

August 27, 2012

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Comment Letter on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57).

Dear Mr. Stawick:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”) appreciates this opportunity to provide comments to the Commodity Futures Trading Commission (the “**Commission**”) regarding the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act proposal (the “**Proposed Cross-Border Guidance**”)¹ and the requirement to report data to swap data repositories or regulators under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”).² This letter supplements ISDA’s August 10, 2012 letter to the Commission.

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.

ISDA strongly supports initiatives to increase regulatory transparency. We also appreciate the efforts of CFTC staff over the past several months to provide direction and clarification where possible as our members begin preparations for complying with the new regulatory regime mandated by the Dodd-Frank Act.

ISDA would like to take this opportunity, however, to advise the Commission of certain logistical and legal challenges to certain members’ compliance with the Reporting Obligation (as

¹ See Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 Fed. Reg. 41,214 (July 12, 2012).

² See 77 Fed. Reg. 41,110 (July 12, 2012).

defined below). We understand that several foreign regulators have submitted comment letters to the Commission describing their concerns with the reporting requirements we discuss herein; our comments reiterate the issues they have outlined.³

Despite the considerable efforts spent preparing to comply with the Commission’s pending obligations, we remain concerned that complete compliance will be difficult to achieve. Specifically, we seek the Commission’s assistance in resolving certain issues related to privacy law and confidentiality obligations to which swap dealers (“**SDs**”) and major swaps participants (collectively, “**Swaps Entities**”), may be subject in non-U.S. jurisdictions. In addition to the relief requested in Part II below, we would also welcome any opportunity to discuss the matters described herein with the Commission.

Title VII of the Dodd-Frank Act creates a new regulatory regime for OTC derivative transactions. Pursuant to Sections 727 and 729 of the Dodd-Frank Act, market participants, including Swaps Entities, futures commission merchants, derivatives clearing organizations and swap execution facilities (collectively, “**Trade Participants**”) must report comprehensive transaction and/or position data, including the identities of the counterparties (“**Trade Data**”) ⁴ of swap transactions—whether cleared or uncleared—to regulators or to swap data repositories (each, an “**SDR**”), which collect and maintain Trade Data (generally referred to herein as the “**Reporting Obligation**”).⁵

ISDA members have been working diligently since the passage of the Dodd-Frank Act to ensure that their respective operations are compliant with the above requirements. Coming into compliance with the Reporting Obligations is a massive project for each submitting Trade Participant. This undertaking includes an extensive analysis of the Dodd-Frank Act requirements on existing processes designed to comply with local rules and regulations, and the identification of any areas that may potentially give rise to conflicts between Dodd-Frank Act requirements and local requirements.

Strict compliance may potentially lead to conflicts of law in a number of foreign jurisdictions. As the Commission acknowledged in Q17 from the Proposed Cross-Border Guidance, one such area of potential conflict may be that privacy laws⁶ in non-U.S. jurisdictions may prohibit the disclosure of Trade Data to SDRs. We note, however, that contrary to the implication of Q17, legal advice obtained by ISDA members has shown so far that this issue does not just apply to

³ See Letter from Pierre Moscovici, Minister of the Ministère de l’économie et des finances, Christian Noyer, Chairman, Autorité de contrôle prudentiel and Jacques Delmas-Marsalet, Interim Chairman, Autorité des marchés financiers, to Gary Gensler, Chairman, the Commission, dated July 27, 2012; see Letter from Masamichi Kono, Vice Commissioner for International Affairs, Financial Services Agency, Government of Japan and Hideo Hayakawa, Executive Director, Bank of Japan, to Gary Gensler, Chairman, the Commission, dated August 13, 2012; see Letter from Patrick Raaflaub, Chief Executive Officer, and Mark Branson, Head of Banks Division, Swiss Financial Market Supervisory Authority FINMA, to Gary Gensler, Chairman, the Commission, dated July 5, 2012, collectively, the “**Foreign Regulator Letters**”).

⁴ Commodity Exchange Act of 1936, as amended, Sections 2(a)(13)(G) and 4r(a)(3).

⁵ 17 C.F.R. Parts 20, 43, 45, 46, 23.204 and 23.205.

