



U.S. COMMODITY FUTURES TRADING COMMISSION

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CFTC Letter No. 12-46
No-Action
December 7, 2012
Division of Market Oversight

Robert Pickel
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Washington, DC 20004

Time-Limited No-Action Relief for Part 20 Reporting Entities Regarding Identifying Information and Time-Limited No-Action Relief for Part 45 and Part 46 Reporting Counterparties Regarding Legal Entity Identifiers, Other Enumerated Identifiers or Other Identifying Terms

Dear Mr. Pickel,

This is in response to your December 3, 2012 letter (the “Letter”) to the Division of Market Oversight (the “Division”) of the Commodity Futures Trading Commission (the “Commission”). By the Letter, you requested, pursuant to § 140.99 of the Commission’s regulations, on behalf of your members with reporting obligations and other similarly situated persons (collectively, “Reporting Parties”) with reporting obligations under Parts 20, 45 or Part 46 of the Commission’s regulations (collectively, the “Reporting Rules”),¹ no-action relief from certain requirements of the Reporting Rules that require the reporting of what you term “Identity Information.”²

In the Letter, you state that there exist potential conflicts between the Commission’s Reporting Rules and the privacy laws of certain non-U.S. jurisdictions.³ You represent that the privacy laws of some non-U.S. jurisdictions may, in certain circumstances, restrict or prohibit the disclosure of a non-Reporting Party’s Identity Information by a Reporting Party. You further represent that depending on the non-U.S. jurisdiction, disclosure of Identity Information may require non-Reporting Party consent, regulatory authorization, or both. In light of your concerns,

¹ You note that the relief requested in the Letter also encompasses § 23.204 and § 23.205 of the Commission’s regulations.

² You define “Identity Information” as “information that would otherwise be required to appear in one of the fields specified in Annex B [of the Letter] and that identifies or would intrinsically reveal the identity of the counterparty or its affiliated group.”

³ You refer to the comment letter dated August 27, 2012. See ISDA “Comment Letter on the Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act (RIN 3038-AD57)” (August 27, 2012).

you request no-action relief from the requirements of what you term a “Trade Participant” to report certain Identity Information pursuant to Parts 20, 45 and 46, in circumstances where reporting Identity Information would violate the privacy laws of a non-U.S. jurisdiction.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)⁴ added to the Commodity Exchange Act (the “CEA”) provisions requiring the retention and reporting of data related to swap transactions. Section 727 of the Dodd-Frank Act added CEA Section 2(a)(13), which establishes requirements for the real-time reporting and public availability of swap transaction data, and requires that all swaps, both cleared and uncleared, be reported to a registered swap data repository (“SDR”). Section 728 of the Dodd-Frank Act added CEA Section 21(b), which directs the Commission to prescribe standards for swap data recordkeeping and reporting. Section 723 of the Dodd-Frank Act added to the CEA new Section 2(h)(5), which addressed the reporting of swap data for both swaps executed before the enactment of the Dodd-Frank Act and swaps executed on or after the date of that enactment.

Pursuant to these newly added provisions of the CEA, the Commission added to its regulations: (i) Part 45,⁵ which establishes swap data recordkeeping and SDR reporting requirements and (ii) Part 46,⁶ which establishes swap data recordkeeping and SDR reporting requirements for pre-enactment swaps and transition swaps (collectively, “historical swaps”). Under each of Parts 45 and 46 (collectively, the “swap data reporting rules”) Reporting Parties have swap data reporting obligations.

Part 20 of the Commission’s regulations sets forth large trader reporting rules for physical commodity swaps.⁷ Part 20 requires routine swaps position reports from clearing organizations, clearing members and swap dealers, and establishes certain non-routine reporting requirements for large swaps traders.

Part 45 and Part 46 of the Commission’s regulations prescribe certain data fields which must be included in swap data reporting.⁸ For all swaps subject to the jurisdiction of the Commission, each counterparty must be identified by means of a single legal entity identifier (“LEI”)⁹ in all

⁴ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁵ 77 Fed. Reg. 2136 (January 13, 2012).

