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Comments by the International Swaps and Derivatives Association, Inc. (**ISDA**) and the Securities Industry and Financial Markets Association (**SIFMA**) on the Consultation Paper issued by the Monetary Authority of Singapore on 12 March 2009 relating to the Review of the Regulatory Regime Governing the Sale and Marketing of Unlisted Investment Products

23 April 2009

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Dear Sir/Madam,

The International Swaps and Derivatives Association, Inc. (ISDA) and the Securities Industry and Financial Markets Association (SIFMA)[1] appreciate the opportunity to collectively express our views on the Consultation Paper issued by the Monetary Authority of Singapore ("**MAS**") on 12 March 2009 relating to the Review of the Regulatory Regime Governing the Sale and Marketing of Unlisted Investment Products (the "**Consultation Paper**").

Executive Summary

The MAS is proposing enhancements to the current regulatory framework for unlisted investment products that are commonly sold to retail investors. The proposals aim to:

"(a) promote more effective disclosure by improving the quality of information available to investors;

(b) strengthen fair dealing in the sale and advisory process; and

(c) enhance MAS' powers under the Financial Advisers Act."[2]

The MAS also proposes to introduce the concept of complex investment products which will be subject to an enhanced sale and marketing regulatory regime. The Consultation Paper follows a review by MAS of the sale and marketing of structured products in light of investors' experience with structured products that had defaulted or lost value as a result of the crisis, as well as international developments[3].

ISDA and SIFMA support this undertaking and are committed to re-building confidence in the Singapore structured products market, including working with our respective members to assist in reviewing and, where necessary, reinforcing the existing regulatory regime.

With regard to the proposals made in the Consultation Paper, we wish to highlight a few of these for discussion in this letter. In particular, we will provide comments on the following proposals:

(i) Product Highlights Sheet

We support the proposal to include a Product Highlights Sheet subject to our comments below.

(ii) Ongoing Disclosure Requirements

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[1] Descriptions of these associations are provided in Appendix 1.
[2] The Consultation Paper, paragraph 2, page 4.
[3] The Consultation Paper, paragraph 1.1.1, page 5.

We are strongly opposed to the proposal to impose ongoing disclosure requirements as specified in paragraph 3.2 of the Consultation Paper.

We support the proposal to generally provide pricing information, but only to the extent that it is applicable to products for which pricing information is available and relevant.

(iii) Fair and Balanced Marketing and Advertising Materials -

We support the proposal to require marketing materials to present a fair and balanced view of the product by way of specific rules requiring the adequate and prominent display of risks associated with investing in the product.

We support the proposal to introduce restrictions on marketing and advertising materials for unlisted investment products listed in paragraphs 3.3.6 and 3.3.7.

(iv) Enhanced Due Diligence for New Products

We generally support these proposals subject to our comments below.

(v) Restrictions on Sale without Advice

We agree that advisers may be obliged to conduct suitability assessments but such obligation may be precluded by the client opting out of providing requested information or of receiving advice.

(vi) Definition of "Complex Investment Products"

We are opposed to the creation of a separate category of investment products with embedded derivatives as "complex investment products" and subjecting such products to an enhanced regime.

(vii) Risk Ratings

We are strongly opposed to the creation of a common risk rating system.

(viii) Mandatory Advice and Health Warning

We are opposed to further restrictions on the sale of products deemed to be "complex investment products".

(ix) Cooling Off Period

We strongly oppose the introduction of a cooling off period for unlisted debentures.

(x) Appointment of Approved Trustee

We strongly oppose the requirement for the appointment of an MAS-approved trustee.

(xi) Remedies for Investors

We suggest that "coat-tail" actions be restricted only to actions where the grounds of the claim is common to all affected investors.

We would also seek to ensure that any proposed changes are only applicable in relation to offerings which are sold to retail investors in Singapore which require a prospectus under the Securities and Futures Act, Chapter 289 of Singapore (the "**SFA**").