⁶ As used herein, “privacy law” generally refers to confidentiality obligations and prohibitions on disclosure arising under bank secrecy laws, blocking statutes and specific privacy and confidentiality laws by common law, statute and regulations thereunder in various jurisdictions around the world.

non-U.S. reporting parties, as privacy laws may apply based on transacting through a foreign branch or other office or in the jurisdiction of the non-reporting party and therefore may also affect U.S. reporting parties. Although differing by jurisdiction and source of prohibition, the results of a survey of 23 jurisdictions have also shown that penalties for violating privacy laws can be severe—including damages, fines, loss of license to operate and even criminal sanctions that may include the imprisonment of staff. We have noted potential liabilities for violation of local law in several select jurisdictions in Part III.

In response to the results of our members' internal investigation and the preliminary results of the survey being conducted by external counsel,⁷ ISDA has considered ways in which to address the issue to mitigate the risks of potential conflicts between complying with the Reporting Obligation and complying with local privacy requirements. The ISDA Protocol contains language so that counterparties signing the Protocol would be consenting to the disclosure of their identity to SDRs and any global trade repositories employed by SDRs to facilitate the Reporting Obligation.⁸ ISDA members have also engaged with third party middleware providers that facilitate data reporting for certain types of transactions to understand their policies regarding the confidentiality of member transaction information and whether they would block certain transactional information such as counterparty identity if a member requested that its identity remain confidential. While a substantial amount of time has been spent to reconcile potential conflicts, the efforts have not resulted in perfect solutions. Consent in the ISDA Protocol may not be effective in certain jurisdictions that do not allow parties that are subject to such local privacy requirements to waive the protections of such local privacy rules or that require different arrangements, such as consent being provided on a per-transaction basis. Middleware providers may be bound by contractual confidentiality provisions that allow members that are subject to local privacy requirements to opt out of reporting that includes the

⁷ As described in further detail below, we have completed the first stage of the survey and intend to survey additional jurisdictions in the coming weeks.

⁸ See ISDA August 2012 DF Protocol Section 2.5. The ISDA August 2012 DF Protocol, which was published on August 13, 2012, provides an industry solution to the need for amending existing swap relationship documentation for the purpose of facilitating compliance with regulatory requirements in a manner that minimizes the need for bilateral negotiations and disruptions to trading. The ISDA August 2012 DF Protocol is intended to address the requirements of the following final rules:

- CFTC, Final Rule, Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012);
- CFTC, Final Rule, Large Trader Reporting for Physical Commodity Swaps, 76 Fed. Reg. 43851 (July 22, 2011);
- CFTC, Final Rule, Position Limits for Futures and Swaps, 76 Fed. Reg. 71626 (Nov. 18, 2011);
- CFTC, Final Rule, Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012);
- CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 Fed. Reg. 2136 (Jan. 13, 2012);
- CFTC, Final Rule, Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128 (Apr. 3, 2012); and
- CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 77 Fed. Reg. 35200 (June 12, 2012).

member's identity, even if the disclosure is for a regulatory purpose and not for public dissemination.

As noted above, the Reporting Obligation may be inconsistent with privacy laws in other jurisdictions that may expose Participants to a range of civil liability or criminal sanctions. As a matter of international comity and prudent oversight of the cross-border derivatives markets, ISDA requests that the Commission take the specific actions suggested in Part II below to provide limited temporary relief to the Reporting Obligation and to implement a final resolution of the issue through selective exemptions and cooperation with non-U.S. regulators. Coming into compliance with the Reporting Obligation is a serious and significant undertaking for each submitting Trade Participant. Such action would allow Trade Participants to focus their efforts on providing as much transparency as possible while mitigating the risk that a Trade Participant might suffer civil or criminal sanctions for violating privacy laws as a result of complying with the Reporting Obligation.

To assist the Commission in making this determination, this letter contains specific details regarding the prohibitions on disclosure of Trade Data in several problematic jurisdictions.

We note that this remains a largely untested area of law as reporting of Trade Data to an SDR is a novel scenario under applicable privacy law. Few, if any, jurisdictions around the world directly address data disclosure requirements to third party organizations other than governmental or regulatory agencies within such jurisdiction.

