

CLIENT MEMORANDUM

CFTC Staff Removes Key Roadblocks to Foreign Data Privacy No-Action Relief

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AUTHORS

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On March 10, 2017, the Staff of the Commodity Futures Trading Commission's Division of Market Oversight extended and modified no-action relief for certain CFTC reporting requirements that may conflict with foreign data privacy laws ("Foreign Data Privacy Relief").¹ The CFTC Staff initially granted time-limited no-action relief in 2012 to address the conflicts between the CFTC's swap data reporting requirements in Parts 20, 43, 45 and 46 of the CFTC's regulations and the privacy laws of many foreign jurisdictions, and has since extended the relief a number of times.² In 2016, the CFTC Staff provided similar relief for reporting entities that submit certain ownership and control reports ("OCR") to the CFTC.³ At a high level, the prior swap data reporting and OCR relief allowed market participants to mask identifying information to the extent that there was a reasonable basis for believing that foreign privacy laws or regulations precluded reporting identifying information to the CFTC or a swap data repository ("SDR").

¹ A copy of CFTC Letter No. 17-16 (Mar. 10, 2017) is available [here](#).

² See CFTC Letter No. 12-46 (Dec. 7, 2012); CFTC Letter No. 13-41 (June 28, 2013); CFTC Letter No. 14-89 (June 27, 2014); CFTC Letter No. 15-01 (Jan 8, 2015); and CFTC Letter No. 16-03 (Jan. 15, 2016).

³ See CFTC Letter No. 16-33 (Apr. 8, 2016).

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Although the CFTC Staff intended the initial swap data and OCR no-action relief to address potential conflicts with foreign privacy laws, many industry participants considered the conditions to rely on the relief impractical or impossible to follow. As a result, many firms were placed in the position of reporting data that might have been in violation of foreign privacy laws, or masking swap data or OCR reports without complying with all of the conditions associated with the no-action relief.

The Foreign Data Privacy Relief combines the swap data and OCR reporting relief and removes some of the more problematic conditions. These modifications should increase the number of participants eligible for the relief. In addition, the Foreign Data Privacy Relief is no longer time-limited.⁴ Rather, as described below, the relief expires when a market participant no longer has a reasonable belief that a foreign data privacy law or regulation precludes reporting identifying information to an SDR or the CFTC.

The Scope of the Relief

The Foreign Data Privacy Relief extends relief from the CFTC's swap data reporting requirements, including SDR reporting in Parts 45 and 46, real-time reporting in Part 43, and swaps large trader reporting in Part 20.⁵ In particular, the reporting party under Parts 43, 45, 46 and/or 20 may mask data fields that identify a non-U.S. counterparty (e.g., the counterparty's legal entity identifier ("LEI") if there is a reasonable belief that a foreign data privacy law or regulation precludes reporting the identifying information.⁶ The relief does not apply if the counterparty is registered with the CFTC as a swap dealer or major swap participant, is a U.S. person, is guaranteed by a U.S. person, or is an "affiliate conduit" of a U.S. person.⁷

The Foreign Data Privacy Relief also extends relief from the CFTC's OCR requirements, including with respect to new Forms 102A and 102B.⁸ As a result, an entity obligated to file a Form 102A or 102B may mask identifying information if

⁴ Because the prior versions of the no-action relief were time-limited, the CFTC Staff was required to issue regular extensions of the relief.

⁵ CFTC Letter No. 16-03 (Jan. 15, 2016) is the prior version of the swap reporting no-action relief and is available [here](#).

⁶ The data fields eligible for masking are specified in CFTC Letter No. 15-01 (Jan. 8, 2015) as well as in Appendix 1 thereto.

⁷ See CFTC Letter No. 13-41 (June 28, 2013) (definition of "privacy law counterparty"). Footnote 14 describes what it means to be "guaranteed by a U.S. person" and footnote 15 describes what it means to be an "affiliate conduit" of a U.S. person. A copy of CFTC Letter No. 13-41 is available [here](#).

⁸ See Part 17. CFTC Letter No. 16-33 is the prior version of the ownership and control reporting no-action relief and is available [here](#).

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there is a reasonable belief that a foreign data privacy law or regulation precludes reporting the identifying information.⁹ The Foreign Data Privacy Relief does not address new OCR Form 71.¹⁰

The Conditions to Rely on the Relief

To rely on the Foreign Data Privacy Relief, a market participant must comply with the following conditions:

