

18 August 2014

The European Securities and Markets Authority
CS 60747
103 rue de Grenelle
75345 Paris Cedex 07, France
Attention: Steven Maijoor, Chair

The European Banking Authority
Tower 42 (level 18)
25 Old Broad Street
London EC2N 1HQ|UK
Attention: Andrea Enria, Chairperson

The European Insurance and the Occupational Pensions Authority
Westhafenplatz 1
60327 Frankfurt am Main
Germany
Attention: Gabriel Bernardino, Chairman

Re: Proposed Margin Rules: Documentation Requirements

Ladies and Gentlemen,

The International Swaps and Derivatives Association¹ ("**ISDA**") is concerned about the documentation that is required for parties to qualify for exemptions from the margin requirements under the Draft RTS on risk-mitigation techniques². This documentation is not required by Regulation (EU) No 648/2012 ("**EMIR**") and imposing such requirements would result in very significant administrative and operational burdens. We set out below proposed

¹ Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 64 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

² Consultation Paper (the "**Consultation Paper**") on the Draft regulatory technical standards (the "**Draft RTS**") on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Art. 11(15) of Regulation (EU) No 648/2012 published by the European Securities and Markets Authority ("**ESMA**"), the European Banking Authority ("**EBA**") and the European Insurance and the Occupational Pensions Authority ("**EIOPA**"), and together with ESMA and EBA, the European Supervisory Authorities, the "**ESAs**") on 14 April 2014.

alternative language that could be used to permit exemptions without documentation requirements.

This letter is a supplement to the letter we sent to the ESAs on 14 July commenting generally on the Draft RTS.

1. The documentation is not required by EMIR.

The Draft RTS requires the parties to agree in writing or by equivalent electronic means if the parties choose not to collect margin for any of the following reasons:

- the nature of the transaction (for foreign exchange forwards and swaps, currency swaps and indirectly cleared derivatives), (Art. 2 GEN, Paras 1, 2 and 4(d), p. 23);
- the parties are below certain numerical thresholds (Art. 2 GEN Para. 3 and 4(a), p. 23 and Art. 1 FP, Para 3, p. 46); or
- the status of one or more of the parties (as a non-financial counterparty not referred to in Art. 10 of EMIR ("NFC-") or an entity listed in Paras. 4 and 5 of Art. 1 of EMIR). (Art. 2 GEN Para. 4(b) and 4(c), p. 24).

These proposed documentation rules (the "**Documentation Rules**") are not required by EMIR. The Draft RTS implements Art. 11(3) of EMIR. Nothing in Art. 11(3) imposes the Documentation Rules. Art. 11(3) requires FCs and NFC+s to have procedures for the exchange of collateral for the portfolio of contracts covered by Art. 11(3) but that does not mean that documentation is required for every exemption. In addition, Art. 11(15)(a) of EMIR provides that the ESAs shall develop draft regulatory technical standards specifying "the risk-management procedures ... required for compliance with [Art. 11(3)]" Documentation requirements are part of risk-management procedures and thus the ESAs have the ability to specify the extent and type of documentation requirements that should apply.

2. The Documentation Rules will be needlessly burdensome

The Documentation Rules will impose very significant operational and administrative costs on the market and these costs are not justified as a policy matter. For example, the Draft RTS requires that an agreement be in effect in December 2015 to exempt an NFC- from margin requirements generally (Art. 1 Gen, Para. 4(b), p. 24) and to exempt any entity from the initial margin ("**IM**") requirements if such entity has a notional amount of swaps of less than EUR 8 billion (or initially EUR 3 trillion). (Art. 1 FP, Para. 3, p. 46). Putting in place such documents by December 2015 would create a significant operational burden across the entire industry, even though, as the Consultation Paper notes, only a relatively small number of entities are likely to actually be required to apply the margin rules from this date. In line with the approach taken for other EMIR RTS, entities should be allowed to rely on representations from their counterparties with respect to their status as an NFC- and position with respect to the threshold. The additional burden of requiring agreements is not outweighed by any clear policy rationale: parties typically use representations or other forms of diligence to verify whether the counterparties have the appropriate status for regulatory purposes. Financial supervisors will be able to determine if a

financial counterparty fails to have adequate procedures to check on the status of its counterparties.

In addition, the BCBS-IOSCO paper issued in September 2013³ did not impose the Documentation Rules. As result, similar requirements may not be imposed by other regulators, putting entities in the European Union at a competitive disadvantage.

3. Alternative language

We suggest the following alternative language. Note: See our July 14 comment letter for additional proposals with respect to the underlined language below.

Art. 2 GEN – Risk management procedures in specific cases (p. 23)

Replace Paragraphs 1, 2, 3 and 4 with the following.

1. By way of derogation from Article 1 GEN, risk management procedures required for compliance with paragraph 3 of Article 11 of Regulation (EU) No 648/2012 may provide that a counterparty is not required to collect initial margin in accordance with the procedures prescribed in this Regulation in any of the following specific cases:
 - a. With respect to a physically settled foreign exchange forward or physically settled foreign exchange swap.
 - b. With respect to the exchange of principal of a currency swap.
 - c. Where the total initial margin calculated to be exchanged between a financial counterparty and a financial or non-financial counterparty for all non-centrally cleared OTC derivatives, determined at group level for both parties as defined in Article 2(16) of Regulation (EU) No 648/2012, is equal to or lower than EUR 50 Million and the counterparties hold the necessary capital against their exposure to their counterparties.
2. By way of derogation from Article 1 GEN, risk management procedures required for compliance with paragraph 3 of Article 11 of Regulation (EU) No 648/2012 may provide that a counterparty is not required to collect initial or variation margin in accordance with the procedures prescribed in this Regulation in any of the following specific cases:
 - a. Where the total collateral amount as defined in paragraph 4 based on all OTC derivatives transactions between two counterparties is equal to or lower than EUR 500 000 (minimum transfer amount). In case the total collateral amount owed to the collateral taker exceeds the minimum transfer amount, the collateral taker shall collect the full total collateral amount, without deduction of the minimum transfer amount.

³ "Margin requirements for non-centrally cleared derivatives", by Basel Committee on Banking Supervision ("BCBS") and the Board of the International Organization of Securities Commissions ("IOSCO") (Sep. 2013).

- b. Where one of the counterparties is a non-financial counterparty other than one referred to in Article 10 of Regulation (EU) 648/2012.
- c. Where one of the parties to the OTC derivatives contract is an entity referred to in paragraph 4 or 5 of Article 1 of Regulation (EU) No 648/2012.
- d. Where the transaction is an indirectly cleared derivative that is intermediated through a clearing member or through an indirect clearing arrangement as long as
 - i. The client or the indirect client is subject to margin requirements of the CCP; or
 - ii. The client or indirect client provides margins consistent with the relevant corresponding CCP's margin requirements.

Paragraphs 5 and 6 of Art 2 GEN would be re-numbered as Paragraphs 3 and 4.

Art. 1 FP – Final Provision (p. 46)

Replace the first paragraph of Paragraph (3) with the following:

Counterparties' risk management procedures may provide that they are not required to collect initial margin in accordance with the procedures prescribed in this Regulation when the conditions in points (a) to (e) are met.

* * *

ISDA appreciates the opportunity to provide this letter to the ESAs. We would welcome the opportunity to discuss this further with the ESAs. Please feel free to contact me or my staff at your convenience.

Sincerely,



Stephen O'Connor
Chairman
ISDA