

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

December 3, 2012

Mr. Richard Shilts
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. Shilts:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”), on behalf of its members with reporting obligations under Part 20, Part 45 or Part 46 of the Regulations (collectively, the “**Reporting Rules**”)¹ of the Commodity Futures Trading Commission (the “**Commission**”) and other similarly situated persons (collectively, “**Trade Participants**”), is writing to request no-action relief pursuant to Rule 140.99 as described below.

ISDA’s mission is to foster safe and efficient derivatives markets to facilitate effective risk management for all users of derivative products. ISDA has more than 800 members from 58 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers.

We refer to the comment letter,² dated August 27, 2012, submitted by ISDA on the Cross-Border Application of Certain Swap Provisions of the Commodity Exchange Act (RIN: 3038-AD57), in which, among other matters, we (i) discussed the potential for conflicts between obligations under the Reporting Rules and the privacy laws of non-U.S. jurisdictions, (ii) described in general terms the results of a survey of selected jurisdictions undertaken by certain of ISDA’s members and (iii) identified five of those jurisdictions as examples for which the survey analysis

¹ 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.

² Available at <http://www2.isda.org/functional-areas/public-policy/united-states/>

indicated that counterparty consent may not be sufficient on a relationship basis (i.e., without the need for a separate consent for each instance of disclosing counterparty information) to obviate the risk of violations of the privacy laws of those jurisdictions.³ As explained in the comment letter, the Reporting Rules risk disrupting cross-border markets because they place both U.S. and non-U.S. Trade Participants in the untenable position of having to choose between, on the one hand, not complying with the provision of the Reporting Rules that requires identification of swap counterparties and, on the other, or being exposed to risks of potentially violating the privacy laws of other jurisdictions and facing potentially severe penalties, which may include criminal sanctions.

I. Relief Requested

ISDA requests confirmation that the staff of the Division of Market Oversight will not recommend enforcement action to the Commission against a Trade Participant that submits Trade Data in which the applicable counterparty's Identity Information has been omitted if the applicable conditions set out below are satisfied. As used in this letter, "**Identity Information**" refers to information that would otherwise be required to appear in one of the fields specified in Annex B and that identifies or would intrinsically reveal the identity of the counterparty or its affiliated group. Each affected data field will be marked with a signifier indicating that Identity Information has been omitted from that field for privacy law reasons. Each reporting Trade Participant will be able to map this redacted report to the full information set contained in its internal systems. When the relief described below ceases to apply, the Trade Participant will report the omitted Identity Information within the timeframes specified below in a manner sufficient to allow the SDR to restore the omitted information to the affected data fields.

The conditions of the relief differ depending on which jurisdiction's privacy laws are implicated by the required reporting.⁴ In cases where the laws of more than one non-U.S. jurisdiction are implicated, the Trade Participant would undertake the reasonable efforts described below with respect to each relevant jurisdiction and would not be required to report its counterparty's Identity Information unless it has obtained Effective Consent, Effective Authorization or Adequate Information (as each such term is defined below), as applicable, with respect to each relevant jurisdiction.

³ The five jurisdictions we identified are: France, Korea, Luxembourg, People's Republic of China and Singapore. A brief description of the applicable privacy law restrictions in these five jurisdictions is included in Annex A. Because SDR reporting is novel and may not have been expressly dealt with in the applicable privacy laws, the survey results should be regarded as reasoned views based on advice taken collectively. As such, the summary findings may not always conform to the internal legal views of a given SD or MSP. In addition, implied duties of confidentiality may arise under the laws of various jurisdictions, and SDs and MSPs will be required to formulate views on whether any such implied duties might restrict the reporting of Trade Data.

⁴ In Q17 of its proposed guidance, Cross-border Application of Certain Swaps Provisions of the Commodity Exchange Act, the Commission requested comment on how it should address SDR reporting with respect to non-U.S. swap entities in light of possible conflicts with the swap entity's home country privacy laws. See 77 Fed. Reg. 41110, 41232. We note, however, that a jurisdiction's privacy laws may apply to a swap transaction based on a nexus other than the swap entity's jurisdiction of incorporation, such the location of a branch or of the non-reporting party. Consequently, the conditions to the requested relief refer to the privacy laws of each relevant jurisdiction. We also observe, as reflected in the jurisdictional summaries in Annex A, that penalties for violating privacy laws can be severe in some jurisdictions, even including imprisonment of staff.