I. Cross-Border Proposals

In the Proposed Cross-Border Guidance and the accompanying Exemptive Order Regarding Compliance with Certain Swap Regulations proposal (the "**Proposed Exemptive Order**") and together with the Proposed Cross-Border Guidance, the "**Cross-Border Proposals**"), the Commission proposes to require Swaps Entities to comply with the Reporting Obligation for swaps with both U.S. person and non-U.S. person counterparties. While many details of the Cross-Border Proposals are unclear (as raised by ISDA in its August 10 comment letter, as well as various other market participants), U.S. Swaps Entities and any non-U.S. Swap Entities entering into swaps with U.S. persons are scheduled to begin complying with the Reporting Obligation for certain transactions as early as on October 12, 2012 (the "**Initial Compliance Date**") with such reporting raising privacy law concerns as addressed herein. Non-U.S. Swaps Entities are eligible to defer their compliance with the Reporting Obligation for swaps entered into with non-U.S. counterparties until July 2013. Regardless of a Swap Entity's applicable compliance deadline, all Swaps Entities may run the risk of running afoul of local privacy law in certain non-U.S. jurisdictions.

The net result of the Cross-Border Proposals would create privacy law issues for all Swaps Entities⁹ due to the breadth of counterparties and transactions covered by the Reporting Obligation. The Cross-Border Proposals also leave non-U.S. Swaps Entities with privacy law concerns even during the deferral period as privacy laws may impact non-U.S. Swaps Entities

⁹ In some instances, this issue will impact Swap Entities' affiliates as well.

based on the home or host country law or regulation of the non-U.S. Swaps Entity, regardless of whether the counterparty is a U.S. person. In addition, the definition of “U.S. person” would cover many counterparties who are incorporated, principally operate in or have some other connection to a non-U.S. jurisdiction such that the local privacy laws of that jurisdiction might attach.¹⁰

II. Relief Requested

In light of the potential conflict of laws created by complying with the Reporting Obligation and the application of privacy laws of a non-U.S. jurisdiction, ISDA respectfully requests that the Commission take the following temporary and long-term actions to implement the Reporting Obligation in a way that furthers the goals of the Commission without requiring Trade Participants to violate their non-U.S. privacy law obligations or creating a disruption to the market.

A. Phase-In Period

ISDA requests additional time for the Commission and Trade Participants to address the privacy law issues, including by allowing Trade Participants to submit Trade Data with the applicable counterparty’s identity redacted if the Trade Participant reasonably believes that doing otherwise may violate non-U.S. privacy laws.¹¹ ISDA requests that Swaps Entities be permitted to begin reporting on a redacted basis from the Initial Compliance Date until the expiration of the Proposed Exemptive Order. Reporting on a redacted basis would allow Trade Participants to begin submitting Trade Data for scenarios where non-U.S. privacy laws do not apply¹², and thus enables reporting to commence for a large segment of the market. Masking of the identity of the non-submitting Trade Participant would achieve the Commission’s goals 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).

¹⁰ We understand that other trade organizations have made similar requests: *see* Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, to David A. Stawick, Secretary, the Commission, dated Aug. 13, 2012; *see* Letter from Sarah A. Miller, CEO, IIB, to David A. Stawick, Secretary, the Commission, dated Aug. 9, 2012.

¹¹ Note that while many Trade Participants have built the ability to mask counterparty identity in other reporting scenarios, implementing the functionality to do so in the context of the Reporting Obligation, including in the interaction with middleware providers who may be reporting Trade Data on the Trade Participants’ behalf, will involve challenges. While the industry is working toward a solution to be ready by the relevant reporting compliance date(s), we respectfully request that the Commission acknowledge the implementation challenges and be flexible in responding to issues that may arise, including, if necessary, by granting limited relief for delays in reporting for limited subsets of transactions where the masking functionality may not be totally complete by the reporting deadline.

¹² We expect this to be the case for a large portion of trading activity, including where non-U.S. privacy laws do not apply to the transaction due to the status of the Trade Participants involved or where counterparty consent has been able to be obtained and is a valid exception to the privacy laws in the relevant jurisdiction.

As discussed in more detail in Part III below, we have been advised that express written consent of the counterparty is, in many jurisdictions, a valid exception to the privacy law prohibitions,¹³ and allowing anonymization of data for affected transactions during this period would give additional time to Trade Participants to obtain bespoke counterparty consent or put in place additional bilateral documentation to satisfy requirements in certain jurisdictions that require consent but where the ISDA Protocol consent may not be sufficient.¹⁴

With respect to historical swaps that are the subject of Part 46 of the Dodd-Frank Act requirements, Swaps Entities may not be in a position to obtain consents from counterparties that may no longer be clients or that may no longer exist. For this reason, a temporary postponement may not assist with resolving potential conflicts in jurisdictions where the solution to resolve such potential conflicts is to seek such consent from counterparties. ISDA hereby requests that, for historical swaps impacted by such jurisdictions, reporting parties be able to submit historical Trade Data with the applicable counterparty's identity redacted on a permanent basis.

