

Report of the OTC Derivatives Regulators Group (ODRG)¹ on Cross-Border Implementation Issues September 2014

At the St. Petersburg summit in September 2013, the G20 Leaders welcomed the set of understandings of the ODRG Principals on cross-border issues relating to OTC derivatives reforms² as a “major constructive step forward for resolving remaining conflicts, inconsistencies, gaps and duplicative requirements.”³ The G20 Leaders also agreed, and the G20 Finance Ministers and Central Bank Governors later reaffirmed, that “jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulatory regimes.”⁴ The G20 Leaders also called on regulators to “report on their timeline to settle the remaining issues related to overlapping cross-border regulatory regimes and regulatory arbitrage.”⁵

In March 2014 the ODRG delivered a report to the G20 that set out a list of identified remaining cross-border implementation issues, a summary of their status, and a timetable for addressing them.⁶ As presented in the March 2014 Report, the ODRG is continuing to work

¹ The ODRG includes Principals of the following regulatory authorities with responsibility for regulation of over-the-counter (OTC) derivatives markets: the Australian Securities and Investments Commission (ASIC), the Brazilian Comissão de Valores Mobiliários, the European Commission (EC), the European Securities and Markets Authority, the Hong Kong Securities and Futures Commission, the Japanese Financial Services Agency, the Ontario Securities Commission (OSC), the Autorité des marchés financiers du Québec (AMF), the Monetary Authority of Singapore, the Swiss Financial Market Supervisory Authority, the US Commodity Futures Trading Commission (CFTC), and the US Securities and Exchange Commission (SEC). For the OSC, CFTC and SEC, references to “Principals” and “ODRG members” are to the Chairs of their respective agencies and not the full bodies.

² ODRG Report on Agreed Understandings to Resolving Cross-Border Conflicts, Inconsistencies, Gaps and Duplicative Requirements, August 30, 2013, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/odrgreport.pdf>.

³ G20 Leaders’ Declaration, September 2013, available at https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG.pdf.

⁴ See Communiqué Meeting of Finance Ministers and Central Bank Governors Sydney, 22-23 February 2014, available at https://www.g20.org/sites/default/files/g20_resources/library/Communique%20Meeting%20of%20G20%20Finance%20Ministers%20and%20Central%20Bank%20Governors%20Sydney%2022-23%20February%202014_0.pdf.

⁵ G20 Leaders’ Declaration, September 2013, see note 3 *supra*.

⁶ ODRG Report to the G20, March 2014, available at https://www.g20.org/official_resources/report_otc_derivatives_regulators_group_cross_border_implementation_issues (March 2014 Report).

to develop approaches to address certain issues and ODRG members continue to work to implement understandings reached previously. This report provides an update to the G20 on further progress in resolving OTC derivatives cross-border implementation issues and identifies a cross-border issue that may call for legislative change.⁷ For the November 2014 G20 Leaders Summit, the ODRG will report how it has addressed or intends to address identified cross-border issues, among other matters.⁸ However, after November 2014, ODRG members will still be in the process of implementing their laws and rules for domestic and cross-border transactions. While legal frameworks continue to be implemented, ODRG members expect certain cross-border issues may continue to require attention. Further, ODRG members anticipate that as new rules are implemented, additional cross-border issues could be identified that may need to be considered by the ODRG in order to seek resolutions.

The ODRG is continuing to work to develop approaches

The ODRG previously identified two areas in which it was working to develop approaches to address cross-border issues: (i) potential gaps and duplications in the treatment of branches and affiliates; and (ii) treatment of organized trading platforms and implementation of the G20 trading commitment.⁹

Treatment of branches and affiliates

With respect to the treatment of branches and affiliates, the ODRG has analysed several alternatives and continues to explore potential solutions. In its analysis of the treatment of affiliates, the ODRG has been considering clearing and trading obligations and potentially other areas.

The ODRG is still considering how equivalence and substituted compliance decisions should be taken in the context of transactions involving affiliates. The ODRG will consider whether any of the approaches for affiliates also may be appropriate for branches.

Organised trading platforms and implementation of the G20 trading commitment

With respect to organised trading platforms, the ODRG Principals agreed that one or more of the following or different approaches should be considered to avoid unnecessary burdens and unintended consequences for foreign organised trading platforms, consistent with our respective statutory and other legal requirements: (a) recognition, (b) registration and substituted compliance, or (c) registration categories and exemptions. The ODRG Principals recognize that there are different ways to regulate organized trading platforms and agreed that

⁷ The Financial Stability Board (FSB) Chair requested that the ODRG, in its September report to the G20, identify any cross-border issues that cannot be resolved without legislative change.

