ISDA Safe, Efficient Markets

BY EMAIL

To: Wholesale Markets, Market Conduct
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Australia: Consultation Paper 389 - Proposed regulatory guide on pre-hedging

The International Swaps and Derivatives Association, Inc. [1] ("**ISDA**") appreciates the opportunity to engage with the Australian Securities and Investments Commission ("**ASIC**") in relation to ASIC's consultation ("**Consultation**") on the draft regulatory guide for market participants on pre-hedging and would welcome the opportunity to have further discussions with ASIC with respect to pre-hedging.

We refer in this letter to:

(a) the Consultation Paper 389: *Proposed regulatory guide on pre-hedging* dated June 2026 ("**Consultation Paper**");

(b) the draft ASIC Regulatory Guide 000: *Pre-hedging*, attached to the Consultation Paper ("**Draft Regulatory Guide**", and the Regulatory Guide to be introduced on pre-hedging the "**Regulatory Guide**");

(c) the *Pre-Hedging Final Report* published by the Board of the International Organization

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 79 countries. These members comprise a broad range of 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, such as exchanges, intermediaries, clearing houses 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 website: www.isda.org.

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of Securities Commissions ("**IOSCO**") in November 2025 ("**IOSCO Final Report**");

(d) ASIC's guidance for market intermediaries on pre-hedging dated 1 February 2024 ("**ASIC 2024 Guidance**"); and

(e) the response by ISDA and the Futures Industry Association ("**FIA**") to IOSCO's consultation report on pre-hedging ("**ISDA/FIA IOSCO Response**").[2]

ISDA has been actively engaged for many years in contributing to discussions on pre-hedging issues internationally, including providing the ISDA/FIA IOSCO Response. ISDA would like to thank ASIC for its continual efforts to ensure that the Australian regulatory framework remains globally aligned with efforts to ensure safe and efficient markets, including on pre-hedging.

Summary of submissions

At the outset, ISDA wishes to emphasise the importance of international consistency of regulatory approaches to pre-hedging, including alignment with the IOSCO Final Report. In this regard, ISDA acknowledges and welcomes that the Draft Regulatory Guide expressly contemplates aligning ASIC's guidance with the recommendations in the IOSCO Final Report. ISDA also wishes to acknowledge ASIC's efforts in recognising the benefits and risks of pre-hedging and developing its policy with consideration of the regulatory and financial impact of its proposed approach.

An appropriate, consistent and well-understood framework for pre-hedging is important for safe and efficient markets. As the Draft Regulatory Guide states:[3]

> *Pre-hedging can support the effective functioning of markets by improving execution and risk management in certain circumstances.*
>
> *At the same time, pre-hedging can introduce market and conduct risks. These risks must be managed carefully so any benefits are realised for markets and clients, not just for the market participant.*

As noted in the ISDA/FIA IOSCO Response, ISDA agrees that compliance with all applicable rules and regulations is essential for appropriate pre-hedging activity. Within applicable rules and regulations, our members have a variety of views on pre-hedging – many view it as essential for risk management, facilitation and market liquidity while others have objections to it. Appropriate disclosure and transparency are key for clients to understand liquidity providers' approach to pre-hedging and structure transactions accordingly.

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2 The ISDA/FIA IOSCO Response is available at: https://www.isda.org/a/FvNgE/ISDA-and-FIA-response-to-IOSCO-re-pre-hedging.pdf.

3 Draft Regulatory Guide, RG 000.09 - RG 000.10.

In summary, ISDA respectfully submits that:

(a) ***Consistency with the IOSCO Final Report and existing Global Codes***: The Regulatory Guide should:

   (i) be consistent with, and not go beyond, IOSCO's guidance in the IOSCO Final Report; and
   (ii) should be consistent with existing industry codes that policymakers and market participants have previously been involved in developing, most notably the FX Global Code, the Precious Metal Code and the FMSB Standard for Large Trades ("**Global Codes**"), in the circumstances in which those Global Codes apply.

Changing the Draft Regulatory Guide to ensure this consistency would help support a level playing field across different markets and promote consistency in the understanding of, and regulatory approach to, pre-hedging internationally. Inconsistencies between ASIC's guidance and the IOSCO Final Report and existing Global Codes are likely to create uncertainty, unintended consequences and adverse impacts on Australian derivatives markets. Market participants already have policies, procedures and institutional frameworks in place to comply with these Global Codes and, in many cases, such compliance is monitored by local regulators. Achieving consistency with international standards is especially important for issues such as any requirement for trade-by-trade disclosure or consent (particularly trade-by-trade client consent), internal controls identifying pre-hedging transactions, and reviews of pre-hedging for transactions outside of a market participant's general supervision framework, noting that each of those requirements go beyond the IOSCO Final Report. This comment is intended to respond to ASIC's specific questions B1Q1, B1Q2, B1Q3 and B1Q4;