Please note that this letter only touches on certain of the items discussed in the Consultation Paper; individual members will have their own views on aspects of the Consultation Paper and may provide such comments independently.

Singapore's market for investment products offers a wide range of listed and unlisted investment products to investors in Singapore to help meet their own unique financial objectives in light of their particular circumstances. The challenge in reviewing the regulatory regime in response to the recent events is to ensure that any new measures introduced do not have the unintended consequence of stifling the market as a whole and depriving investors of products which may be eminently suitable for them. To that end, the interests of the industry and of the MAS are aligned in ensuring that the lessons from this experience are well understood and serve to focus the review of the regulations, whilst being careful to preserve a regulatory framework that is conducive to product innovation and future growth. If the regulatory review is conducted with this in mind, investors will be better protected, but yet have the opportunity to invest in an ever evolving suite of attractive and appropriate products to meet their particular investment needs.

Retaining the current regulatory approach of requiring adequate disclosure by the issuer to investors of the features and risks of an investment product and where advice is given, a reasonable basis for the adviser's recommendation is the right approach.

The Consultation Paper discusses the appropriateness of the current regulatory approach which comprises two key elements: "first, adequate disclosure by the issuer to investors of the features and risks of an investment product; and second, where advice is given, a reasonable basis for the adviser's recommendation"[4].

The MAS has noted in the Consultation Paper that "recent events have led to questions whether the current regulatory approach is appropriate in view of the nature and risks of complex investment products. There have been suggestions that regulators should take on the responsibility for approving products before they can be sold to retail investors"[5] MAS indicated in the Consultation Paper that they have considered these issues carefully but have concluded that it is undesirable for a regulator to certify whether products are suitable for retail investors for reasons discussed in the Consultation Paper. We very strongly support this conclusion. As discussed in the Consultation Paper, moving towards a merit-based approach would have a number of very significant disadvantages and undesirable consequences.

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[4] The Consultation Paper, paragraph 1.2.1, page 5.
[5] The Consultation Paper, paragraph 2.1.1, page 8.

Comments on specific proposals in the Consultation Paper

We set out below our comments in relation to a number of selected proposals from the Consultation Paper.

1. Products Highlight Sheet

> **"Q1: MAS seeks views on the proposal to require issuers to prepare a Product Highlights Sheet to accompany an offer of an unlisted investment product where the offer requires a prospectus to be issued.**
>
> **Q2: MAS seeks views on the proposed form and content of the Product Highlights Sheet.**
>
> **Q3: MAS invites suggestions on how the Product Highlights Sheet can be made more readable and useful for investors.**
>
> **Q4: MAS invites suggestions on additional information and specific features that should be disclosed in the Product Highlights Sheet for particular products."**

1.1 The members consider that although a Product Highlights Sheet may be useful in summarising key information, a separate document that cross-references the prospectus compounds potential liability without enhancing existing disclosures or providing new disclosures.

1.2 The members also note that constituting the Product Highlights Sheet as a separate document may invite retail investors to disregard the disclosures in the main prospectus in determining the suitability of the investment product in question. This risk is magnified by the possibility that the Product Highlights Sheet may, inadvertently, be distributed to investors without the prospectus. Additional administrative supervision may be onerous and cannot entirely preclude this from happening, notwithstanding the highest standards of vigilance.

1.3 The members respectfully propose that the Product Highlights Sheet should instead be incorporated into the main prospectus as the first few pages of the prospectus. This would eliminate the risk of separate distribution and also reinforce the primacy of the prospectus as the key disclosure document upon which issuer liability is established.

