



Réf. : CU/SC
N° AMF : 2013005411

Regulation policy and international affairs division

Mr. Richard A. Shilts
Acting Director, Division of Market Oversight
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
USA

August 20th, 2013

By electronic mail: r.shilts@cftc.gov

Dear Mr. Shilts,

Re: Response to Request for Advice regarding Disclosure Prohibitions

On July 23, 2013, the *Autorité des marchés financiers* (AMF) received from the International Swaps and Derivatives Association, Inc. (ISDA) a letter requesting a formal written response regarding the circumstances under which the reporting of certain information to a swap data repository (SDR) or to the U.S. Commodity Futures Trading Commission (CFTC) in accordance with CFTC regulations described in that letter, is prohibited under statutes and regulations applicable in France.

We understand that ISDA's request relates to a time-limited and conditional relief granted by the CFTC on June 28, 2013 (the "CFTC No-Action Letter") for entities recognized as Reporting Counterparties under the CFTC regulations, in response to a formal request from ISDA on June 21, 2013 (the "ISDA Letter"). We also understand that, in the ISDA Letter, ISDA included France within a list of 16 jurisdictions in which it deems the reporting of certain information to be subject to statutory or regulatory prohibitions (the "Enumerated Jurisdictions"). We further understand that one of the conditions imposed by the CFTC No-Action Letter for the time-limited and conditional relief to apply is for the Reporting Counterparties (or an industry association such as ISDA) to submit a formal written request to, and obtain a formal response letter from, the relevant non-U.S. regulator or governing authority in the Enumerated Jurisdictions, within 60 days from the issuance of the CFTC Letter (i.e. August 27, 2013).

Pursuant to the above, ISDA has requested, on behalf of its members and in order to enable them to avail themselves of the time-limited and conditional relief under the CFTC No-Action Letter, that the AMF identifies the relevant provisions that would prohibit a Reporting Counterparty from reporting certain information to an SDR pursuant to CFTC regulations.

We were surprised to learn about this process. The interposition of ISDA between the CFTC and the relevant jurisdictions results in the circumvention of the domestic institutional channels. We are of the view that regulators should not interpose third parties between each other to provide interpretations of their domestic laws unless agreed by those regulators as being the most appropriate channel for coordination under the circumstances. This topic should be handled by direct collaboration between regulators.

Concerning the information requested, you will find attached a copy of the French relevant legislation (law n°68-678 of July 26, 1968 and Articles L. 511-33 and L. 531-12 of the French Monetary and Financial Code).

Conformément à la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, les personnes physiques disposent d'un droit d'accès et de rectification aux données personnelles les concernant. Ce droit peut être exercé auprès de la Direction de la régulation et des affaires internationales.

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However, reporting to trade repositories should be considered in the context of the Regulation (EU) N°648/2012 of the European Parliament and of the Council of July 4, 2012 on OTC derivatives, central counterparties and trade repositories (EMIR). Under Article 9 of EMIR, counterparties and CCPs established in the European Union shall ensure that the details of any derivative contract they have concluded and of any modification to or termination of the contract is reported to a trade repository registered or recognised by the European Securities and Markets Authority (ESMA), according, respectively, to Article 55 or 77 of EMIR. Counterparties and CCPs established in the EU will be permitted to satisfy their reporting requirements by reporting to a non-EU trade repository where such trade repository is located in a foreign jurisdiction recognized by ESMA as equivalent regarding the regimes governing trade repositories.

There is no provision in EMIR that prohibits the reporting of any information to a trade repository. On the contrary, Article 9 of EMIR establishes that a counterparty or a CCP that reports the details of a derivative contract to a trade repository (EU or non-EU) or to ESMA, or an entity that reports such details on behalf of a counterparty or a CCP, shall not be considered in breach of any restriction on disclosure of information imposed by that contract or by any legislative, regulatory or administrative provision (i.e. blocking law or professional secrecy as mentioned above). No liability resulting from a disclosure shall lie with the reporting entity or its directors or employees.

This provision will have direct effect in France.

The AMF, which is the competent authority in France to enforce Article 9 of EMIR, considers that once the above mentioned conditions are fulfilled, the reporting requirements under EMIR will, as soon as applicable, supersede, for the purpose of the reporting requirement to a trade repository, any domestic privacy or blocking law. As such, the AMF hereby reiterates the previous responses provided by the French authorities *inter alia* to the Financial Stability Board on the national framework applicable to reporting to trade repositories (or to their US equivalent, SDRs).

The AMF has always been, and remains, fully committed to working with its foreign counterparts as well as market participants to address potential areas of concern in particular regarding the OTC derivatives markets reforms implementing the G20 commitments, including trade reporting, as in all other areas of financial regulation. Should you have any question on the above matter, please do not hesitate to contact us.

Sincerely,

Edouard Vieillefond
Managing Director
Regulation Policy and International Affairs Division



Encl.: Law n°68-678 of July 26, 1968 and Articles L. 511-33 and L. 531-12 of the French Monetary and Financial Code

Cc:

Ms Sarah E. Josephson, Director, Office of International Affairs, Commodity Futures Trading Commission

Mr. Roger Cogan, Senior European Policy Director, European Regulatory Policy Team
International Swaps and Derivatives Association

Mr. Patrick Pearson, Head of Financial Markets Infrastructure, European Commission