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October 30, 2015

By Electronic Mail

Re: Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps; Proposed Rule, 80 Fed. Reg. 52,544 (Aug. 31, 2015)

Mr. Chris Kirkpatrick
Secretary
Commodity Futures Trading Commission
1151 21st St NW
Washington, DC 20036

Dear Mr. Kirkpatrick,

Markit appreciates the opportunity to comment on the Commodity Futures Trading Commission (“CFTC” or “Commission”) notice of proposed rulemaking regarding Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps (“Proposal”).¹

Markit (NASDAQ: MRKT)² is a global financial information services company, offering independent data, valuations, risk analytics, processing, and other financial services across regions, asset classes and financial instruments. Markit and its subsidiaries have over 4,000 employees globally, including over 1,600 in the United States, of which over 650 are located in New York, 500 in Boulder, and 400 in Dallas.

Markit’s trade processing platform³ provides a range of trade processing services for derivatives across asset classes and regions.⁴ Globally over 2,000 firms use Markit’s trade processing platforms that process, on average, 90,000 derivatives transaction processing events every day and provide customers a single point of connectivity to 16 clearinghouses worldwide. Markit also provides regulatory reporting services⁵ and has also sent over 60 million trade reports to swap data repositories (“SDRs”) and trade repositories worldwide in accordance with requirements from eight (8) different regulatory reporting regimes.

¹ Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps; Proposed Rule, 80 Fed. Reg. 52,544 (Aug. 31, 2015), available at <http://www.cftc.gov/idc/groups/public/@lfederalregister/documents/file/2015-21030a.pdf>.

² Please see <http://www.markit.com> for further information.

³ Also known as “MarkitSERV,” a wholly-owned subsidiary of Markit. See <http://www.markitserv.com>.

⁴ Middleware services include a variety of post-trade processing functions, including confirmation, matching, submission of trades to clearing, regulatory reporting, and other post-trade processing. See MarkitSERV Overview, <https://www.markit.com/Product/File?CMSID=307bef8dbc8b4b979ab81c74feeaac32>.

⁵ Markit serves as a third-party reporting agent in markets regulated by the Commodity Futures Trading Commission (“Commission” or “CFTC”). See 17 CFR 45.9 (“Registered entities and swap counterparties required by this part to report required swap creation data or required swap continuation data, while remaining fully responsible for reporting as required by this part, may contract with third-party service providers to facilitate reporting.”).

Markit has been actively and constructively engaged in the debate about regulatory reform in financial markets, including topics such as the implementation of the Pittsburgh G20 commitments for OTC derivatives and the design of a new regulatory regime for benchmarks and indices. Over the past years, we have submitted more than 120 comment letters to regulatory authorities around the world and have participated in numerous roundtables.

We commend the Commission's thoughtful approach to the Proposal and targeted revisions to its reporting requirements. The Commission's cost-benefit analysis is presented carefully and deserves praise. While we commend the Commission's corrections and helpful clarifications that generally preserve but improve existing regulatory reporting workflows, we question the Commission's failure to address a fundamental flaw in its previous policy. As described in further detail below, Markit:

- a. commends the Commission's amendments clarifying the reporting obligations of a derivatives clearing organization ("DCO") that has accepted a swap for clearing;
- b. questions the value of removing the requirement to report confirmation data for intended-to-be-cleared swaps;
- c. welcomes the amended rules providing a link between the unique swap identifier ("USI") of an original swap to the clearing swaps in the SDR records for the clearing swaps;
- d. urges the Commission to reconsider allocating both the responsibility to report clearing swap data and the power to determine which SDR receives the data to DCO; and
- e. recommends the Commission to adopt a "counterparty choice" approach that would empower the counterparties to cleared swaps to select both who reports cleared swap data and which SDR should receive such data.

I. Discussion

- a. *Markit commends the Commission's amendments clarifying the reporting obligations of a DCO that has accepted a swap for clearing*

The Proposal contains a number of amendments intended to clarify the roles of market participants and infrastructures in cleared swap workflows. For example, Commission regulation 45.1 would be amended under the Proposal to add new definitions for "original swaps" and "clearing swaps."⁶ Most importantly, Commission regulation 45.4(c) would amend the Commission's rules to make it clear that DCOs must report continuation data, including terminations, to the SDR housing the original swap (also known as the "alpha" swap) data.