⁶ 77 Fed. Reg. 35200 (June 12, 2012).

⁷ 76 Fed. Reg. 43851 (July 22, 2011).

⁸ Appendix 1 to Part 45, Exhibits A-D set forth the Minimum Primary Economic Terms (“PET”) data fields for swap data reporting pursuant to that part and Appendix 1 to Part 46, Exhibits A-D set forth the PET data fields for historical swaps.

⁹ LEI is defined in § 45.6 of the Commission’s regulations. The current LEI designated by the Commission is known as a CFTC Interim Compliant Identifier (“CICI”), but is hereinafter referred to as an (“LEI”) for ease of reference. The relief granted in this Division letter applies both to CICIs and LEIs.

swap data reporting pursuant to Part 45¹⁰ and Part 46.¹¹ As such, a Reporting Counterparty¹² has reporting obligations under Part 45 and Part 46 that include providing certain PET data, including the LEI of the non-Reporting Counterparty in swap data reported to a registered SDR. Part 20 of the Commission’s regulations requires, among other things, that a Reporting Entity¹³ disclose the identity of the counterparty in respect of which positional information is being reported in large swap trader reports and associated filings.¹⁴

I. Legal Entity Identifier and Other Enumerated Identifiers.

For the purposes of this Division letter, the “Privacy Law Identifier” is a single identifier used by all Reporting Counterparties, that is not an LEI, and that consists of free text communicating that information has been withheld due to privacy law. In addition, for the purposes of this Division letter, “Other Enumerated Identifiers” are: 1) the identity of the counterparty electing the clearing requirement exception in CEA Section 2(h)(7) for all asset classes; 2) an indication of the counterparty purchasing protection or an indication of the counterparty selling protection (but not both) in the credit and equity asset classes; 3) the buyer or seller (but not both) in the commodity asset class; and 4) for all asset classes, the internal identifier used by an SDR for a non-Reporting Counterparty, exclusively in those cases where such internal identifier directly identifies the non-Reporting Counterparty (*e.g.*, the internal identifier used by an SDR is the name of the non-Reporting Counterparty).¹⁵

¹⁰ Section 45.6 sets forth the requirements regarding the use of LEIs in all swap data reporting pursuant to Part 45 of the Commission’s regulations. *See also* “Q & A – On Start of Swap Data Reporting” (October 9, 2012), issued by Division of Market Oversight staff,

http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/startreporting_qa_final.pdf.

¹¹ Section 46.4 sets forth the requirements regarding the use of LEIs in swap data reporting for historical swaps.

¹² For the purposes of this Division letter, Reporting Counterparty has the meanings assigned in § 45.1 and § 46.1 of the Commission’s regulations respectively, as applicable.

¹³ For the purposes of this Division letter, Reporting Entity has the meaning assigned in § 20.1 of the Commission’s regulations.

¹⁴ *See* note 11, *supra* at 43863-4; *See also* “Large Trader Reporting for Physical Commodity Swaps: Division of Market Oversight Guidebook for Part 20 Reports” (May 31, 2012), updated by Division of Market Oversight Staff, <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/ltrguidebook053112.pdf>.

¹⁵ In cases where “reporting confirmation data normalized in data fields is not yet technologically practicable,” § 45.3 permits reporting counterparties to report confirmation data through “an image of the document or documents constituting the confirmation” for 180 days following the compliance date. *See* § 45.3(b)(3); § 45.3(c)(1)(iii); § 45.3(c)(2)(iii); and § 45.3(d)(3). The relief provided in this Division letter also permits Reporting Counterparties to temporarily withhold reporting of such images (hereinafter, “§ 45.3 images”) in cases where they would include Legal Entity Identifiers, Other Enumerated Identifiers, and Other Identifying Terms (as defined below) that would otherwise require manual redaction. The relief provided in this Division letter in no way limits the obligation of a Reporting Counterparty to otherwise comply with § 45.3, including the provision of “confirmation data normalized in data fields” as required by Commission regulations.

