

June 20, 2014

Mr. Vincent McGonagle  
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. McGonagle:

The International Swaps and Derivatives Association, Inc. (“**ISDA**”),<sup>1</sup> on behalf of its members with reporting obligations under Part 20, Part 45 or Part 46 of the Regulations (collectively, the “**Reporting Rules**”)<sup>2</sup> of the Commodity Futures Trading Commission (the “**Commission**”) and other similarly situated persons, is writing to request, pursuant to Rule 140.99, an extension of the expiration date and other modifications to the no-action relief provided under CFTC Letter No. 13-41, as described below.

Conflicts between the Commission’s Reporting Rules and non-U.S. data privacy, bank secrecy, state secrecy, blocking statutes and similar laws (collectively, “**Privacy Laws**”) remain a formidable challenge in reporting cross-border transactions. Such conflicts place both U.S. and non-U.S. reporting parties in the untenable position of having to choose between, on the one hand, not complying with provisions of the Reporting Rules that require identification of swap counterparties or, on the other, being exposed to risks of potentially violating the Privacy Laws of other jurisdictions and facing potentially severe penalties, which may include criminal sanctions. These challenges can only be addressed effectively through efforts by regulators to achieve international harmonization of relevant laws so that a reporting party’s compliance with mandatory trade reporting obligations in itself will be recognized as a permitted disclosure (even without counterparty consent) under all applicable Privacy Laws, a result that, while now prominent on the international regulatory agenda, is unlikely to be achieved prior to June 30,

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<sup>1</sup> 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 64 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](http://www.isda.org).

<sup>2</sup> 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.

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2014, the expiration date of the relief provided by CFTC Letter No. 13-41, or any time soon thereafter.

Accordingly, ISDA requests that the Division of Market Oversight extend the expiration date of the no-action relief provided in CFTC Letter No. 13-41 until the earlier of (i) such time when the reporting counterparty no longer holds the requisite reasonable belief regarding the consequences of reporting the specified counterparty identity information and (ii) 11:59 pm eastern daylight time on June 30, 2015. Further, ISDA requests that the conditions of the no-action relief provided in CFTC Letter No. 13-41 be modified in the following respects:

- First, the relief should apply to any swap transaction with respect to which the reporting counterparty party has formed a reasonable belief, *based on legal advice of internal or outside counsel and/or a response received from a non-U.S. regulatory authority of the jurisdiction of the applicable Privacy Laws*, that statutory or regulatory prohibitions imposed by an Enumerated Jurisdiction preclude<sup>3</sup> the reporting counterparty from reporting the Opposite LEI, Other Enumerated Identifiers, Other Identifying Terms or Part 20 Identifying Information (as such capitalized terms are defined in CFTC Letter No. 13-41) with respect to the reporting party's counterparty. The condition under CFTC Letter No. 13-41 that the reporting party obtain a formal written response from a non-US regulatory authority did not take into account that the relevant authority may not have an established process for providing advisory guidance to market participants, or may not have resources available to consider the individualized circumstances of each market participant requesting a response. In addition, a condition, such as that imposed under CFTC Letter No. 12-46, that the reasonable belief be based on legal advice<sup>4</sup> of outside counsel (to the exclusion of internal counsel) would be unnecessarily restrictive and impose unwarranted costs and delay. The application of Privacy Laws to swap reporting pursuant to the Reporting Rules is a specialized topic for which the most developed and accessible legal expertise may reside within an institution. There is no reason to presume that qualified internal counsel would not provide objective advice to his or her institution. It would be a condition of the relief that the reporting party retain, as part of its compliance with Commission recordkeeping requirements, a copy of (or the reporting counterparty's written memorialization of) the advice or response on which it based its reasonable belief regarding non-U.S. Privacy Laws.

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<sup>3</sup> We note that a reporting counterparty may be precluded from reporting such information either (i) because of a statutory or regulatory prohibition that is not waiveable by the non-reporting counterparty or (ii) because, although the prohibitions are waiveable in principle, the conditions for such waivers to be effective make them unreliable or impracticable for reporting purposes (e.g., consents may be revocable, required to be given specifically for each instance of disclosure, or subject to legal standards that expose reporting counterparties to unacceptable risk that consent may later be found to be ineffective). The requested relief is intended to encompass both of these situations.