B. Coordination Among Regulators

In addition, ISDA requests that the Commission cooperate with non-U.S. regulatory authorities to facilitate regulatory or legislative changes or develop an information sharing regime or other agreements (*e.g.*, Memoranda of Understanding or substantively similar agreements) that would protect submitting Trade Participants from the application and enforcement of non-U.S. jurisdictions' privacy laws as a result of their compliance with their Reporting Obligation.¹⁵ Where privacy law issues appear likely to remain unresolved by these efforts of the Commission following the expiration of the temporary relief discussed in Part II.A above, we request that the Commission issue additional ongoing relief, including by extending the ability of Trade Participants to mask counterparty identity in data submissions as necessary.

C. Virtual Redaction of Certification in Form 7-R

As a part of the Dodd-Frank Act requirements, SDs will have to register with the National Futures Association (“NFA”) and complete a Form 7-R (among other forms and materials). The

¹³ Even in those jurisdictions where consent to disclose Trade Data from a counterparty would be sufficient to satisfy any confidentiality obligations to which a Trade Participant is subject, the content and the manner of its delivery vary in certain jurisdictions—creating considerable logistical difficulties that may require additional time to address.

¹⁴ Some market participants have raised concerns that there may be a small number of jurisdictions where masking is not sufficient to overcome the privacy law risks. We expect this would be an issue in a very limited number of jurisdictions, though market participants are currently looking into the issue.

¹⁵ We note that pursuant to Article 9(4) of the proposed European Market Infrastructure Regulation (“EMIR”), reporting Trade Data to an SDR approved by the European Securities and Markets Authority (“ESMA”) would not be considered in violation of that counterparty's confidentiality obligations in any member state of the European Union. While this would not resolve privacy law issues for the initial Reporting Obligation compliance dates, assuming EMIR is approved as proposed and a U.S. SDR obtains ESMA approval, we do not anticipate that Trade Participants would thereafter encounter the issues we note below in E.U. member states France, Luxembourg or Spain. Accordingly, we encourage the Commission to continue its coordination efforts with ESMA to ensure that a U.S. SDR will be so approved. We caution, however, that any safe harbor established by EMIR does not necessarily resolve all of the confidentiality issues that Swap Entities benefiting from such safe harbor may face in non-E.U. jurisdictions.

NFA has developed an on-line system for registration (“Online Registration System” or “ORS”) that includes a template to be completed and includes a “Firm Agreement” that includes various certifications and acknowledgments. For non-U.S. SDs, the Firm Agreement includes a certification that “the applicant is not subject to any blocking, privacy or secrecy laws which would interfere with or create an obstacle to full inspection of the applicant’s books and records by the Commission, the U.S. Department of Justice and the NFA.”¹⁶ Given the privacy law findings discussed in Part III below, participants registering as Swaps Entities who are foreign applicants may not be able to make this certification. As the Form 7-R is an electronic form and cannot be modified or redacted, non-U.S. SDs seeking to file their registration applications in anticipation of the mandatory registration date will be in a position to have to file the application with a certification that may not be accurate at the time of filing. Deferring the filing of Form 7-R and the registration application is not a practical option. In the “General Registration Questions FAQs” on the NFA’s website, under “Registration – Who Has to Register,” the NFA anticipates requests for exemption or for “no action” opinions with respect to the application registration requirements. ISDA hereby requests a limited “no action” opinion that a foreign applicant that submits a Form 7-R will be deemed to have submitted such Form 7-R with the certification referred to above as virtually redacted, and that such virtual redaction would not result in the rejection of the Form 7-R or otherwise put in jeopardy the approval of such foreign applicant’s registration in time for the Initial Compliance Date. ISDA requests that such virtual redaction remain in place for the period of deferral requested in Part II.A above and thereafter continue with respect to the jurisdictions that may give rise to potential conflicts that have not been resolved during such postponement period.

III. Privacy Law Surveys

In preparation for compliance with the Reporting Obligation, certain of ISDA’s members undertook a survey of 23 jurisdictions (collectively, the “**Jurisdictions**”)¹⁷ to determine whether Trade Participants’ compliance with the Commission’s Reporting Obligation may contravene local law to which a Trade Participant may be subject either by virtue of doing business (i) through a non-U.S. branch or non-U.S. entity (regardless of the location of the applicable counterparty) or (ii) with a non-U.S. counterparty. The members selected such Jurisdictions because a substantial amount of their collective business, operations or swaps counterparties are based in these various locations.

