ISDA Safe, Efficient Markets

Comments by the International Swaps and Derivatives Association, Inc. (ISDA) on the Consultation Paper on Proposed Amendments to the Securities and Futures Act dated February 2015 issued by the Monetary Authority of Singapore

March 31, 2015

International Swaps and Derivatives Association, Inc.
50 Collyer Quay
#09-01 OUE Bayfront, Singapore 049321
P 65 6538 3879
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

ISDA®

March 31, 2015

Capital Markets Policy Division
Markets and Policy & Infrastructure Department
Monetary Authority of Singapore
10 Shenton Way
MAS Building
Singapore 079117

SFA_FAA_LegisConsult@mas.gov.sg

BY E-MAIL

Dear Sirs,

Consultation Paper on Proposed Amendments to the Securities and Futures Act

A. Introduction:

The International Swaps and Derivatives Association, Inc. ("**ISDA**") [1] welcomes the opportunity to respond to the Consultation Paper on Proposed Amendments to the Securities and Futures Act issued by the Monetary Authority of Singapore ("**MAS**") on February 11, 2015 (the "**Consultation Paper**")[2].

ISDA had previously submitted responses to the Consultation Paper on Proposed Regulation of OTC Derivatives[3] (the "**Regulation of OTC Consultation Paper**") and the Consultation Paper on Transfer of Regulatory Oversight of Commodity Derivatives from International Enterprise ("**IE**") Singapore to MAS [4] (the "**Transfer of Commodity Derivatives Consultation Paper**"), both issued by MAS on February 13, 2012 as well as Consultation Paper I on Proposed Amendments to the Securities and Futures Act on Regulation of OTC Derivatives issued on May 23, 2012 [5] (the "**SFA Consultation Paper I**") and the Consultation Paper II on Proposed Amendments to the Security and Futures Act on Regulation of OTC Derivatives issued on August 3, 2012[6] (the "**SFA Consultation Paper II**").

---

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 67 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

[2] http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2015/Consultation-Paper-on-Proposed-Amendments-to-the-SFA.aspx.

[3] http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2012/Consultation-Paper-on-Proposed-Regulation-of-OTC-Derivatives.aspx and ISDA's submission dated 26 March 2012.

[4] http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2012/Consultation-Paper-on-Transfer-of-Regulatory-Oversight-of-Commodity-Derivatives-from-IE-to-MAS.aspx and ISDA's submission dated 26 March 2012.

[5] http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2012/Consultation-Paper-I-on-Proposed-Amendments-to-the-SFA-on-Regulation-of-OTC-Derivatives.aspx and ISDA's submission dated 22 June 2012.

[6] http://www.mas.gov.sg/News-and-Publications/Consultation-Paper/2012/Consultation-Paper-II-on-Proposed-Amendments-to-the-SFA-on-Regulation-of-OTC-Derivatives.aspx and ISDA's submission dated 31 August 2012.

We commend MAS for responding to the feedback received on the consultation papers described above and for consulting on draft legislative amendments in phases. We also commend MAS for considering the feedback received and incorporating such feedback in the amendments to the Securities and Futures Act (Cap. 289) ("**SFA**"), which was last amended in November 2012 to implement the reforms, such as the reporting and clearing of OTC derivative transactions and the regulation of OTC derivatives trade repositories and clearing facilities. We look forward to continuing our dialogue with MAS on these issues.

Capitalised terms used but are not otherwise defined herein have the meaning given to such terms as set out in the Consultation Paper.

General Observations

Before we address the proposed amendments set out in various Parts of the Consultation Paper and the corresponding draft legislative amendments set out in the Annexes to the Consultation Paper, we would like to make a few general observations:

International Developments, Cross-Border Harmonisation and Regulatory Coordination

In developing the proposals to complete the expansion of its regulatory ambit to regulate OTC derivatives, we commend MAS for taking into consideration the issues previously consulted. Further, we appreciate and commend MAS for continuing to engage with the industry throughout the various consultation papers.

By way of background, we would like to refer MAS to the recent consultation report issued in November 2014 by the International Organization of Securities Commissions ("**IOSCO**") Task Force on Cross-Border Regulation[7] (the "**IOSCO Consultation Report**") to which ISDA responded with comments, which is attached as a Schedule to this submission. In particular, we wish to highlight how over-the-counter ("**OTC**") derivatives markets have been affected by a lack of cross-border regulatory harmonization. The absence of consistency in regulatory reform in the OTC derivatives markets has resulted in real and direct impacts on financial markets, which in turn affects other product areas and, more importantly, threatens the efficiency with which 'real economy' end-users can manage and transfer business risk to the financial markets. In developing its proposals, we urge MAS to keep in mind, the bigger aim of cross border harmonization of derivatives regulation, in its regulation of OTC derivatives in Singapore. We urge MAS to continue observing the reforms in the region and their impact on those markets, and to continue to engage in international regulatory coordination and cooperative efforts for current and future legislative reforms with the aim of achieving cross-border harmonization of such regulations.

Consistency of Legislative Reform and Timing

We commend MAS' efforts in introducing legislation in a manner that allows for flexibility and growth in the future. We believe that this is vital for legislation to continue to evolve in tandem with developments in the OTC derivatives market.

[7] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD466.pdf

While this approach is generally welcomed by the industry, the industry encourages continued discussions relating to primary legislation as well as subsidiary legislation and how these changes may interact. Taking into account the extensive proposed amendments to the SFA, ranging from product definition changes to licensing and conduct of business, the industry is concerned that there may be potential gaps between the policy intent, the drafting of the changes to primary legislation and the potential impact on subsidiary legislation. Such potential gaps require closer scrutiny and consideration and should ideally be minimized. It is important that there be no disconnect or discrepancy between the actual drafting in the primary and subsidiary legislation and the policy intent underpinning both. Consideration should also be given to the interaction between the SFA, related MAS' directives, notices, guidelines as well as other legislation such as the Financial Advisers Act (Cap. 110) ("**FAA**") and the potential impact the proposed changes to the SFA may have on these related regulations.

Continued discussions with MAS will play an important role by allowing the industry to discuss and highlight any issues they may have prior to implementation. The industry requests that sufficient time be given to study the finer details of the subsidiary legislation to ensure that there is no unintended impact on their derivatives business as it is envisaged that many of the actual details and exemptions will be set out in subsidiary legislation. In this regard, the industry seeks guidance from MAS as to which subsidiary legislation will require further amendments and strongly urge MAS to only implement the changes to the SFA after consultation on subsidiary legislation has been finalized.

Response to Specific Parts

The remainder of this submission sets out our comments in relation to the various Parts of the Consultation Paper. Our response in relation to each Part will be divided into two sections - (i) general comments; and (ii) specific comments on the draft legislative amendments.

B. Part A: Amendments arising from the OTC Reforms

1. Amendments to Part I (Preliminary) of the SFA

We note from the Consultation Paper that MAS has addressed the need to review the existing product definitions in the SFA, such as "derivatives contract", "securities" and "futures contracts", in view of adapting the SFA to regulate OTC derivative contracts.

The industry welcomes and supports the revised principles-based definition of "derivatives contract" and considers this an improvement from the existing list-based approach. In moving towards a principles-based definition of "derivatives contract", MAS may wish to consider some of the issues which may arise in taking such an approach, for instance, identifying whether a product should be exempted.