Based upon your representations,¹⁶ the Division believes that time-limited relief for Reporting Counterparties from the requirement to report the LEIs of their non-Reporting Counterparties (the “Opposite LEI”) and Other Enumerated Identifiers pursuant to Parts 45 and 46 is warranted under specific conditions.¹⁷

Accordingly, the Division will not recommend that the Commission commence an enforcement action against a Reporting Counterparty for failure to report the Opposite LEI and Other Enumerated Identifiers for any swap for which the Reporting Counterparty has:

- (i) formed a reasonable belief that:¹⁸
 - (a) based on a written opinion of outside legal counsel, statutory or regulatory prohibitions in non-U.S. jurisdictions preclude the Reporting Counterparty from reporting the Opposite LEI and Other Enumerated Identifiers to a registered SDR as required by Parts 45 and 46; or
 - (b) (1) based on a written opinion of outside legal counsel, common law in a non-U.S. jurisdiction could expose the Reporting Counterparty to criminal or civil liability for reporting the Opposite LEI and Other Enumerated Identifiers to a registered SDR as required by Parts 45 and 46; and (2) the Reporting Counterparty determines that there is a material risk that the non-Reporting Counterparty or regulatory authority may initiate litigation; and
- (ii) not yet obtained consent from such non-Reporting Counterparty or the relevant non-U.S. regulatory authorization with respect to such non-Reporting Counterparty, as applicable, to disclose the Opposite LEI and Other Enumerated Identifiers; and
- (iii) made reasonable and demonstrable efforts to obtain such consent or regulatory authorization, as applicable.¹⁹

¹⁶ Specifically, the relief provided in this Division letter is premised on the representations made in your December 3, 2012 Letter, which makes reference to your “Comment Letter on the Cross-Border Application of Certain Swap Provisions of the Commodity Exchange Act,” dated August 27, 2012. The relief provided in this Division letter is also premised on your letter to Chairman Gensler dated July 3, 2012 (“CFTC Reporting Rules – Compliance Challenges”) and the legal analysis attached thereto.

¹⁷ Section 23.204 requires swap dealers and major swap participants to comply with Part 45 of the Commission’s regulations. To that extent only, section 23.204 is incorporated by reference into the no-action relief herein.

¹⁸ With respect to the jurisdictions listed in Appendix A to your “Comment Letter on the Cross-Border Application of Certain Swap Provisions of the Commodity Exchange Act,” dated August 27, 2012 (excluding the United States), the no-action relief granted in this Division letter requires that Reporting Counterparties and Reporting Entities be in possession of the necessary written opinions of outside legal counsel at such time as they avail themselves of the no-action relief. With respect to other jurisdictions, Reporting Counterparties and Reporting Entities may avail themselves of relief upon the effectiveness of this letter, but are not required to obtain the necessary written opinions of outside legal counsel until January 31, 2013.

¹⁹ The Division notes that “reasonable and demonstrable efforts” as used in parts I, II, and III of this Division letter shall include direct efforts by a Reporting Counterparty or Reporting Entity to obtain the consent of a non-Reporting

The Division will extend this relief until the earlier of: 1) such time as the Reporting Counterparty has obtained consent from such non-Reporting Counterparty or regulatory authorization, as applicable, to report the Opposite LEI and Other Enumerated Identifiers; 2) such time as the Reporting Counterparty no longer holds a reasonable belief that non-U.S. privacy law(s) preclude it from reporting the Opposite LEI and Other Enumerated Identifiers; or 3) 12:01 a.m. eastern daylight time June 30, 2013. Such no-action relief is subject to the following conditions:

