Deutsche Bank

November 5, 2010

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

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Interim Final Rules for Reporting of
Pre-Enactment Swaps and Security-Based Swaps

Dear Mr. Stawick and Ms. Murphy:

Deutsche Bank AG ("DBAG" and, together with its affiliates, "Deutsche Bank") appreciates the opportunity to provide the Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC" and, together with the CFTC, the "Commissions") with our views regarding the interim final rules (together, the "Interim Final Rules") for reporting certain pre-enactment swaps and security-based swaps (collectively, "swaps") recently promulgated by the Commissions pursuant to Sections 729 and 766 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").[1]

Deutsche Bank supports the efforts of the Commissions to implement the mandate, and foster the public policy goals, of the swaps trade reporting requirements of the Act. However, we are concerned about four aspects of the Interim Final Rules. First, we believe that the requirement to submit actual copies of non-electronic trade confirmations for pre-enactment swaps will be burdensome to both market participants and registered swap data repositories ("SDRs"), without corresponding regulatory benefits. Second, the scope of reportable unexpired pre-enactment swaps ("Reportable Swaps") for organizations, such as Deutsche Bank or similarly situated banks, that conduct their swaps business both in the United States and in non-U.S. jurisdictions, is extremely vague. Third, we are concerned about the ambiguity and broad scope of the

[1] Commodity Exchange Act Release, 17 C.F.R. Part 44 (October 1, 2010); Exchange Act Release No. 34-63094 (October 13, 2010).

requirements to retain certain information and documents relating to the terms of swaps. Fourth, we have concerns that identifying trade counterparties by name will expose swap dealers and others who submit counterparty-identifying information to liability under non-U.S. law and will generally undermine the legitimate confidentiality expectations of trading counterparties when transacting with U.S. swap dealers.

Deutsche Bank respectfully submits that these concerns can and should be addressed by the Commissions in a manner that is consistent with their statutory mandate and without weakening the policy goal of enhancing regulatory oversight over the swaps market.

Submission of Non-Electronic Confirmations

Under the Interim Final Rules, swap dealers and other market participants are obliged to submit to an SDR (or, under certain circumstances, to the relevant Commission), by the applicable compliance date, specified information in respect of Reportable Swaps, including "a copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy."[2]

As a threshold matter, for purposes of this letter, references to "electronic" confirmations refer to the report made by confirmation matching services representing transactions matched between parties. Other confirmations exchanged by fax or in hard copy format are assumed to be "non-electronic" confirmations.

The submission of non-electronic transaction confirmations will be extremely burdensome for reporting entities. While in recent years market participants for certain asset classes (such as credit default products) have moved toward a greater degree of reliance upon electronic matching systems (which involve the electronic submission of agreed economic terms to a matching engine), swaps referencing other asset classes (such as interest rates and equities) have been slower to move to these systems. Deutsche Bank has a vast quantity of Reportable Swaps for which only non-electronic confirmations exist. Thus, the delivery of non-electronic confirmations would constitute a massive undertaking and would require significant additional staffing and other resources to collect, organize and transmit all relevant non-electronic confirmations. If the Interim Final Rules are not modified, we expect that they will ultimately result in the delivery of hundreds of thousands (if not millions) of pages of Reportable Swaps documentation to SDRs or (if applicable) the Commissions *from Deutsche Bank alone*.

Naturally, SDRs and (if applicable) the Commissions receiving this data would also face the daunting challenge of receiving and tagging this quantity of non-electronic confirmations. Moreover, since the data embedded in non-electronic confirmations would be in a non-standardized, free-text format, it would be a massive (if not impossible) task to pair non-electronic confirmations relating to transactions matched between parties or otherwise extract relevant data from such documents, thereby limiting the utility of the information.

[2] Commodity Exchange Act Rule § 44.02(a)(1)(i); Exchange Act Rule 13Aa-2T(b)(1)(i).

As an alternative, we suggest that the Commissions modify the Interim Final Rules to permit the reporting in a common electronic format of the principal economic terms of each Reportable Swap. Furnishing reportable data in this manner would allow market participants to utilize their existing electronic records to locate and extract specific data elements on a far more efficient basis than would be the case if reporting entities were required to deliver transaction confirmations. [3] Electronic matching engines could also be used to pair transactions for which non-electronic confirmations would have otherwise been delivered. This approach would considerably reduce the resources that will be necessary for reporting entities to fulfill their reporting obligations under the Interim Final Rules. The SDRs (or the relevant Commission, if applicable) would also benefit from efficiencies that would be realized using this approach to reporting pre-enactment swap transaction data, since receiving comprehensive transaction data in an electronic file would simplify the process of extracting specific data elements.

