ISDA Safe, Efficient Markets

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RE: Consultative report on Authorities' access to trade repository data

Dear Secretariats,

On behalf of our members, ISDA[1] appreciates the opportunity to respond to this consultation, with the goal of contributing to robust and stable financial markets. The emergence of multiple trade repositories in various jurisdictions for different asset classes creates a set of specific issues with regards to access to the different sets of data and data aggregation to allow regulators to fulfil their various responsibilities. ISDA is focused on aspects related to access to the data and in particular confidentiality concerns and requirements to make the data meaningful on a global aggregated level while building a cost effective reporting infrastructure.

Our response focuses in particular on:

- Data confidentiality requirements and privacy issues. This covers privacy law requirements that conflict with reporting obligations as we further detail below. It also addresses concerns around the proposed scope of access in particular if measured against the G20 commitments as we further detail in Question F. Strong international collaboration between regulators is needed to solve these issues over time;
- Unique identifiers, applied globally as a necessary basis for data aggregation; and
- Financial products Markup Language (FpML), which is a solution for the technical standardization requirements.

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC 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 including exchanges, clearinghouses 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.

One item worth highlighting upfront relates to data confidentiality and privacy laws. In certain jurisdictions consent is required from counterparties to allow reporting of counterparty information. While this adds an operational burden to the reporting process and requires a period of time to be implemented, consent where permitted, and where requirements for informed consent are met, serves to address confidentiality restrictions. Where consent, even if obtained, is not sufficient, and reporting of counterparty identifying information could lead to criminal charges, a regulatory solution is the only safeguard. Further, where local laws are unclear on the point, any ambiguity may not be resolved in favor of the reporting party and therefore a regulatory solution is the preferred safeguard. Execution of a Global MOU among regulators would be most effective to mitigate data confidentiality risk to reporting parties and resolve interpretive ambiguities.

We have pleasure in submitting our response, and look forward to staying engaged with CPSS and IOSCO in regards to future initiatives on this topic. Please feel free to contact me or ISDA's staff at your convenience.

Sincerely,

Robert Pickel
Chief Executive Officer
International Swaps and Derivatives Association, Inc. (ISDA)

ANNEX 1: CONSULTATION QUESTIONS & RESPONSES

A. *Is the list of functional mandates comprehensive? Are there other functional mandates carried out by authorities that are not currently listed? –* (**no response**)

B*. Are the descriptions of the functional mandates listed in the report clear and comprehensive to facilitate a mapping between these mandates and a particular authority? If not, how can the description be improved to ensure it is clear and comprehensive? Do the descriptions provide for sufficient flexibility to account for the potential of changing data needs of authorities over time (e.g. as the regulatory regimes for mandatory clearing of OTC derivatives mature, the information needs of regulators may also change)? –* (**no response**)

C*. Does the mapping table, on its own, provide enough guidance to both authorities and TRs on the level of data access that an authority may typically require in support of its mandate(s)? If not, what changes should be made? –* (**no response**)

Question to the TRs: do you have examples of instances in which you did decline access based on a functional mandate? If so, why? – (**no response**)

D. *Is the guidance to address non-typical requests sufficient to allow TRs to make a determination on these types of requests? If not, how could the guidance be improved? Would the types of information listed in the illustrative template facilitate a TR's decision making process when considering an authority's request for data? What additional information, if any, would be required? –* (**no response**)

Question to the TRs: do you have examples of instances in which you did decline access in response to a non-typical request? If so, why? – (**no response**)

E*. What are the specific issues or challenges in creating anonymised data? How does the TR ensure that the identity of the counterparties cannot be inferred from the data provided, while making a sufficient level of data available to the requesting authority in support of its mandate(s)? Does it seem feasible to ensure the anonymity of data transmitted without unduly restricting data access? – (***no response***)*

F*. Are the approaches and safeguards presented to address legal and confidentiality constraints sufficient? What other approaches or safeguards would be effective? Are there any other constraints or obstacles that need to be addressed?*

ANSWER:

We are particularly concerned that the data confidentiality approaches in practice will be very difficult to implement and have the following concerns:

1. Inappropriate scope of data access

CPSS/IOSCO recognize indemnification and confidentiality requirements as a legal barrier to the ability of regulators globally to utilize the transparency offered by Trade Repositories, but mention that it needs to be ensured that such confidentiality concerns do not serve as the sole motivation to establish a TR where no independent business reason exists for such an entity. Various mitigating actions are proposed in order to address confidentiality obstacles. Also, the report suggests establishing procedures that allow for a timely and continuous access to data. This is proposed for a large number of mandates, where authorities get access to transaction level data that identifies counterparty information. This would give a broad number of authorities across the globe with a respective mandate unlimited data access to all reported transactions. It therefore seems that CPSS and IOSCO favour full transparency and an extensive and irrepressible automatic exchange of data. As such, the consultative report is

based on the assumption that there is no room for confidentiality concerns of private data when public authorities are concerned. In particular:

