

February 10, 2017

Mr. Amir Zaidi  
Director, Division of Market Oversight  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, DC 20581

**Re: Request for No-Action Relief – Parts 20, 45 and 46**

Dear Mr. Zaidi:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”),<sup>1</sup> on behalf of its members with reporting obligations under Part 20, Part 45 or Part 46 of the Regulations (collectively, the “**Reporting Rules**”)<sup>2</sup> of the Commodity Futures Trading Commission (the “**Commission**”) and other similarly situated persons, is writing to request, pursuant to Rule 140.99, that the Division of Market Oversight (the “**Division**”) extend the expiration date of the no-action relief provided under CFTC Letter No. 16-03 (“**NAL 16-03**”), as described below.

Conflicts between the Commission’s Reporting Rules and non-U.S. data privacy, bank secrecy, state secrecy, blocking statutes and similar laws (collectively, “**Privacy Laws**”) remain a challenge in reporting cross-border transactions. As you know, this is an issue that the international regulatory community has been grappling with over the past several years. Although this letter speaks to jurisdictions for which conditions outlined in CFTC Letter No. 13-41<sup>3</sup> were met, market participants continue to consider countries listed in the June 21, 2013<sup>4</sup> ISDA letter to the Division, as well as numerous additional jurisdictions, to be problematic.

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<sup>1</sup> Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 66 countries. These members comprise a broad range of 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, such as exchanges, intermediaries, clearing houses 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](http://www.isda.org).

<sup>2</sup> The relief requested in this letter also encompasses CFTC Rules 23.204 and 23.205 insofar as the swap entity has complied with the conditions of the no-action relief with respect to the reporting required under such rules.

<sup>3</sup> <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/13-41.pdf>

<sup>4</sup>

[http://www2.isda.org/attachment/NjY5Ng==/Q69%20Request%20for%20Extension%20of%20redaction%20NAL%20Data%20Privacy\\_Jun%2021%202013%20FINAL.pdf](http://www2.isda.org/attachment/NjY5Ng==/Q69%20Request%20for%20Extension%20of%20redaction%20NAL%20Data%20Privacy_Jun%2021%202013%20FINAL.pdf)

## I. FSB Report

### A. Overview

The Financial Stability Board (“**FSB**”) has been engaging with its member jurisdictions to assess OTC derivatives trade reporting and whether FSB member regulatory frameworks are sufficient to provide transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse. FSB members **“agreed that jurisdictions should remove barriers to reporting complete information by June 2018 at the latest, and that masking of counterparty-identifying data be discontinued by year-end 2018, once barriers to reporting are removed.”**<sup>5</sup>

The FSB published a “Thematic Review on OTC Derivatives Trade Reporting” (“**Peer Review**”) in late 2015<sup>6</sup>. The main objectives of the Peer Review were to: (i) examine the extent of trade reporting across jurisdictions, (ii) identify any legal barriers that prevent or hinder reporting of complete transaction information to Trade Repositories (“**TR**”) or that limit authorities’ access to information held in TRs, and (iii) identify other challenges to effective reporting to TRs.

The Peer Review “highlighted the significant challenges to effective trade reporting resulting from” FSB member jurisdictions’ “legal barriers to reporting complete information to TRs, and to authorities’ access to TR-held data.” FSB members agreed to outline their planned actions to address these legal barriers as a follow-up to the Peer Review.

The subsequent “Report on FSB Members’ Plans to Address Legal Barriers to Reporting and Accessing OTC Derivatives Transaction Data” (“**FSB Report**”)<sup>7</sup>, published in August 2016, is a summary of FSB member jurisdictions’ plans regarding legal barriers to reporting complete information to TRs and to authorities’ access to TR-held data.