1.4 The members express considerable concern with the requirement that the contents of the Product Highlights Sheet be written and presented in a "clear, concise and effective"[6] manner, and failure to comply with such requirement would result in liability being imposed on those responsible for the prospectus. The members submit that such language may be useful as a guideline prescribed to issuers by the MAS. However, it would be problematic to impose liability on such basis as the question of whether information has been written and presented in a "clear, concise and effective manner" is highly subjective and goes to

[6] The Consultation Paper, paragraph 3.1.9, page 17.

presentation rather than content. Whereas a content-based omission may be ascertained factually (e.g. omission of a key fact or failure to provide a specific disclosure), it is not possible to similarly determine a defect in the manner in which information has been presented. The members conclude therefore that adoption of such language would introduce great uncertainty and would respectfully propose that the requirement for “clear, concise and effective” presentation be retained only to the extent that it is a non-binding guideline. The members would further welcome clear and detailed guidelines on the information that should be disclosed in the Product Highlights Sheet.

1.5 The members also express concern that the four-page limit of the Product Highlights Sheet may not be sufficient for disclosure purposes. The length of a product summary is dependent on the complexity of a product - a summary of a more complex product may run into greater length in order to be adequate. The incorporation of graphical illustrations such as bar graphs and charts may further strain the page limit and as a result not be feasible, even though such graphical representations may present information in a more comprehensible way than equivalent text that occupies less space. The members propose that in lieu of a strict page limit, the requirement should be that the material terms and risks of the investment product must be disclosed in the Products Highlight Sheet.

1.6 On the MAS being empowered to prevent further issues of securities referred to in paragraph 3.1.10 of the Consultation Paper, please clarify that “further issues of securities” means a prohibition on any further offer to Singapore investors of the securities to which the offending Product Highlights Sheet relate (and not a blanket prohibition on the issuer’s ability to issue securities, which may be disproportionate). Even so, we would further highlight that a stop order issued on collective investment schemes (“CIS”) is problematic in that there is no fixed subscription period and the nationality of the investor is not easily determined. The CIS issuer may prejudice non-Singapore investors if its only feasible means of complying with any stop order by the MAS is to refuse to issue securities generally to Singapore and non-Singapore investors alike. We would urge the MAS to consider the implications of stop orders on particular classes of securities such as the CIS and qualify the application of stop orders accordingly. Alternatively, the MAS should consider remedy periods prior to the imposition of stop orders. We also seek clarification on the action MAS will take in relation to securities already issued pursuant to the offending Product Highlights Sheet.

1.7 **For the foregoing reasons, we support the proposal to include a Product Highlights Sheet subject to our comments as follows:**

1.7.1 the Product Highlights Sheet should be attached to and constitute part of the main prospectus, and is expressed to be subject to the terms of the prospectus;

1.7.2 the requirement for “clear, concise and effective” presentation of the Product Highlights Sheet should be a guideline and not a statutory requirement that attracts potential liability;

1.7.3 the content requirements of the Product Highlights Sheet should be guided by principles and a strict page limit should not be imposed; and

1.7.4 the Product Highlights Sheet should be intended as a summary and should not contain further specific disclosure requirements.

2. Ongoing Disclosure Requirements

> **"Q5: MAS seeks views on the proposal to impose the specific ongoing disclosure requirements described above to issuers of unlisted investment products, where prospectus requirements apply. MAS invites suggestions for additional ongoing disclosure requirements."**

2.1 The members are concerned about the proposed reporting of material changes affecting the risk and returns of the unlisted investment products, more particularly, the ambit of material changes required to be reported. The members seek clarification on what comprises material changes that affect the risk and returns of investment products, considering that the materiality of a particular change would be contingent on the risk appetite of an individual investor.

2.2 The members would also highlight that derivative-linked products are affected by events on many levels, and attempting to track and report such changes may be an impractical exercise. As an example, an equity-linked product is affected by events beyond those that directly affect the liquidity of the product or the creditworthiness of the issuer, guarantor or counterparty - drastic movements in the underlying shares may, for example, be considered material events. Additionally, events affecting the companies that the relevant shares belong to may also be characterised as material events, whether specific to that company, the industry that the company belongs to, or even resulting from economic and political changes in the countries that the company operates in. The spectrum of what may constitute material changes is very wide for the many derivative-linked products that would be governed by these specific ongoing disclosure requirements. The extent of due diligence may go beyond what product providers contemplate or are capable of providing. In an effort to mitigate liability, it is likely that product providers would inundate investors with excessive information and undermine the intention to allow investors to make informed decisions. Disclosure would also vary across the market as product providers would take different views on the materiality of various events.

