



June 27, 2016

Chairman Mark Carney
Financial Stability Board
Basel, Switzerland

Re: **Addressing Legal Barriers to Reporting of, and Access to, OTC Derivatives Transaction Data (PLEN/2016/29)**

Dear ,

South Africa appreciates the opportunity to provide comment to the Chairman's request (PLEN/2016/29) of member jurisdictions' planned actions to address legal barriers to reporting OTC derivatives transactions, as well as regulatory access to reported data. We agree with the Chairman that addressing barriers is critical for fully delivering on the G20 Leaders' objectives, particularly from our point of view, as a significant share of South Africa's OTC derivatives transactions are cross-border and the likelihood is that South African OTC derivatives data can be expected to be held in foreign trade repositories (TRs). The ability to observe market developments and to monitor systemic risk build up is as important for South Africa as it is for other jurisdictions and we therefore remain committed to integrating appropriate regulatory and legislative reforms to ensure consistency with international best practice.

The National Treasury, together with the Financial Services Board and the South African Reserve Bank are leading the OTC derivatives reform agenda in South Africa, and this document represents our consolidated submission to the survey on proposed action.

I. Progress towards implementing OTC derivatives trade reporting

Since 2012, South Africa has made steady progress towards implementing the OTC derivatives reforms. The Financial Markets Act, which was enacted in 2013, together with the draft Ministerial Regulations (draft Regulations)¹ and Board Notices, provide the legal and regulatory framework for the establishment and licensing of domestic TRs. The framework provides for additional requirements and duties related to the design and operation of the TR. These requirements include the development of policies and

¹ National Treasury, see: <http://www.treasury.gov.za/otc/>

procedures that define the rights and interests of users and other relevant stakeholders with respect to the transaction data stored in the TR's systems; and a duty to provide continuous, direct and immediate electronic access to all transaction data in accordance with internationally acceptable communication procedures and standards for messaging to the primary authority (that is the Financial Services Board) and other relevant supervisory authorities. The regulatory requirements also extend to market participants' obligations to report of OTC derivative transaction information to TRs, in line with international standards. It is anticipated that these requirements will be in force by end-2016.

Progress in implementing the reforms is further dependent on the realisation of the Twin Peaks regulatory regime that is currently being established through the Financial Sector Regulation Bill. When the Financial Sector Regulation Bill is enacted, the Financial Sector Conduct Authority will replace the Financial Services Board as the primary authority responsible for regulating TRs in South Africa, and the Prudential Authority will be established and have oversight responsibilities in the regulation of TRs. Additionally, the South African Reserve Bank through its enhanced oversight role in maintaining financial stability, will be responsible for assessing the observance on principles developed for market infrastructures, such as the *Principles for Financial Market Infrastructures*.

Further legislative amendments are also being proposed to the Financial Markets Act, through the Financial Sector Regulation Bill, to enable South African market participants to utilise the services of foreign TRs to satisfy domestic and foreign reporting requirements, subject to an equivalence assessment of home country regulatory standards by the South African Authorities. We recognise that the South African OTC derivatives market is primarily characterised by interbank trades between domestic and foreign banks, and as such domestic participants face significant exposure to global markets. The practical implication is that a majority of these trades will be reported to foreign/global TRs in fulfilment of counterparties' statutory reporting obligations in the home country. The proposals will therefore forge a path to further cooperation with foreign regulators, and extends to information sharing and supervisory arrangements, consistent with international standards. It is expected that the framework will be in place by at least by early 2017.

II. Barriers to reporting information into TRs

South African law permits reporting to a licensed domestic and foreign TR (when the amendments to the Financial Markets Act become effective) to satisfy domestic reporting requirements and requires counterparty consent. Similarly, market participants' voluntary reporting requires consent and covers reporting to a domestic as well as a foreign TR.

Fulfilment of domestic reporting requirements to licensed foreign TRs will be possible when the Promotion and Protection of Personal Information Act commences (expected to be end-2017), with consent of the counterparty or receiving authorisation.

With respect to reporting to a domestic or foreign TR pursuant to foreign requirements, counterparty consent is required. South African Authorities may facilitate full reporting of transactions, subject to entering into regulatory and co-operation arrangements with the foreign regulators, and ensuring appropriate safeguards with respect to the protection of the security of the information.