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a. Consent-required Jurisdictions

A “**Consent-required**” **Jurisdiction**” is one in which Effective Consent is the sole requirement to be met in order to report a counterparty’s identity without violating such jurisdiction’s privacy laws. A Trade Participant would not be required to report its counterparty’s Identity Information if the Trade Participant reasonably believes that doing otherwise may violate the privacy laws of a jurisdiction in this category; provided that the Trade Participant shall use reasonable efforts to obtain the Effective Consent of its relevant counterparties. The relief described in this paragraph would cease to apply, and the Trade Participant would be required to report its counterparty’s Identity Information in accordance with the Reporting Rules, as soon as is reasonably practicable (and in all events within 30 days) following its obtaining Effective Consent with respect to a counterparty. For this purpose, “**Effective Consent**” means counterparty consent to disclosure that (i) is effective without the need for a separate consent for each instance of disclosure and (ii) removes the basis for the Trade Participant to reasonably believe that it may violate such jurisdiction’s privacy laws.

b. Jurisdictions that are not Consent-required Jurisdictions

A Trade Participant would not be required to report its counterparty’s Identity Information if the Trade Participant reasonably believes that doing otherwise may violate the privacy laws of a jurisdiction in this category; provided that, subject to paragraph c. below, the Trade Participant shall use reasonable efforts to obtain an Effective Authorization with respect to its counterparties for which reporting implicates such jurisdiction’s privacy laws. The relief described in this paragraph would cease to apply, and the Trade Participant would be required to report its counterparty’s Identity Information in accordance with the Reporting Rules, as soon as is reasonably practicable (and in all events within 30 days) following its obtaining Effective Authorization with respect to a counterparty; provided that, to the extent an Effective Authorization renders a jurisdiction a Consent-required Jurisdiction, the relief and the conditions of paragraph a. above shall apply above. For this purpose, “**Effective Authorization**” means regulatory authorization for disclosure that (i) imposes no material condition (except it may require obtaining Effective Consents) and (ii) removes the basis for the Trade Participant to reasonably believe that it may violate such jurisdiction’s privacy laws.

c. Jurisdictions for which a Trade Participant lacks Adequate Information

A Trade Participant would not be required to report its counterparty’s Identity Information if the Trade Participant reasonably determines that (i) there is a reasonable question as to whether such reporting would implicate the privacy laws of a jurisdiction in this category and (ii) it does not have available to it the information it deems adequate to satisfy itself, in the exercise of its customary diligence, that it could report its counterparty’s Identity Information without incurring a risk of violating the jurisdiction’s privacy laws and without the need for a separate consent for each instance of disclosure (“**Adequate Information**”); provided that the Trade Participant shall use reasonable efforts to obtain Adequate Information. The relief described in this paragraph would

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cease to apply, and the Trade Participant would be required to report its counterparty's Identity Information in accordance with the Reporting Rules, as promptly as is reasonably practicable (and in all events within 30 days) following its obtaining Adequate Information with respect to a counterparty; provided that paragraphs a. or b. above, as appropriate, would apply in the event that a Trade Participant obtains information that establishes that the jurisdiction in question is a Consent-required Jurisdiction or one in which an Effective Authorization would permit reporting of a counterparty's identity without violating privacy law restrictions.

The "reasonable efforts" described above may include actions taken individually by a Trade Participant or collectively with other Trade Participants (including in reasonable reliance on the initiatives of industry associations). In addition, a Trade Participant would be deemed to have used reasonable efforts to obtain counterparty consents if it complies with policies and procedures reasonably designed to obtain such consents. We note that obtaining and tracking consent on a counterparty-by-counterparty basis is a challenging exercise for a dealer and may require an investment of time and operational build of infrastructure.

The conditions described above apply to reporting obligations under any of the Reporting Rules, except that with respect to Part 46 and transactions reportable thereunder that have terminated prior to December 31, 2012 (or if later, the applicable compliance date for reporting that type of transaction), the conditions described in the provisos to paragraphs b. and c. above shall not apply.⁵

ISDA requests that the no-action relief described in this letter shall expire no earlier than June 30, 2013. In addition to the foregoing, if an event occurs that makes the privacy law concern no longer applicable to a particular transaction report (whether due to the counterparty having provided consent in a jurisdiction where such consent is valid, a change of law or regulation in the applicable jurisdiction, etc.), the requested no-action relief would cease to apply to that report 30 days following the occurrence of such event.⁶

While the industry is working toward making all trade confirmations be reportable in electronic format, this is currently not in place for all confirmations, as the Commission has recognized in its rulemaking. ISDA members have indicated that redacting identifying information in paper-confirmed transactions would need to be a manual process that is not feasible with this volume of transactions. Therefore, ISDA requests that the no action relief described in this letter include failure to submit confirmation data for transactions that would ordinarily be reported via an image file of the confirmation. We note that this additional relief would only be applicable to paper-confirmed transactions and would not limit the PET data that market participants are obligated to report for these transactions.