We commend MAS for its efforts in recognizing that OTC derivative contracts are different from those in the securities and futures market such that existing and future provisions of the SFA will need to be amended appropriately to apply them to OTC derivative contracts and market participants. We similarly urge MAS to continue bearing these factors in mind when implementing subsidiary legislation or regulation in connection with the SFA and the OTC derivative market.

As an example, the proposed definition of "derivative contract" includes futures contracts. As there are intrinsic differences between the OTC derivative markets and the futures markets, we respectfully request MAS to carefully consider each relevant Part of the SFA when replacing "futures contract" with "derivative contract". Further the industry seeks clarification from MAS on the treatment of such "futures contract" and how they are intended to be regulated as part of the new regime for "capital market products".

In addition, we note that by amending the definition of a "derivatives contract" as proposed, the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013 (the "**Reporting Rules**") will be impacted. As it stands "futures contracts" are not in-scope under the Reporting Rules. However, once the new "derivative contract" definition comes into effect and without further amendment to the Reporting Rules, "futures contracts" will arguably be in-scope for reporting in accordance with definitions for "credit derivative contract", "foreign exchange derivative contract" and "interest rate derivatives contract" as defined in the Reporting Rules. We seek confirmation that it is not MAS' intention to change the scope of transaction types that are already being reported to the trade repository as it will require firms to change their reporting systems.

We also note that separate sub-sets of "derivative contracts" have been proposed, for example, "securities-based derivative contract" and "exchange-traded derivative contract" in the SFA. As not all derivative contracts are standardized and can be easily classified into the various proposed product definitions, we seek further clarity on how such products will be treated, as certain proposed requirements which had been applicable to securities may not be applicable or relevant to certain securities-based derivative contracts. For example, it is not clear whether a securitized derivative product such as a note, warrant or certificate issued under a programme will be considered a "securities-based derivative contract" or a "debenture"[8]. In the latter category, it may be considered a "security" and carved out from the definition of "derivative contract". Conversely, a single named credit default swap ("**CDS**") may be treated as a "security-based derivative" and therefore subject to the prospectus requirements in the SFA. MAS may wish to consider issuing guidance on the treatment of such product types as a means of providing clarity to the industry.

We set out our specific comments to these definitions in the table below.

Provision	**Comment**
Part I (*Preliminary*) *of the SFA*	
Revised definition of "**derivative contract**" and related definitions:	We seek clarification as to how various product terms are intended to be read together, such as "securities-based derivative contract" as it is not entirely clear from the definition of "securities-based derivative contract" that this falls under a "derivative contract". On the other hand, an "exchange-traded derivative contract" means a derivative contract and a "futures contract" means an "exchange-traded contract", as described in the proposed amendments. However, there is no similar linkage for "securities-based derivative contracts" as this does not explicitly refer back to a

[8] Limb (b) of the definition of "securities" – "*debentures of a government, corporation, body unincorporated, partnership or business trust*".

	"derivative contract". We acknowledge that "underlying things" in the definition of "derivatives contracts" contains a "financial instrument" which includes, among other things, securities and securities index and implicitly covers "security-based derivative contracts". We accept that a separate definition of "security-based derivative contracts" may be needed from a licensing and offers of investment purposes. However, this may create an ambiguity as to whether a "security-based derivative" falls under the ambit of a "derivative contract". For example, a note, warrant or certificate issued under a bank's programme may be considered a "security" and excluded from the definition of "derivative contract". Alternatively, it may be defined as a "security-based derivative contract" and therefore considered a "derivative contract". This is because the proposed definition of "securities" has been amended to cover "shares or any similar instrument representing a legal or beneficial ownership interest in a corporation, partnership, limited liability partnership or unit in a business trust; or (b) debentures of a government, corporation, body unincorporated, partnership or business trust…"[9] and no longer includes "any right, option or derivative in respect of any such debentures, stocks or shares"[10]. This possibly infers that a "security" which has any embedded derivative element may be considered a "derivative contract" as opposed to "securities". Conversely, a single-named CDS may possibly be classified as a "securities-based derivative contract" and therefore may be subject to other requirements in the SFA such as Part XIII - Offers of Investments. The second limb of "derivative contract" refers to a contract having a value that is determined or derived from one or more "underlying things", which then refers to a "financial instrument", among others. For clarity purposes, we suggest that the definition of "financial instrument" should only include "any currency, currency index, interest rate, interest rate instrument, interest rate index, securities, securities index, credit rating, a group or groups of such financial instruments…"[11]. As MAS has the ability to prescribe other asset classes in the future, it may be more prudent to provide certainty by limiting the ambit of this definition. Deposits defined under Section 4B of the Banking Act and Section 2 of the Financial Companies Act are excluded from the definition of "derivative contract". As it is not clear if structured deposits as prescribed under the Financial Advisers (Structured Deposits — Prescribed Investment Product and Exemption) Regulations will

[9] Definition of "securities"
[10] Limb (c) of the current definition of "securities"
[11] Proposed definition of "financial instrument"

	similarly be excluded, we seek clarification on this point. Further, we seek clarification on whether repurchase contracts and securities lending transactions are intended to be excluded from the definition. It is not explicitly clear from the list of exclusions that physically-settled commodity forwards and options are excluded from "derivative contracts" (as noted in Section 3.3 of the Consultation Paper). This is because a "derivative contract" is any contract or arrangement where a party to the contract or arrangement may discharge its obligations, or value of the contract or arrangement is derived from by reference to the value or amount of one or more underlying things. As the definition of "underlying things" includes a commodity, we note that a commodity forward and option, regardless of whether it settles physically or by cash, may be captured in the definition of a "derivative contract". If the intention is for physically-settled commodity forwards and certain options to be excluded, it may be preferable to specifically exclude such contracts from either primary or subsidiary legislation. Separately, we have also provided certain examples below which may be helpful for MAS to consider when scoping the ambit of "derivative contracts". These examples may also be useful when considering the scope of "spot contracts". ▪ **An aircraft or real estate sale**. Under standard terms of an aircraft sale agreement, title does not transfer until a point in the future when certain conditions are satisfied. Parties may not intend this to be a forward agreement, although it may work in a similar way. It may not be clear that the exemption for spot contracts will exclude this and if so, what would be considered a "current spot price" of an aircraft in such an instance. Similar concerns arise with respect to real estate sales, where settlement generally occurs at some point in the future. Even if these were excluded, it may be possible that a wide array of non-derivative-like contracts may be captured. ▪ **A contract for the future provision of services.** For example, the value of such a contract may increase over time, thereby potentially placing it within the definition of a "derivative contract". ▪ **A business transfer**. Again, the date for completion of the transfer will often be a point in the future. We seek clarification as to whether the spot exemption should include such a contract. ▪ **A loan sub-participation**. Such a contract is usually not considered "a derivative contract". As you may be aware, Australia has a principles-based definition

