



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Market Oversight

CFTC Letter No. 16-03
No-Action
January 15, 2016
Division of Market Oversight

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Further Extension of the Time-Limited, Conditional No-Action Relief Provided in CFTC Letter 13-41; Additional Relief

Dear Ms. Kruse:

This is in response to your December 10, 2015 letter (“Letter”) to the Division of Market Oversight (“DMO”) of the Commodity Futures Trading Commission (“Commission”). By the Letter, you requested pursuant to § 140.99 of the Commission’s regulations certain no-action relief for members of the International Swaps and Derivatives Association (“ISDA”) and other similarly situated persons with reporting obligations under Parts 20, 45 or 46 of the Commission’s regulations (the “Relevant Regulations”). Specifically, you request an extension of the expiration date of the no-action relief provided in CFTC Letter No. 15-01 and certain additional relief.¹

Background

As you are aware, DMO previously granted time-limited, conditional no-action relief in CFTC Letter No. 12-46² until no later than 12:01 a.m. eastern daylight time June 30, 2013 regarding certain Identity Information (as defined in CFTC Letter No. 12-46)³ in certain non-U.S. jurisdictions referenced in your original no-action request to DMO dated December 3, 2012. The relief covered ISDA members and other similarly situated persons with reporting obligations

¹ See CFTC Letter No. 15-01 (Jan. 8, 2015), available at <http://www.cftc.gov/idx/groups/public/@lrlettergeneral/documents/letter/15-01.pdf>.

² See CFTC Letter No. 12-46 (Dec. 7, 2012), available at <http://www.cftc.gov/idx/groups/public/@lrlettergeneral/documents/letter/12-46.pdf>.

³ See *id.* at 1, n.2.

under the Relevant Regulations. On June 28, 2013, DMO issued CFTC Letter No. 13-41⁴ extending the relief provided in CFTC Letter No. 12-46, with respect to certain identifying information in “Enumerated Jurisdictions,”⁵ until no later than 11:59 p.m. eastern daylight time June 30, 2014. On June 27, 2014, DMO issued CFTC Letter No. 14-89 extending the relief provided in CFTC Letter No. 13-41 until no later than 12:01 a.m. eastern standard time on January 16, 2015.⁶ On January 8, 2015, DMO issued CFTC Letter No. 15-01 (collectively with CFTC Letter Nos. 12-46, 13-41 and 14-89, the “Prior Letters”) updating and further extending the relief provided in CFTC Letter No. 13-41 until no later than 12:01 a.m. eastern standard time on January 16, 2016.⁷

As DMO stated in CFTC Letter No. 15-01, “the March 2014 report of the OTC Derivatives Regulators Group [noted that] there are statutory or regulatory prohibitions that may prevent reporting to trade repositories.”⁸ In a December 2, 2014 letter to DMO, you wrote that the prior expiration date of January 16, 2015 did not provide adequate time for resolution of the issues addressed in CFTC Letter No. 14-89, although international regulators and governing authorities continue their efforts in that regard. You explained in your Letter that this is still the case.⁹ Additionally, you request certain modifications to the relief offered under CFTC Letter No. 13-41.

Requests for Additional Relief

⁴ See CFTC Letter No. 13-41 (June 28, 2013), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/13-41.pdf>.

⁵ The Enumerated Jurisdictions listed in the Annex to your June 21, 2013 letter are: France, Korea, Luxembourg, the People’s Republic of China, Switzerland, Taiwan, Belgium, India, Algeria, Singapore, Bahrain, Argentina, Hungary, Samoa, Austria, and Pakistan.

⁶ See CFTC Letter No. 14-89 (June 27, 2014), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/14-89.pdf>.

⁷ CFTC Letter No. 15-01 updated the relief set forth in CFTC Letter No. 13-41 “by replacing the definition of ‘Part 20 Identifying Information’ found in section I.(F) of CFTC Letter No. 13-41 by adding certain data elements to account for New Form 102S.” CFTC Letter No. 15-01 at 2. Form 102S was added to the Commission’s regulations in Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (November 18, 2013).