III. Barriers to Authorities' access to TR-held data

Currently there is no licensed TR in South Africa, nonetheless it is envisaged that there would be no barriers to Authorities' access (direct or indirect) to domestic TR data. Exemptions under the Promotion and Protection of Personal Information Act permit Authorities to obtain information without consent to the extent necessary to enable the proper fulfilment of supervisory obligations imposed by law. The Financial Markets Act and the draft Regulations enable Authorities other than the TR's primary Authority to obtain access to data held at a domestic TR in respect of reporting obligations imposed on transactions or positions.

Indirect access by foreign regulators to data held in domestic TRs can be facilitated by entering into appropriate information sharing and co-operation arrangements with the foreign regulators. The provisions of Section 22 of the Financial Services Board Act enable the sharing of information by the Financial Services Board with other Authorities, including foreign regulators. Moreover, draft Regulations impose an additional duty on a TR to provide access to transaction data held by the TR to other supervisory authorities relevant to those authorities' mandate and responsibilities, where a supervisory cooperation arrangement with the Financial Services Board as contemplated in section 22 of the Financial Services Board Act have been entered into. This position will be further clarified in proposed wording of section 239 in the Financial Sector Regulation Bill, which will also be applicable to the Prudential Authority and the South African Reserve Bank, so the scope of potential information sharing will be expanded.

One aspect to note is that regarding the sharing of information in terms of MOUs, while with section 22 of the Financial Services Board Act, MOUs are deemed to be compliant with section 72 of the Promotion and Protection of Personal Information Act as it relates to cross border processing of information; in terms of section 239 of the Financial Sector Regulation Bill there is not a deeming provision or an exemption that would be in place. It would, therefore, be necessary for Authorities to include appropriate measures in MOUs, and put in place appropriate arrangements with third parties when sharing information, to ensure that there is not a violation of section 72 of the Promotion and Protection of Personal Information Act as a result.

In conclusion, South Africa is committed to seeing the reforms to the OTC derivatives market, and going forward will monitor any further issues arising, and respond accordingly.

Yours sincerely,

Mr Roy Havemann
Chief Director, National Treasury

Date:

Supplementary questions regarding barriers to authorities' access to TR-held data

Access by domestic authorities to data held in domestic TR

Does the barrier relate only to personal identifying information or does it relate to non-individual clients as well?

The definition of “personal information” in the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (“the PoPI Act”) applies to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person. The barrier would relate to non-individual clients, to the extent that the client was an identifiable, existing juristic person.

Could you please confirm that standing consent would be possible under this regime (or would consent need to be given trade-by-trade)?

Section 11 of the PoPI Act does not explicitly provide for the potential for providing standing consent. However, it would be possible for standing consent to be given, if the consent was worded in an appropriate manner that ensures that all applicable requirements in the PoPI Act are addressed. The onus remains on the ‘responsible party’ collecting information to ensure that proper consent has been obtained. Also, any consent could be revoked at any time by the ‘data subject’, and if that occurred, any further processing of information must cease. It would be advisable for any consent to consider and appropriately provide for any potential envisaged further processing of information that might be required, and the purposes for that further processing of information, to ensure that any further processing of the information would be covered by the consent.

From whom and in what circumstances would the authorisation referred to be obtained?

In the initial response provided, “authorisation” as referred to relates to the ability of the Information Regulator which is established in terms of section 39 of the PoPI Act to authorise the processing of personal information, through the granting of an exemption in terms of section 37 of the PoPI Act, to process personal information, even if that processing is in breach of a condition for the processing of that personal information.

It is also relevant to note, that in terms of section 38, the processing of information in respect of certain other “relevant functions” is already authorised and is granted an exemption from certain requirements in the PoPI Act.

Please could you answer the same questions for reporting to foreign TRs pursuant to foreign legal requirements.

The above responses would also apply in relation to reporting to foreign TRs pursuant to foreign legal requirements. It would be important, in any MoUs that are entered into by South African authorities with other foreign authorities, to ensure that matters relating to consent are appropriately provided for.

Discontinuing ‘masking’ once barriers to reporting are removed (Recommendation 3)

In relation to this matter, based on an understanding of the concept as meaning that information is distorted so that it no longer identifies the subject, it would be appropriate to note that South Africa is busy developing reporting requirements to TRs by providers of OTC derivatives. It is not envisaged that masking of counterparty information will be allowed. The current draft proposal contains requirements for the identification of counterparties by either the use of a legal entity identifier or a pre-legal entity identifier.