⁸ For the November 2014 G20 Leaders Summit, the ODRG also will report on timetables for implementing approaches, as necessary, and will include updates, as needed or appropriate, on issues that the ODRG previously identified as being addressed in other fora or through bilateral engagement.

⁹ See the March 2014 Report for a description of these issues.

organized trading platforms, regardless of their location, that are recognized or have an applicable license, registration, permission, or exemption in a jurisdiction should be able to be used to comply with a trading commitment of that jurisdiction. They also agreed that whenever possible, and consistent with applicable laws and regulations, the details of laws and regulations applicable to foreign organized trading platforms, including registration requirements, should be made clear before their implementation. Enhancing clarity and predictability of the details of applicable laws and regulations for various stakeholders should help reduce regulatory uncertainty and avoid unnecessary burdens and unintended consequences. ODRG Principals further agreed that there should be appropriate transitional measures and a reasonable but limited transition period for foreign organized trading platforms.

In addition, while there is variation in timing among ODRG members in implementing the G20 trading commitment,¹⁰ the ODRG Principals agreed to discuss development of a framework for early consultation among authorities on mandatory trading determinations, to the extent practicable and where appropriate, subject to jurisdictions' determination procedures. They also agreed to discuss how ODRG members could work closely and coordinate bilaterally or multilaterally, as appropriate, to avoid unnecessary burdens and unintended consequences, including towards alignment of the timing of implementation where practicable.

ODRG members continue to work to implement understandings reached previously

The ODRG previously identified four areas in which it was working to implement understandings reached previously: (i) equivalence and substituted compliance; (ii) clearing determinations; (iii) risk mitigation techniques for non-centrally cleared derivatives transactions (margin); and (iv) data in trade repositories and barriers to reporting to trade repositories.¹¹

Equivalence and substituted compliance

ODRG members continue to make progress in the area of equivalence and substituted compliance. Information about ODRG members' actions since the March 2014 Report relating to equivalence and substituted compliance assessments is provided in Annex A to this report.

In the context of equivalence and substituted compliance assessments, ODRG members are continuing to discuss regulatory outcomes, the role of international standards, assessment processes, including timing and consultations, and the assessment of supervisory and enforcement regimes.

¹⁰ The "trading commitment" refers to the G20 Leaders' agreement in Pittsburgh in 2009, that among other things, all standardized OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate.

¹¹ See the March 2014 Report for a description of these issues. In the March 2014 Report the ODRG identified reporting information to trade repositories as an issue the ODRG was monitoring.

The ODRG is considering (a) how to monitor the continued effectiveness and comparability of foreign legal regimes after equivalence or substituted compliance has been granted and (b) how deference to foreign regimes will work in practice.

Clearing determinations

Consistent with the previously agreed framework, ODRG members have continued to consult each other on mandatory clearing determinations, including sharing drafts of proposed determinations.

Risk mitigation techniques for non-centrally cleared derivatives transactions (margin)

With respect to risk mitigation techniques for non-centrally cleared derivatives transactions (margin), ODRG members have been consulting among themselves, including sharing drafts of proposed rules, in order to seek consistent approaches, to the extent possible, to the implementation of the international standards. The ODRG is liaising with the Basel Committee on Banking Supervision (BCBS) and International Organization of Securities Commissions (IOSCO) group that has been established to monitor implementation of the standards set out in the BCBS and IOSCO report, *Margin requirements for non-centrally cleared derivatives*, as discussions and findings of BCBS and IOSCO would provide a useful basis for the discussions in the ODRG.

Data in trade repositories and barriers to reporting to trade repositories

The ODRG identified two issues with respect to data and trade repositories: (a) reporting information to trade repositories and (b) authorities accessing information from trade repositories. On the matter of reporting information to trade repositories, the ODRG and FSB have noted that there are barriers that can prevent reporting to trade repositories, and have called for jurisdictions to remove barriers to trade reporting by market participants, with particular attention to removing barriers to reporting of counterparty information.¹² As noted in the letter delivered to the FSB by the ODRG in August 2014, a copy of which is attached to this report, existence of barriers that prevent reporting of counterparty-identifying information to trade repositories contravene the G20's objectives as outlined in the Leaders' 2009 Pittsburgh communiqué. The ODRG has requested that the FSB make a clear and unambiguous statement that jurisdictions need to remove all barriers that prevent reporting of counterparty-identifying information and discuss the setting of an ambitious but realistic deadline by which such barriers are addressed. In addition, the ODRG noted that it is considering the possibility of having a deadline by which the masking of counterparty-identifying information in reports to trade repositories would not be permitted. The ODRG further called on the FSB to make the issue of barriers to reporting to trade repositories a key point of assessment for its Standing Committee on Standards Implementation's Thematic Peer Review on Reporting of OTC Derivatives Transactions to Trade Repositories.