	approach for defining a "derivative contract". In order to appropriately scope the ambit of "derivative contracts", an industry taxonomy overlay was created through the Australian Securities & Investments Commission ("**ASIC**") Regulatory Guide 251[12] which lists out the OTC derivative asset classes and product types.
New definition of "**exchange-traded derivative contracts**" and revised definition of "**futures contracts**"	We understand that a "futures contract" should be viewed as a subset of an "exchange-traded derivative contract"; however, the proposed definitions of "futures contract" and "exchange-traded derivative contract" may be too similar as they both refer to a contract traded pursuant to the business rules or practices of an organized market. As such, it may be necessary to create a meaningful distinction between the two definitions such that unintended and incorrect categorizations may be avoided for an exchange-traded OTC derivative and a "futures contract". As an example, we may wish to consider Enclear contracts; these are traded on Cleartrade (which is incorporated in Singapore) are executed bilaterally and are handled by the exchange as block futures. These should still be considered "futures contracts" rather than OTC derivatives**.** A possible solution may be for a "futures contract" to reference the terms of the contract (other than price) as being non-negotiable. This is an existing concept in Part I of the First Schedule of the SFA in limb 2(2)(b)[13] whereby a futures market does not include a place or facility that allows persons to negotiate material terms (in addition to price). This would then allow for a "futures contract" to be a contract that is traded pursuant to the business rules or practices of an organized market where all of the material terms other than price are determined by the business rules and practices of the market and cannot be negotiated or varied by the parties. Further we seek clarification on whether contracts, which are executed on an organized market such as a swap execution facility ("**SEF**") should be classified as an "exchange traded contract", as such contracts may not necessarily have the characteristics of an exchange-traded OTC derivative.

[12] http://download.asic.gov.au/media/2948586/rg251-published-13-february-2015.pdf, The Australian Securities & Investments Commission, Regulatory Guide 251 Derivative Transaction Reporting, RG 251.66, February 2015.
[13] Current definition of "futures market" in limb 2(2)(b) of Part I of the First Schedule.

New definition of "**securities-based derivative contract**":	As noted above, unlike "exchange-traded derivative contract", the definition of "securities-based derivative contract" does not explicitly refer or relate to a "derivative contract". We would urge MAS to consider the possibility of making this similar to the drafting approach suggested for "exchange-traded derivative contract" if, indeed, the intention is for "securities-based derivative contract" to be a sub-set of a "derivative contract".
Revised definition of "**capital markets product**" and "**dealing in capital markets products**" ("**Second Schedule**"):	The definition of "capital markets product" lists a number of products such as securities, unit in collective investment schemes ("**CIS**"), derivative contract and spot foreign exchange contract "for the purposes of leverage foreign exchange trading". We understand that spot foreign exchange contract has now been qualified to refer to only such types of contracts for the purposes of "leveraged foreign exchange trading" and would like to confirm that our understanding is correct. We refer to Regulation 42 of the Securities and Futures (Licensing and Conduct of Business) Regulations ("**SFR**") and also refer to the Second Schedule. We note that there were no proposed edits to Regulation 42. However, as the revised definition of "capital markets products" now includes collective investment schemes, we would like to clarify if the contract note requirement under Regulation 42 would be applicable to all capital market products or whether it would only apply to "securities" and "securities-based derivative" contract.
New definition of "**spot contract**" and "**spot foreign exchange contract**":	The definition for "spot foreign exchange contract" is missing from the Second Schedule. The definition of "spot contract" requires the intention for a party "to take actual delivery of the underlying thing"[14], without specifying any time constraints by which delivery may take place. We seek clarification that there will be no limit as to when a future delivery may take place. While we commend MAS for including a carve-out of "spot contract" from the definition of "derivative contract", we remain slightly concerned that not all of the contracts which would not typically be considered as derivative contracts are completely excluded.

2. Amendments to Part II (Markets) of the SFA

We note in Section 2.2.1 of the Consultation Paper that MAS intends to regulate entities seeking to operate facilities or markets for the trading of OTC derivative contracts by extending the existing regulatory regime (i.e. either approved as an "Approved Exchange" or

[14] Proposed definition of "spot contract"

a "Recognised Market Operator") for market operators to such entities. In this regard, MAS has proposed introducing a new definition of "organised market" which aims to define a market by its underlying function of facilitating the exchange, sale or purchase of specified products regulated under the SFA, including derivative contracts.

In reviewing the draft legislation for the purposes of this Consultation Paper, members encourage MAS to consider defining the types of trading arrangements which may fall within the definition of an "organised market". For example, it should be sufficiently clear that "one-to-many" trading is outside the scope of the definition of "organised market".

Our more detailed comments to this Part are set out in the table below.

Provision	**Comment**
Part II (Markets) of the SFA and First Schedule	
Section 5 (*Objectives of this Part*):	We would be grateful if MAS would please consider whether it is possible to include the maintenance of market liquidity as an objective of the regulation of organised markets.
Section 15 (*General obligations*):	We would be grateful if you would please consider an alternative term to "investing public" as it is not clear who this is meant to refer to. OTC derivatives market participants are typically sophisticated or high-end investors who meet certain prescribed criteria before joining such platforms and are not typically considered as general public. In this regard, members query the appropriateness for an approved exchange ("**AE**") to consider such interests of the investing public to the same extent as the other obligations listed in Section 15 for example, a fair, orderly and transparent market.
First Schedule, Part 1 – definition of "**organised market**"	In Section 4.6 of MAS' response to the Regulation of OTC Consultation Paper, particularly relating to bulletin boards which perform a price discovery function by facilitating the interaction of bids and offers of market makers, we note that where buyers and sellers can reasonably expect to transact based on information posted on such bulletin boards, MAS considers such bulletin boards to fall within the definition of an "organised market". However, it may not be sufficiently clear from the proposed definition of "organised market" that this is the case. We also note that independent software vendors ("**ISVs**") are not intended to fall within the definition of "organised market". However, it is also not sufficiently clear from paragraph 1(2) of the First Schedule which currently refers to the use "by only one person", that the foregoing is excluded from the definition of "organised market". To ensure clarity, we believe that entities providing quotes to or transacting with counterparties on a "one-to-many" basis are excluded and/or a specific reference to "multiple-to-multiple" trading should be included in the definition. Further,

	in the case of an entity which has an electronic platform used by several legal entities within the same group, we seek clarification as to whether this would be considered as being on a "one-to-many" basis. We note that paragraph 2.2.3 of the Consultation Paper provides that unlike an electronic trading facility, the facilitation of transactions in OTC derivatives via a voice or telephone-assisted should not be considered as activities on an "organised market". Accordingly, any persons facilitating OTC derivative transactions solely through "voice or telephone-assisted" means will be regulated as capital markets intermediaries and not market operators. For clarity, we would urge that the exemption be made clear in the definition of "organized market" in Part I of the First Schedule.