The FSB Report concludes, after having received reports from all member jurisdictions and the European Commission that:

**“In summary, while some work is in process to remove barriers to both reporting of complete OTC derivatives transaction information to TRs and authorities’ access to TR-held data, significant work remains across FSB member jurisdictions to achieve this and concrete plans to address the barriers have not been formulated in a number of cases. Therefore, based on reports received to date, it appears that, across FSB member jurisdictions, further significant planning and implementation efforts will be needed in order to meet the agreed June 2018 deadlines.”**

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<sup>5</sup> <http://www.fsb.org/wp-content/uploads/Report-on-FSB-Members%E2%80%99-Plans-to-Address-Legal-Barriers-to-Reporting-and-Accessing-OTC-Derivatives-Transaction-Data2.pdf> (August 16, 2016).

<sup>6</sup> Thematic Review on OTC Derivatives Trade Reporting, Financial Stability Board (November 4, 2015).  
<http://www.financialstabilityboard.org/wp-content/uploads/Peer-review-on-trade-reporting.pdf>

<sup>7</sup> Report on FSB Members’ Plans to Address Legal Barriers to Reporting and Accessing OTC Derivatives Transaction Data  
<http://www.fsb.org/wp-content/uploads/Report-on-FSB-Members%E2%80%99-Plans-to-Address-Legal-Barriers-to-Reporting-and-Accessing-OTC-Derivatives-Transaction-Data2.pdf> (August 26, 2016).

Separately, the OTC Derivatives Regulators Group (“**ODRG**”) had previously sent several letters to the Chairman of the Financial Stability Board (“**FSB**”) highlighting the urgent need for changes, including legislative changes, to remove barriers to reporting counterparty-identifying information to trade repositories. The ODRG had suggested that the FSB discuss setting an “ambitious but realistic deadline” for addressing such barriers to reporting, and stated its belief that any deadline set should be appropriate in order to achieve the G20’s objectives of effective reporting and supervision of reporting entities, while being “feasible for the jurisdictions concerned, having regard to their legislative processes.”<sup>8</sup>

## **B. Relief Jurisdictions**

In reviewing the FSB Report against the jurisdictions for which ISDA understands relief to be available under NAL 16-03, we have made the following observations:

- **Austria, Belgium, Hungary, and Luxembourg:** These countries are not FSB member jurisdictions and are not specifically referenced in the FSB Report. The FSB notes that national barriers to reporting pursuant to foreign requirements (*e.g.*, counterparty consent) would be superseded as soon as the European Commission (“**EC**”) has adopted an equivalence decision. The EC has not yet adopted an equivalence determination. The EC is still evaluating multiple jurisdictions as to whether such equivalence should be granted.
- **France:** An [Amendment of the Articles of the Monetary and Financial Code](#) (“**Amendment**”) was adopted by the National Assembly on 9 June 2016 and passed by the Senate on December 11, 2016. Although the FSB report concludes that this law is in force and therefore France no longer has barriers to full reporting, industry participants are not able to apply a “blanket” unmasking for all counterparties and all transactions immediately, but rather need time to carefully examine the implications and actions that need to be taken due to the Amendment.

Although the Amendment permits the identification of counterparties located in France, market participants are still reviewing and reassessing the impact of the Amendment with respect to aspects including:

- The impact to non-French branches;
- The data protection statutes of the client’s jurisdiction, if the client is not located in France; and
- The local laws applicable for the locations from which the trade is executed, since banking secrecy may still apply, depending on the location of the executing sales and trading personnel.

Under the previous French banking secrecy laws, unmasked information could not be provided to the trade repository in certain scenarios and the trade repository was not able to mask on behalf of the market participant. Due to the Amendment, market participants must review what was previously implemented to determine instances in which masking

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<sup>8</sup> [http://www.cftc.gov/idc/groups/public/@internationalaffairs/documents/file/oia\\_odrgreportg20\\_0914.pdf](http://www.cftc.gov/idc/groups/public/@internationalaffairs/documents/file/oia_odrgreportg20_0914.pdf)

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of counterparty information can be lifted, and cases where masking may be required to be retained. This review requires the involvement of multiple areas within the institution, including legal, compliance, back and middle office, and information technology. Once the review is complete, the technology infrastructure for trade reporting must be partially rebuilt in order to incorporate this more complex logic.

