

U.S. Response: Addressing Legal Barriers to Reporting of, and Access to, OTC Derivatives Transaction Data

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”)¹ provides for a comprehensive new regulatory framework for swaps subject to the jurisdiction of the U.S. Commodity Futures Trading Commission (“CFTC”) and security-based swaps subject to the jurisdiction of the U.S. Securities and Exchange Commission (“SEC”).

The CFTC and SEC are responsible for promulgating, overseeing, and enforcing new trade reporting requirements for swaps and security-based swaps, respectively. Accordingly, this U.S. Response presents a response from each of the CFTC and SEC, as relevant and appropriate, to the questions in the annex to Chairman Carney’s letter dated March 13, 2016.

I. Barriers to reporting information into TRs

Instructions:

Each jurisdiction should report the specific actions that it plans to take to address those circumstances where the trade reporting peer review reported that barriers to complete reporting of trades exist in its jurisdiction or where it is uncertain whether barriers exist. Please refer to Section 3 (pages 18–23) and Tables 5, 6, 7 and 8 (pages 44–47) of the peer review report for further context.

In particular, in all cases in Tables 5, 6 or 7 where an entry for your jurisdiction is not coloured green, or in Table 8 where the entry for your jurisdiction indicates an answer other than that no masking is permitted, please report either (i) the actions to be taken to address the barriers, or (ii) the reasons why there is not in practice a barrier to full reporting of trade information.

- **Please report the actions to be taken (or that have been taken) to permit by June 2018 (or remove by that date any uncertainty over the permissibility of) full reporting of transactions to a TR pursuant to domestic requirements. Please provide detail relating to the applicability of these actions to different types of transaction, types of counterparty, location of reporting entity, location of TR or location of counterparty.**
- **Please report the actions to be taken (or that have been taken) to permit by June 2018 (or remove by that date any uncertainty over the permissibility of) full reporting of transactions to a TR pursuant to foreign requirements. Please provide detail relating to the applicability of these steps to different types of transaction, types of counterparty, location of reporting entity, location of TR or location of counterparty.**

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (available at: <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>).

- **If your jurisdiction requires that counterparty consent be provided before a trade participant may make transaction reports (whether pursuant to domestic or foreign reporting requirements), but counterparties are not currently permitted to give ‘standing consent’, please report the actions to be taken (or that have been taken) that will permit standing consent to the reporting of transactions to any domestic or foreign TR to be given by June 2018.**
- **Where masking is currently accommodated in your jurisdiction, please set out the actions that will be taken (or that have been taken) in your jurisdiction, or any pre-conditions that would need to be met, such that masking will be discontinued by end-2018.**

Response:

CFTC and SEC

The Financial Stability Board’s *Thematic Review on OTC Derivatives Trade Reporting* (“Peer Review Report”) identified no U.S. legal or regulatory barriers to full reporting of trade information to trade repositories, whether such reporting is pursuant to U.S. domestic requirements or pursuant to foreign requirements. In particular, the entries corresponding to the United States are colored green in all cases in Tables 5, 6, and 7 of the Peer Review Report.

The entry corresponding to the CFTC in Table 8 of the Peer Review Report indicates both that masking is not permitted in the United States by statute and that the CFTC’s Division of Market Oversight (“DMO”) nevertheless has issued time-limited relief stating that it will not recommend enforcement action for a failure to report certain identifying information for enumerated jurisdictions. A fuller explanation with respect to the CFTC is provided below. The SEC does not permit or accommodate masking of data.

CFTC

DMO has issued a series of staff “no-action” letters (“NALs”) stating that DMO would not recommend that the CFTC take enforcement action against swap counterparties for masking certain identifying information required to be reported, subject to various conditions. DMO commenced issuing these NALs in 2012. DMO has extended and, in some cases, amended and expanded these NALs (e.g., in NAL 16-03, DMO permitted masking based on reporting restrictions in additional jurisdictions identified by the International Swaps and Derivatives Association, Inc. (“ISDA”)).² The relief provided under NAL 16-03 (the most recent NAL) ends by its terms on the earlier of: (i) the reporting party no longer holding the requisite reasonable belief regarding the privacy law consequences of reporting, as discussed in the prior NALs and modified in NAL 16-03; and (ii) 12:01 a.m. eastern standard time on March 1, 2017. While DMO has extended masking relief several times, DMO retains the authority to, in its discretion,

² See Peer Review Report, at 12 (noting that ISDA has delivered letters to authorities requesting that such authorities allow masking when the reporting of identifying information of a transaction party may conflict with, or violate, statutory or regulatory requirements in certain jurisdictions).

further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief.

