Commission’s plan to amend its rules through undertaking a formal rulemaking process. Most notably, we agree with the Commission’s first goal of ensuring that the Commission receives accurate, complete and high quality data on swaps transactions for its regulatory oversight role. In that regard, the Coalition believes that the Commission’s single-sided reporting regime is the best and most efficient means for regulators to obtain high quality data. A single, high-quality stream of agreed upon and confirmed data by the counterparties avoids unnecessary duplication and reduces the chance of false mismatches in the swap data repositories (“SDRs”). While SDRs, reporting counterparties and other affected stakeholders have undertaken substantial efforts in good faith towards implementing and complying with the Reporting Rules to date, there is broad industry consensus that certain aspects of those rules are overly prescriptive, unnecessarily complex and have resulted in the reporting of inconsistent and suboptimal swaps data. This sentiment has been echoed by CFTC Chairman J. Christopher Giancarlo and several other past and current Commissioners, all of whom have publicly noted that the current swaps data that is reported to the Commission offers very little insight into actual swaps risk exposures.<sup>6</sup>

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<sup>3</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376, Pub. Law 111-203 (July 21, 2010), as amended.

<sup>4</sup> 17 C.F.R. §§ 43.3 and 45.8.

<sup>5</sup> CFTC No-Action Letter (“NAL”) 13-09 (Apr. 5, 2013).

<sup>6</sup> 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”); Statement by Commissioner Sharon Y. Bowen, *George Washington Law 2016 Manuel F. Cohen Lecture* (Feb. 4, 2016), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opabowen-8> (“Under our current rules, all swaps transactions, whether cleared or uncleared, must be reported to a trade repository. . . We are still refining this data however. Our rulemaking did not provide an accompanying data specification document to clearly outline each data field.”); Statement by Commissioner Scott D. O’Malia, SIFMA Compliance and Legal

In addition, the Coalition agrees with the Commission's second goal of streamlining reporting in order to make it more efficient. In certain instances, the prescriptive yet ambiguous nature of the Commission's Reporting Rules makes the reporting of data difficult. For example, with respect to bespoke or unique swap terms, the Reporting Rules require that reporting parties report unique specifications by reporting such specifications in data fields meant for more standardized products or in a catch-all data field. The ambiguity leaves both SDRs and the industry uncertain how to properly report data in compliance with the Commission's Reporting Rules. Notwithstanding these concerns, the Coalition acknowledges that the Commission's Reporting Rules have successfully resulted in the reporting of all swaps in the United States. Thus, while the swaps data that is currently reported to SDRs is less than perfect, the Commission's Reporting Rules have substantially advanced the reporting commitments set forth in the 2009 Pittsburgh G-20 Summit.<sup>7</sup>

Lastly, the Coalition supports the Commission's approach to revise parts of the Commission's Reporting Rules through a full rulemaking process as opposed to taking less formal measures. Given that the Commission's Reporting Rules are the backbone of the agency's regulatory framework for transparency into the swaps market, it is important that the Commission's potential reforms thereto follow a thorough public consultation process, which is subject to the Administrative Procedure Act.<sup>8</sup>

### III. THE COALITION'S SPECIFIC COMMENTS TO THE ROADMAP

In addition to expressing our more general support for the Division's and the Commission's efforts on reforming its Reporting Rules, the Coalition has more specific substantive and procedural comments to the Roadmap. Those comments are set forth in the respective sections that follow.

#### A. SDR Data Reconciliations

The Roadmap sets out three projects as part of the Division's review. The first project is focused on the review of SDR operations (also known as "Tranche 1").<sup>9</sup> As part of Tranche 1, the Roadmap provides that the Division will "identify [the] most efficient and effective solution of

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Society Annual Seminar (Mar. 19, 2013), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opaomalia-22> ("In a rush to promulgate the reporting rules, the Commission failed to specify the data format reporting parties must use when sending their swaps to SDRs. In other words, the Commission told the industry what information to report, but didn't specify which language to use. This has become a serious problem. . . The end result is that even when market participants submit the correct data to SDRs, the language received from each reporting party is different. In addition, data is being recorded inconsistently from one dealer to another.").

<sup>7</sup> OECD, Leaders' Statement: The Pittsburgh Summit, G-20 (September 24-25, 2009), available at <https://www.oecd.org/g20/summits/pittsburgh/G20-Pittsburgh-Leaders-Declaration.pdf>.