<sup>4</sup> The Division's requirement, set out in a Commission press release dated December 21, 2012 (Press Release PR6479-12), that written legal advice not denominated as an "opinion" include an attestation using prescribed language set forth in the press release is without foundation in the legal opinion literature. If the substance of the applicable Privacy Laws necessitates that legal conclusions be reasoned and qualified, that fact is unavoidable, and any requirement to include sui generis language outside the norms of recognized legal practice in the relevant jurisdiction can only serve as a disincentive to outside counsel providing the needed advice.

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- Second, the requirement that the reporting party's counterparty meet the definition of Privacy Law Counterparty, as defined in CFTC Letter No. 13-41, should be eliminated because the Privacy Laws of a non-US jurisdiction may apply to a transaction regardless of whether the reporting party's counterparty falls within that definition. For example, the Privacy Laws of an Enumerated Jurisdiction could apply based on the location of the branch of the reporting party through which the transaction is entered into, even if the reporting party's counterparty is not *located* in that jurisdiction. Furthermore, the counterparty's status as a U.S. person, a person guaranteed by or acting as a conduit affiliate of a U.S. person, or a registered swap dealer or major swap participant generally will be irrelevant to the jurisdictional analysis under the applicable Privacy Laws, and consequently retaining these limitations of CFTC Letter No. 13-41 would make the relief unavailable notwithstanding the existence of genuine conflicts of laws that are not remediable by the counterparties.
- Third, the “**Enumerated Jurisdictions**” for purposes of this request are: France, Korea, Luxembourg, People's Republic of China, Switzerland, Taiwan, India, Algeria, Singapore, Bahrain, Argentina, Hungary, Samoa, Austria, Spain, Romania, Costa Rica, Uruguay, Venezuela and Philippines.<sup>5</sup> This list includes six jurisdictions -- Spain, Romania, Costa Rica, Uruguay, Venezuela and Philippines -- that were not identified as Enumerated Jurisdictions in CFTC Letter No. 13-41. Identification of Privacy Law conflicts in new jurisdictions is to be expected as the international regulatory focus on Privacy Law barriers to reporting intensifies and as industry participants expand the scope of their activities across the globe. Because industry participants must prioritize their review of local Privacy Laws based on business relevance, even this revised list is not necessarily comprehensive. In particular, market participants continue to consider the Privacy Law implications of transactions with natural persons, to whom more stringent Privacy Law protections often apply. In the interest of supervisory efficiency and economy, ISDA recommends that the requested relief be made available with respect to jurisdictions not included in the foregoing list if a reporting party (or a group or industry association on behalf of similarly situated parties) notifies the Division that the reporting party (or one or more members of the group or association) has formed the requisite reasonable belief with respect to the Privacy Laws of the new jurisdiction.

We emphasize that the Division should not expect uniformity across reporting counterparties in their determinations that a Privacy Law conflict exists in a given jurisdiction. The applicability of non-U.S. Privacy Laws, and judgments regarding their interpretation and appropriate implementation by institutions, are highly fact-specific and reflective of situational characteristics of those institutions. The laws in many jurisdictions apply differently based on the nature of an institution's presence in a given jurisdiction. Moreover, the local law advice received by various ISDA member firms is not uniform. While consensus generally exists around a majority of the jurisdictions in which Privacy Law conflicts exist, even expert counsel in each jurisdiction can have

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<sup>5</sup> This list consists of jurisdictions identified by ISDA member firms based on their analyses of statutory or regulatory prohibitions that may preclude reporting of counterparty identity information.

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differing views as to the interpretation of existing laws in the novel context of swap data reporting, the cross-border reach of local law and the effectiveness of consent.