(b) ***Proportionate, principles-based and risk-based***: The Regulatory Guide should be proportionate, principles-based and calibrated to the risks, market context and circumstances faced by market participants and clients. This should allow market participants to implement the guidance in a manner appropriate to their circumstances, whilst allowing controls and governance to evolve over time. Accordingly, guidance should not be overly prescriptive in imposing or implying additional requirements beyond the existing Australian legal requirements (taking into account existing laws and regulations, including those relating to market misconduct, best execution and client fairness). Also, suggestions by ASIC as to approaches to be taken by market participants (including Observed Better Practices) should be expressly described as not exhaustive and not indicative of minimum requirements. For example, the "Purpose of this guide" section could acknowledge that:

   (i) ASIC's guidance should not be interpreted as exhaustive;

(ii) it is appropriate for a participant, when undertaking the activities contemplated in the Regulatory Guide, to take into account the size, risk and complexity of any particular transaction and the type and sophistication of, and relationship with, any particular counterparty and
(iii) appropriate approaches to pre-hedging may differ depending on asset class, business sector, risk profile, counterparty and other factors;[4] and

(c) ***The Better Practices should not be included in the Regulatory Guide***: The Better Practices should not be included in the Regulatory Guide. This is because the Better Practices (and parts of the Draft Regulatory Guide more generally) go beyond the guidance set out in the IOSCO Final Report. Including guidance that goes beyond the IOSCO Final Report (including the Better Practices) in the Regulatory Guide is likely to:

(i) create uncertainty and confusion as to whether the measures are simply examples of "observed better practices" or whether they are de facto minimum standards or conduct that should be required or at least expected from all market participants;
(ii) impose additional cost on market participants participating in the Australian market, with limited benefit or utility; and
(iii) result in an uneven playing field for those participating in the Australian market compared to other comparable markets.

If ASIC determines to include Better Practices in the Regulatory Guide, ISDA respectfully requests that ASIC amend the Better Practices as described in this submission. This includes that ASIC distinguish clearly between: (i) guidance supporting core requirements under Australian law; and (ii) non-exhaustive examples of better practice that do not purport to create regulatory expectations for conduct or set minimum requirements with which market participants are required to comply. This comment is intended to respond to ASIC's specific questions B2Q1, B2Q2, B2Q3 and B2Q4.

In relation to ASIC's specific question B2Q5, we do not request that other Better Practices be included in the Regulatory Guide.

We provide further comments on specific proposals below.

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[4] For example, considerations such as size relative to the market, market events and market volatility also determine whether a liquidity/price provider decides to pre-hedge with the intention to benefit their client/s to minimise market impact or reduce the risk of information leakage.

Proposal B1: The Draft Regulatory Guide

Our comments in this section are intended to address ASIC's questions B1Q1, B1Q2, B1Q3 and B1Q4.

(i) *Scope of the Draft Regulatory Guide*

ISDA respectfully submits that aligning the scope of application of the Regulatory Guide with that of IOSCO's recommendations in the IOSCO Final Report would support the aims of the Draft Regulatory Guide described in paragraph 4 of the Consultation Paper.

Member feedback highlighted several ways in which the Regulatory Guide could be more closely aligned with the IOSCO Final Report. These include:

(a) while the Draft Regulatory Guide uses the broad expression "Market Participants", the IOSCO Final Report defines pre-hedging as "*trading undertaken by a* ***dealer***" (which is understood to refer to banks, intermediaries and liquidity providers), and the ASIC 2024 Guidance was directed to "market intermediaries". The Regulatory Guide could be clarified such that "Market Participants" comprise dealers, market makers and other intermediaries acting as principal (and not buy-side firms and corporate end users who are not typically in the business of intermediating transactions, but who may hold AFS licences or rely on ASIC relief from licensing requirements). Similarly, ASIC could clarify the scope of application of the Regulatory Guide to offshore and market participants, who rely on relief from the application of the Australian licensing regime;

(b) agency-style concepts, such as the references to "order execution options" at RG 000.17 and the "Key points" section of Part D, could be clarified or removed to avoid ambiguity;

(c) a new paragraph following RG 000.5 could clarify that the Regulatory Guide is not intended to impose dealer-style controls on buy-side firms, corporate end users or other clients, or to capture ordinary non-dealer hedging activity such as an investor hedging a currency exposure before completing an underlying investment (acknowledging, however, that various existing Australian regulatory requirements are not limited to dealers and this guidance would not limit the application of those requirements);

(d) exchange-traded equity market and futures products could be expressly excluded from the scope of the guidance, on the basis that existing market integrity rules already provide an appropriate framework. This would ensure that the guidance remains focused on over-the-counter derivatives, FICC and other off-exchange wholesale markets; and

(e) references to "situational disadvantage and vulnerability" of clients (and similar expressions) be removed, as they are not used in the IOSCO Final Report and are not concepts well established in the Australian regulatory framework.

(ii) *Consistency with the IOSCO Final Report*

ISDA welcomes ASIC's adoption of the IOSCO definition of pre-hedging, which provides a workable and internationally consistent framework for identifying the relevant conduct.