2.3 The members note that product pricing would also have to take into account the costs of providing increased due diligence and complying with ongoing disclosure requirements, resulting in lower returns for investors.

2.4 The members also note that the materiality of an event on the price and on the risk and returns of the investment product is not usually ascertainable until some time after the event has occurred. The preparation and distribution of the notice would add to the time transpired before the investor receives notice of the material event. The members consider that it may be too impractical to inform investors of material events in a timely manner. The members would also like to clarify at this point that the past practice of providing information to investors through publicised websites remains acceptable to the MAS.

2.5 The members consider that reporting of material events may trigger investor panic and precipitate panic selling by retail investors in cases where such selling may not be warranted, resulting in a distorted deterioration in the price of the product.

2.6 Product providers, as financial entities, may often come into possession of market-sensitive information through banking and investment-related activities. Confidentiality obligations relating to such events may conflict with an unqualified obligation to notify investors of material events.

2.7 The members are not aware of similar requirements in other major jurisdictions mandating ongoing disclosure requirements. The introduction of such novel requirements in the Singapore market may consequently impede the development of the Singapore market for financial products.

2.8 **For the foregoing reasons, we strongly urge the MAS not to impose ongoing disclosure requirements as specified in paragraph 3.2 of the Consultation Paper.**

"Q6: MAS seeks views on the proposal to require issuers to make available, publicly and regularly, bid or redemption prices."

2.9 Many structured products are formulated with the intention and priced on the assumption that investors would hold such products to maturity and there would be no secondary market nor obligation on the part of the product provider to create a secondary market. In such circumstances it would make little sense to determine and publicise pricing information for the products. Providing investors with pricing information may mislead investors into assuming that such products may indeed be liquidated at the publicised prices, which depends on the existence of the secondary market, and if any, its actual state. Should this proposal be extrapolated to mean the product provider is then obliged to create a secondary market, this would have to be priced into the relevant product. The consequences may be that pricing is increased accordingly or that it is not viable for the product provider to offer certain products.

2.10 The frequency and the means of publication at which pricing information may be provided is also contingent on the valuation methods and the features specific to a particular product. Rather than adopt a "one-size-fits-all" approach, the members respectfully propose that the product provider should have the discretion to make determinations of the frequency and means of publication, but is otherwise obliged to publicise the frequency and sources of pricing information in the disclosure documents.

2.11 **For the foregoing reasons, we support the proposal to generally provide pricing information, but only to the extent that it is applicable only to products for which pricing information is available and relevant. The frequency and nature of disclosure obligations should also depend on the product in question. The MAS should allow product providers to determine the frequency and sources of pricing information if these are disclosed in the disclosure documents.**

3. Fair and Balanced Marketing and Advertising Materials

"Q7: MAS seeks views on the proposal to require marketing and advertising materials for all unlisted investment products to give a fair and balanced view of the product.

Q8: MAS seeks views on the proposal to introduce restrictions on marketing and advertising materials for unlisted investment products.”

3.1 The members generally agree that marketing and advertising materials should present a fair and balanced view of the product. The members consider that this would be achieved with better certainty by requiring the adequate and prominent disclosure of downside risks alongside returns on products, rather than to legislate the requirement of “fair and balanced” presentation which would be highly subjective.

3.2 While the MAS does not pre-vet marketing and advertising materials, the members would highlight that recalling and reprinting circulated marketing and advertising materials found to be in breach of marketing restrictions may escalate costs to a prohibitive degree. The members respectfully submit that MAS could agree to informal preliminary reviews through which objectionable material may be identified and removed, though without prejudice to the official MAS position of not endorsing any marketing and advertising materials.

