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ISDA response - EC consultation on a Code of Conduct for Interest Representatives 15 February 2008

ISDA © (International Swaps and Derivatives Association) represents participants in the privately negotiated derivatives industry. ISDA was chartered in 1985, and today has over 800 member institutions from 56 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities.

ISDA welcomes the opportunity to comment on the draft Code of Conduct for Interest Representatives, and is firmly committed to transparent, helpful engagement with the EU institutions on policy matters of relevance to the privately negotiated derivatives industry.

For the purposes of this response to the European Commission's draft Code, ISDA will also refer to the European Commission's March 2007 Communication following the Green Paper on the 'European Transparency Initiative.'

General Comments

ISDA is generally supportive of the Commission's efforts to develop a Code of Conduct for Interest Representatives, but has a number of concerns which it believes warrant further consideration and, indeed, consultation.

In this regard, there is a considerable degree of uncertainty on:

- The nature of the register of lobbyists accepting the terms of the code – in particular as to what registration will require;
- The full extent of the financial disclosure required of interest representatives – not clear from either the draft Code or the March 2007 Communication.

Given that registration and associated financial disclosure are required of signatories to the Code, we believe that it is entirely reasonable to request that the European Commission provide more detail as to what these entail, and give interested parties a chance to comment on this detail.

Code of Conduct

Principles: ISDA fully supports the principles of openness, transparency, honesty and integrity in its dealings with the EU institutions. We agree that interest representatives signing the aforementioned register should abide by these principles. As mentioned, we maintain concerns about the nature of this register.

Rules:

In their representation activities.....interest representatives shall:

- 1. Identify themselves by name and organization.*

ISDA is happy to support this rule.

- 2. Declare the clients and the interests they represent.*

We suggest that the wording of this rule be changed to simply ‘Declare the interests they represent’ (the reference to ‘clients’ would not apply to e.g. trade associations, in-house government relations executives, or trade unions). We suggest that (for the purposes of trade associations) simply giving the name of the trade association should suffice in this context, unless further information is sought by the official with whom contact is made.

- 3. Ensure that information provided to the EU institutions is accurate, complete and up-to-date to the best of their knowledge.*

We fully support the spirit of this rule, but feel that it should take account of the intentions of interest representatives providing information to the European Commission. We therefore propose an amendment, based on the following wording: ‘Ensure, to the best of their knowledge that information provided to the EU institutions is up-to-date and is not misleading.’

- 4. Not obtain or try to obtain information dishonestly from the EU institutions.*

We support this rule.

- 5. Not induce EU officials to contravene standards of behaviour applicable to him or her.*

We believe the European Commission (and indeed other EU institutions) needs to endeavour to clarify and communicate what these standards of behaviour are.

In the absence of a wide understanding of what these rules are, we propose that this rule prohibit interest representatives only from inducing officials to contravene standards of behaviour which it knows the recipients to be bound by.

We also believe that there should be recognition of the responsibility of officials to communicate these rules where interest representatives unknowingly propose actions which may contravene these rules.

6. *If employing former EU officials, respect their obligation to abide by the rules and confidentiality requirements which apply to them.*

ISDA supports this rule.

Other Provisions

Registration: Registration implies acceptance of this code.

While the rules outlined in the draft Code of Conduct are acceptable, subject to some amendments, there is still considerable doubt as to the full scope of registration requirements, underlining the need for further consultation.

The register will include requirements to disclose financial information. In the list (supplied in the March 2007 Communication) of minimum criteria for assessing whether information supplied suffices for joining the register, trade associations are required to estimate costs associated with 'direct lobbying' of EU institutions and provide this information in the registry. ISDA believes that the key factor determining the influence of lobbying is not the money spent on it, but the insights delivered to policymakers in lobbying.

ISDA would also like to point out the difficulties of isolating such a figure in trade associations, where often, many staff are frequently or occasionally involved in lobbying, but also perform other functions in their associations. The presence of one or more full-time lobbyists on the staff of an association does not necessarily imply greater influence or even expenditure than for an association with no full-time lobbyist but several 'part-time' lobbyists on staff.