- The report does not contain any qualification of this assumption irrespective of (i) the jurisdiction of the authority seeking data; (ii) that authority's mandate; or (iii) how the authority uses the information obtained.
- The report appears to imply that the data requesting authority should be the determining gatekeeper to decide the scope and granularity of information to be provided: "The TR should not have discretion over the level of access that each requesting authority is granted" and "TR supervisors should avoid playing a role as gate keeper to data held in a TR…", which would mean a complete removal of constitutional systems of due process in most countries.
- The report fails to discuss the reasons why confidentiality safeguards were implemented in the first place and why such concerns should not be valid in the OTC sphere. This is surprising considering that the exchange of confidential data is an area with a long history of debate.
- Unfettered exchange of information should not be the norm with certain jurisdictions, to be further defined. For instance, it should not be possible to abuse the G20 commitment to obtain information about purposes other than monitoring the nature and level of risk arising from reported transactions.
- Furthermore, it should be recognized that it is not proportionate to require client identifying information where individuals are concerned for the following reasons. First, as it is commonly understood that client identifying information is not disclosed to the market, collecting client identifying information is pointless from the viewpoint of transparency, the first objective of the Pittsburgh summit commitment. Second, individuals almost by definition are not relevant from a systemic risk perspective. Third, while named data may be of some value to guard against market abuse, it should be noted that individuals are materially more likely to use trading instruments other than OTC derivatives to commit market abuse. In particular, market abuse conducted by individuals tends to be insider dealing, which is more often done on exchanges via the purchase or sale of shares than by using OTC derivatives where one party to the trade would be likely to get in touch with the other party should the trade turn out different from expectations. It goes without saying that a financial intermediary needs to be in a position to provide encompassing information to authorities should there be a concern of market abuse. But it would be wholly disproportional to collect ex-ante information on all individuals.

From a procedural perspective, the report appears not to include any working group member that is traditionally tasked with data confidentiality concerns, such as Data Protection Authorities.

2. Disproportional in light of G20 commitment

It should be remembered that the original G20 commitment called for the reporting of OTC derivatives to (i) increase transparency, (ii) mitigate systemic risk and (iii) protect against market abuse. Against this background, the report contains several mandates that appear to have no basis in the Pittsburgh commitment. The report should therefore contain a restricted number of recognized mandates, on the basis of the Pittsburgh commitment, for which it is appropriate to exchange information. Wording with the effect that "mandates include (but are not necessarily limited to) …" an enumeration of mandates leaves the door wide open for

potential abuse. Furthermore, the report suggests that various mandates may require access to named data, contrary to the mandates as suggested by the Pittsburgh commitment.

3. Potential inconsistency in the implementation

The guideline suggests that each TR should implement effective processes and procedures related to effective and practical access to the data they maintain. Such an approach will further increase fragmentation across the different jurisdictions and make it more difficult to have a harmonized data base, which will allow for aggregation of data. The different jurisdictions and authorities should agree first on a common data standard, before rolling out guidelines that will result in a high level of fragmentation. The approach, based on guidelines, will therefore likely result in international inconsistency. It is unlikely that all jurisdictions will follow the guidelines to the full extent. Legal barriers and differences in legal requirements can make it impossible for certain authorities to fully implement the guidelines. Also, when a jurisdiction wants to implement procedures and data templates, it might hesitate to coordinate with its counterparts for fear that other jurisdictions might disagree over how to act, lengthening the time that it might take to reach agreement and respond effectively.

One solution to prevent the misuse of data and to ensure appropriate data access would be for IOSCO / CPSS and the respective authorities to define precise criteria that allow for an exchange of named data. Furthermore, the authorities/ TRs that handle and exchange confidential data need approved security standards. This leaves aside the difficulty of identifying the set of data for each contract that does not risk revealing the identity of the counterparty.

G. *What are the specific issues and challenges in further investigating the possibility for the public sector to identify a centralised or other mechanism to collect and share global aggregated data, as a complement to the direct access by the different authorities to TR held data? Would either a "logical" centralisation of federated TRs applying common technical reporting standards or a central public entity be possible options to collect and share global aggregated data?*

ANSWER:

The report rightfully points out that with the current structure of multiple TRs per asset class spread across different jurisdictions with varying trade reporting requirements and the fact that OTCD data likely will overlap between TRs there is a risk that the financial stability objectives, which are the basis for transaction reporting requirements to TRs, might not be achieved. There is an additional risk that incompleteness of the data can lead to misguided decision making. ISDA believes that the ability to query data across multiple TRs will be a necessity, in particular for systemic risk management. This could potentially be achieved through a centralized "TR of TRs". The cost versus the benefits of such an approach should be considered carefully. As explained further below unique identifiers will be a necessary requirement for the successful implementation of such a TR of TRs. These identifiers, if implemented correctly, can allow for the necessary data aggregation without the need for a centralized TR. Regulatory bodies that get access to the TR of TRs data should have access to the same data residing in each of the TRs. The added value is convenience. While in our view a "TR of TRs" is not the solution, we do believe that a reduction in the number of TRs will benefit the industry and regulatory community.