3.3 **For the foregoing reasons, we support the proposal to require marketing materials to present a fair and balanced view of the product by way of specific rules requiring the adequate and prominent display of risks associated with investing in the product.**

3.4 **We support the proposal to introduce restrictions on marketing and advertising materials for unlisted investment products listed in paragraphs 3.3.6 and 3.3.7.**

“Q9(a): MAS seeks views on the alternative proposals:

(i) to prohibit the use of the term “capital/principal protected”; or

(iii) for the industry to develop a standard definition for the term “capital/principal protected” for unlisted investment products.

Q9(b): MAS invites suggestions on how the terms “capital/principal protected” and “capital/principal guaranteed” can be accurately translated into other languages.”

3.5 The members note that a primary concern of retail investors that dictates their buying decisions in relation to investment products is the recoverability of the principal invested. An outright prohibition on the use of these terms would create, in the absence of substitute terminology, a lacuna in communications between the investor, the product provider and their intermediaries.

3.6 The members appreciate the opportunity to assist the development of an industry standard definition for the term “capital/principal protected” and suggest that a definition of the term “capital/principal protected” products should meet the following criteria:

3.6.1 the terms and conditions of the investment product contain a promise by the issuer to return the principal or investment amount in full to the investor at maturity or at certain specified dates;

3.6.2 an investor in a capital or principal protected product may generally expect to receive his principal or investment amount in an investment product in accordance with its terms provided that:

(i) the investor holds the investment product to maturity or such specified dates on which such repayment is due;

(ii) no event of default occurs during the term of the investment product; and

(iii) no early redemption or termination event occurs in respect of the investment product; and

3.6.3 the issuer's obligations in respect of the investment product are not guaranteed by any entity.

3.7 The members note that certain jurisdictions such as Taiwan have developed non-English definitions that distinguish between "capital/principal protected" and "capital/principal guaranteed".

3.8 **We urge the MAS to consult the industry with the view to developing a standard definition for "capital/principal protected" rather than to prohibit usage of the term.**

4. Enhanced Due Diligence for New Products

"Q10(a): MAS seeks views on the proposal to require distributors to put in place formal written policies and procedures to assess the nature of a new product and assess its suitability for targeted customer segments.

Q10(b): MAS seeks views on the proposed due diligence questions.

Q10(c): MAS invites suggestions on how to enhance the due diligence process for new products.

Q11: MAS seeks views on the proposal to enhance existing documentation requirements by requiring FAs to set out in more detail the basis for their recommendation.

Q12: MAS seeks views on the proposal that representatives make reasonable enquiries to obtain key information from the customer.

Q13: MAS seeks views on the proposal to make it an obligation for FA companies to put in place effective systems and internal controls to ensure that their representatives fulfil these obligations."

4.1 **We generally support these above proposals but would emphasize that in requiring distributors to develop criteria for the risk profiling of investors, the element of active discernment in assessing suitability should not be reduced into a checkbox-ticking exercise by virtue of overly rigid risk assessment prescriptions. We would also propose that the key information that representatives should try to obtain from**

the customer include information as regards the customer's financial sophistication and past experience with investment products.

5. Restrictions on Sale Without Advice

> **"Q14: MAS seeks views on the proposal that FAs may dispense with giving advice only when the customer contacts the FAs on his own initiative to purchase the investment product.**
>
> **Q15: MAS seeks views on the proposal to require that FAs warn customers in writing that the customer is waiving his right to receive advice as to whether a product is suitable for him under the FAA."**

5.1 The members would like to clarify that customers that are solicited by FAs retain the discretion to opt out of receiving advice and to purchase products on an "execution only" basis. The members note that customers should continue to be able to exercise their right to privacy.

5.2 The members note that customers may in certain cases, while not refusing advice wholesale, elect to withhold vital information that prevents the FA from ascertaining an investment product's suitability for the customer. In such circumstances the FA should not be obliged to proceed with the recommendation but be able to opt out with the disclaimer that it is the customer's responsibility to ensure suitability of the product selected.