- **Samoa:** Samoa is not one of the FSB’s member countries and is not specifically referenced in the FSB Report.
- **Singapore:** The FSB Report notes that “Singapore stated that legislative amendments have been proposed that will remove the need for client consent to be obtained for the purposes of complying with domestic and foreign reporting obligations and are targeted to be tabled in Parliament in the second half of 2016 and to take effect in 2017.”

However, the Securities and Futures (Amendment) Bill 2016 is still currently going through the Parliamentary process. The [Monetary Authority of Singapore](#) website conveys that the Amendment has gone through its second reading in Parliament during the week of January 13, 2017.

- **Switzerland:** The FSB Report indicates that Switzerland no longer has barriers to reporting information to TRs, and no barriers to authorities’ access to TR-held data, since the Swiss Financial Market Infrastructure Act (“**FMIA**”) went into effect<sup>9</sup>. ISDA was advised by Swiss counsel of the applicability of the FMIA for certain scenarios including:
  - (a) **Where the reporting counterparty is located and registered in Switzerland:** Reporting obligations under FMIA apply; rules of Article 105(4) of FMIA apply. Article 105(4) states "Reports to a recognized foreign trade repository may include further details. If these consist of personal data, the approval of the person in question is to be obtained." Therefore, to the extent the reporting fields include further information not required to be reported under Swiss laws, there would be a requirement to obtain client consent if personal data is to be reported. One example may be in the case where a Swiss bank provides delegated reporting services under EMIR, the bank would need the consent of the client to report personal data not required to be reported under the reporting rules of the FMIA. Note that no TRs have been recognized by Swiss Financial Market Supervisory Authority (“**FINMA**”) to date.
  - (b) **Where the reporting counterparty is located in Switzerland as a branch, including as a branch of a U.S. person:** Reporting obligations under foreign law apply, except to the extent that FINMA were to determine that the Swiss branch is subject to Swiss reporting obligations under FMIA because the relevant foreign rules are not equivalent to those of the FMIA. This would be a case-by-case determination for the relevant branches concerned.

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<sup>9</sup> <http://www.fsb.org/wp-content/uploads/Switzerland.pdf>

In addition to FMIA rules, data transfer out of the Swiss branch to comply with the relevant foreign reporting obligations must also meet the requirements of Article 42c of the Swiss Financial Market Supervision Act (“**FINMAG**”)<sup>10</sup> which entered into force on 1 January 2017.

Regarding data transfer out of the Swiss branch to comply with the relevant reporting obligations under FMIA, the rules of FMIA Article 105(4) would apply. See (a) of this letter for a notation regarding Article 105(4).

- (c) **Where the reporting counterparty is located outside Switzerland but the non-reporting party is located in Switzerland:** FMIA is not applicable. The reporting obligation would lie with the foreign counterparty under foreign laws; to the extent that the reporting counterparty can make the reports on the basis of the information it has available, no further consents are required from the counterparty located in Switzerland.

Industry participants must review and analyze the impact of FMIA, and in some cases FINMAG, versus what was previously implemented, and are not able to apply a “blanket” unmasking for all counterparties and all transactions immediately. Once the evaluation is complete, technology infrastructures for trade reporting must be amended to incorporate the new logic.

## **II. Relief Requested**

In summary, although work is underway to address barriers so that participants can report trades with foreign counterparties pursuant to participants’ reporting requirements without breaking applicable laws, ISDA submits that it would be premature for the Division to allow the relief under NAL 16-03 to lapse. In light of the foregoing, we believe that an extension under NAL 16-03 is warranted as follows:

- 1) For the following countries: Austria, Belgium, Hungary, Luxembourg, Samoa, and Singapore. ISDA requests that the Division extend the expiration date of the no-action relief provided in NAL 16-03 until the earlier of (i) such time when the reporting counterparty no longer holds the requisite reasonable belief regarding the consequences of reporting the specified counterparty identity information and (ii) such time when the relevant privacy law barrier to reporting has been removed in accordance with the recommendations of the ODRG and the FSB.
- 2) For France and Switzerland, ISDA requests that the Division extend the expiration date of the no-action relief provided in NAL 16-03 until the earlier of (i) such time when the reporting counterparty no longer holds the requisite reasonable belief regarding the consequences of reporting the specified counterparty identity information and (ii) six months from the date of expiry of NAL 16-03.