Necessary conditions for successful aggregation of data residing in multiple TRs are the adoption of global technical standards and global unique identifiers. A common global technical standard, such as FpML, allows for data aggregation on a detailed level across

different TRs, even if, because of variations in underlying legislation and rule making in various jurisdictions, the reporting requirements are different in different TRs. The use of a global Unique Trade or Transaction Identifier (UTI) ensures the uniqueness of contract information and avoiding double reporting and counting because of different reporting requirements in different jurisdictions. The Legal Entity Identifier (LEI) allows for a unique identification of the counterparties to each trade. Globally adopted product taxonomy and product identifiers, reported with each trade, allow for consistent data aggregation across products.

The next section will go into more detail regarding each of these initiatives.

H. *How do you assess the progress made so far in terms of technical standardisation of data reported to TRs and implementation of tools and methods to facilitate the aggregation of data stored in TRs? Do you see the need for additional initiatives and in which specific areas?*

ANSWER:

The technical standard used by market participants to report to the DTCC TRs in different jurisdictions is Financial products Markup Language (FpML)[2].

The reporting requirements in different jurisdictions are analyzed through the FpML reporting working group and after a public vetting period included in the standard. The final Recommendation for FpML version 5.5 is planned for May 2013. Reporting coverage in this version includes requirements from CFTC, ESMA, HKMA and JFSA. Requirements in other jurisdictions are analyzed as soon as they become available with the goal of including them in the standard.

FpML provides a clear process of version releases and open industry working groups. While the focus to date has been on the standardization of the communication from the reporting institutions to the TRs, regulators could leverage this work when retrieving data from the TRs[3].

We strongly advocate common industry standards to facilitate data aggregation and analysis by regulators for legal entities, products and for trade identifiers. In line with the discussion in the previous section, to be useful for data aggregation, these standards need to be unique and global in nature.

Legal Entity Identifier (LEI)

ISDA, as part of the global coalition of trade associations working on LEI, is in full support of the ongoing LEI implementation and the continued dialogue between industry and regulators during this process. The recent establishment of the appropriate governance structure under the LEI Regulatory Oversight Committee (ROC) and the work on getting the Local Operating Units (LOUs) active in issuing LEIs, are steps in the right direction. We encourage industry and regulators to further push the implementation of the LEI. A successful timely LEI implementation will be one of the cornerstones of data aggregation for OTC derivatives.

[2] www.fpml.org

[3] See e.g. http://www.fpml.org/news/Use_of_FpML_for_Risk_Evaluation.pdf

Product Classification/Taxonomy

The ISDA membership recognized early on the need for a uniform product classification. We developed the OTC taxonomy[4] covering all derivatives asset classes and defined a governing process to manage future changes to the taxonomy, which we expect to evolve over time. The taxonomy has been integrated into FpML and we have engaged in discussions with ISO TC68 WG6 covering the Classification for Financial Instruments (CFI). In those jurisdictions where reporting has started, the ISDA taxonomy is currently reported as part of each trade record submitted to the Swap Data Repositories (SDRs).

Consistent use of a taxonomy, which can evolve over time, across all TRs will be a key component for data aggregation across multiple TRs. To date regulators have paid limited attention to the need for global consistency in this area.

Unique Trade Identifiers (UTI)/ Unique Swap Identifier (USI)

The need for an identifier for each individual trade was highlighted in the August 2011 CPSS/IOSCO report, without being prescriptive on how this should be implemented in practice. The Commodity Futures Trading Commission (CFTC) has been very prescriptive in its requirements for such a unique identifier on a contract level through the definition of the USI. A critical component of any Trade identifier to guarantee uniqueness across all trade identifiers is a unique id ("namespace") for each party that assigns a trade identifier. The combination of the trade identifier and the namespace creates a unique trade identifier.

The CFTC approach cannot be used on a global basis. Getting a namespace requires registration, which is a process unique to parties that fall under CFTC jurisdiction.

The ISDA Data and Reporting Regulatory Implementation Committee considered several alternatives for a global UTI while considering practical implementation constraints in certain asset classes.

After weighing the pros and cons of many alternatives, including the LEI, industry stakeholders agreed that a unified solution across all asset classes is preferable, specifically a 10 character Prefix to the UTI.

The actual construct of the 10 characters is currently under discussion, a shortlist has been determined and the industry working groups are actively working towards an agreed solution.

ISDA will be happy to keep CPSS and IOSCO updated on the progress in these areas.

[4] For the latest product taxonomy and governance document see: http://www2.isda.org/functional-areas/technology-infrastructure/data-and-reporting/