5.3 The members would highlight, with respect to private banks, that many private banking customers appoint their own financial advisors to buy products on their behalf as their agents. The members would respectfully submit in such cases that these customers tend to rely on the advice of their own financial advisors, who may also actively manage the customers' investment portfolios on their behalf. The responsibility of providing advice should therefore rest with the direct financial advisors of the end-customers. As a general rule, the members respectfully propose that the FA's obligation to advise should only arise where there is a direct sales relationship between the FA and the customer, but not where the customer is acting through agents or proxies.

5.4 The members would further like to confirm that this and all other proposals in the Consultation Paper apply only to offers made to retail investors where a prospectus is required. There is no need to enhance the regulatory regime for investors who subscribe for investment products pursuant to an exemption under Subdivision (4) of Division 1, Part XIII of the SFA.

5.5 **For the foregoing reasons, we agree that FAs may be obliged to conduct suitability assessments but such obligation may be precluded by the client opting out of providing requested information or of receiving advice. We seek clarification that the obligation to conduct suitability assessments should not arise where the FA is not in a direct sales relationship with the customer.**

6. Definition of “Complex Investment Products”

> **“Q18(a): MAS seeks views on the proposal to define a complex investment product based on whether or not derivatives are embedded in the investment product.**
>
> **Q18(b): MAS invites suggestions on how the definition of “complex investment products” may better capture the differences between simpler and more exotic derivatives.”**

6.1 The members agree with a comment made by the Hong Kong Securities and Futures Commission in their report entitled “*Issues raised by the Lehman Minibonds crisis. Report to the Financial Secretary dated December 2008*”: “Complexity of the structure of a product does not necessarily mean that the product is an unduly risky investment in normal market conditions.[7]” The problem with defining “complex investment products” with the view to tighter regulation of such products is that it conflates product complexity and product risk. The misconception therefore arises that complex products equate to high risk products and complexity is therefore the premise for greater scrutiny by regulators. This is untrue – for example, a principal protection feature may increase the complexity of an investment product while reducing its risk at the same time.

6.2 The members recognise the argument that complexity may make an investment product hard to understand for retail investors. However, the knowledge that is needed by investors to make informed decisions is not that of the structure of the product but rather the possible outcomes and inherent costs and risks of the product. Complexity of a product does not preclude the comprehensive disclosure of the risks of the product.

6.3 The members would respectfully submit that it may be reductive to introduce umbrella definitions and to subject all derivative-linked products indiscriminately to the same regulatory regime. Where products are greater in complexity and produce a greater range of possible outcomes, more disclosures are required. In this way, the disclosure-based regime applicable to all unlisted investment products tends to adapt to the complexity of the products. There is therefore little basis for an enhanced regime to govern investment products that embed derivatives. Should the MAS wish to reinforce the existing regime, the members would suggest adding specific disclosure obligations relating to derivative elements. The members would be happy to work with the MAS on developing these disclosure obligations.

6.4 Derivatives are often embedded in an investment product as mechanisms for the allocation of risk. As such, they may be useful for the portfolio diversification and risk management strategies of investors. An enhanced regime for derivative-linked products will discourage product providers from creating such products and reduce the market availability of such products, to the detriment of investors.

6.5 **For the foregoing reasons we urge the MAS to reconsider defining investment products with embedded derivatives as “complex investment products” and**

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[7] Paragraph 16.4, page 33 of the report.

subjecting such products to an enhanced regime. We would propose the addition of specific disclosure obligations relating to derivative elements as a more consistent approach.

7. Risk Ratings

7.1 The members note that the MAS has proposed industry initiatives to introduce a risk rating system.

7.2 The members strongly agree with the MAS that a risk rating does not encapsulate all the risks present in an investment product and may instead generate false comfort and lead to uncritical reliance on ratings on the part of investors. The members also strongly agree that attempting to create risk ratings that track market changes or account for material events may be administratively impossible.

