

July 31, 2013

Mr. Jean GUILL,
Director General,
Commission de Surveillance du Secteur Financier
110, route d'Arlon
L-2991 Luxembourg

Request for Advice regarding Disclosure Prohibitions

Dear Mr. Guill,

The International Swaps and Derivatives Association, Inc. (“**ISDA**”)¹ is writing to request your written advice regarding the circumstances under which reporting of certain information to a swap data repository (“**SDR**”) or to the United States Commodity Futures Trading CFTC (the “**CFTC**”) in accordance with CFTC regulations, as described below, is prohibited under the statutes and regulations of your jurisdiction.

On June 21, 2013, ISDA submitted to the CFTC’s Division of Market Oversight a request seeking relief in order to address conflicts that may arise between CFTC swap data reporting regulations and the banking secrecy, confidentiality, or privacy laws of several enumerated jurisdictions, including Luxembourg. In response to that request, the CFTC granted time-limited and conditional relief (in CFTC Letter No. 13-41)² that would permit a reporting party to omit Identity Information (as defined below) of its swap counterparty (by providing substitute “masking” identifiers) from reports made pursuant to Part 20, Part 45 or Part 46 of CFTC Regulations (collectively, the “**Reporting Rules**”). One of the conditions of CFTC Letter No. 13-41 is the receipt of a formal written response, not later than August 27, 2013, that specifically addresses the matters set out in Section 3 below from you, as the relevant regulator or governing authority. ISDA plans to make your response available to its members who, as a condition to availing themselves of the no-action relief, must submit to the CFTC and retain in their records a copy of your response. Your timely response to this request will help to ensure that firms are not required to unmask previously filed reports prior to the expiration of the relief granted under CFTC Letter No. 13-41 and that regulatory conflicts do not stand in the way of robust international participation in Luxembourg’s derivatives markets, with the attendant benefits of increased customer choice, competitiveness and liquidity for users of those markets.

¹ 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.

² CFTC Letter No. 13-41 and ISDA’s related request for relief are attached hereto.

Section 1 below describes the obligations of a reporting party under the Reporting Rules. Reporting under Part 45 and Part 46 is made to SDRs, a category of CFTC-registered entity that is required to make data available to the CFTC and certain other regulators. Section 2 describes the duties of an SDR with respect to information reported to it. Section 3 sets out the matters as to which we request your written response.

1. Obligations of the Reporting Party

Pursuant to statutory provisions of the Commodity Exchange Act (“CEA”) added by the Dodd-Frank Act,³ the CFTC has promulgated the following regulations:

- Part 45,⁴ which establishes swap data recordkeeping and SDR reporting requirements; and
- Part 46,⁵ which establishes swap data recordkeeping and SDR reporting requirements for so-called “historical swaps,” which were entered into prior to the reporting compliance date.

For swaps subject to the jurisdiction of the CFTC, Part 45 and Part 46 prescribe certain data fields which a reporting party⁶ must include in its swap data reporting to an SDR.⁷ Such reportable data fields include the identity of the counterparties to a swap (by legal entity identifier (“LEI”)),⁸ as well as “Other Enumerated Identifiers”⁹ and/or “Other Identifying Terms”¹⁰ that may identify the non-reporting party.

³ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁴ 77 Fed. Reg. 2136 (January 13, 2012).

⁵ 77 Fed. Reg. 35200 (June 12, 2012).

⁶ For swap transactions in which one of the parties is a CFTC-registered swap dealer, the “reporting party” (i.e., the party responsible for submitting reports to the SDR) will be the swap dealer.

⁷ Appendix 1 to Part 45, Exhibits A-D set forth the Minimum Primary Economic Terms (“PET”) data fields for swap data reporting pursuant to that part and Appendix 1 to Part 46, Exhibits A-D set forth the PET data fields for historical swaps.

⁸ LEI is defined in § 45.6 of the CFTC’s regulations. The current LEI designated by the CFTC is known as a CFTC Interim Compliant Identifier (“CICI”), but is hereinafter referred to as an (“LEI”) for ease of reference. Section 45.6 sets forth the requirements regarding the use of LEIs in all swap data reporting pursuant to Part 45 of the CFTC’s regulations. *See also* “Q & A – On Start of Swap Data Reporting” (October 9, 2012), issued by Division of Market Oversight staff, http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/startreporting_qa_final.pdf. Section 46.4 sets forth the requirements regarding the use of LEIs in swap data reporting for historical swaps.

⁹ “**Other Enumerated Identifiers**” are: (1) the identity of the counterparty electing the clearing requirement exception in CEA Section 2(h)(7) for all asset classes; (2) an indication of the counterparty purchasing protection or an indication of the counterparty selling protection (but not both) in the credit and equity asset classes; (3) the buyer or seller (but not both) in the commodity asset class; and (4) for all asset classes, the internal identifier used by an SDR for a non-reporting party, exclusively in those cases where such internal identifier directly identifies the non-reporting party (*e.g.*, the internal identifier used by an SDR is the name of the non-reporting party).

¹⁰ “**Other Identifying Term**” means a term of a swap that a reporting party reasonably believes would identify a non-reporting counterparty if disclosed, and is required to be reported pursuant to the certain Part 45 data fields entitled “Any other term(s) of the trade matched or affirmed by the counterparties in verifying the [transaction]”.

