

August 12, 2014

Mark Carney
Chairman
Financial Stability Board
Centralbahnplatz 2
CH – 4002 Basel
Switzerland

RE: OTC DERIVATIVES REGULATORS GROUP (ODRG) - BARRIERS TO REPORTING TO TRADE REPOSITORIES

DEAR MARK
Dear Chairman Carney,

We are writing to raise for the Financial Stability Board's (FSB) consideration an important issue concerning the G20 commitment to report all OTC derivatives transactions to trade repositories and to recommend that the FSB take action to resolve this issue.

The issue relates to the existence of barriers, including data protection laws, blocking statutes, state secrecy laws, and bank secrecy laws, which can prevent reporting of counterparty-identifying information to trade repositories. Barriers to reporting in certain jurisdictions are significantly reducing the effectiveness of reporting obligations and impeding the effective supervision of reporting entities, thus contravening the G20's objectives outlined in the Leaders' 2009 Pittsburgh communiqué.

We believe there is an urgent need for changes, which may include legislative changes, in these jurisdictions to remove such barriers, and the FSB and G20 should take measures to ensure that these changes are implemented as quickly as possible.¹ In addition, we believe there is a role for the Standing Committee on Standards Implementation (SCSI) in helping to identify where barriers may exist and to determine and assess the process for the removal of such barriers. We also consider that there is the need for a clear deadline for positive steps to be taken to remove these barriers.

BACKGROUND

This is an area the FSB has considered in the past. In your letter to G20 Ministers and Central Bank Governors of 15 April 2013, you noted²:

In the longer term, trade repositories will be the source of comprehensive data on derivatives markets, but we need to make sure that the relevant authorities have access to accurate and usable data. ... It is clear that challenges remain. For instance, privacy restrictions in some jurisdictions that create barriers to reporting the information necessary for regulatory purposes need to be fully addressed.

¹ We note that in February 2014, the FSB Chair requested that the ODRG identify any cross-border issues that cannot be resolved without legislative change.

² https://www.financialstabilityboard.org/publications/r_130419a.pdf

The FSB's Fifth Progress Report on Implementation of OTC Derivatives Reforms, published in April 2013, likewise stated³:

Jurisdictions should remove barriers to trade reporting by market participants, with particular attention to removing barriers to reporting of counterparty information and to information access by authorities.

Jurisdictions should continue to monitor the development of or changes in such laws and their proposed reporting requirements to ensure that any planned reforms adequately address barriers to reporting OTC derivatives transactions.

This is an issue that we have also been closely monitoring, both as individual authorities in the process of implementing our reporting obligations, and through the ODRG. In our August 2013 and March 2014 ODRG Reports to the G20, we noted that there are barriers, including data protection laws, blocking statutes, state secrecy laws, and bank secrecy laws, which can prevent reporting to trade repositories, and that barriers to reporting in certain jurisdictions will continue to impact the effectiveness of reporting obligations unless these barriers are removed. ODRG members agreed that barriers should be removed so that participants can report trades with foreign counterparties pursuant to the participants' reporting requirements and without breaching applicable laws. We further stated that we do not believe providing exemptions to participants from reporting information to trade repositories concerning foreign counterparties (e.g., on the basis that reporting is restricted by foreign law) is an acceptable arrangement, other than on an interim basis.

ODRG MEMBER AUTHORITIES' EXPERIENCES

ODRG member authorities have been moving rapidly to implement reporting obligations for OTC derivatives transactions. All ODRG member jurisdictions have or shortly will have laws, regulations, or rules in place that require the reporting of OTC derivatives transactions, and the information required to be reported includes vital identifying information about the counterparties to these transactions. As ODRG member jurisdictions implement trade reporting requirements, the requirements have or will have the effect of overriding any pre-existing barriers to reporting arising under local law.

However, barriers in a jurisdiction may still prevent counterparty-identifying information from being reported pursuant to applicable reporting requirements outside that jurisdiction. This can have the effect of placing a reporting entity that is subject to reporting requirements in an ODRG member jurisdiction under conflicting laws.