- *Reasonable Belief.* The reporting party must form a reasonable belief that statutory or regulatory prohibitions in a non-U.S. jurisdiction preclude it from reporting identifying information to an SDR or the CFTC. The no-action relief does not provide guidance regarding how a market participant may form the reasonable belief other than to note that “the reasonable belief must be formed in good faith after careful analysis of the applicable authority.”¹¹ Companies should evaluate their current process to designate when counterparties or customers may be subject to a foreign data privacy law and thus potentially eligible for data masking.
- *Privacy Law Identifier.* The no-action relief specifies the manner in which a market participant may mask identifying information. For purposes of the swap data reporting rules (*i.e.*, Parts 43, 45, 46 and 20), the market participant masking counterparty information must utilize a “privacy law identifier.” This is a code that is unique to each counterparty, but is not the counterparty’s LEI. The Foreign Data Privacy Relief confirms that market participants may **not** utilize generic terms for all data being masked (*e.g.*, “name withheld”), but rather must provide the unique privacy law identifier.
 - When masking for purposes of the OCR reports, reporting parties should consult the CFTC Staff technical guidebook.¹²
- *Backloading.* If a market participant no longer holds a reasonable belief that foreign data privacy laws preclude reporting certain data, the participant must backload all such data previously masked in reports to an SDR or the CFTC. The backloaded reports must be filed within 30 days of when a participant no longer holds a reasonable belief. The reporting party must notify an SDR or the CFTC, as applicable, prior to submitting backloaded reports.

⁹ A list of data elements that provide identifying information can be found in Appendix A to CFTC Letter No. 16-33.

¹⁰ Form 71 obligates the account originator for a customer omnibus account to report identifying information about customers with a reportable position in the customer omnibus account.

¹¹ Foreign Data Privacy Relief at Footnote 28.

¹² A copy of the current CFTC OCR Guidebook dated May 25, 2016 is available [here](#).

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Companies that rely on the CFTC's data-masking no-action relief should review their current compliance program that is designed to identify when foreign data privacy laws may apply, report masked data in accordance with the no-action relief, and retain the data to backload reports if and when needed.

Expiration of the Relief

As a general matter, the relief expires when a market participant no longer has a reasonable belief that a statutory or regulatory prohibition in a non-U.S. jurisdiction precludes it from reporting identifying information to an SDR or the CFTC (referred to as the "Reasonable Belief Expiration Date"). The Foreign Data Privacy Relief also requires, as a condition to the relief, that the International Swaps and Derivatives Association ("ISDA") notify the CFTC's Division of Market Oversight ("DMO") if the privacy laws in a foreign jurisdiction no longer preclude swap data reporting, which in turn triggers a Reasonable Belief Expiration Date. A similar condition applies to the Futures Industry Association ("FIA") for purposes of OCR reporting. DMO plans to issue some form of public notice to the industry upon the occurrence of a Reasonable Belief Expiration Date for each jurisdiction. Therefore, market participants should track ISDA's and FIA's "reasonable belief" updates.

The Foreign Data Privacy Relief also addresses an update on French and Swiss privacy laws. The CFTC Staff notes that according to the ISDA letter, based on the 2016 Financial Stability Board report, France and Switzerland may no longer restrict the reporting of certain identifying information. However, ISDA further explains that it would be premature to require market participants to "apply an immediate blanket unmasking for all counterparties and transactions" until market participants have been able to review the full impact of the changes.¹³ In particular, French and Swiss laws may continue to restrict reporting in certain cases. To the extent the update to French and/or Swiss law no longer prohibits the reporting of identifying information, market participants have until **September 1, 2017** to backload previously masked reports and to begin reporting unmasked data going forward. If French or Swiss laws continue to prohibit reporting in certain circumstances, then market participants may rely on the Foreign Data Privacy Relief beyond September 1, 2017.

Conclusion: Material Changes to Existing No-Action Relief

The most significant change to the Foreign Data Privacy Relief, as compared to prior versions, is the removal of certain conditions to rely on the relief. Specifically, market participants are no longer required to submit a formal written request to a foreign regulator and receive a formal written response from the foreign regulator outlining the application of foreign data privacy laws and regulations that prohibit reporting to an SDR or the CFTC. In addition, the Foreign Data Privacy Relief no longer enumerates specific jurisdictions that may require masking of data reports.¹⁴ Instead, if a market

¹³ Foreign Data Privacy Relief at 4-5.

¹⁴ CFTC Letter No. 13-41 enumerated the following jurisdictions: Algeria, Argentina, Austria, Bahrain, Belgium, China, France, Hungary, India, Korea, Luxembourg, Pakistan, Samoa, Singapore, Switzerland and Taiwan. In CFTC Letter No. 16-03, the CFTC Staff noted that ISDA requested that the following jurisdictions be added to the list of enumerated jurisdictions: Costa Rica, the Philippines, Romania, Spain, Uruguay and Venezuela.

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participant forms a reasonable belief that a foreign privacy law or regulation prohibits reporting, the participant may mask data reports consistent with the Foreign Data Privacy Relief regardless of whether a jurisdiction is enumerated or not enumerated.

Ultimately, this latest version of the no-action relief should increase the number of participants eligible to mask swap data reports to an SDR, swap position reports to the CFTC, and OCR reports to the CFTC. Market participants should evaluate the availability of relief along with their current methodology for masking data to ensure consistency with the Foreign Data Privacy Relief.

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