Markit commends the Commission's amendments clarifying the reporting obligations of a DCO that has accepted a swap for clearing. This is an important improvement to the Commission's rules since the role of DCOs in the reporting of cleared swaps are unclear. This had led to workflow problems and this proposal should resolve those issues.

- b. *Markit questions the value of removing the requirement to report confirmation data for intended-to-be-cleared swaps*

⁶ "Clearing swap means a swap created pursuant to the rules of a DCO that has a DCO as a counterparty, including any swap that replaces an original swap that was extinguished upon acceptance of such original swap by the DCO for clearing." "Original swap means a swap that has been accepted for clearing by a derivatives clearing organization." Proposed regulation 45.1.

Current Commission regulation 45.3 requires reporting entities to report two types of creation data to an SDR, i.e. primary economic terms (“PET”) data’ and confirmation data.⁷ This requirement applies to intended-to-be-cleared (“ITBC”) and cleared swaps alike. Under the Proposal, swap execution facilities (“SEFs”) and designated contract markets (“DCMs”) and other reporting counterparties would continue to be required to report PET data as part of their creation data reporting for all swaps, but would be required to report confirmation data only for swaps that, at the time of execution, are not intended to be submitted to a DCO for clearing.

We believe that removing the requirement for confirmation reports for ITBC swaps while maintaining the requirement for PET reports does not significantly benefit reporting workflows. We note that current reporting workflows, including those involving Markit as a reporting agent, automatically generate both PET and confirmation data reports for ITBC swaps. There is little incremental cost for us and other firms providing part 45 data records to SDRs to submit confirmation data while submitting PET data. Moreover, the proposal would result in two different workflows for ITBC swaps and uncleared swaps, resulting in two different workflow builds with no commensurate benefit.

In the event the Commission insists on eliminating the requirement for reporting confirmation data for ITBC swaps, we would advise that the Commission clarify that confirmation data could still be reported to SDRs though such reports would not be mandatory and such reports would not subject a counterparty to regulatory exposure. This approach would provide market participants, SEFs, and DCMs with the (and their reporting agents) flexibility to determine when to phase out confirmation data reporting.

- c. *Markit welcomes the amended rules providing a link between the USI of an original swap to the clearing swaps in the SDR records for the clearing swaps*

Commission regulation 45.5 currently requires that each swap subject to the Commission’s jurisdiction be identified in all recordkeeping and all swap data reporting by the use of a USI. Proposed Commission regulation 45.2(c)(2) would require DCOs to report, as a part of the continuation data for a cleared swap, the USI of the original swap that is replaced by clearing swaps.

As we have stated previously,⁸ we believe that the most effective method to establish a link between new and existing swaps is to store the USI of the original swap as a prior USI. The proposed approach is generally consistent with our past suggestions and we welcome it.

- d. *Markit urges the Commission to reconsider allocating both the responsibility to report clearing swap data and the power to determine which SDR receives the data to DCOs*

Proposed Commission regulation 45.3 would modify and clarify DCO creation data reporting obligations for swaps that result from the clearing process. Under proposed Commission regulation

⁷ Commission regulation 45.1 defines “required swap creation data” as primary economic terms data and confirmation data. Commission regulation 45.1 defines “primary economic terms data” as “all of the data elements necessary to fully report all of the primary economic terms of a swap in the swap asset class of the swap in question” and defines “confirmation data” as “all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap. For cleared swaps, confirmation data also includes the internal identifiers assigned by the automated systems of the DCO to the two transactions resulting from novation to the clearing house.” Commission regulation 45.1

⁸ Markit comment letter regarding Review of Swap Data Recordkeeping and Reporting Requirements,

May 7, 2014, at 8, available at

<http://www.markit.com/Company/RegulatoryResponsesFile?CMSID=b32b2d4015cf4f7d8719851ae784ff89>.