- i. The Reporting Counterparty shall retain, as part of its compliance with Commission recordkeeping requirements, written evidence of its reasonable and demonstrable efforts to obtain non-Reporting Counterparty consent or the relevant non-U.S. regulatory authorization, as applicable;
- ii. The Reporting Counterparty shall retain, as part of its compliance with Commission recordkeeping requirements, a copy of the written opinion of outside legal counsel on which it based its reasonable belief regarding non-U.S. privacy law(s) as they pertain to reporting the Opposite LEI and Other Enumerated Identifiers to a registered SDR;
- iii. The Reporting Counterparty shall include the Privacy Law Identifier with all swap data reported pursuant to Parts 45 or 46 in each instance in which it would otherwise have been required to report an Opposite LEI or Other Enumerated Identifier; and
- iv. Upon the expiration of the relief in this section pursuant to any of clause 1), 2), or 3), above, a Reporting Counterparty shall correct all Privacy Law Identifiers, previously submitted to an SDR pursuant to this Division letter, with the corresponding Opposite LEIs, Other Enumerated Identifiers, and § 45.3 Images²⁰ by no later than 30 days from the date of such expiration. Prior to making such corrections, a Reporting Counterparty shall notify the relevant SDR.

II. Limited Relief for the data fields titled “Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap” in the Interest Rate and Other Commodity Asset Classes and “Any other term(s) of the trade matched or affirmed by the counterparties in verifying the trade” in the Foreign Exchange Asset Class.

Counterparty. While Reporting Counterparties may exercise reasonable reliance upon the initiatives of industry associations, such reliance shall not be deemed an acceptable substitute for reasonable and demonstrable efforts directly by a Reporting Counterparty in instances where such initiatives fail to obtain the consent of individual non-Reporting Counterparties prior to the expiration of the no-action relief provided herein.

²⁰ If reporting confirmation data normalized in data fields is technologically practicable at the time a Reporting Counterparty submits a corrected Privacy Law Identifier, then such Reporting Counterparty shall submit its correction(s) in an electronic format as required by Part 45.

For the purposes of this Division letter, “Other Identifying Term” means a term of a swap that a Reporting Counterparty reasonably believes would identify the non-Reporting Counterparty if disclosed, and is required to be reported pursuant to the following Part 45 data fields:²¹

- (1) For swaps in the Foreign Exchange asset class (other than cross-currency swaps), the “Any other term(s) of the trade matched or affirmed by the counterparties in verifying the trade” data field required by Appendix 1 to Part 45, Exhibit B;
- (2) For swaps in the Interest Rate asset class (including cross-currency swaps), the “Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap” data field required by Appendix 1 to Part 45, Exhibit C; and
- (3) For swaps in the Other Commodity asset class the “Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap” data field required by Appendix 1 to Part 45, Exhibit D.

Based upon your representations,²² the Division believes that time-limited relief for Reporting Counterparties from the requirement to report an Other Identifying Term that a Reporting Counterparty reasonably believes would identify a non-Reporting Counterparty is warranted under the following specific conditions.

Accordingly, the Division will not recommend that the Commission commence an enforcement action against a Reporting Counterparty for failure to report an Other Identifying Term for any swap for which the Reporting Counterparty has:

- (i) formed a reasonable belief that:²³
 - (a) based on a written opinion of outside legal counsel, statutory or regulatory prohibitions in non-U.S. jurisdictions preclude the Reporting Counterparty from reporting an Other Identifying Term to a registered SDR as required by Part 45; or
 - (b) (1) based on a written opinion of outside legal counsel, common law in a non-U.S. jurisdiction could expose the Reporting Counterparty to criminal or civil liability for reporting an Other Identifying Term to a registered SDR as required by Part 45; and (2) the Reporting Counterparty determines that there is a material risk that the individual non-Reporting Counterparty or regulatory authority may initiate litigation; and
- (ii) not yet obtained consent from such non-Reporting Counterparty or the relevant non-U.S. regulatory authorization with respect to such non-Reporting Counterparty, as applicable, to disclose the Other Identifying Term; and

²¹ Information required by the data fields specified in items (1), (2), and (3) of section II of this Division letter, but which is not an Other Identifying Term, must continue to be reported as required by Part 45.

²² See note 16, *supra*.

²³ See note 18, *supra*.