<sup>8</sup> Administrative Procedure Act, 60 Stat. 237, Pub. Law 79-404 (June 11, 1946), as amended.

<sup>9</sup> CFTC Roadmap, pp. 5-6.

swap counterparty(ies) to confirm the accuracy and completeness of data held in an SDR.”<sup>10</sup> The Roadmap further provides that Division staff will “consider which counterparty(ies) must perform reconciliations.”<sup>11</sup>

The Coalition believes that SDR data reconciliations should always be undertaken by the reporting party to the swap transaction. That is, we believe that the sole legal obligation responsibility for the reporting, reconciliation and/or verification of swap transaction data should rest with the single party to the transaction that is best situated to provide and confirm timely, complete data. Imposing new reporting obligations on non-reporting parties (such as end-users), which are not in the business of dealing swaps and do not have the dedicated systems, personnel or resources to confirm swap details at an SDR, would be unnecessarily burdensome, inefficient and costly.

#### *B. Adopting Relief from Various Staff No-Action Letters on Reporting Obligations*

In order to address many of compliance challenges and difficulties arising out of the Commission’s accelerated efforts to finalize its Reporting Rules and other related regulations promulgated under Dodd-Frank, Division staff was impelled to issue a series of guidance and no-action relief to SDRs, reporting parties and market infrastructures. In total, Division staff has issued 63 swap data reporting-related letters and guidance following the Commission’s adoption of the Reporting Rules.<sup>12</sup> Rather than having a patchwork of permanent and temporary no-action letters, we believe that the CFTC should adopt as final rules the substance of the relief granted through both time-limited and permanent CFTC’s no-action letters and guidance relating to reporting obligations. We urge, however, that in adopting the substance of the various relief and guidance, the Commission do so in such a way that promotes efficiency, market certainty and reduces the number of prescriptive conditions imposed on qualifying parties, all while maintaining the integrity of reported swap data. To do otherwise would defeat the intended goals of the Roadmap.

By way of example, Coalition members generally rely on the conditional relief in Letter 13-09, which grants, among other things, an exemption from swaps reporting under Part 45 for inter-affiliate swap transactions.<sup>13</sup> Financial and non-financial end-users use inter-affiliate swaps

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., NAL 12-32; NAL 12-75; NAL 13-36; NAL 13-56; NAL 14-90; NAL 14-119; NAL 15-38; NAL 16-72; NAL 17-16; Interpretive Guidance 13-69.

<sup>13</sup> Coalition for Derivatives End-Users, *Comment Letter: Request for No-Action Relief from the Division of Market Oversight Staff Pursuant to CFTC Regulation 140.99: End-User Reporting Requirements for Inter-Affiliate Swaps and Compliance Dates for End-User Reporting* (Feb. 26, 2013), available at [http://coalitionforderivativesendusers.com/uploads/sites/351/Coalition%20for%20Derivatives%20End-Users%20Request%20to%20DMO%20for%20No-Action%20Relief%20re%20Inter-Affiliate%20Swap%20Reporting%20and%20Compliance%20Dates%20\(PDF\)%20February%2027,%202013.pdf](http://coalitionforderivativesendusers.com/uploads/sites/351/Coalition%20for%20Derivatives%20End-Users%20Request%20to%20DMO%20for%20No-Action%20Relief%20re%20Inter-Affiliate%20Swap%20Reporting%20and%20Compliance%20Dates%20(PDF)%20February%2027,%202013.pdf).

as a risk management best practice to manage internal risks of the enterprise. While Coalition members are very appreciative of the relief provided in Letter 13-09, such relief is only available where a swap transaction meets a series of onerous conditions, including that all swaps entered into “between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR registered with the Commission, pursuant to, or as if pursuant to parts 43, 45, and 46 of the Commission’s regulations.”<sup>14</sup> This condition effectively extends the Reporting Rules to cross-border transactions. In particular, the condition forces an end-user, which seeks to take advantage of the relief, to report all of their external swaps to a U.S. SDR even when those external swaps are not required to be reported to a U.S. SDR. Other conditions in Letter 13-09 are also unnecessarily restrictive such as the distinction between wholly and majority-owned affiliates and the condition explaining that the use of the inter-affiliate clearing exception denies the ability of an end-user to elect the relief in Letter 13-09. In short, the underlying concerns with each of the above-referenced conditions are that the conditions ignore the fact that inter-affiliate transactions have no market impact and do not consider the practical realities of how end-users use derivatives for risk management within a corporate group.<sup>15</sup>