- Fourth, ISDA requests that the definition of “**Privacy Law Identifier**” used in CFTC Letter No. 13-41 be modified to permit the reporting party to use free text or other signifiers to withhold counterparty identity information. Additionally, it should be clarified that a reporting party may but need not use an identical Privacy Law Identifier in every report (e.g., identifiers may differ per asset class, middleware provider, or other factors). This flexibility would better accommodate the range of modalities (including vendor-provided middleware) used for reporting.

Conflicts between reporting obligations and Privacy Laws have been recognized by international regulators as a significant challenge to effective trade reporting, and efforts to resolve such conflicts are underway. In its March 2014 Report on Cross Border Implementation Issues, the OTC Derivatives Regulators Group (“**ODRG**”), of which the Commission is a member, acknowledges that Privacy Laws may prevent reporting to trade repositories<sup>6</sup> and holds that jurisdictions should remove such barriers so that participants can report trades with foreign counterparties pursuant to participants’ reporting requirements without breaching applicable laws. Although the ODRG report states that exemptions to accommodate such barriers are acceptable only on an interim basis, ISDA submits that it would be premature for the Division to allow the relief under CFTC Letter No. 13-41 to lapse. The ODRG Report notes that advances with respect to the removal of barriers have been reported in the semi-annual progress reports published by the Financial Stability Board (“**FSB**”), and that a planned FSB peer review on trade reporting aims to obtain a better understanding of the outstanding issues across jurisdictions.<sup>7</sup> With respect to Privacy Laws in the EU, a preemptive mechanism exists under EMIR Article 9(4) but will apply to reporting pursuant to the Reporting Rules only after a finding of equivalence is made and implemented.

Reporting party behavior in accordance with the requested relief achieves substantially complete compliance with the Reporting Rules even after the omission of specified counterparty identity information from Part 20, 45 and 46 reports. Extending the relief as requested would avoid inhibiting the participation of Commission registrants in local swap markets and allow time for the affected jurisdictions to resolve cross-border conflicts associated with swap data reporting as they implement their own data reporting frameworks. Accordingly, the requested relief is an

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<sup>6</sup> Report of the OTC Derivatives Regulators Group on Cross-Border Implementation Issues (“**ODRG Report**”) (March 2014), p.6. See also OTC Derivatives Market Reforms – Fifth Progress Report, Financial Stability Board (April 2013), pp.48-49 (“authorities reported that plans to adopt legislation and/or regulation that would allow for such reporting are underway”) (available at [http://www.financialstabilityboard.org/publications/r\\_130415.pdf](http://www.financialstabilityboard.org/publications/r_130415.pdf)); OTC Derivatives Market Reforms – Sixth Progress Report, Financial Stability Board (September 2013), pp.52-54 (“[h]owever, the full implementation of needed regulation or other acts that may remove barriers for market participant reporting and authority access to data (depending on the specific nature of the privacy and blocking laws as well as the extent of information to be reported) may still take some time”); OTC Derivatives Market Reforms – Seventh Progress Report, Financial Stability Board (April 2014), pp.8-10 (“[j]urisdictions generally reported that barriers to reporting transactions caused by privacy or confidentiality provisions would be overridden once domestic reporting requirements came into effect”); *Id.* at fn. 5 (noting that 11 countries responded that they had some barriers to reporting and 5 countries responded that they were uncertain if they had barriers in place).

<sup>7</sup> ODRG Report, p.6.

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appropriate extension of comity to these non-US jurisdictions, without detracting from the Commission's ability to achieve its objectives under the Reporting Rules.

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

Although not within the scope of the present request, challenges remain to be addressed with regard to obtaining and processing counterparty consent as required under the Privacy Laws of some jurisdictions. We refer the Division to our request letter submitted on June 28, 2013, and would be glad to discuss current concerns in this regard with the Division.

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

Sincerely,

A handwritten signature in black ink, appearing to read "S. O'Connor", with a long horizontal flourish extending to the right.

Stephen O'Connor  
Chairman  
International Swaps and Derivatives Association, Inc.

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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 June 20, 2014 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.

Sincerely,

A handwritten signature in black ink, appearing to read "S. O'Connor", with a long horizontal flourish extending to the right.

Stephen O'Connor  
Chairman  
International Swaps and Derivatives Association, Inc.