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OTC Derivatives Supervisors Group
Attention: Theo Lubke on the Group's behalf
Federal Reserve Bank of New York
33 Liberty Street
New York, NY 10045

Dear Sirs,

The industry understands the importance of properly-managed trade repositories (TRs) in providing supervisors with trade data, including client names, to enable them to develop a more complete view of OTC derivatives market activity and thereby enhance their ability to oversee the market and its participants.

The industry is committed to providing as much of the required data to TRs as it is legally able to do. We highlighted to supervisors the fact that there are legal obstacles to providing client data as soon as we became aware of it. As a first step towards addressing those obstacles the industry undertook a survey of the G20 jurisdictions with a view to establishing the current position in those jurisdictions so as to provide to supervisors a picture of the current position and an indication of where action is required. Having reviewed the results of that survey and considered the complex interaction of the different applicable legal systems, we had further discussions with Clifford Chance as to ways of dealing with the issues that we identified. We have discussed these issues with supervisors, and have been exploring ways to overcome the hurdles identified.

As part of this effort, dealers have been reviewing their own terms of business with customers in order to identify the extent to which those terms of business would either permit or prevent the contemplated disclosures. It has been suggested that dealers seek consent of their customers, where necessary, to the disclosure of the relevant data, and that ISDA publish a Protocol in order to achieve this multilaterally. However, for the reasons set out below, it is unlikely that most customers would be willing to give such consent or to sign up to a Protocol. Therefore, this can only be part of the overall solution. ISDA is prepared to publish such a Protocol, if our members request it, but some members of our working group feel that given the likely reluctance of customers to sign it, it might be preferable not to publish it.

ISDA's legal working group on data confidentiality has asked ISDA to highlight the issues listed below to the OTC Derivatives Regulators' Forum. In short, whilst there is more work for the dealers to do, the industry also needs help from the regulators.

1. It is clear that there is no single action that can be taken to address the various legal obstacles to provision of client data. There is likely to be a "patchwork" of different steps that can be taken, such as obtaining customers' consent, seeking changes in the law in relevant jurisdictions and identifying those circumstances in which existing legislation and/or the dealers' own terms of business would currently permit disclosure.

2. Since any contractual consent will have to be couched in broad terms in order to capture all the contemplated disclosures and to address the need for “informed” consent in many jurisdictions, industry faces the risk that its customers will refuse to provide that consent. This risk is exacerbated by the current uncertainty over how the data will be used (please see item 7(a) below).
3. The dealers will not – and indeed cannot – agree among themselves simply to refuse to deal with customers that withhold consent. Any such agreement would breach antitrust laws. (It has not been suggested that dealers should do this; however, we would like to point out that this constraint does exist.)
4. In some jurisdictions, legislation may not permit disclosure of customer data, even where the customer has given express consent to such disclosure.
5. Except to the extent that a legal framework – involving both contractual consent and broad-based, consistent legislative change – permitting the contemplated disclosures is put in place, dealers may have to screen data that they have for each customer (or class of customer) and manually block its disclosure, and will therefore not be able to provide client names. It should be noted in this regard that the provision of client data, even on a no-names basis, involves relationship and reputational risks, and possibly, in some jurisdictions, legal risks, to dealers. Some dealers currently providing trade data to TRs on a no-name basis are concerned that they may in some cases face the risk that doing so will breach contractual confidentiality obligations to their clients, depending on the specific wording of their terms and conditions. Until a clear and unambiguous legal basis for disclosure exists in all relevant jurisdictions, data submitted to TRs will be incomplete.
6. We encourage the regulators to commit to supporting and implementing a suitable legal framework to protect dealers providing the required data. Contractual consent may provide a limited short-term fix, but the legislative solution will be the most effective in the medium to long term. A legislative initiative that would permit dealers to disclose client data to TRs, for which ISDA has provided suggested wording, is being proposed in the EU in the context of the market infrastructure regulation. The Working Group appreciates the proactive role that the UK FSA has taken in this process. However, other applicable jurisdictions also need to be addressed. ISDA and the dealers are working to identify and prioritise those jurisdictions. In the interim, industry is faced with the difficult prospect of having to manage conflicting regulatory requests and requirements and contractual obligations.
7. In addition to working together to promote legislative change, there are some important areas in which the industry needs the help of supervisors if it is to comply with their requirements to provide client data. These include the following:
 - a) To assist the industry in soliciting the consent of its customers, the industry requests a clear statement from the supervisors outlining the intended use of data, access rights and the measures that will be put in place to protect its confidentiality. The proposals in the recently-published CPSS-IOSCO Consultative Report “Considerations for trade repositories in OTC derivatives markets” (discussed further below) do not go far enough in this regard. We understand that the OTC Derivatives Regulators Forum is working on guidance on these issues, which will be published soon.