In our experience, reporting entities have raised a number of scenarios where they generally are not able to identify foreign counterparties under trade reporting requirements:

- i. where they have not received the consent of the foreign counterparty and/or a relevant foreign regulator, or in circumstances where such consent is impracticable to obtain – for instance because under the law of the foreign

³ https://www.financialstabilityboard.org/publications/r_130415.pdf

- jurisdiction standing consent is not effective and consent must be given each time there is a trade report or each time a trade report is updated; or
- ii. where *any* disclosure of counterparty-identifying information by the reporting entity (even with consent) breaches foreign law, attracting administrative, civil, or even criminal sanctions such as monetary fines, civil actions or revocation of licences.

In view of these issues, some ODRG members have granted time-limited relief to allow ‘masking’⁴ of counterparty-identifying information in reports to trade repositories. Other ODRG members have maintained that the requirement for reporting counterparty-identifying information cannot be waived and that non-reporting of counterparty identifying information because of legal, regulatory, or contractual impediments, is a breach of the reporting obligation.

RECOMMENDATIONS

The need for legislative change

We have concerns that since April 2013 little has been done in many G20 and FSB jurisdictions to address the barriers that prevent reporting of the information necessary to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse.

We believe the FSB should make a clear and unambiguous statement that jurisdictions need to remove all barriers that prevent reporting of counterparty-identifying information, such as those that are specified above.

For clarity, we are not calling for wholesale removal of data protection laws, blocking statutes, state secrecy laws, and bank secrecy laws, but only those preventing the identification of counterparties under reporting obligations to trade repositories. We do however believe it is important that such laws ensure that reporting entities are able to comply with their trade reporting obligations as required by the G20 commitments.

The case for a deadline

ODRG members are seeking to end the masking of counterparty-identifying information. For that purpose, ODRG members are considering the possibility of having a deadline by which masking would not be allowed. Masking on an ongoing basis would hinder the effectiveness of reporting obligations, and thus undermine the G20 objectives of improving transparency in the derivatives markets, mitigating systemic risk, and protecting against market abuse

We therefore request the FSB discuss the setting of an ambitious but realistic deadline by which the barriers to trade reporting such as those mentioned above are addressed. We believe any deadline set should be appropriate in order to achieve the G20’s objectives, while being feasible for the jurisdictions concerned, having regard to their legislative processes.

⁴ Masking means allowing a counterparty subject to a reporting requirement to anonymise the identity of its counterparty. This can occur through different means, including redaction.

Engagement by SCSI

We also call upon the FSB to make this issue a key point of assessment for SCSI in its Thematic Peer Review on Reporting of OTC Derivatives Transactions to Trade Repositories. We suggest that SCSI build on work already undertaken by other working groups, including the work of the OTC Derivatives Working Group, in compiling the FSB progress reports.

SCSI should undertake a thorough survey across all FSB jurisdictions to identify all barriers which can prevent reporting of counterparty-identifying information to trade repositories and to plan to assess the removal of such barriers.

Involvement of the G20

As these barriers may arise under the laws of non-ODRG G20 and FSB jurisdictions, the FSB should consider seeking G20 Leaders' agreement to take the necessary steps to ensure removal of these barriers.

CONCLUSION

We remain at your disposal for any questions related to the above and look forward to continuing our joint efforts to further progress in the cross-border implementation of efficient OTC derivatives reform.

Yours sincerely,



Mary Jo White
Chair of the United States Securities and Exchange Commission

On behalf of the ODRG members

Greg Medcraft, Chairman of the Australian Securities and Investments Commission
Leonardo P. Gomes Pereira, Chairman of the Comissão de Valores Mobiliários (Brazil)
Jonathan Faull, Director General at Directorate General for Internal Market and Services
European Commission
Steven Maijoor, Chair of the European Securities and Markets Authority
Ashley Alder, Chief Executive Officer of the Hong Kong Securities and Futures Commission
Masamichi Kono, Vice-Commissioner of the Japan Financial Services Agency
Howard Wetston, Chair of the Ontario Securities Commission
Louis Morisset, President and CEO, l'Autorité des marchés financiers du Québec
Lee Boon Ngiap, Assistant Managing Director, Monetary Authority of Singapore
Anne Héritier Lachat, President of the Board of Directors of the Swiss Financial Market
Supervisory Authority
Timothy Massad, Chairman of the United States Commodity Futures Trading Commission