⁵ We note that resolution of privacy concerns related to Part 46 reporting may not be possible for certain trades terminated prior to December 31, 2012. For example, where the dealer no longer has an ongoing business relationship with the counterparty, consent may not be attainable.

⁶ ISDA understands from its member firms that market participants would be able to update the counterparty identifying information in previously-submitted masked trades where the transaction remains outstanding. However, there are currently no processes in place for market participants to systematically update records of previously-submitted masked trades that have already been terminated.

II. Discussion

ISDA believes that the relief requested is tailored to address conflicts with other jurisdiction's privacy laws while achieving substantially complete compliance with the Reporting Rules in the form adopted by the Commission. In scenarios where non-U.S. privacy laws do not apply, Trade Data would be submitted in the form specified in the Reporting Rules. Even if non-US privacy laws forbid counterparty identification, submission of otherwise complete Trade Data with the identifying information of the counterparty redacted would achieve the goals of the Reporting Rules by allowing the public to see real time public dissemination (where applicable) of anonymous Trade Data and would give the Commission access to information about the market exposure and trading activity of the submitting Trade Participant (in most cases the swaps entity it regulates).

The relief also constructively furthers the resolution of conflicts that prevent Trade Participants from being able to comply with the counterparty identification element of the Reporting Rules. In those scenarios where means of resolving the conflict with foreign privacy laws are potentially available to Trade Participants, the conditions of the relief require Trade Participants to use reasonable efforts, as described above, to attempt to achieve resolution through seeking either counterparty consent or regulatory approvals. In those scenarios where counterparty consent would result in Effective Consent, the segment of the market of greatest interest to the Commission, namely the largest and most active counterparties (regardless of home jurisdiction), is likely to be the most responsive to dealer communications regarding documentation requirements, while unresponsive counterparties are more likely to be concentrated in the dormant and inactive segment of the market. ISDA's August DF Protocol contains a consent provision. Although it is impossible to be certain at this juncture given the measured pace of Protocol participation, it is reasonable to anticipate that the most active counterparties will choose to participate in the run-up to January 1, or soon after.

For the foregoing reasons, ISDA requests that the staff of the Division of Market Oversight issue the no-action relief described above.

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

Sincerely,



Robert Pickel
Chief Executive Officer

Cc: Mr. Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight

ANNEX A

Indicative Problematic Jurisdictions – summary of privacy restrictions

i. France

Trade Participants may only disclose Trade Data involving a counterparty if the disclosure is made: (i) pursuant to a list of statutory exemptions or (ii) the counterparty delivers its consent to the disclosing Trade Participant each time the latter intends to make a disclosure. Relevant provisions of French law include: (i) Article L. 511-33 et seq. of the French Code monétaire et financier for credit institutions and (ii) Article L. 531-12 et seq. of the same code for investment firms.

Trade Data reporting to SDRs may not qualify for any statutory exemption and transaction-by-transaction consent is not a feasible solution for high-volume activity and would certainly result in delayed reporting. Consent that is to be obtained via an industry protocol such as the ISDA August 2012 Dodd Frank Protocol may not be sufficient for this reason. Requests for disclosure by foreign legal or regulatory authorities—without instruction from a French authority—are similarly insufficient. Potential liabilities for violations of local privacy law in France include fines of up to €75,000 for legal persons and €15,000 for natural persons, action for damages, suspension of operations, withdrawal of business licenses and, for natural persons involved in a violation, imprisonment of up to one year.

ii. Korea

Trade Participants may not be able to disclose any Trade Data about their respective counterparties unless the disclosures in question are made at the order of Korean regulators, the Financial Services Commission or Governor of the Financial Supervisory Service or otherwise qualify for an exemption under the Real Name Act. Relevant provisions of the Real Name Act include: (i) Article 3 and (ii) Article 4.1.