3. Amendments to Part VIA (Reporting of Derivative Contracts) of the SFA

In the proposed definition of "derivatives contracts", "spot contracts" are excluded. "Spot contracts" are contracts for the sale or purchase of any underlying thing at the current spot price. However, in subsidiary legislation, a "foreign exchange derivatives contract" refers to a "derivatives contract which (a) relates to one or more currencies or currency indices; or (b) involves one or more cash flows which are determined by reference to one or more currencies or currency indices, but does not include an excluded currency contract"[15]. It is our view that spot contracts settling at current spot price will be excluded from the scope of trade reporting because the definition of "foreign exchange derivative contract" refers back to "derivatives contract" in primary legislation which has already excluded spot contracts. As such, it is our view that an "excluded currency contract" will no longer be usefully valid because the scope of transactions captured for the purposes of trade reporting would have already excluded spot contracts. As such, we seek clarification on the interaction between "spot contracts" in the definition of "derivatives contract" in primary legislation and "foreign exchange derivative contract" and "excluded currency contract" in subsidiary legislation, i.e., the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013 (the "**Reporting Rules**"). As the reporting of foreign exchange derivatives contracts will commence in May 2015, we seek clarification that firms may continue to rely on the definition of "excluded currency contract" as stated in the Reporting Rules when reporting their foreign exchange derivatives contract to the trade repository. We seek confirmation from MAS that the proposed changes in the SFA such as the proposed definition of "derivatives contract", will not change the scope of the reporting regime that firms are relying on to report their OTC derivatives transactions.

Part (a) of "specified person" in section 124 of the SFA has been amended from "any bank in Singapore licensed under the Banking Act" to "any bank". Under section 125(1), every specified person who is party to a specified derivative contract is required to report information and any amendment, modification, variation or change to such information as prescribed by the authority. With the proposed change to "any bank", this may be viewed as extra-territorial in nature and may extend the regulatory obligation under the SFA beyond the

[15] Part I Section 2(1) (*Definitions*) of the Securities and Futures (Reporting of Derivatives Contracts) Regulation 2013: - "foreign exchange derivatives contract".

licensed branch as it would capture foreign branches of a foreign bank located in Singapore if it is not acting as an agent and may already be subject to a reporting regime in its home jurisdiction. Any change to "any bank" should include a nexus linking the transaction to the bank in Singapore such that it specifically relates to reportable transactions which are traded in Singapore or booked in Singapore, hence, defining the scope of reportable transactions as originally provided for.

The amendment from "enters into" to "executes or causes to be executed" in section 125 of the SFA is of concern as "causes to be executed" has a potentially wide scope. For example, "causing to execute" may be construed to capture a trader in Singapore passing an order to the execution desk in London to be booked in London or a transaction which may not have been executed by an agent in Singapore but where such an agent in Singapore has acted as a conduit to a transaction being booked elsewhere. To this end, members seek clarification on what actions by an agent could be construed as "causing" a derivatives contract to be executed. Further we seek clarification that the concept of nexus for Singapore, as developed after significant discussions with the industry, will be observed for "traded in Singapore" transactions and/or "booked in Singapore" transactions to ensure consistency and promote clarity among the industry.

The industry strongly supports and welcomes the lift on banking confidentiality in the SFA[16] that will allow financial institutions and agents to report customer information for the purposes of complying with MAS' and certain foreign trade reporting obligations. The proposed new section 125(6A) appears to be drafted broadly such that a specified person can report or disclose "any information on a specified derivative contract" in compliance with MAS or the prescribed foreign reporting obligations. While this generally provides members comfort that they can rely on such clause for complying with trade reporting requirements, the industry seeks guidance on the types of "restrictions" the clause was meant to override for example, whether section 125(6A) is intended to solely cover banking secrecy obligations under the Banking Act only or whether it also extends to personal data under the Personal Data and Protection Act, or even the common law duty of client confidentiality.

Provision	**Comment**
Part VIA (Reporting of Derivative Contracts) of the SFA	
Section 124 (*Interpretation*) definitions.	MAS has removed the requirement for a bank to be a "bank in Singapore licensed under the Banking Act" in the definition of "specified person": We seek clarification on the intention behind this change and the rationale to extend the scope to "any bank" given that the list of other "specified persons" have some kind of nexus to Singapore. We believe there should be some kind of nexus to Singapore for a "bank" otherwise it would capture the foreign branches of a foreign bank that is located in Singapore which may unintentionally expand the scope of reportable transaction beyond the "bank in Singapore".

[16] New section 125(6A) of the SFA.

Section 125 (Reporting of specified derivative contracts) and related sub-sections	As noted earlier, Section 125(1) should have a Singapore nexus, similar to section 125(3)(c). Sections 125(2) and (3): We seek clarification that the term "caused to be executed" is not intended to capture persons providing advice and sales and/ or marketing activities. Further we seek clarification that "executes or causes to be executed" will be tied to and governed by the definition of "booked in Singapore" and "traded in Singapore" as stated in the Reporting Rules. Section 125(5) We would like to seek clarification that "deemed reporting" will no longer be accepted and only "delegated reporting" as reflected in the use of "on behalf of the specified person" will now be required. If this is the intent, we respectfully request MAS to consider a transition period to allow affected parties to transition from "deemed reporting" to a "delegated reporting" arrangement. Section 125(6A): It is not clear from the second part of section 125(6A) whether the "restriction imposed by ***any*** prescribed written law or ***any*** requirement imposed thereunder or ***any*** rule of law…" refers to only Singapore laws or whether it is intended to cover regulations in other jurisdictions. We seek clarification that reporting entities may still continue to mask counterparty data as stated in the Fifth Schedule[17] of the 2013 Reporting Regulations[18] and that section 125(6A) would not override the exemption granted to reporting entities with regards to masking of counterparty information for the jurisdictions listed in the Fifth Schedule. We note that the temporary exemption to allow firms to mask counterparty information will expire on October 31, 2015. We seek clarification that the lifting of banking confidentiality in the SFA will occur prior to the expiration of the masking exemption. This is to ensure that there are no gaps in compliance with the banking confidentiality requirements. If the lifting of banking confidentiality in the SFA occurs after October 31, 2015, we respectfully request MAS to consider extending the temporary exemption to mask counterparty information. The safe harbor in section 125(6A) may not be sufficient as it only

[17] Algeria, Argentina, Austria, Bahrain, Belgium, France, Hungary, India, Luxembourg, Pakistan, People's Republic of China, Republic of Korea, Samoa, Singapore, Switzerland, Taiwan.
[18] Section 11 (Deferred reporting of counterparty information in certain cases) of the 2013 Reporting Regulations.

	relates to "statutory obligations" to observe "confidentiality". It may not be clear that common law duty of confidentiality and contractual confidentiality are included in its ambit. It may not also be clear if Section 47 of the Banking Act (Cap.19) and the personal data protection privacy laws under the Personal Data Protection Act 2012 are also included. Section 125(6A)(c) As most firms are already reporting to trade repositories in certain foreign jurisdictions, the lifting of the banking secrecy for the purposes of trade reporting would greatly assist the industry in complying with a particular jurisdiction's reporting obligations.

4. New Part VIC (Trading of Derivative Contracts) of the SFA

We welcome and support MAS' decision to continue to monitor developments and conduct detailed analysis to determine the appropriate conditions prior to imposing a trading regime.

We set out our specific comments below:

Provision	**Comment**
Part VIC (Trading of Derivative Contracts) of the SFA	
Section 129(I)	If a "specified derivative contract" is subject to a trading mandate, the industry urges MAS to consider a lead time for implementation and the types of derivatives contracts that may be subject to this trading mandate. We would also ask that MAS considers how this may interact with any potential mandatory clearing requirement.
Section 129(J)(2) and (3)	We note that a failure to execute a specified derivative contract on an organised market through an approved exchange ("**AE**") or a recognized market operator ("**RMO**") will carry a fine. We seek clarification on whether parties should be given a choice to void or cancel such contracts given that there could be operational and other considerations resulting in that contract being traded off-market and whether MAS would consider exemptions to account for such considerations.