### *C. Harmonization*

As part of the second project of the Roadmap (also known as “Tranche 2”), the Division states that it will coordinate and harmonize its reportable data fields with the standards developed as part of the CPMI-IOSCO-led international data field harmonization efforts.<sup>16</sup> Similarly, the Roadmap notes that Division staff will explore alignment of the CFTC’s reporting obligations with those required by the European Securities Market Authority. We believe that the Roadmap appropriately identifies the challenges presented by the CFTC having its own unique set of reporting requirements and list of reportable data fields that is distinct from those requirements and data fields required by other regulators. Thus, the Coalition fully supports the Roadmap’s stated plan to harmonize where appropriate. The differences between various reporting rulesets

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<sup>14</sup> NAL 13-09.

<sup>15</sup> Other jurisdictions have recognized the importance of exempting inter-affiliate transactions from reporting obligations and have proposed to address the concerns raised by industry. For instance, the European Union has just proposed a blanket exemption for reporting of inter-affiliate swaps. See European Commission, Proposal for a Regulation of the European Parliament and of the Council, amending Regulation (EU) No 648/2012, COM(2017) 208 final (May 4, 2017), available at [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2017/0208/COM\\_COM\(2017\)0208\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0208/COM_COM(2017)0208_EN.pdf) (“Intragroup transactions involving any NFCs should be exempted from the reporting obligation. Given the nature and limited volume of such trades, this has the advantage of significantly reducing the costs and burdens of reporting for those counterparties that are the most disproportionately affected by the requirement, while the resulting very limited loss of data will not significantly affect authorities’ ability to monitor systemic risk in the OTC derivative markets.”)

<sup>16</sup> CFTC Roadmap, pp. 7-11; Committee on Payments and Market Infrastructures and the Board of International Organization of Securities Commissions, *Consultative Report: Harmonization of critical OTC derivatives data elements (other than UTI and UPI) – third batch* (June 2017), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD565.pdf>.

make reporting complex and costly for global derivatives users and present significant obstacles for the aggregation of derivatives data in order to better understand global derivatives trading activity. Indeed, the Coalition further believes that harmonization is absolutely critical for the successful and efficient functioning of global swaps markets. Moreover, we encourage the Commission to work with global regulators towards substituted compliance and reciprocal equivalence determinations related to reporting and enhanced information sharing agreements that provide for the increased sharing of swaps data among regulators.

In addition, Tranche 2 of the Roadmap specifically mentions possible alignment of the CFTC's Reporting Rules and the Securities and Exchange Commission's ("SEC") security-based swap data reporting rules.<sup>17</sup> There are several instances where the CFTC and the SEC would require market participants to report different data fields and to use different parameters in determining which trades are subject to reporting. Since many market participants and SDRs participate in both swaps and security-based swaps markets, we agree with the Division's plan for alignment of domestic regulatory rulesets. To that end, we respectfully request that the Division coordinate closely with SEC staff to develop consistent reporting obligations in order to reduce the ineffectual differences between their two rulesets.

#### *D. Timing*

We believe that the Division's review and the Commission's efforts should ensure that any final rules adopted by the Commission (and ultimately implemented by the industry) do not seek to meet an artificially imposed deadline for implementation at the expense of compromising quality and uniformity of data reporting. The Roadmap provides that the Commission expects full compliance with revised final rules by the end of 2019. We respectfully urge that the Division not rush its public consultation and analysis and that staff spends an appropriate amount of time necessary to ensure that the Commission's Reporting Rules successfully meet the Roadmap's twin goals.

#### **IV. CONCLUSION**

Thank you in advance for your consideration of the Coalition's comments. The Coalition is committed to working with the Division and the Commission in order to ensure that the Commission receives high quality and accurate swaps data, which it needs to conduct its regulatory oversight function. At the same time, the Coalition is committed to ensuring that derivatives end-

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<sup>17</sup> CFTC Roadmap, p. 10.

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users are able to continue to hedge their business risks through the use of derivatives without being forced to endure undue burdens as the result of any changes to the CFTC's Reporting Rules.

Please contact Michael Bopp at 202.955.8256 or at [mbopp@gibsondunn.com](mailto:mbopp@gibsondunn.com) if you have any questions or concerns.

Yours sincerely,

The Coalition for Derivatives End-Users