Written consent may also need to be obtained each time disclosure is sought. Accordingly, the use of an industry protocol to report Trade Data would not satisfy the statute's requirements. Disclosures made upon the request of foreign legal or regulatory authorities would similarly be in violation of local law. Violations of local law in Korea under with the Real Name Act can trigger fines of up to 100 million Korean won and, for natural persons, imprisonment of up to five years. Under the Capital Market Act, fines can range up to 200 million Korean won and imprisonment of natural persons for five years.

iii. Luxembourg

Trade Participants may not be able to disclose Trade Data unless the relevant disclosure requirement is under applicable local law. Luxembourg requires that any consent delivered by a counterparty must satisfy the standards set forth by Luxembourg's Comité des juristes (the "CODEJU"), which is an advising committee of the Luxembourg finance sector regulator, the Commission de Surveillance du Secteur Financier. Relevant provisions of Luxembourg law include: (i) Articles 37-1(1), 41(1) through (5bis) of the Luxembourg law of 5 April 1993 on the

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financial sector and (ii) Articles 111-1(2) to 111-1(8) of the law of 6 December 1991 on the insurance sector.

A counterparty's consent to disclosure of Trade Data to an SDR may not be covered by a statutory exemption and the use of an industry protocol to deliver consent may not satisfy the CODEJU's standards. Disclosures made upon the request of foreign legal or regulatory authorities may also not qualify for a statutory exemption nor satisfy the CODEJU standards. Violations of Luxembourg law can trigger a range of penalties, including fines of up to €5,000 for natural persons and €10,000 for legal persons, contractual damages, injunction orders, withdrawal of licenses, suspension or prohibition of business activities, professional bans and imprisonment of natural persons for a period of up to six months.

iv. People's Republic of China

Trade Participants may disclose Trade Data at the instruction of the Chinese regulatory authorities pursuant to the state's Regulations on Financial Institutions' Anti-money Laundering. Trade Participants may also make disclosures as required by a foreign legal or regulatory authority, *provided* that local law permits the disclosure or the disclosure requirement is otherwise consistent with local law—which arguably would not be the case for disclosure of Trade Data under the Reporting Obligation as there is no direct local equivalent. To the extent that Chinese law does not authorize disclosure of Trade Data, Trade Participants subject to such law would not be permitted to make any disclosures, regardless of a foreign law requirement or the consent of a counterparty. Potential liabilities for violation of Chinese privacy law include fines of up to RMB 500,000, suspension of operations and withdrawal of business licenses.

v. Singapore

Trade Participants may only be entitled to disclose Trade Data to local regulatory authorities as required by Singapore law. Under Regulation 47(2) of the Securities and Futures (Licensing and Conduct of Business) statute (the “SFR”), Trade Data may only be able to be disclosed at the instruction of the Monetary Authority of Singapore (the “MAS”). Therefore, many Trade Participants may not be able to disclose Trade Data at the request or demand for disclosure by a foreign authority or an SDR unless such disclosure has been otherwise authorized by the MAS—even upon the consent of the applicable counterparty. Trade Participants' accession to an industry protocol that contains provisions to obtain consent to disclose Trade Data may not be effective absent approval of the MAS. Violations of Singapore privacy law can trigger civil and criminal liabilities, including fines (up to \$125,000 for natural persons and \$250,000 for legal persons), damages in tort, revocations of licenses and imprisonment of up to three years for natural persons.

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ANNEX B

Affected Fields – Part 45

- Legal Entity Identifier (or CICI) of affected party (non-reporting counterparty) (all asset classes)
- If no CFTC-approved LEI for the non-reporting counterparty is yet available, the internal identifier for the non-reporting counterparty used by the swap data repository (all asset classes)
- The identity of the counterparty electing the clearing requirement exception in CEA section (2)(h)(7) (all asset classes)
- An indication of the counterparty purchasing protection or an indication of the counterparty selling protection – not both (credit/equity)
- Buyer or Seller – not both (commodity)
- The field entitled “any other terms of the swap matched or affirmed by the counterparties in verifying the swap” but only with respect to information that would intrinsically reveal the identity of a counterparty. Examples:
 - For commodities, a large position at certain delivery points could effectively identify the counterparty. In this case, “Floating rate index name” would identify location and would need to be masked.
 - For rates/FX, to the extent that a particular sub-field explicitly names a specific event relating to the counterparty (e.g., merger, acquisition, issuance, etc.), the terms could intrinsically reveal the counterparty’s identity would need to be masked.

Affected Fields – Part 20

- Counterparty Name
- In 102S submission:
 - Counterparty name
 - Contact details (name, address, etc)

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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 December 3, 2012 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.

Robert C. Pehel