5. Amendments to Part IV and the Second Schedule (Regulated Activities) to the SFA, and the Second Schedule to the SF(LCB) R

We note that MAS intends to introduce the regulated activity of "dealing in capital markets products" which will encompass the existing regulated activities of "dealing in securities", "trading in futures contracts" and "leveraged foreign exchange trading" as well as the new

regulated activity of "dealing in OTC derivatives". To this end, we urge MAS to take into account, when drafting the subsidiary legislation, the intricacies in each of the four activities.

We also note that MAS intends to amend Section 90 of the SFA with respect to the variation of a capital markets services ("**CMS**") licence and the relevant sections in relation to representative notifications in the SFA to give effect to the changes described in Section 2.5.2 of the Consultation Paper. Given that the licensing requirement will be consulted upon at a later time, members will provide their comments at the time when subsidiary legislation is available for public comment.

Provision	**Comment**
Annex 4 – Draft Amendments to the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations	
Regulation (X) – *Exemption from requirement to hold CMS license to deal in capital market products in respect of OTC derivatives*	The concept of dealing for one's "own account" is used in both Annexes 1 and 4 and we seek MAS' guidance on what is defined or considered as "own account" dealing.
Amendments to Part IV and the Second Schedule (Regulated Activities) to the SFA, and the Second Schedule to the SF(LCB) R	The definition of "capital markets product" includes spot FX contract for the purpose of leverage FX trading. We seek clarification as to whether MAS intends to exclude FX trades arranged by licensed banks and banks with accredited or institutional investors from this definition..
	With revisions to the definition of "derivative contract", more products would be regulated under SFA and FAA. Many of the unregulated products form part of the international business, with overseas-based staff advising or dealing with Singapore-based investors. We seek clarification with respect to MAS' intent regarding existing and future business relations between overseas based staff and Singapore-based clients in relation to these products which would become regulated ("**Overseas Business Relationships**"). We would be grateful for MAS' consideration on the following: (a) We would be grateful if MAS would consider grandfathering any of the existing Overseas Business Relationships, and if so, what the defined parameters of the Overseas Business Relationships would be.

	(b) Where existing and new Overseas Business Relationships require paragraph 9 of the Third Schedule of the SFA ("**para 9**") and paragraph 11 of the First Schedule of the FAA ("**para 11**") approvals (i.e. local entity with foreign related corporations), we seek clarification as to what the approving criteria would be. Given that derivative contracts may be recently regulated or in the midst of being regulated in other jurisdictions, the current criteria set out in the para 9 application guidelines may not necessarily be applicable, for example, paragraph 3.2(e). If the criteria of para 9 and para 11 arrangements change, this may affect current business models and practices, potentially resulting in a significant impact on certain business entities. (c) In the absence of para 9 and 11 approvals, we would be grateful if MAS could provide guidance on the accepted approach for parent-branch set ups. While financial institutions may continue to appoint foreign based representatives on the Representative Notification Framework ("**RNF**"), we note that the number of overseas-based representatives who may be appointed is subject to MAS' approval.
X.(1)(c)(ii)(E)	Given that OTC derivative contracts may be recently regulated or in the midst of being regulated in other jurisdictions, other jurisdictions may not have an established licensing or registration system in place for derivatives as yet. We understand that the list of counterparties as set out in paragraph X.(1)(c)(ii) do not cover entities that are allowed to trade OTC derivatives in other jurisdictions without an OTC license. We also understand that the intention of the exemption under paragraph X(1)(c) is to exclude proprietary transactions which are generally out-of-scope for licensing. However, we have also received comments that the current drafting may exclude trades which are truly proprietary in nature and may make an arbitrary differentiation between proprietary trades with banks or OTC derivatives licensors on one hand and proprietary trades with investment firms on the other hand. In order to achieve the legislative intention, paragraph X.(1)(c)(ii)(E) may need to be amended to include entities that are otherwise permitted to trade OTC derivatives even without an OTC license.
X.(1)(c)(iii) and X.(2)	We understand that the intention of paragraph X.(1)(c) is to exclude OTC market making activities from the licensing exemption. A possible consideration may be to refer to a market-maker as one who provides two-way-quotes. This may avoid catching activities that are not truly market making in nature. For example, in certain firms, it is very common for certain traders to trade for a related corporation and in return, the employment entity

	of the traders would receive arms length compensation/remuneration in accordance with applicable Tax Transfer Pricing Guidelines provided by Inland Revenue Authority of Singapore ("**IRAS**") and the Organisation for Economic Co-operation and Development ("**OECD**") and internally adopted tax transfer pricing policy. Such activities are merely internal trading arrangements and should not be treated as market making activities.

C. Part B: Transfer of Regulation of Commodity Derivatives from CTA to SFA

Members welcome MAS' approach to transfer the regulatory oversight of commodity derivatives (except spot commodity transactions) from the CTA to the SFA as previously consulted in the Transfer of Commodity Derivatives Consultation Paper and do not have material concerns over such a transfer. The commodity derivative market is unique and has characteristics which are different from those of financial derivatives, not only with respect to the underlying asset but also in the role played by such market participants. We urge MAS to continue to take these factors into account when considering the regulatory framework that should apply to commodity derivatives. Relevant exemptions should also be appropriately migrated to the SFA such that it causes minimal disruption to market participants that were regulated under the CTA.

We note from Section 3.3 of the Consultation Paper that MAS intends to exclude (i) physically-settled commodity forward contracts and (ii) certain commodity contracts which contain some form of optionality (for example, option for non-delivery) from the scope of regulation under the SFA. However, these contracts are not reflected in the exclusions to the proposed definition of "derivative contract" in the SFA. If the intent is to exclude physically-settled commodity forwards and certain commodity contracts with some form of optionality, we believe there may be a need to specifically exclude such contracts either in primary or subsidiary legislation. We welcome the opportunity for further consultation on this matter.

Provision	**Comment**
Annex 1 – Draft Amendments to the SFA	
Definition of "commodity"	It may not be explicitly clear from the definition of "commodity" that minerals, precious metals and oil (as intended in Footnote 3 of the Consultation Paper) are included in the definition as they may not necessarily fall under "any produce, item, goods, article". We seek clarification as to whether intangible commodities such as OTC electricity or power derivatives and futures will be included within the SFA.
Annex 3 – Draft Amendments to the Commodity Trading Act (CTA)	