Part 20 of the CFTC's regulations sets forth large trader reporting rules for physical commodity swaps.¹¹ Part 20 requires clearing organizations, clearing members and swap dealers to make routine swaps position reports to the CFTC, and establishes certain non-routine reporting requirements for large swaps traders. Part 20 requires, among other things, that a reporting entity disclose "Part 20 Identifying Information",¹² including the identity, of the counterparty in respect of which positional information is being reported in large swap trader reports and associated filings.¹³

Reporting parties may book swap transactions to entities, offices or branches that are within Luxemburg or outside of Luxemburg, including to their home office.

As used in this letter, "**Identity Information**" means the identity of a counterparty (by name or identifier, such as an LEI), Other Enumerated Identifiers, Other Identifying Terms and Part 20 Identifying Information.

2. SDR Duties with respect to Reported Data

A SDR is a person that collects and maintains information or records with respect to swap transactions entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.¹⁴ A SDR that uses U.S. jurisdictional means to perform its functions as such must be registered with the CFTC, and must comply with specific duties and core principles as set out in the CEA and CFTC regulations.¹⁵ Duties of a SDR with respect to information reported to it are set out in CEA section 21(c), which mandates, among other matters, that a SDR: provide direct electronic access to the CFTC or any designee of the CFTC (including another registered entity); provide public reporting of anonymous swap data in accordance with real-time reporting rules established by the CFTC;¹⁶ upon request and after notifying the CFTC, make data available to other specified U.S. regulators, the U.S. Department of Justice and any other person that the CFTC determines to be appropriate, including foreign authorities; and, subject to the foregoing, maintain the privacy of any and all swap transaction information that the swap data repository receives from a swap dealer, counterparty, or any other registered entity.

A SDR's provision of information to non-CFTC regulators, government authorities and other appropriate persons is subject to a requirement that the SDR obtain certain confidentiality and

¹¹ 76 Fed. Reg. 43851 (July 22, 2011).

¹² "**Part 20 Identifying Information**" means the following counterparty information:

(1) The counterparty name field in § 20.4 submissions; and (2) The following counterparty information included in a 102S filing pursuant to § 20.5: (i) Name; (ii) Address (except that the country of the counterparty shall be provided); (iii) Contact Name; (iv) Contact Job Title; (v) Contact Phone; (vi) Contact Email.

¹³ See note 12, *supra* at 43863-4; See also "Large Trader Reporting for Physical Commodity Swaps: Division of Market Oversight Guidebook for Part 20 Reports" (May 31, 2012), updated by Division of Market Oversight Staff, <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/ltrguidebook053112.pdf>.

¹⁴ CEA section 1a(48).

¹⁵ CEA section 21; CFTC Regulations Part 49.

¹⁶ CFTC Regulations Part 43 implement real-time reporting of anonymous swap data. A SDR disseminating real-time data is prohibited from doing so in a manner that discloses or otherwise facilitates the identification of a party to a swap. CFTC Regulation 43.4(d)(1).

indemnification agreements.¹⁷ The CFTC's authority to publicly disclose information obtained in the course of its investigative and market surveillance activities is governed by the CEA.¹⁸

3. Response Requested

In order to allow its members with reporting obligations under the Reporting Rules to avail themselves of the no-action relief under CFTC Letter No. 13-41, ISDA respectfully requests that you issue a formal written response to this letter that:

- A) specifically identifies any statutes or regulations that (i) are enforced by the Commission de Surveillance du Secteur Financier and (ii) would prohibit a reporting party from reporting Identity Information¹⁹ pursuant to the Reporting Rules in any of the circumstances described below, or other circumstances where such prohibition would apply; and
- B) specifically addresses the applicability of such statutes or regulations under the circumstances described below, or other circumstances you may identify in which such prohibition on reporting in accordance with the Reporting Rules would apply:
 - (1) where the reporting counterparty is located and registered in Luxembourg;
 - (2) where the reporting counterparty is located in Luxembourg as a branch, including as a branch of a U.S. person;
 - (3) where the reporting counterparty is located outside Luxembourg but the non-reporting party is located in Luxembourg. To the extent any prohibition would apply differently depending on the jurisdiction (other than Luxembourg) where the reporting party is located or where swaps are booked, please specifically address any relevant jurisdiction-specific factors.

ISDA members believe that factors other than the jurisdiction of the parties may be relevant in determining whether prohibitions on reporting Identity Information apply. We would therefore also respectfully ask that you address the applicability of such statutes or regulations where (i) the relevant trade is booked in Luxembourg; or (ii) some other activity in the trade is performed in Luxembourg (for example sales or marketing activities) but the trade is booked in another jurisdiction. We attach as Annex A a general summary of the legal considerations in your jurisdiction that were deemed relevant to the questions presented above by counsel consulted by

¹⁷ CEA section 21(d). The CFTC has issued an interpretive statement to the effect that a registered SDR is not subject to the confidentiality and indemnification agreement provisions of section 21(d) if (i) such registered SDR is also registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime; and (ii) the data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime. 77 Fed. Reg. 65177.

¹⁸ See Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 Fed. Reg. 54538, 54550; CEA section 8; CEA section 8a(6).

¹⁹ If the prohibition would apply differently, or would not apply, to certain sub-categories of Identity Information, please address the relevant differences.

certain ISDA members. The summary is provided for informational purposes, and has not been independently verified by ISDA.

ISDA respectfully requests that you respond to this request as soon as possible, as the CFTC has required firms to obtain such formal responses by August 27, 2013. We apologize for the urgency of this request and any resulting inconvenience.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Cogan', with a long horizontal flourish extending to the right.

Roger Cogan
Senior European Policy Director

Attachments:

CFTC Letter No. 13-41

ISDA Letter to CFTC Division of Market Oversight, dated June 21, 2013

ANNEX