⁸ CFTC Letter No. 15-01 at 1.

⁹ For example, you noted in your letter that the Financial Stability Board (“FSB”) recently stated that:

[b]arriers to reporting are widespread among FSB member jurisdictions, particularly in the case of reporting pursuant to foreign reporting requirements. While in many cases these barriers can be overcome through obtaining counterparty consent or authority authorisation, or through equivalence and recognition frameworks, in other cases barriers cannot be addressed in these ways.”

Thematic Review on OTC Derivatives Trade Reporting, Financial Stability Board (November 4, 2015), <http://www.financialstabilityboard.org/wp-content/uploads/Peer-review-on-trade-reporting.pdf>.

Reasonable Belief. First, in regards to the “reasonable belief” requirement specified in CFTC Letter No. 13-41, ISDA stated in its Letter that DMO should accept, as the basis for the “reasonable belief,” any one or more of three alternatives. DMO notes that one of these (the formal response from a foreign regulator or governing authority) is a separate condition of the relief in its own right. ISDA’s request as to the “reasonable belief” condition thus conflated two of the three conditions of the relief. DMO believes that it remains critical that the relevant party obtain, and provide DMO, a formal response from the relevant non-U.S. regulator(s) or governing authorit(ies) that reporting such information pursuant to the Relevant Regulations would violate the law of the non-U.S. jurisdiction.¹⁰ Therefore, this requirement, as set out in sections II(iii) and III(iii) of CFTC Letter No. 13-41, remains a condition of the relief provided herein. However, in regards to the issue raised by ISDA concerning what standard must be met to demonstrate that the reporting party has formed the requisite “reasonable belief,”¹¹ DMO notes that the current extension does not requires any particular means of forming the requisite “reasonable belief.”

In response to ISDA’s contention that, among other things, “the relevant authority may not have an established process for providing advisory guidance to market participants . . .,” DMO understands that any such instances that might exist are rare or unique in nature. In such cases, DMO might consider alternatives on a case-by-case basis.

Privacy Law Counterparty. Second, ISDA contended in its Letter that “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.” DMO intends to consider your request for expanded relief in this regard, as supplemented by additional, specific¹² fact patterns ISDA may provide in the future, while the extension granted in this no-action letter is operative.

Enumerated Jurisdictions. Third, ISDA stated that its list of Enumerated Jurisdictions for purposes of its latest request for relief includes six jurisdictions (Spain, Romania, Costa Rica, Uruguay, Venezuela and the Philippines) that were not identified as Enumerated Jurisdictions in CFTC Letter No. 13-41. ISDA added that DMO should expect ISDA to request additional jurisdictions to be defined as Enumerated Jurisdictions as industry participants “expand the scope of their activities across the globe.” ISDA recommended that:

¹⁰ In CFTC Letter No. 13-41, DMO stated that “[a] Reporting Entity may mask Opposite LEIs, Other Enumerated Identifiers, . . . Other Identifying Terms [or Part 20 Identifying Information] only to the extent that the non-U.S. regulator or governing authority has specifically indicated that reporting such information pursuant to Parts [20,] 45 and 46 of the Commission’s regulations would violate the law of the non-U.S. jurisdiction.” CFTC Letter No. 13-41 at 6-7, 9.

¹¹ Both conditions II.(i) and III.(i) of CFTC Letter No. 13-41 require that the reporting party form a reasonable belief that reporting certain information under the Relevant Regulations would violate applicable foreign privacy laws.

¹² DMO does not intend to provide blanket relief for unspecified masking triggers, as it needs to carefully consider the implications of each, both individually and in the aggregate.

[i]n the interest of supervisory efficiency and economy . . . 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 [DMO] 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.