Paragraph (X)(y) - Amendment to Section 58(2) (*Proceedings by whom and when to be taken and power to compound*) of the CTA	Annex 3 expands the scope of Section 58(2)[19] to include "an offence under a provision that has been repealed". We seek clarification from MAS on the intention behind this amendment as it infers an ability to fine a person under a provision that has already been repealed. If so, we seek clarity as to the length of the look back period, i.e. whether this is intended to include all repealed provisions as at a specific date or from the inception of the CTA itself.
Amendments to Schedule (Exemptions) to the CTA, in particular: Paragraph (X)(zc) – Deletion of sub-paragraphs (a) to (d) of paragraph 1	As paragraphs (1)(a) to (d) will be deleted from the Schedule (Exemptions) of the CTA, we seek clarification if paragraphs (1)(a)(i) and (1)(a)(ii) will also be included as part of the exemptions in the SFA.
Annex 4 – Draft Amendments to the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations	
Paragraph (X) – *Exemption from requirements to hold capital markets services licence to deal in capital markets products in respect of over-the-counter derivatives contracts*	We support the migration of exemptions for persons who deal in OTC commodity derivatives only with accredited investors or institutional investors and persons who are approved Global Trading Company. We request that the exemption in paragraph 1(b) is also extended to persons who deal in OTC commodity derivatives with expert investors as well (notwithstanding proposed deletion of the expert investors concept under the consultation to Enhance Safeguards to Investors in the Capital Markets), given that persons who deal in such products as part of their business have a high degree of expertise even if they may be trading via a vehicle that does not meet the S$10m net asset test, as prescribed under Section 4A(ii) of the SFA

D. Part C: Other Amendments to the SFA

We set out our specific comments below:

Amendments to New Part VIIA (Short Selling) of the SFA

We note that in the 7 February 2014 consultation jointly issued with Singapore Exchange, MAS proposed to introduce a short position reporting regime, under which participants with net short positions above certain thresholds would have to report the positions to MAS. To

[19] The Board may, without instituting proceedings against any person for an offence under this Act or any regulations made thereunder, which is punishable only by a fine, demand and receive the amount of such fine or such reduced amount as it thinks fit, from such person, whereupon —

(a) if that person pays that amount to the Board within 14 days after the demand, no proceedings shall be taken against him in relation to the offence;

(b) if that person does not pay the amount so demanded, the Board may cause proceedings to be instituted in relation to the offence.

effect the regime, MAS proposes to introduce a new Part VIIA on Short Selling in the SFA which aims to set out the regulatory framework for (i) the marking of short sell orders and (ii) short position reporting.

We would be grateful if MAS is able to provide guidance on the types of "specified capital markets products" it intends to prescribe for the purposes of this short position reporting regime. Given that it will take time to put in place the necessary processes and systems to track the short selling of such products, we would be grateful if MAS would consult the industry on its proposals and allow a sufficient phase-in period for its implementation.

Provision	**Comment**
Amendments to New Part VIIA (Short Selling) of the SFA	
New part VIIA (Short Selling) of the SFA – para 137ZK	We seek clarification as to whether the intent of the short selling framework is to cover cases where the client has an obligation to deliver shares it does not hold under a derivatives contract (for instance, an uncovered call option) or if the intent is to cover only shares which are listed on an exchange. We also seek clarification regarding the obligation and responsibility of reporting the net short position under para 137ZK. As noted above, we seek guidance on the implementation timeline, taking into account the operating aspects of the reporting requirement.

Amendments to Part XII (Market Conduct) of the SFA

Provision	**Comment**
Part XII (*Market Conduct*)	
Section 196	Please note our earlier comments with respect to "derivative contracts" and "securities-based derivative contracts".
Section 197 (*False trading and market rigging transaction*)	We seek clarification as to whether Section 197 which deals with false trading and market rigging transaction is intended to apply to "securities-based derivative contracts". It may be argued that Section 197 may be more suitably applied to contracts such as "exchange-traded contracts" which are traded on the open market as opposed to OTC derivatives contracts which are priced and traded bilaterally. Therefore, it may be said that provisions dealing with false trading and market rigging transaction may be better suited to preventing such misconduct relating to the transparency of a market or the veracity of prices which are traded on an organised market. We note that Section 197 refers to "organised market". However in Section 197(2), there does not appear to be a specific reference to

	"organised market". Instead this subsection appears to cover, for instance, securities-based derivative contracts. We therefore seek clarification as to whether Section 197 is intended to apply to "securities-based derivative contracts" as this may include OTC derivative contracts which are traded bilaterally.
Section 215 *(Information generally available* Section 216 *(Material effect on price or value)*	We note that Sections 215 and 216 have been amended to include references to "securities-based derivative contracts". Taking this into account, we seek clarification as to the meaning of "persons who commonly invest" as set out in Section 215(b)(i) and Section 216.

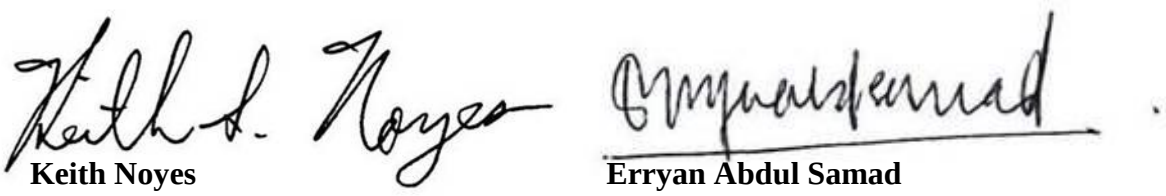
Amendments to Part XIII (Offers of Investments) of the SFA

Provision	**Comment**
Part XIII (Offers of Investments)	
Section 239	As a "securities-based derivative contract" is included in the definition of "investments" and may capture an OTC derivative such as a single-named CDS, we proposed that such OTC derivative contracts be excluded from the prospectus requirements under the SFA as we do not believe that the prospectus requirements are intended for and should be imposed on bilateral OTC derivative contracts which are not offered to the public at large.

ISDA appreciates the opportunity to provide comments on the Consultation Paper. If you have any questions on this submission or would like to further discuss any other topics, please contact Keith Noyes at (knoyes@isda.org, at +852 2200 5909) or Erryan Abdul Samad (eabdulsamad@isda.org, at +65 6222 4526) at your convenience.

Yours sincerely,

For the International Swaps and Derivatives Association, Inc.



Keith Noyes
Regional Director, Asia Pacific

Erryan Abdul Samad
Counsel, Asia

ISDA

Schedule
ISDA's Response dated 23 February 2012 to the
The International Organization of Securities Commissions ("IOSCO")
Task Force on Cross-Border Regulation Consultation Report

February 23, 2015

Ms. Rohini Tendulkar
IOSCO General Secretariat,
C/ Oquendo 12, 28006 Madrid.

Re: Public comment on the IOSCO Task Force on Cross-Border Regulation Consultation Report

Dear Ms. Tendulkar,

The International Swaps and Derivatives Association, Inc. (ISDA)[20] appreciates the International Organization of Securities Commissions (IOSCO) Task Force on Cross-Border Regulation's engagement with the industry throughout this consultation process. ISDA has previously submitted comments to the Task Force on a number of specific issues, and highlighted how over-the-counter (OTC) derivatives markets have been affected by a lack of effective cross-border regulatory harmonization[21]. OTC derivatives markets have historically been the most global in nature of all financial markets, and the absence of consistency in regulatory reform is having a direct impact on these markets as a result. This also affects other product areas and, more importantly, threatens the efficiency with which 'real economy' end-users can manage and transfer business risk to financial markets.