45.8(i), the DCO would be the reporting counterparty for clearing swaps, regardless of who is the reporting counterparty for the ITBC swap. Under this proposed regulation, the DCO would also have the sole discretion to determine the SDR that receives trade data for a cleared swap transaction.⁹ The Commission “requests comment on the extent to which a DCO’s choice of an affiliated SDR may impact competition, including how market share among affiliated and non-affiliated SDRs may increase or lessen such an impact on competition.”¹⁰

The Commission’s proposed policy would provide regulatory approval for anticompetitive tying of clearing and regulatory reporting services in contravention of the Commission’s own regulatory precedent set forth in the Commission’s adjudication of CME Rule 1001.¹¹ CME Rule 1001 provided that, regardless of the desires of a swap counterparty or trading venue, all CME-cleared swap trades must be reported to CME’s Repository Service. In reviewing CME Rule 1001, the CFTC considered whether the rule constituted unlawful “tying” of clearing and regulatory reporting services.¹² Citing antitrust case law, the CFTC found that in order to constitute unlawful tying, the activity at issue must be undertaken by a person that has market power.¹³

The CFTC subsequently determined that a market share below 30 percent is generally recognized as insufficient to support a finding of market/monopoly power.¹⁴ The CFTC’s decision to approve CME Rule 1001 was predicated on the fact that did not reach this threshold, i.e. “CME’s share of cleared swaps appear[ed] small at th[e] time” and therefore “the [CFTC] [was] unable to conclude [...] that CME Rule 1001 will unreasonably restrain trade or impose a material anticompetitive burden[.]”¹⁵

At the time of the CFTC’s decision (March 2013) regarding CME Rule 1001, CME had a less than 30% market share in the market for cleared swaps.¹⁶ The marketplace for clearing services is considerably more concentrated than it was in March 2013. For example, the market for CDS index

⁹ “Clearing swaps. Notwithstanding the provisions of paragraphs (a) through (h) of this section, if the swap is a clearing swap, the derivatives clearing organization that is a counterparty to such swap shall be the reporting counterparty and shall fulfill all reporting counterparty obligations for such swap.” Proposed Commission regulation 45.8(i).

¹⁰ Proposal, 80 Fed. Reg. at 52,571.

¹¹ See e.g., Statement of the CFTC, Mar. 6, 2013, <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/statementofthecommission.pdf> and Chicago Mercantile Exchange Inc. (“CME”) Rule 1001 (“CME Rule 1001”), voluntarily submitted to CFTC staff review on Dec. 6, 2012, available at <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul120612cme001.pdf>, and ICE Clear Credit Rule 211, submitted for self-certification on Apr. 10, 2013, available at <http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul041013icc002.pdf>.

¹² Statement of the CFTC at 11 (“Determining whether Rule 1001 is anticompetitive in light of those standards depends, in part, on whether CME has either market power or monopoly power. Assessing either market power or monopoly power first requires defining the relevant market for the tying product (in this case, the market for CME’s swap clearing services. Once the appropriate relevant antitrust market is defined, market power or monopoly power within that market can be assessed. While there is no established numerical cutoff, a market share below 30 percent is generally recognized as insufficient to support a finding of market/monopoly power.”) (citations omitted).

¹³ *Id.*

¹⁴ *Id.* at 11-12.

¹⁵ *Id.*

¹⁶ *Cf. id.* citing inter alia *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-29 (1984) (a 30 percent market share in the tying product market insufficient to support a finding of market power to sustain a tying violation). “[C]ourts virtually never find monopoly power when market share is less than about 50 percent,” *id.* at 231-32, or a dangerous probability of monopolization when shares are less than 30 percent. *Id.* at 320.

clearing is considerably more concentrated than the marketplace described by the Commission in 2013.¹⁷ One firm has over 88% market share in the global market for CDS indexes, as measured by open interest.¹⁸ This firm has even greater market share when one looks at the overall market for CDS clearing by including single-name CDS.