7.3 The members would add that a common risk rating system would not be feasible considering the large variation in the assessment of risks across product providers and even across the branches and offices of a product provider. A workable system would require market-wide consensus on and adoption of a single coherent system with a catalogue of risk values that account for the wide spectrum of investment products, their derivative elements and the unlimited entities and obligations that such derivative elements may reference. The members respectfully submit that achieving this would be beyond any means in practical reality.

7.4 **For the foregoing reasons, we are strongly opposed to the creation of a common risk rating system. We consider that proper and adequate disclosure of risks should still remain the basis of regulation.**

8. Mandatory Advice and Health Warning

"Q19: MAS seeks views on the proposal to require the sale of complex investment products to be allowed only with advice.

Q20: MAS seeks views on the proposal to require distributors to put in place additional safeguards to ensure that representatives do not sell complex investment products to customers with limited knowledge of investment products.

Q21: MAS invites suggestions on how the proposals for complex investment products may be adapted for online distributors.

Q22: MAS seeks views on the proposal to require issuers and distributors of complex investment products to incorporate a "health warning" on all disclosure documents, and marketing and advertising materials."

8.1 For the same reasons in paragraph 5.1 above, the members consider that it is crucial for customers to retain their right to privacy. Without the "execution only" model of sale, the retail customers for whom discretion is key, may resist the purchase of such products, reducing demand and diminishing the viability of the market.

8.2 As in paragraph 5.3 above, the members note that certain customers are independently advised and purchase products through their intermediary advisors. The responsibility of providing advice should remain with the direct financial advisors of the end-customers.

8.3 With respect generally to online distribution of investment products, we believe that there should be a level playing field for distribution of investment products, whether through internet portals or through physical branches. An investor who purchases a product through the internet should enjoy the same protection as any walk-in customer to a branch.

8.4 **For the foregoing reasons, we would strongly urge the MAS against further restrictions on the sale of products deemed to be "complex investment products".**

9. Cooling Off Period

> **"Q25: MAS seeks views on the proposal for a cooling off period of seven days for unlisted debentures."**

9.1 The members understand that the imposition of the cooling off period is intended to mitigate high pressure sales tactics. However, the imposition of a cooling off period may encourage moral hazard and prevent investors from doing the due diligence they would otherwise be inclined to do.

9.2 The members note that a cooling off period would result in additional costs which will be passed on to the investor. A cooling off period amounts to product providers effectively selling a short-dated put option to investors, exposing product providers to the movement of the underlying markets and imposing additional costs. Break costs associated with the cancellation of the transaction would also arise. If all such costs are absorbed by the product provider, it may not be viable for the product provider to sell the investment product. If these costs are passed on to the investor, the price of the product may be unattractive to the investor.

9.3 The members recognise that the investment product may alternatively be priced only at the end of the cooling off period. However, investors will in the interim face uncertainty on the price of their investment. Investors also stand to lose any rise in value during the cooling off period; any loss in value may also compel investors to cancel the product regardless of the underlying merits.

9.4 The members are not aware of any major jurisdiction that imposes a mandatory cooling off period for unlisted debentures. Cooling off periods tend to apply to certain categories of products or in limited circumstances. For example, the cooling off period in Article 16 of the EU Prospectus Directive applies only after the publication of any supplement to a prospectus. The introduction of a cooling off period on the sale of unlisted debentures is unprecedented and may consequently limit the range of investment products available to investors in Singapore.

9.5 **For the foregoing reasons, we strongly urge against the introduction of a cooling off period for unlisted debentures.**

10. Appointment of Approved Trustee

"Q26: MAS seeks views on the proposal to require issuers of unlisted debentures, where the offers require a prospectus to be issued, to appoint a trustee approved by MAS.

Q27: MAS seeks views on the proposed specific duties in relation to a trustee approved by MAS."