We appreciate the efforts of the Task Force, in this latest Consultation Report, to identify tools at a regulator's disposal to address cross border regulation. In this letter, ISDA reiterates how cross-border regulatory harmonization could be achieved, and suggests ways in which IOSCO can reduce undesirable regulatory outcomes that threaten the efficient functioning of markets. ISDA's sees this harmonization as the start to assisting the market generally, with respect to the application of any tool by the relevant competent authority(ies) in the context of the cross border regulation of securities market activities.

With respect to the cross-border regulatory tools identified in the consultation paper, ISDA considers that recognition offers most flexibility and adaptability across different markets

[20] Since 1985, ISDA has worked to make the global OTC derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 67 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.
[21] ISDA comment letter dated May 29, 2014; http://www2.isda.org/functional-areas/public-policy/united-states

whilst also being consistent with the statement of the G20 Leaders in 2013 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"[22].

1. Managing cross-border regulatory conflict – IOSCO role

IOSCO is one of a number of international organizations that have the ability to influence cross-border regulatory coordination. The Basel Committee on Banking Supervision (BCBS) has a significant role in many areas, as does the Financial Stability Board (FSB). Notwithstanding this, ISDA believes the IOSCO task force can realistically propose improvements in the way its members coordinate activities that have cross-border implications, as well as the future role of IOSCO in the international regulatory community. To this end, we note and generally support the suggestions on IOSCO's role regarding cross-border issues set out in section 8 of the consultation paper and have identified several specific areas where IOSCO's expertise and leadership can make a significant improvement in the consistency of current and pending rules.

As noted by ISDA in its previous comment letter[23], many of the current cross-border challenges exist due to the fact that there is an inherent focus on domestic markets at the IOSCO member level. National securities regulators are generally explicitly required to consider the impact of their conduct (including rule-making, supervision and enforcement) on their domestic market as a priority, rather than consider any effect outside their jurisdiction. Further, securities regulators may face constraints in fully implementing IOSCO standards or recommendations, particularly in the realm of rule-making.

This domestic focus explains some of the challenges IOSCO and its members have faced in implementing the Group of 20 (G-20) commitments in a way that avoids fragmentation of markets, protectionism and regulatory arbitrage between different jurisdictions[24]. Smooth global implementation of the G-20 commitments has been further impeded by insufficient cooperation and coordination among securities regulators as the assessment of the various principal regulatory tools currently utilized by surveyed jurisdictions to regulate cross-border securities market activities identifies.

We note that the consultation paper reports "little support" for IOSCO to facilitate the settlement of disputes arising from the assessment of foreign regulatory regimes. However, it is ISDA's view that IOSCO is uniquely placed to facilitate resolution of disputes between jurisdictions and ISDA supports a stronger, more active role for IOSCO in this field. In certain areas of international rulemaking, such as benchmarks, margin for uncleared trades and principles for financial market infrastructure, IOSCO has taken a lead in developing international rule standards ahead of national implementation, and we strongly support this template for future rulemaking. In the case of many of the cross-border challenges, however, national rules were written ahead of international consensus, but there is a role for IOSCO here also. IOSCO should develop and implement principles-based standards for resolution of differences between jurisdictions, provide a forum for discussion of disputes and

[22] G20 Communique: Meeting of Finance Ministers and Central Bank Governors, Sydney, 22-23 February 2014.
[23] See footnote 2, above.
[24] http://www.mea.gov.in/Images/pdf/pittsburgh.pdf.

consider the institution of an arbitration or college type process for resolution of matters of international importance.

In section 2, we repeat a number of proposed principles that we believe IOSCO and its members could adopt to promote cross-border regulatory coordination. Whilst we appreciate that the principles focus on coordination on the development and implementation of IOSCO standards that may have a cross-border impact, we believe that ultimately, such common standards are necessary to facilitate cross-border supervisory coordination and the application by each national authority of the tool most suited to its jurisdiction on the basis of a harmonized outcomes based approach.

In section 3, we discuss the cross-border regulatory tools identified and discussed in the consultation paper.

In section 4, we highlight specific areas in which we see opportunities for leadership of cross-border harmonization initiatives.

2. ISDA principles for inter-jurisdictional recognition of derivatives regulation

ISDA supports adherence to the following principles, as regulators address the causes of and solutions for harmful extraterritorial regulation.

1) An effective framework should be grounded in the declarations issued by the G-20 following the Pittsburgh and Cannes meetings.

The five G-20 goals are the basis of derivatives regulatory reform and should be met through regional or national efforts to achieve consistency and avoid fragmentation of global markets. These goals include: clearing of standardized derivatives; exchange/electronic trading, where appropriate; reporting to trade repositories; higher capital requirements for non-cleared trades; and margin requirements for non-cleared trades.

2) In order to minimize burdens on regulators, maintain global markets and avoid market fragmentation, regulators at international, regional and national level should evaluate individual regimes to allow for a principles-based approach to cross-border compliance.

Such evaluation should take place throughout the regulatory process, to facilitate early and preventative identification of issues in the formation of regulation and to assist in the resolution of disputes concerning the application of any embedded regulation.

3) For purposes of substituted compliance or equivalence, comparisons of one jurisdiction's requirements to another's may use a variety of analytical methods, all of which must start with identification of a set of common principles that elaborate on the G-20 regulatory goals.

In this way, regardless of the tool employed by a jurisdiction, the burden of inconsistent and conflicting regulatory requirements can be minimized.

4) Ultimate decisions regarding comparability require not only a bilateral dialogue between regulators, but also a transparent process.

Decision by national authorities regarding substituted compliance and comparability determinations must be done in consultation with industry participants.

5) Regulators should consult and cooperate with each other before implementing their derivatives regulations.

ISDA believes that IOSCO can play a vital role in facilitating bilateral or multilateral inter-jurisdictional recognition efforts, which will greatly help markets to progress to a consistent international framework that avoids duplication or jurisdictional over-reach.

ISDA has (in August 2013) published examples of how these principles can apply to various areas within derivatives regulation. These examples have been developed and organized in relation to three of the five primary goals of derivatives regulation issued by the G-20[25].

3. The cross-border regulatory toolkit

ISDA continues to maintain that cross-border regulatory harmonization is key to addressing the negative impacts of conflicting extra-territorial regulation. With harmonized regulatory principles, the application of any of the tools identified in the consultation paper is facilitated and the negative impacts of conflicting requirements mitigated.

That said, of the three tools identified, ISDA considers that national treatment does not really constitute regulatory coordination, as such. Whilst we acknowledge the concept of accommodations for foreign entities, such accommodations are limited in scope and do not prevent market participants from being subject to duplicative regulatory regimes. Even where regulatory harmonization has or can been achieved, the duplicative nature of national treatment would still have at least financial consequences for the regulated entities which in turn would undoubtedly impact end-users. This duplication also contradicts one of the reported aims of national treatment, namely, to treat all relevant entities the same and to create a level playing field.

Concerning passporting, ISDA supports this tool where available however does not consider it suitable for all markets. To be effective, any regulatory tool has to give all affected markets the security that it continues to offer appropriate protections for domestic investors and market participants and the stability of domestic markets. ISDA does not consider that passporting offers the flexibility required to accommodate developing markets.

It seems to ISDA that of the three tools discussed, recognition is the most adaptable across markets and regions. It also offers the potential to reduce the burden of duplicative regulation. Again, however, the utility of recognition does depend upon regulatory harmonization.