- e. *Markit recommends the Commission to adopt a “counterparty choice” approach that would empower the counterparties to cleared swaps to select both who reports cleared swap data and which SDR should receive such data*

Instead of sanctioning anticompetitive tying arrangements, we urge the Commission to adopt a less anticompetitive approach to the reporting of clearing swaps. This could be done, for example, by amending the final rulemaking to allow the reporting counterparty for the ITBC swap to freely choose whether it would like to report creation and continuation data for the resulting clearing swaps and the SDR that is to receive this data. We call this approach the “counterparty choice” approach.

Under the counterparty choice approach, nothing would prevent the reporting counterparty to the ITBC swap to delegate the responsibility for clearing swaps to a DCO. In fact, many counterparties might decide to do and many DCOs may offer competitive rates and accuracy or the counterparties could choose a DCO-affiliated SDR or an independent SDR as the destination of their swap data. For those market participants that want to house all of their swap data in one SDR or would like to delegate their clearing swap data reporting to anyone but the DCO, for whatever reason, the Proposal would foreclose this possibility, even if the DCO-affiliated SDR offers no value added services.

There are also policy benefits that would follow from the counterparty choice approach. For example, if an SDR has access to a market participant’s swap data housed in a single SDR, there are a wide variety of value-add services, including portfolio-level analytics, that the SDR or independent service providers could more easily provide. The centralization of data encouraged

¹⁷ ICE Clear Credit and ICE Clear Europe (collectively “ICE”), “The Global Leader in Cleared CDS Volume” accounts for 100% of the approximately \$771.9 billion of global single-name credit default swap (“CDS”) open interest. See ICE Clear Credit, <https://www.theice.com/clear-credit> (last visited Apr. 23, 2015).

¹⁸ Global CDS Index Open Interest

	ICE Clear Credit	ICE Clear Europe	ICE Total	CME	LCH	Total
Open Interest in Billions USD (1 EUR = 1.1 USD)	\$525	\$182	\$707	\$57	\$47	\$811
Market Share	65%	22%	87%	7%	6%	

Chart based on data from ICE Clear Credit, <https://www.theice.com/clear-credit> (last visited Oct. 22, 2015); CME Credit Products, <http://www.cmegroup.com/trading/cds/> (last visited Oct. 22, 2015); and LCH.Clearnet, CDSClear Volumes, <http://www.lchclearnet.com/en/asset-classes/otc-credit-default-swaps/volumes> (last visited Oct. 22, 2015).

by counterparty choice would also facilitate and incentivize reviews for accuracy of SDR data.¹⁹ In short, we believe market forces should be allowed to determine who should report clearing swaps and which SDR receives swap data. For additional discussion in support of the counterparty choice approach, we refer you to two comment letters we have submitted in recent years on this issue.²⁰

* * * * *

Markit appreciates the opportunity to provide these comments to the Commission. We would be happy to elaborate on or further discuss any of the points addressed above. If you have any questions, please do not hesitate to contact the undersigned or Salman Banaei at salman.banaei@markit.com.

Yours sincerely,



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¹⁹ If a counterparty relies on SDR data for commercial reasons, as well as for regulatory purposes, it would have commercial incentive to review the accuracy of SDR data.

²⁰ “Proposed Rule 901(a)(2)(i) [providing that clearing agencies would be reporting sides and could select the SDR that receives regulatory reports] would sanction what should otherwise be the unlawful tying of clearing and SDR services[...] frustrate the enhancement of “competition” and deter innovation in the market for post-trade processing services” and “more efficient reporting processes[,] [...] [and] enhance the ability of SDRs affiliated with a clearing agency to impose exit barriers that will deter competition in the market for SDR services and increase data fragmentation.” Markit comment letter regarding Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, May 4, 2015, at 8-9, <https://www.sec.gov/comments/s7-03-15/s70315-6.pdf>. See also id. at 4-8. “Specifically, the Commission should permit the RCP of the initial trade to determine which SDR the alpha, beta and gamma swaps shall be reported to as this should have a positive impact on the quality and consistency of the reported data.” Markit comment letter regarding Review of Swap Data Recordkeeping and Reporting Requirements,

May 7, 2014, at 25-26, available at <http://www.markit.com/Company/RegulatoryResponsesFile?CMSID=b32b2d4015cf4f7d8719851ae784ff89>.