10.1 The members consider that the mandatory requirement for a trustee assumes in the best case scenario that trustees that are duly empowered would act assertively in realising and safeguarding the interests of the investors. The assumption is problematic in that trustees act only upon having obtained full indemnity for any costs they may incur. The willingness of trustees to act is thereby contingent on retail investors agreeing, collectively, to provide such an indemnity. The consequences are either that the trustee is ineffective in protecting the rights of the debenture holders, or that all relevant debenture holders have to agree to bear the costs arising from the actions of the trustee. We believe that recent events have shown that in those cases where a trustee has been appointed, it has not resulted in greater promptness and effectiveness in safeguarding noteholders' interests. We would respectfully submit that a trustee should only be required where the notes are issued by a special purpose vehicle or where the notes are collateralised and such a trustee is necessary in order to ensure that the collateral arrangements are legally enforceable.

10.2 The members would further highlight that many structured note programmes in Singapore are extensions of the larger global programmes of financial institutions. Such programmes either do not have a trustee for debenture holders or appoint trustees based in London or New York. Under the MAS proposal, the product provider would be required to incur further costs and expenses in separately appointing a trustee for Singapore investors. Consequently, the mandatory requirement of a trustee compounds the certainty of additional costs with uncertainty in the effectiveness of the trustee in protecting investors. The cost-effectiveness of a mandatory trustee is questionable and discourages product providers from offering products in Singapore, impeding the development of Singapore's financial markets.

10.3 For the foregoing reasons, we consider that the appointment of the trustee will not necessarily be effective in safeguarding the rights of investors but will subject product providers to additional costs which may make the offering non-viable. We would strongly urge against requiring the appointment of an MAS-approved trustee.

11. Remedies for Investors

"Q29: MAS seeks views on the proposal to widen the application of the civil liability provision in Part III of the FAA.

Q30: MAS seeks views on the proposal to enable a court to have regard to whether the investor had made a reasonable effort to resolve the dispute before commencing action in court.

Q30: MAS seeks views on the proposal to introduce a "coat-tail" provision in Part III of the FAA."

11.1 The members have no comments generally on the widening of the civil liability regime but would highlight the commercial reality that the increased risk of civil liability means that legal insurance and indemnity costs for distributors rises commensurately. Distributors would consequently earn reduced revenue margins and distributor participation would be reduced in the market for unlisted investment products.

11.2 The members would strongly urge that a "coat-tail" provision has to be limited to actions taken by the MAS and in circumstances where there is a systemic failure on the part of the product provider or FA common to the claims of all litigants (for example, a failure to provide a specific disclosure that results in investor losses). Being that facts of individual claims vary widely and that the grounds of individual claims are inevitably dissimilar, the members would caution against allowing "coat-tailing" on the verdict of a civil penalty action brought by an individual claimant. It would be highly prejudicial for a defendant to have to address a range of compensation claims that, regardless of the individual merits of such claims, automatically achieve the same footing as a single claim that has succeeded on the unique circumstances particular to that claim.

11.3 **For the foregoing reasons, we would strongly urge the MAS to restrict "coat-tail" actions to actions brought by the MAS where the grounds of the claim is common to all affected investors.**

12. Conclusion

We fully support the initiatives of MAS to review and, where necessary, enhance the existing regulatory regime for the sale and marketing of unlisted investment products to retail investors. We are grateful for the opportunity to present our views on the Consultation Paper, and we are committed to working with the Singapore government and regulators in this endeavour to help to re-build confidence in the structured products market in Singapore.

We look forward to the MAS providing, in due course, details of the transitory provisions and compliance timetable in relation to the transition to the new regime for existing unlisted investment products.

Appendix 1

The International Swaps and Derivatives Association, Inc. (**ISDA**) has over 820 member institutions from 57 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities. As such, we believe that ISDA brings a unique and broad perspective, both in terms of the depth of representation across the derivatives industry and in terms of international representation and understanding of the regulatory arrangements in other jurisdictions.

The Securities Industry and Financial Markets Association (**SIFMA**) brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.