The survey confirmed that, as a general matter, Trade Participants may disclose Trade Data to local regulatory authorities under local law requirements, but in a number of Jurisdictions they may not disclose Trade Data to commercial organizations, such as SDRs or to other regulators based on legal requirements outside the relevant Jurisdiction. We describe in further detail

¹⁶ NFA, Firm Application, page 40. Form 7-R also includes unique certifications that the registrant provide access to its books and records to certain U.S. regulatory agencies. To the extent that complying with such documentary requests is inconsistent with local law, we would request that the NFA’s “no action” opinion permit the virtual redaction of any related certification.

¹⁷ Please see [Appendix A](#) for a list of Jurisdictions. Note that this is an initial wave of the survey only and that Trade Participants are unlikely to be able to obtain by applicable Reporting Obligation deadlines advice for all jurisdictions in which they have Dodd-Frank reportable trading activity. Absent that knowledge, Trade Participants will likely take a conservative view of the privacy law restrictions in those jurisdictions.

below how complying with the Reporting Obligation would create difficulties for compliance with local law in certain Jurisdictions (collectively, “**Problematic Jurisdictions**”).

We understand that the Foreign Regulator Letters submitted to the Commission address the concerns of certain foreign regulatory authorities with the impact of the Reporting Obligation on their respective local privacy laws. The Foreign Regulator Letters discuss a range of issues, including, but not limited to: (i) uncertainty as to whether the Reporting Obligation is sufficient to override local secrecy and data protection laws, (ii) whether the extraterritorial reach of the Reporting Obligation respects international comity principles and (iii) additional details on when and how Swap Entities may be relieved from the Reporting Obligation based on “substitute compliance”.

The survey found that, in many jurisdictions express written consent of the counterparty is a valid exception to the privacy law prohibition, but that in some Jurisdictions, counterparty consent alone may not be sufficient to allow a Trade Participant to disclose Trade Data to an SDR. We reiterate that even where express consent resolves any outstanding privacy law issues, obtaining consent from the necessary counterparties may require market education and additional time to implement. Please refer to Part III.B below for additional details.

What follows is (i) a brief summary of the findings across the Jurisdictions and (ii) a brief description of applicable local law that either prohibits or otherwise complicates disclosure of Trade Data to SDRs.¹⁸

A. General Survey Findings

The survey results indicate that in all of the Jurisdictions surveyed, there is either a statutory or regulatory privacy obligation that may apply. Even if local law or the parties’ contract is silent on the duty of confidentiality, the parties may be subject to an implied duty of confidentiality. Such implied duty includes an obligation of each party to treat the other party reasonably and fairly—and could arise to restrict the reporting of Trade Data. Implied duties are generally considered to be satisfied if the disclosing Trade Participant obtains the consent to disclose from its counterparty. For jurisdictions where the privacy law restrictions may be waived by express written consent of the counterparty, the problem may be resolvable by the submitting Trade Participant itself, assuming that the Commission grants the relief requested in Part II.A above to give the industry time to educate the market on this issue and obtain the necessary counterparty consents. We discuss in Part III.B below those Jurisdictions in which the consent of the counterparty alone may not be sufficient to remove the applicable privacy law restriction.

¹⁸ Please note that in many instances the law of the Jurisdiction does not clearly deal with the situation where a submitting Trade Participant is required to report Trade Data to a foreign repository or regulator. Therefore the findings below may be stated in degrees of likelihood about how a Jurisdiction’s privacy law restrictions and exceptions may be interpreted in this context. Given that the issues are not always black and white, and that the legal advice summarized below was obtained collectively, it may not always conform to the internal legal views of all ISDA members or any other Swaps Entities. Each institution must individually assess its privacy law risks and its views may differ from others and from the advice below on what it is and is not able to disclose.