Naturally, and as is already contemplated in the Interim Final Rules, the Commissions would at any time be able to request from a reporting entity a copy of any particular transaction confirmation, which would be subject to record retention requirements.

We believe that this suggested approach is consistent with the relevant provisions of the Act. Moreover, it would allow the Commissions to discharge their statutory obligations, and enhance their ability to oversee the swap markets, in a manner that reduces burdens on the resources of market participants, the SDRs and the Commissions.

Scope of Reportable Swaps in a Multi-Jurisdictional Context

Like many global financial institutions, Deutsche Bank conducts its Swaps businesses out of several legal entities. For example, a trade with a U.S. customer or a non-U.S. counterparty may be "booked" into one legal entity (such as a non-U.S. office of DBAG) but arranged by employees of a U.S. branch or affiliated broker-dealer. Similarly, a trade may be booked at and arranged solely by DBAG with a non-U.S. counterparty, but reference a U.S.-listed security. We are concerned that the jurisdictional provisions of the Act (*i.e.*, Sections 722 and 772) do not provide sufficient guidance as to the scope of Reportable Swaps where there are U.S. and non-U.S. contacts. Without such guidance, we are concerned that there is significant risk of over-

[3] We note that requiring the submission of transaction confirmations, whether in electronic or non-electronic format, may present a view of the terms and conditions of Reportable Swaps that does not reflect certain post-execution events, such as succession events or events that modify the terms by operation of law. Permitting the reporting of data via a common electronic format would ensure that current terms are provided to the SDR (or the relevant Commission, if applicable), therefore eliminating the potential delivery of stale information.

or under-reporting of swaps.[4] Moreover, an overbroad interpretation of Reportable Swaps will potentially lead to multiple and possibly inconsistent reporting obligations (for example, in the U.S. and Europe) with respect to pre-enactment swaps.

While the list of fact patterns in which jurisdictional considerations are raised is long, we respectfully request that the Commissions provide guidance and clarity (perhaps by articulating a set of factors to be considered) for determining whether certain swaps are covered by the Interim Final Rules as Reportable Swaps. Such clarity would be consistent with the policy goals behind the Interim Final Rules, and would provide greater certainty to the marketplace with respect to reporting obligations where there are jurisdictional questions.

Record Keeping

The Commissions have indicated that persons who may be required to report swaps must maintain certain records, including (in the case of swaps) information relevant to the price of the transaction and (in the case of security-based swaps) all information from which the price of the transaction was derived. However, the Commissions also indicate that information is subject to the retention requirement "if available" and "in such form as they currently exist." We are concerned that the scope of information and documents required to be retained in their current format goes beyond what a regulated financial institution, such as DBAG and many of its affiliates, would currently be required to retain as part of its books and records under otherwise applicable law and corporate policies. The Interim Final Rules should clarify that the information to be retained by U.S. and non-U.S. banks, broker-dealers and other similarly regulated entities should not exceed that required to be retained to support their books and records in the ordinary course of their business, and in accordance with bank records retention policies and procedures. At a minimum, this would include the economic terms of the transaction (which, for so long as the trade is outstanding, will exist in the bank's books and records) and the confirmation of the transaction, in whatever form. We believe that the retention of such data would be sufficient to allow the Commissions to execute their statutory mandate without providing any undue burden on the resources of market participants.

[4] Under-reporting of Reportable Swaps would not only result in a violation of trade reporting requirements for pre-enactment swaps, but would also potentially affect the availability of the exemption from the Act's mandatory clearing requirement, since this exemption for pre-enactment swaps turns upon proper and timely reporting. *See* Section 723(a)(3) of the Act, amending Section 2(h)(6)(A) of the Commodity Exchange Act, and Section 763(a) of the Act, enacting Section 3C(e)(1) of the Securities Exchange Act.

Confidentiality

Legal Requirements Regarding Counterparty Privacy

The reporting of Reportable Swaps also raises important concerns relating to the confidentiality of counterparty information.

Counterparty financial information is subject to privacy laws and regulation in many jurisdictions.[5] Such privacy and other confidentiality requirements may attach as a legal matter in the jurisdiction where a dealer is located, where the counterparty is located, or where the transaction was solicited; they may also arise as a matter of contract. In some cases, dissemination or disclosure of such information could lead to severe civil or criminal penalties for those required to submit information to an SDR pursuant to the Interim Final Rules. These concerns are particularly pronounced because of the expectation that Reportable Swap data will be reported, on a counterparty-identifying basis, to SDRs, which will be non-governmental entities, and not directly to the Commissions.