- (iii) made reasonable and demonstrable efforts to obtain such consent or regulatory authorization, as applicable.²⁴

The Division will extend this relief until the earlier of: 1) such time as the Reporting Counterparty has obtained consent from such non-Reporting Counterparty or regulatory authorization, as applicable, to report the Other Identifying Term; 2) such time as the Reporting Counterparty no longer holds a reasonable belief that non-U.S. privacy law(s) preclude it from reporting the Other Identifying Term; or 3) 12:01 a.m. eastern daylight time June 30, 2013. Such no-action relief is subject to the following conditions:

- i. The Reporting Counterparty shall retain, as part of its compliance with Commission recordkeeping requirements, written evidence of its reasonable and demonstrable efforts to obtain non-Reporting Counterparty consent or the relevant non-U.S. regulatory authorization, as applicable;
- ii. The Reporting Counterparty shall retain, as part of its compliance with Commission recordkeeping requirements, a copy of the written opinion of outside legal counsel on which it based its reasonable belief regarding non-U.S. privacy law(s) as they pertain to reporting an Other Identifying Term to a registered SDR;
- iii. The Reporting Counterparty shall include all terms, which are not an Other Identifying Term, required to be reported pursuant to Part 45;²⁵ and
- iv. Upon the expiration of the relief in this section pursuant to any of clause 1), 2), or 3), above, a Reporting Counterparty shall correct all Other Identifying Terms, previously omitted or submitted in a masked form to an SDR pursuant to this Division letter, with the corresponding Other Identifying Term and § 45.3 Images,²⁶ by no later than 30 days from the date of such expiration. Prior to making such corrections, a Reporting Counterparty shall notify the relevant SDR.

III. Certain Counterparty Information Required by Part 20 of the Commission's Regulations.

In addressing your request for Part 20 relief, this Division letter uses the term "Part 20 Identifying Information" to mean the following counterparty information:

²⁴ See note 19, *supra*.

²⁵ Nothing in section II of this Division letter should be interpreted as altering the responsibility of a Reporting Counterparty to report all swap data that is not an Other Identifying Term or otherwise addressed by this Division letter.

²⁶ If reporting confirmation data normalized in data fields is technologically practicable at the time a Reporting Counterparty submits a corrected Other Identifying Term, then such Reporting Counterparty shall submit its correction(s) in an electronic format as required by Part 45.

- (1) The counterparty name field in § 20.4 submissions; and
- (2) The following counterparty information included in a 102S filing pursuant to § 20.5:
 - (a) Name
 - (b) Address (except that the country of the counterparty shall be provided)
 - (c) Contact Name
 - (d) Contact Job Title
 - (e) Contact Phone
 - (f) Contact Email

Based upon your representations,²⁷ the Division believes that time-limited relief for a Reporting Entity from the requirement to report Part 20 Identifying Information pursuant to § 20.4 and § 20.5 of the Commission's regulations is warranted under specific conditions.²⁸

Accordingly, the Division will not recommend that the Commission commence an enforcement action against a Reporting Entity for failure to report Part 20 Identifying Information for any § 20.4 or § 20.5 submission for which the Reporting Entity has:

- (i) formed a reasonable belief that:²⁹
 - (a) based on a written opinion of outside legal counsel, statutory or regulatory prohibitions in non-U.S. jurisdictions preclude the Reporting Entity from submitting Part 20 Identifying Information for such counterparty to the Commission; or
 - (b) (1) based on a written opinion of outside legal counsel, common law in a non-U.S. jurisdiction could expose the Reporting Entity to criminal or civil liability for submitting Part 20 Identifying Information for such counterparty to the Commission; and (2) the Reporting Entity determines that there is a material risk that the individual counterparty or regulatory authority may initiate litigation; and
- (ii) not yet obtained consent for the disclosure of Part 20 Identifying Information from such counterparty or the relevant non-U.S. regulatory authorization with respect to such counterparty, as applicable; and
- (iii) made reasonable and demonstrable efforts to obtain such consent or regulatory authorization, as applicable.³⁰

²⁷ See note 16, *supra*.