B. Problematic Jurisdictions

In the following Jurisdictions, a single consent from a counterparty (*e.g.*, within a master agreement such as, but not limited to, the ISDA August 12 Dodd Frank Protocol) may not be viewed as sufficient to authorize disclosure of Trade Data. In each of the Jurisdictions discussed in this Part III.B, Trade Participants may disclose Trade Data upon the instruction of the appropriate *local* legal or regulatory authority. However, disclosures made by Trade Participants in reliance on foreign law (*e.g.*, pursuant to the Reporting Obligation under U.S. law) alone run a considerable risk of being inconsistent with other local privacy law and duties of confidentiality and expose such Trade Participants to civil, and sometimes criminal, liabilities. Such liabilities include monetary fines, actions for damages, license revocations and, in some Jurisdictions, imprisonment. We note that this list is not exhaustive; Swaps Entities may encounter difficulties in other jurisdictions that have not been surveyed.

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 Trade Repositories 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 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 \$S125,000 for natural persons and \$S250,000 for legal persons), damages in tort, revocations of licenses and imprisonment of up to three years for natural persons.

vi. Spain

Any consent delivered by a counterparty must be precise enough for Spanish courts to deem (i) that the consent delivered was what the Trade Participant intended and (ii) that the consent was otherwise fair, reasonable and proportionate. Relevant provisions of Spanish law include: (i) Article 1.258 Spanish Civil Code; (ii) Circular 6/2009, of 9 December, of the National Securities Market Commission; (iii) Conduct of business obligations of the Securities Market Law 24/1988, of 28 July and Royal Decree 217/2008 of 15 February¹⁹; (iv) Article 81.2 of Law 24/1988 and (v) First Additional Provision of Law 26/1988, of 29 July, on Discipline and Intervention of Credit Institutions.²⁰

Simple consent language in an industry protocol may not be sufficient to demonstrate that the consent sufficiently satisfied condition (ii) above. Spanish law imposes a range of penalties for violations of local privacy law, including fines (up to €250,000 for natural persons; €500,00 (or 0.5% of its capital, whichever is larger) for credit entities and €600,000 for investment firms), criminal sanctions (including daily fines for a period of 12 to 24 months of up to €5,000 per day), public or private reprimands, as well as prohibitions on holding directorships or management posts (and, where applicable, removal from such positions).

vii. Switzerland

Disclosures based on foreign law or at the request of an SDR may not be permitted; disclosures absent consent otherwise must be based on a provision of *Swiss law* that expressly requires or allows such disclosure. Relevant provisions of Swiss law include: (i) Article 28 of the Swiss Civil Code; Article 47 of the Federal Act on Banks and Saving Institutions of 8 November 1934; (iii) Article 43 of the Federal Act on Stock Exchanges and Securities Trading of 24 March 1995; (iv) Article 4, para. 3, Swiss Federal Act on Data Protection and the Ordinance to the Federal Act on Data Protection and, potentially, (v) Article 271 of the Swiss Penal Code which prohibits disclosure of confidential data pursuant to the unauthorized official acts of a foreign state or its representatives without the authorization of the appropriate Swiss authority.

In addition to seeking consent from the applicable counterparty, Trade Participants are subject to additional requirements if they seek to transmit Trade Data outside of Switzerland. Such requirements include an assessment of the quality of data protection laws in the target jurisdiction and, if inadequate, an undertaking to enter into a more robust data protection arrangement (and an attendant notification to the applicable Swiss authority of its intention) if applicable, notification to the Swiss regulators that the trade party intends to undertake a more robust data protection arrangement because of inadequate protection in the target country.

¹⁹ Applicable only to Spanish investment firms or Spanish branches of foreign investment firms.

²⁰ Applicable only to Spanish credit entities or Spanish branches of foreign credit entities.

Penalties for violations of Swiss privacy law include fines of up to CHF 1,080,000 and, for natural persons, imprisonment of up to three years.

* * *

We thank the Commission for the opportunity to comment on the proposed Cross-Border Guidance, including its connection to final rules related to the reporting of OTC derivative transactions. Please do not hesitate to contact me or my staff to discuss such issues or if you otherwise have additional questions.

Sincerely,



Robert Pickel

Chief Executive Officer

APPENDIX A

List of Jurisdictions Surveyed

1. Australia
2. Bermuda
3. Brazil
4. Canada (Ontario)
5. Canada (Quebec)
6. Cayman Islands
7. France
8. Germany
9. Hong Kong
10. India
11. Ireland
12. Italy
13. Japan
14. Korea
15. Luxembourg
16. Netherlands
17. People's Republic of China
18. Singapore
19. Spain
20. Switzerland
21. Taiwan
22. United Kingdom
23. United States