DMO will permit additional jurisdictions to be included as Enumerated Jurisdictions to the extent all other conditions of the relief are satisfied, including, without limitation, obtaining the confirmation of relief from the relevant regulator(s) and governing authorit(ies) and submitting those confirmation letters to PrivacyLawReporting@cftc.gov, as discussed in CFTC Letter No. 13-41. New jurisdictions will only be treated as Enumerated Jurisdictions on a going forward basis and only from the time all conditions are satisfied.¹³

Privacy Law Identifier. ISDA also requested in its Letter that (1) 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 and (2) DMO clarify that a reporting party may, but need not, use an identical Privacy Law Identifier in every report, because “identifiers may differ per asset class, middleware provider, or other factors.” ISDA asserted that such flexibility “would better accommodate the range of modalities (including vendor-provided middleware) used for reporting.” With respect to this request for expanded relief, DMO continues to believe that the relief provided in CFTC Letter No. 13-41 strikes an appropriate balance between addressing concerns regarding non-U.S. privacy, secrecy and blocking laws and the regulatory purposes achieved through the reporting of counterparty identifying information pursuant to the Relevant Regulations. Accordingly, DMO is not modifying the relief provided in CFTC Letter No. 13-41 and associated conditions as requested with respect to the CFTC Letter No. 13-41 “Privacy Law Identifier” definition.

No-Action Relief

DMO believes that a further time-limited, conditional extension of the existing relief in CFTC Letter No. 13-41, modified as discussed above in response to ISDA’s Letter, is appropriate so that relevant jurisdictions and parties with reporting obligations may continue their efforts to resolve issues raised in the Prior Letters and herein.

In light of the foregoing, DMO is extending the expiration of the relief provided in CFTC Letter No. 13-41, as amended by CFTC Letter No. 15-01 and herein, until 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 Letters and modified herein; and (ii) 12:01

¹³ As a condition of relief, CFTC Letter No. 13-41 required submitting to PrivacyLawReporting@cftc.gov within 60 days of the date of CFTC Letter No. 13-41 request letters to foreign regulators or governing authorities and their responses. Because this no-action letter is not providing relief in connection with new Enumerated Jurisdictions until such letters and responses are received, there is no need to impose a 60 day deadline.

a.m. eastern standard time on March 1, 2017, contingent on satisfaction of the following conditions:

(1) With respect to requesting and obtaining formal responses from relevant non-U.S. regulators or governing authorities, each reporting counterparty and reporting entity may rely on this extension of relief only to the extent that it previously satisfied all terms and conditions enumerated in CFTC Letter No. 13-41, and only with respect to Enumerated Jurisdictions where such reporting counterparty or reporting entity previously obtained formal responses from the relevant non-U.S. regulators or governing authorities that such reporting counterparty or reporting entity believes satisfied the conditions in of sections II.(iii) and III.(iii) of CFTC Letter No. 13-41 and were submitted in accordance with the conditions in sections II.(ii) and III.(ii) of CFTC Letter No. 13-41. For any additional jurisdictions that become Enumerated Jurisdictions pursuant to the terms of this relief, any reporting counterparty and reporting entity must satisfy all the terms and conditions enumerated in CFTC Letter No. 13-41, as amended herein; and

(2) Upon the expiration of this extended relief, each reporting counterparty and reporting entity must meet the back loading conditions found in sections II.iii and III.iv of CFTC Letter No. 13-41, based on the new expiration date of this extended relief.

DMO's letter reflects DMO's views alone, and not necessarily the position or views of the Commission or of any other division or office of the Commission. The no-action position taken herein does not excuse affected persons from compliance with any other applicable requirements of the CEA or the regulations thereunder. As with all no-action letters, DMO retains the authority to, in its discretion, further condition, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein.

If you have any questions concerning this correspondence, please contact Dan Bucsa, Deputy Director, Division of Market Oversight—Data and Reporting Branch, at (202) 418-5435, Sebastian Pujol Schott, Associate Director, Division of Market Oversight—Compliance Branch, at (202) 418-5641, or David E. Aron, Special Counsel, Division of Market Oversight—Data and Reporting Branch, at (202) 418-6621.

Sincerely,

Vincent McGonagle
Director
Division of Market Oversight