Should the barriers to swap reporting be lifted such that reporting parties no longer reasonably believe that non-U.S. law prohibits swap reporting pursuant to the Commodity Exchange Act (“CEA”), as amended by the Dodd-Frank Act, then masking should end, theoretically, as such barriers are lifted and entities, that were masking their reports, stop doing so as a result. On a practical level, the most effective way to ensure that DMO rescinds the relevant no-action relief by the end of 2018, thereby ending permitted masking, is for all foreign regulators, whose statutory regimes ISDA claims make masking necessary, to expressly and publicly advise the CFTC that the claimed barriers to reporting do not, or no longer, exist and consequently that there is no basis, or is no longer any basis, for reporting parties to claim otherwise. DMO also notes that even if all relevant Financial Stability Board (“FSB”) member jurisdictions remove such restrictions by the end of 2018, the requests for relief submitted to-date by ISDA reference certain jurisdictions that are not represented in the FSB.

II. Barriers to authorities’ access to TR-held data

Instructions:

Each jurisdiction should report the specific actions that it plans to take to address those circumstances where the trade reporting peer review reported that legal barriers to authorities’ access to TR data exist. Please refer to Section 4 (pages 23–30) and Table 9 (page 48) of the peer review report for further context.

In particular, in all cases in Table 9 where an entry for your jurisdiction is not coloured green, please report either (i) the actions to be taken to address the barriers, or (ii) the reasons why there is not in practice a barrier.

- **Please report the actions to be taken (or that have been taken) to permit by June 2018 (or remove by that date any uncertainty over the permissibility of) access by domestic authorities and foreign authorities to data held in a domestic TR in your jurisdiction.**
- **Please report the actions to be taken (or that have been taken) to permit by June 2018 (or remove by that date any uncertainty over the permissibility of) direct access by both non-primary domestic authorities and foreign authorities to data held in a domestic TR. Alternatively, please describe why direct access for these authorities will not be permitted in your jurisdiction.**
- **Please report the actions to be taken (or that have been taken) to coordinate with other domestic or foreign authorities in establishing cooperative arrangements that facilitate authorities’ access to TR-held data (whether it be through direct or indirect access).**
- **Please report the actions to be taken (or that have been taken) to work with other domestic or foreign authorities and TRs, as appropriate, to facilitate the creation of**

appropriate operational frameworks that facilitate access to TR-held data, whether direct or indirect.

Response:

CFTC and SEC

The entries in Table 9 of the Peer Review Report corresponding to the United States indicate that, as of November 2015, authorities' direct access to data held in trade repositories was permitted only with very significant or challenging conditions. This conclusion reflects the impact of statutory restrictions that at the time of publication of the Peer Review Report required a requesting authority to indemnify the relevant repository and the CFTC or the SEC (as applicable). On December 4, 2015, these statutory indemnification requirements were repealed by amendments of the CEA and the Securities Exchange Act of 1934.³

CFTC

Although the confidentiality requirements related to swap data access by other authorities will remain in effect, the removal of the indemnification requirement from the CEA addresses a significant barrier to other authorities' access to U.S. swap data repositories

In order to implement the amendments to the CEA, the CFTC intends to work to incorporate these changes so as to facilitate swap data access.

The CFTC is committed to working with other domestic and foreign authorities to facilitate appropriate access to data held at swap data repositories.

SEC

Trade information concerning security-based swaps will be required to be reported to an SEC-registered security-based swap data repository in accordance with the Dodd-Frank Act and the SEC's Regulation SBSR. As noted above, the statutory indemnification requirement was repealed on December 4, 2015.

The Peer Review Report noted that in September 2015 the SEC proposed rules to govern both domestic and foreign authorities' direct access to security-based swap data held by security-based swap data repositories, including a proposed conditional exemption from the statutory indemnification requirement described above. As a condition to direct access, the proposal contemplated cooperative arrangements between the SEC and the recipient authority. The SEC proposed that such arrangements would address the confidentiality of the security-based swap information made available to the recipient entity and could be in the form of a memorandum of understanding or otherwise. Following the repeal of the statutory indemnification requirement described above, the SEC re-opened the public comment period on this proposal, and this re-

³ Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015) (available at <https://www.congress.gov/114/plaws/publ94/PLAW-114publ94.pdf>).

opened consultation period closed on 22 February 2016. The SEC is considering its proposal in light of comments received and the repeal of the statutory indemnification provision.