This figure would also be particularly difficult to isolate in the case of individual firms' in-house interest representation, where often, relevant staff may also be responsible for activities other than lobbying.

ISDA believes that, for these reasons, a certain amount of flexibility should be built into the disclosure requirements, with the option open to registrants of a narrative statement explaining (in broad terms) what the amount quoted consists of.

Breaches of the code: Registrants are informed that breaches of the above rules may lead to suspension or exclusion from the register.

Suspension or exclusion from the register comes with the following disadvantages, according to the March 2007 Communication:

- Exclusion from the Commission 'alert' system concerning new consultations.
- '*Submissions will be considered as individual submissions*' if submitting organizations provide information which is deemed inadequate to the requirements of the standard template' for internet consultations to be combined with the register.

We have concerns about the second of these points in particular. The implication seems to be that submissions will be deemed less representative, and therefore less impactful, if the interest group concerned does not conform with the standards expected in the template mentioned (declaring who they represent, what their mission is, and how they are funded).

The aim in any regulatory initiative should be to have the best regulation, reflecting what is necessary for the market, with the wishes of the majority of market participants at the very least a major factor in any associated decision-making. Commission officials should be able to use their judgment in this regard, without the constraint of having to engage in an artificial mathematical calculation based on the amount of submissions provided and the amount of ‘weight’ attributed to each submission, when the weight of a specific submission could be reduced by virtue of the completely unrelated matter of whether or not they have signed this register. This is not a sound basis for policymaking.

ISDA also points out that consideration of e.g. an association submission as an individual submission (because of this sanction) would actually reduce overall levels of transparency in any consultation, as it would not be clear whose views were being reported, and the weight of industry support behind them.

Complaints: Signatories should be aware that citizens have the possibility to lodge a complaint about a suspected breach of the rules set out in this Code.

ISDA believes that a formal procedure needs to be established to guard against ‘bogus’ or trivial complaints, particularly when the threat of exclusion or suspension from the register is real.

In addition, more information should be provided to industry (possibly in further consultation) on

- How alleged breaches of the code would be investigated by the Commission;
- How a decision in this regard would be made;
- What provisions would be in place to appeal such a decision.

Publication of contributions and other documents: Interest representatives are informed that their contributions to public consultations will be published on the internet together with the identity of the contributor, unless the contributor objects to publication of the personal data on grounds that such publication would harm his or her legitimate interests. Upon request on the basis of Regulation (EC) No 1049/2001 on access to documents, the Commission may have to disclose correspondence and other documents surrounding the interest representatives’ activities.

The European Commission should allow for scope for interest representatives to request that their contributions be treated confidentially for commercial reasons. It is not clear from this wording that this would be covered by the meaning of ‘legitimate interests’. Again this lack of certainty warrants further consultation.

We believe that the European Commission should not publish any submission without the express consent of the submitting interest representatives.

Other Comments

Possible inter-institutional cooperation: The March 2007 White Paper expresses support for the idea of a ‘one-stop-shop’ approach i.e. an inter-institutional approach to recognition or registration of lobbying interests (pages 5-6). We note, however that the Communication does little more than ‘invite the other institutions to examine the possibility of closer cooperation’ in this regard.

We believe that it would be reasonable to propose that the European Commission and European Parliament agree a common approach to such a register before continuing discussions with industry on this code.

Consultation standards: While we recognise that the Commission has made great strides in improving its consultation standards, we believe there remains evidence to suggest that implementation of these consultation standards by the European Commission’s different departments is uneven. The March 2007 Communication from the European Commission listed a number of measures it would emphasise to improve standards of consultation in the Commission (training and awareness-raising, sharing good practices, creating new consultation templates etc). We welcome information on progress in implementing these measures, and any external evaluation of the consultation policy of the Commission that the Commission has launched (see page 7 of the March 2007 Communication).

We would also propose that the Commission establish procedures for interest representatives to make complaints where they feel their interests have been compromised because of incomplete or unfair consultation practices by the Commission.