²⁸ Nothing in this Division letter should be interpreted as altering the responsibility of a Reporting Entity to make reports required by § 20.4 and to make 102S filings pursuant to § 20.5, even if information in such filing is masked pursuant to this Division letter.

²⁹ See note 18, *supra*.

³⁰ See note 19, *supra*.

The Division will extend this relief until the earlier of: 1) such time as the Reporting Entity has obtained consent from such counterparty to disclose Part 20 Identifying Information or regulatory authorization, as applicable, for such counterparty; 2) such time as the Reporting Entity no longer holds a reasonable belief that that non-U.S. privacy law(s) preclude it from disclosing the Part 20 Identifying Information; or 3) 12:01 a.m. eastern daylight time June 30, 2013. Such no-action relief is subject to the following conditions:

- i. The Reporting Entity shall retain, as part of its compliance with Commission recordkeeping requirements, written evidence of its reasonable and demonstrable efforts to obtain counterparty consent or the relevant non-U.S. regulatory authorization, as applicable;
- ii. The Reporting Entity shall retain, as part of its compliance with Commission recordkeeping requirements, a copy of the written opinion of outside legal counsel on which it based its reasonable belief regarding non-U.S. privacy law(s) as they pertain to submitting Part 20 Identifying Information for such counterparty to the Commission;
- iii. The Reporting Entity shall make a Form 102S filing for the counterparty in accordance with § 20.5, which filing shall include the country of such counterparty and an indication of the Part 20 Identifying Information of the counterparty redacted pursuant to this Division letter;
- iv. The Reporting Entity shall report that information has been withheld due to privacy law for each Part 20 Identifying Information field not reported pursuant to this Division letter; and
- v. Upon the expiration of the relief in this section pursuant to any of clause 1), 2), or 3), above, a Reporting Entity shall make a corrective Part 20 data submission for all Part 20 Identifying Information that was previously withheld or submitted in a masked form pursuant to this Division letter, by no later than 30 days from the date of such expiration. The Reporting Entity shall contact the Commission's Office of Data and Technology ("ODT") prior to making such corrective Part 20 data submission, and such submission shall be in a form and manner acceptable to ODT.

The no-action relief provided in this Division letter applies to Reporting Counterparties and Reporting Entities, regardless of whether they are members of ISDA. It is time-limited, and expires no later than **12:01 a.m. eastern daylight time June 30, 2013**. It applies only to LEIs and Other Enumerated Identifiers pursuant to Parts 45 and 46, Other Identifying Terms pursuant to Part 45 and Part 20 Identifying Information. Further, the no-action relief provided in this Division letter in no way limits the Commission's authority to request and obtain a non-Reporting Party's Identity Information.

The no-action relief provided herein contains a collection of information, as that term is defined in the Paperwork Reduction Act.³¹ Therefore, a control number for the collection must be obtained from the Office of Management and Budget. In accordance with 44 U.S.C. § 3507(d) and 5 C.F.R. §§ 1320.8 and 1320.10, the Division will, by separate action, prepare an information collection request for review and approval by OMB, and will publish in the *Federal Register* a notice and request for public comments on the collection burdens associated with the no-action relief. If approved, a Reporting Counterparty or Reporting Entity may not rely on the Division's determination not to recommend an enforcement action to the Commission unless it provides the information the Division has determined is essential to the provision of no-action relief.

The Division's letter, and the no-action position taken herein, which is based on your representations, reflects the views of the Division only, and not necessarily the position or views of the Commission or of any other division or office of the Commission's staff. 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, the Division 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 Sebastian Pujol Schott, Associate Director, Division of Market Oversight, at (202) 418-5641, or Stuart Armstrong, Attorney Advisor, Division of Market Oversight, at (202) 418-5095.

Sincerely yours,

Richard A. Shilts
Acting Director
Division of Market Oversight

³¹ 44 U.S.C. §§ 3501 *et. seq.*