¹² See OTC Derivatives Market Reforms, Fifth Progress Report on Implementation, April 2013, available at http://www.financialstabilityboard.org/publications/r_130415.pdf ("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.") and the March 2014 Report.

On the issue of authorities' access to data in trade repositories, ODRG members continue to explore direct access as the preferred approach to ensuring authorities have access to relevant data held in trade repositories. As reported previously, direct access to trade repository data may not be available at this time in all circumstances. Accordingly, ODRG members continue to discuss access issues on a bilateral basis and are working to develop practical solutions to trade repository data access issues as authorities in their respective jurisdictions implement arrangements for the sharing of data held in trade repositories.

Timetable

For the November 2014 G20 Leaders Summit, the ODRG will report how it has addressed or intends to address the treatment of branches and affiliates and any further understandings on the implementation of the G20 trading commitment and a timetable for implementing these approaches. The ODRG also will provide an update on ODRG member progress on existing understandings and, as necessary, a timetable in those areas. The November report will include updates, as needed or appropriate, on issues being addressed in other fora or through bilateral engagement.

The ODRG Principals remain committed to meeting as necessary to address identified cross-border issues. They also remain committed to working to address new cross-border issues that may be identified as regulatory frameworks continue to be implemented.

Annex A

ODRG members note the following progress since the March 2014 Report on equivalence and substituted compliance assessments:

In June 2014, ASIC published regulatory guidance that states ASIC considers a number of jurisdictions' trade reporting requirements are equivalent to the Australian requirements, including the requirements of the European Union (EU), Japan, and CFTC.¹³ ASIC is engaging in equivalence processes relating to potential licensed trade repositories, prescribed trade repositories and regulated foreign markets.

In the EU, determinations of equivalence are being proposed for the following jurisdictions in respect of central counterparty (CCP) requirements and are pending adoption: Japan, Australia, Hong Kong, India and Singapore. EU equivalence determinations in respect of transaction requirements are expected to follow.

In June 2014, the OSC published amendments to its OTC derivatives trade reporting rule (OSC Rule 91-507)¹⁴ to permit certain market participants subject to Ontario trade reporting obligations to benefit from substituted compliance when they report trades pursuant to CFTC swap data reporting rules. The OSC conducted a comparability analysis using an outcomes-based approach to determine whether CFTC rules and regulations are sufficiently equivalent for the purposes of the substitute compliance provision of the Ontario rule. The OSC is engaging in similar equivalency processes in respect of OTC derivatives data reporting rules of other foreign jurisdictions for substituted compliance treatment.

The AMF has published draft amendments to its Regulation 91-507 Respecting Trade Repositories and Derivatives Data Reporting so that the AMF can establish a list of jurisdictions whose laws, regulations and instruments are considered equivalent.¹⁵ The consultation period ended on August 21, 2014. An outcomes-based analysis of equivalence is underway for key jurisdictions.

In June 2014, the SEC adopted rules and guidance to address the application of several key cross-border requirements including, among other things, a definition of "U.S. person" (to be used by certain market participants to determine which regulatory requirements apply to cross-border security-based swap transactions) that reflects a territorial approach. The SEC also adopted a rule setting forth the procedures for submission of applications for substituted compliance determinations.¹⁶

¹³ See <http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC-Derivative-Transaction-Rules-%28Reporting%29-2013---FAQs?openDocument#a2>.

¹⁴ See http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20140626_91-507_derivatives-data-reporting.htm.

¹⁵ See <http://www.lautorite.qc.ca/en/consultations-derivatives-pro.html>.

¹⁶ See, SEC final rule, Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities, June 2014, available at <http://www.sec.gov/rules/final/2014/34-72472.pdf>.

The ODRG notes the following bilateral progress between ODRG members on other issues since the March 2014 Report:

In June 2014, ASIC, together with the Reserve Bank of Australia, entered into a memorandum of understanding with the CFTC regarding cooperation and the exchange of information related to the supervision of clearing organisations that operate on a cross-border basis in both Australia and the United States.¹⁷

¹⁷ See [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cftc-rba-asic-clearingmou06051.pdf/\\$file/cftc-rba-asic-clearingmou06051.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cftc-rba-asic-clearingmou06051.pdf/$file/cftc-rba-asic-clearingmou06051.pdf).

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 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.¹⁸ 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 noted¹⁹:

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.

¹⁸ 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.

¹⁹ 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 stated²⁰:

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 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

²⁰ https://www.financialstabilityboard.org/publications/r_130415.pdf

- 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’²¹ 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.

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.

²¹ 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.

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