- b) Terms of business with clients differ from dealer to dealer, but they may permit disclosure of information to regulators “upon request”. Whether or not “upon request” covers an ongoing request for broad disclosure as well as occasional one-off requests will be a matter of interpretation for each dealer; generally, however, a clear request from relevant supervisors to each dealer to report client trade data to the TRs for subsequent disclosure to regulators could enable some dealers to provide the required data on the basis of their existing terms of business. Since the TRs are simply the means to achieve such disclosure, any such request should make clear that the data should be disclosed through TRs, for onward transmission to regulators.
 - c) The industry requests practical and meaningful support from the regulators with regard to the dialogue with local regulators. Regulators should be aware that in order to avoid infringing local laws dealers may have to identify affected group entities and block out data originating from (or relating to transactions booked in) those entities in the relevant jurisdictions. This may again result in incomplete data being submitted to TRs. Dealers have tried to address this issue by approaching local regulators on an ad-hoc basis. This approach has led to inconsistent responses (even from the same regulator) and is hugely inefficient, both for dealers and for regulators. A broad-based legislative approach would solve this, or at least reduce the problem to a manageable level. In the meantime, regulators could provide support in the form of a letter from the OTC Derivatives Regulators’ Forum to other regulators outlining the basis of the TRs project. This should give dealers the basis on which to approach local regulators. ISDA would be happy to provide assistance in drafting such a letter.
8. In relation to supervisors’ use of data provided by TRs, we note that the CPSS-IOSCO Consultative Report referred to above addresses access to information in TRs by “relevant authorities”, which is defined as being financial sector public authorities including central banks, securities and market regulators, prudential supervisors of market participants, the authorities who have jurisdiction over a TR and “other authorities who have interests over a TR”. ISDA and individual dealers will be responding to the Consultative Report. Following are some specific comments in relation to the CPSS-IOSCO paper and the issues raised therein, as relevant to the discussions on client data confidentiality:
- a) The CPSS-IOSCO paper emphasises the need for TRs to take steps to ensure the confidentiality of information and to have robust system controls and safeguards to protect data from loss and information leakage. There should be a commitment from the authorities that directly or indirectly seek access to the data to maintain corresponding standards.
 - b) The CPSS-IOSCO paper should specifically emphasise the need for TRs, when disclosing confidential information to authorities, to do so in a way that provides robust protection against the risks of loss and information leakage (e.g. using encrypted formats when transmitting data to authorities). The authorities should use similar standards when sharing the data (when permitted to do so).
 - c) The CPSS-IOSCO paper does not refer to the desirability of TRs maintaining policies and procedures to ensure that confidential information is not used for the purposes of trading in securities or other financial instruments or otherwise misused by the TR or its staff. For example, it may be appropriate for TRs to put in place policies and procedures to control personal account dealing by staff and, where the TR or its affiliates engage in other businesses, information barriers to ensure that those other businesses do not have access to the information. The authorities seeking access should recognise equivalent restrictions.

- d) Relevant authorities directly or indirectly seeking access to information in TRs should publicly commit to comply with the relevant standards and make publicly available information on the legal framework regarding their use of the information (including information on the circumstances in which the information can be disclosed to other authorities and the measures in place to ensure compliance with the standards regarding confidentiality and security). These disclosures should be in English and should be collated and published centrally by CPSS-IOSCO in a comparable form and subject to a peer review process. TRs should be encouraged not to disclose information to authorities that have not publicly committed to observe the requisite standards and to participate in these arrangements.
- e) Consideration should be given to the intellectual property rights in the trade data. There should be clear limitations on the use of the trade data by the TRs outside the context of providing trade data to the regulators.

The foregoing suggests that there perhaps ought to be a regulatory framework governing the operation of the TRs themselves. The TRs are commercial organisations, but they now have, or will have, significant access to and control of market information. The regulators should consider applying a consistent set of rules to the TRs to whom trade data is provided, governing their duties, ethics and conduct. TRs should also be required to indemnify dealers against losses that dealers suffer due to the TRs' misconduct or their breach of confidentiality obligations.

The ISDA legal working group will reach out to the TRs with a view to agreeing standard wording for disclosure to regulators.

These issues apply consistently across asset classes and all centralised infrastructure initiatives (including in relation to collateral) and need to be addressed in a consistent manner.

We would be happy to meet with you to discuss the next steps in this important project.

Yours sincerely,



David Geen
General Counsel