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<sup>10</sup> Swiss Financial Markets Supervision Act, FINMA Circular 17/6 “Direct transmission” (December 8, 2016) [https://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi\\_6PzD0IPSAhVoyVQKHbdgAT4\\_QFgcMAA&url=https%3A%2F%2Fwww.finma.ch%2Fen%2F-%2Fmedia%2Ffinma%2Fdokumente%2Fdokumentencenter%2Fmyfinma%2Frundschreiben%2Ffinma-rs-2017-06.pdf%3Fla%3Den&usg=AFQjCNEXEax\\_Mogf7o\\_Ob1QRo2D76sDUbg](https://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi_6PzD0IPSAhVoyVQKHbdgAT4_QFgcMAA&url=https%3A%2F%2Fwww.finma.ch%2Fen%2F-%2Fmedia%2Ffinma%2Fdokumente%2Fdokumentencenter%2Fmyfinma%2Frundschreiben%2Ffinma-rs-2017-06.pdf%3Fla%3Den&usg=AFQjCNEXEax_Mogf7o_Ob1QRo2D76sDUbg)

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However, if as a result of the review currently undertaken by industry participants it is determined that there are circumstances under which masking is still required, ISDA would like the opportunity to request a revision and extension of the relief available.

- 3) ISDA acknowledges and appreciates the Division's willingness, as noted in NAL 16-03, to permit additional jurisdictions to be covered by the relief, provided certain conditions are met. ISDA requests that this attribute of NAL 16-03 continues to be made available provided a reporting party (or a group, or industry association on behalf of similarly situated parties) notifies the Division that the reporting party (or one or more members of the group or associations) has formed the requisite reasonable belief with respect to the Privacy Laws of the additional jurisdiction(s), and meets the requisite conditions.
- 4) Industry participants continue to face cross-border challenges with the use of a Privacy Law Identifier<sup>11</sup> ("PLI") when reporting a swap to multiple jurisdictions through the use of global trade repositories and via vendor-provided middleware. ISDA acknowledges that use of the PLI is a condition of the relief; however, due to the existing challenges, ISDA requests that the Division allow market participants to rely on the relief, provided they are acting in good faith and utilizing their best efforts to address these issues in order to comply with this condition.

Thank you for your consideration of these concerns. Please contact me if you have any questions.

Sincerely,

[Signature on file]

Eleanor Hsu  
Director, Data and Reporting  
The International Swaps and Derivatives Association, Inc.

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<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjK8MjZ9YXSahXnAMAKHZaZC-sQFggaMAA&url=http%3A%2F%2Fwww.cftc.gov%2Fidc%2Fgroups%2Fpublic%2F%40rlettergeneral%2Fdocuments%2Fletter%2F13-41.pdf&usg=AFQjCNFH-f61o7blUu1yy7zzPvU0jXS5Pg&bvm=bv.146496531,bs.1,d.ZGg>

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**Certification Pursuant to Commission Regulation 140.99(c)(3)**

As required by Commission Regulation 140.99(c)(3), I hereby (i) certify that the material facts set forth in the attached letter dated February 10, 2017 are true and complete to the best of my knowledge; and (ii) undertake to advise the Commission, prior to the issuance of a response thereto, if any material representation contained therein ceases to be true and complete.

Sincerely,

[Signature on file]

Eleanor Hsu  
Director, Data and Reporting  
The International Swaps and Derivatives Association, Inc.