[25] Please see the links below, to access these examples, as well as a more detailed methodology for regulatory comparisons:
http://www2.isda.org/attachment/NTgwOA==/Common%20Principles%20-%20Examples%2020130820.pdf
http://www2.isda.org/attachment/NTgwNw==/Methodology%20for%20Regulatory%20Comparisons%2020130820.pdf

We would also observe that in the interests of certainty, the guidelines applied by regulators should be consistent and transparent and focused on outcomes rather than a line-by-line comparison of regulation. As flagged in section 2 above, we consider this to be a role that IOSCO would be well placed to facilitate.

4. Opportunities for Leadership

As we noted in our prior letters, there are specific areas of conflicting regulations that require immediate resolution. These problematic areas are: (1) clearing, (2) trade reporting, (3) trade execution, (4) resolution and recovery regimes, and (5) margining for non-cleared derivatives.

(1) Clearing

One of the most urgent cross-border issues that has to be tackled is clearing.

US rules require foreign central counterparties (CCPs) to either register as derivatives clearing organizations (DCOs) with the Commodity Futures Trading Commission (CFTC) or obtain exemption from registrations with the CFTC. These rules prevent US clients from clearing with foreign CCPs that are not registered or exempt from registration with the CFTC.

To complicate things further, Europe's equivalence determinations for US central counterparties (CCPs) and other European and non-European banks have not been completed. Absent such determinations, US CCPs, and European banks are not allowed to act as clearing members of any CCP in a non-equivalent jurisdiction, while Europe's Capital Requirements regulation prevents these entities from applying the lowest possible 2% risk-weight for cleared exposures.

If the equivalence issue is not resolved as soon as possible, European, US, South Korean and Indian clearing members will face potentially large losses unwinding cleared position in a market that knows that these unwinds must take place.

To prevent such a devastating outcome, we encourage IOSCO to assert its leadership role in bringing the appropriate national authorities to the table to resolve these pressing issues.

(2) Trade Reporting

The other area that deserves immediate attention is trade reporting. Implementation of the G-20 trade reporting commitment across jurisdictions has lacked the necessary coordination to achieve harmonized reporting regimes. This has caused a disjointed and costly network of reporting obligations, with market participants reporting to a multiplicity of trade repositories on different bases.

As a result, despite having access to more information than ever before, regulators lack a completely consolidated view of the true risk picture, and they currently have no means of aggregating data.

For example, single-sided reporting is required for OTC derivatives in the US[26], while Europe requires double-sided reporting of OTC and exchange-traded derivatives[27], as well as collateral reporting[28]. The differences between the US and European reporting requirements mean that separate systems need to be built to meet each reporting requirement. This is costly and duplicative.

In the meantime, Hong Kong, Singapore, Australia, Malaysia, Taiwan, China, India and South Korea have all been developing their own reporting regimes. There are differences in reporting fields, reportable products and other elements in each jurisdiction, and this only makes it more challenging to build an efficient data capture system.

A consistent cross-border trade reporting regime will promote comity and will allow national authorities to conduct a meaningful oversight of the derivatives market.

(3) Trade Execution

ISDA believes that it is critical that G20 members, under IOSCO's leadership, start the process of translating the G20's general intent to encourage centralized trading into to a set of common principles to avoid regulatory disparity, market fragmentation, low trading liquidity, and duplicative compliance requirements.

In this regard, we urge IOSCO to engage with other national authorities to achieve mutual recognition of various trading venues based on substituted compliance to ensure regulatory consistency across jurisdictions.

(4) Resolution and Recovery regimes

In our past submissions we listed a host of issues that have to be addressed in this area. One significant issue that is worth reiterating here is that the current legal framework in Europe does not guarantee that the resolution measures taken by the home jurisdiction of a bank will be recognized by a host country where the bank has significant assets. This poses a serious issue for resolving systemically important financial institutions (SIFIs).

(5) Margining for non-cleared derivatives.

The conclusions reached by BCBS-IOSCO on margining for non-cleared OTC derivatives is an example of positive global-level regulatory coordination, in an effort to avoid fragmentation, protectionism and regulatory arbitrage.

Nevertheless, there remain potential differences at the national and regional level, either due to insufficient granularity in the BCBS-IOSCO rules or because of differences in scope in primary legislation in different jurisdictions. For example, without an agreement on the scope of entities subject to the margin requirements, national level rules could apply to swap dealers and major swap participants in one jurisdiction or to all financial counterparties and certain non-financial counterparties in another. Similarly, the treatment of certain

[26] Part 45, Dodd-Frank Wall Street Reform and Consumer Protection Act
[27] EMIR Regulation, Article 9
[28] EMIR delegated regulation (ESMA regulatory technical standard) n°148/2013, article 3 and annex I for application of EMIR regulation article 9.5.

instruments, such as foreign exchange swaps and forwards, may be inconsistent across jurisdictions due to statutory restrictions.

Conclusion

Insufficient cross-border cooperation risks market distortion, fragmentation, a reduction in competition and higher costs for end-users seeking to hedge commercial risks, with negative consequences for investment and economic growth and ultimately end-users. Inconsistencies and divergences in the regulatory approach of different jurisdictions can subject market participants to duplicative and/or conflicting requirements and creates the potential for regulatory arbitrage.

Whilst we fully appreciate the requirement for authorities to maintain appropriate levels of investor protection and to prevent the importation of risks, such assessment cannot be done without considering cross-border issues and the potential impact on fair and effective global financial markets. There needs to be a renewed and concerted international focus to avoid further fragmentation and to remediate existing fractures.

Ultimately, cross-border harmonization is key but cross-border cooperation and recognition also play a fundamental part in avoiding unnecessary duplicative or conflicting regulation. To this end, ISDA sees recognition as the most adaptable of the tools discussed in the consultation paper.

Additionally, ISDA considers that IOSCO is uniquely placed to facilitate resolution of disputes between jurisdictions and supports a stronger, more active role for IOSCO in this field. In certain areas of international rulemaking, such as benchmarks, margin for uncleared trades and principles for financial market infrastructure, IOSCO has taken a lead in developing international rule standards ahead of national implementation, and we strongly support this template for future rulemaking. In the case of many of the cross-border challenges, however, national rules were written ahead of international consensus, but there is a role of IOSCO here also. IOSCO should develop and implement principles-based standards for resolution of differences between jurisdictions, provide a forum for discussion of disputes and consider the institution of an arbitration or college type process for resolution of matters of international importance.

Such an international forum for dialogue and resolution of potential national concerns is central to developing trust between regulators and to ensuring that workable implementation initiatives and timelines are agreed. ISDA considers such global cooperation the optimal way to ensure consistent global general principles and effective outcomes-based cross-border recognition whilst allowing each market to adopt the tool best suited to its needs, provided that its application meets the agreed general principles.

As the trade association representing the world's most global financial business – OTC derivatives – ISDA appreciates the opportunity to comment on extraterritoriality issues. We also welcome the initiative taken by IOSCO to address extraterritoriality-related concerns in its Task Force on Cross-Border Regulation. We would be happy to elaborate on these concerns should IOSCO have any further questions on the views expressed herein.

ISDA®

Sincerely,

Scott O'Malia
Chief Executive Officer
International Swaps and Derivatives Association, Inc.