We therefore request that the Commissions adopt comprehensive rules designed to protect those who are subject to reporting obligations under the Interim Final Rules from incurring civil and criminal liability in connection with their compliance with the Interim Final Rules.

Such rules could take the form of an exclusion from the obligation to report any information the reporting of which could reasonably subject the reporting entity to civil liability or criminal prosecution. This might be accomplished by permitting the redaction of certain sensitive transaction data, such as the identity of parties, where the reporting of such data could reasonably be expected to have adverse civil or criminal consequences. Alternatively, another approach could require such data to be reported only under certain limited circumstances, and only directly to the relevant Commission rather than to an SDR, in cases where reporting such data to an SDR could reasonably be expected to have adverse civil or criminal consequences.

In addition, the Commissions should engage directly with their regulator counterparts in jurisdictions that have strict regimes pertaining to disclosure of financial information to seek modifications of conflicting requirements that would subject reporting entities to liability under non-U.S. law due to compliance with the Interim Final Rules.

We also note that because of ambiguity as to what constitutes a Reportable Swap in a multi-jurisdictional context, as described above, even if the Commissions provide safeguards with respect to these concerns and non-U.S. jurisdictions provide exceptions to their privacy laws under circumstances where information is required to

[5] *See, e.g.*, Financial Stability Board, Implementing OTC Derivatives Market Reforms—Report of the OTC Derivatives Working Group, Annex 11 (October 25, 2010) (available at http://www.financialstabilityboard.org/publications/r_101025.pdf).

be reported by law, it may be difficult to determine transactions that constitute Reportable Swaps. Even where trade reporting exceptions from privacy laws exist, market participants may be faced with uncertainty over whether they will actually benefit from the carve-out if the relevant transaction is not squarely within the category of swaps that are Reportable Swaps. Without clarity, market participants may be faced with the untenable position of making a judgment that may result in the violation of either a non-U.S. jurisdiction's privacy laws, or the Interim Final Rules. We therefore request that the Commissions provide greater clarity as to the territorial boundaries of what constitutes a Reportable Swap.

Protection of Reported Data by SDRs and the Commissions

Beyond the potential for legal exposure of reporting entities under the Interim Final Rules, we observe that all market participants have legitimate interests in the protection of their confidential and identifying financial information. In this regard, we respectfully suggest that the Commissions take all possible steps to ensure that identifying information is protected by SDRs and the Commissions themselves. Regarding SDRs, the Commissions should, using their statutory authority under Sections 728 and 763 of the Act, impose strict requirements on the handling, disclosure and use by the SDRs of identifying information and on the operational and technological measures that must be employed by SDRs to protect such information from disclosure (including by way of unauthorized access).

FOIA Protection

We also have concerns regarding the protection of information furnished to the Commissions under the Interim Final Rules, whether pursuant to the request of a Commission or reporting of Reportable Swaps where no SDR will receive reports concerning that category of Reportable Swap. The SEC's adopting release for its Interim Final Rule states that: "[o]ther than information for which a reporting entity requests confidential treatment and that may be withheld from the public in accordance with the provisions of 5 U.S.C. 522 (The Freedom of Information Act ("FOIA")), the collection of information pursuant to [the SEC's Interim Final Rule] will not be kept confidential and will be publicly available."[6] While Deutsche Bank presumes that the likely intent of the Commissions is that reporting of Reportable Swaps will ultimately be made entirely to SDRs, and that specific requests by the Commissions for data will likely be eligible for protection (upon request) under one of FOIA's exceptions (such as Exceptions 5 or 8), it is an untenable situation that sensitive counterparty-identifying information could be subject to disclosure under FOIA either because a reporting party inadvertently fails to make a FOIA confidentiality request or because an exemption is ultimately held to be unavailable. The Commissions should affirmatively state that they intend to keep information furnished pursuant to the Interim Final Rules confidential under FOIA, or to seek a legislative solution.

[6] Exchange Act Release No. 34-63094 at 28.

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We thank the Commissions for the opportunity to comment on the topic discussed above and for the Commissions' consideration of Deutsche Bank's views.

Please feel free to call either of the undersigned with any question or request for additional information that you may have.

Sincerely,

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