As a general observation, we respectfully submit that ASIC should amend several aspects of the Draft Regulatory Guide to ensure the Regulatory Guide is consistent with the IOSCO Final Report. This would better achieve ASIC's objective of promoting common understanding, reduce the risk of confusion and unforeseen circumstances, mitigate the additional costs for market participants to participate in the Australian market, and enhance the likelihood of achieving a level playing field. If the compliance burden of operating in Australia is materially higher than in other major markets, this may harm the competitiveness of Australian markets and their participants and reduce available liquidity.

For example, we refer to the following paragraphs:

(a) RG 000.19, which states that principal trading activity that does not fall within the definition of pre-hedging "creates a heightened risk of constituting market abuse"; and

(b) RG 000.25(b), which states that pre-hedging which moves market prices and reduces available liquidity could "be considered unconscionable conduct" or "potentially create misleading or false appearances as to the price or volumes in the market".

As principal market makers, dealers manage a large number of transactions simultaneously, balancing market risk and ensuring sufficient inventory across their entire franchise and in multiple markets. It is relevant to note that the IOSCO Final Report, in its Explanatory Note to Recommendation A2, acknowledges that "*the dealer will also need to consider and balance other responsibilities when pre-hedging, such as their need to provide liquidity to other counterparties or their broader risk management responsibilities*". ISDA submits that the Regulatory Guide should make clear that dealers making markets for other clients and managing portfolio level risk in the ordinary course does not, of itself, create a heightened risk of market abuse, and that any market impact arising out of pre-hedging is not indicative of misconduct by itself. We note that ASIC's examples on adverse price and liquidity effects could be read as suggesting that any market movement caused by pre-hedging is potentially problematic. To avoid the unintended consequence of stifling legitimate market activity, we respectfully request that ASIC clarify these references to focus on non-compliant conduct itself, such as: (i) prohibited front running activity (as distinct from pre-hedging); (ii) misuse of confidential information, such as front-running; (iii) conduct that is not designed to minimise market impact; and (iv) failures in conflicts management and controls.

(iii) *Specific pre-hedging compliance and supervisory arrangements*

We refer to RG 000.69 and the requirement that market participants "should have appropriate compliance and supervisory arrangements for pre-hedging". This provision partially mirrors Recommendation B4 in the IOSCO Final Report that "*Dealers should have appropriate compliance and supervisory arrangements that also cover pre-hedging".* While IOSCO accepts that existing firmwide arrangements will be sufficient to cover pre-hedging activity, ASIC's guidance as currently described in the Draft Regulatory Guide indicates market participants must develop additional arrangements specific to pre-hedging and potentially separate to a participant's broader compliance function, which does not align with the IOSCO Final Report or market practice generally (which we discuss further in relation to Better Practice 3).

We respectfully submit that the guidance be amended to reflect that pre-hedge trading cannot be isolated and identified, and that existing surveillance functions are sufficient to detect and mitigate market conduct risks.

(iv) *Physical segregation and behavioural controls*

Similarly, ISDA members raised concerns regarding the references to physical segregation measures at RG 000.48, 000.65(c), 000.70(b), 000.93 and 000.94.

Pre-hedging activity may not be readily identifiable or distinguishable from inventory management and therefore it would not be practicable to physically separate traders while they pre-hedge. Where conditions require physical segregation through such barriers, segregation measures are generally managed through existing divisional arrangements designed to support the responsible management of material non-public information and the prevention of insider trading, among other obligations, for example. Members were also of the view that the existing measures (including monitoring processes), which apply to trading activities generally, already sufficiently address conflicts of interest and market conduct risks without needing to be specifically tailored to pre-hedging activity.

Furthermore, RG 000.94 refers to 'behavioural controls' in addition to physical and electronic information controls. Member feedback expressed that 'behavioural controls' introduced ambiguity for participants and requested that ASIC provide examples of these controls so that market participants can understand ASIC's expectations. ASIC could also clarify that it does not expect physical and electronic information controls to separately apply to pre-hedging outside of exceptional high-risk scenarios. ISDA respectfully requests that ASIC remove or amend the suggestion that traders segregate themselves in dark rooms (as this creates some doubt as to whether ASIC considers that pre-hedging can be feasibly done in accordance with Australian law without this type of segregation).

(v) *Extent of records*

RG 000.100 requires participants to "*maintain adequate records of internal pre-hedging plans and strategy (including any changes or deviations), limits, operation of compliance and supervisory controls, escalation decisions, and approvals*". ISDA submits that requirement goes beyond the IOSCO Final Report. First, the requirement is not entirely clear as to whether pre-hedging trades must be individually identified and logged. This is likely not possible without an excessively complex review mechanism that significantly over-captures possible pre-hedging activity. Secondly, feedback highlighted that implementing processes to identify and log individual transactions could adversely affect the speed at which dealers must act to meet client demands. ISDA respectfully requests that paragraph RG 000.100 be removed to more closely align with the IOSCO Final Report.

(vi) *Benefits of pre-hedging*

Regarding the reference in RG 000.10 to benefits being "*realised for markets and clients, not just for the market participant*", ISDA submits that ASIC should clarify there is no requirement to pass through all benefits of pre-hedging to the client. The reference to "clearly demonstrate[ing]" intent to benefit the client should be clarified to reflect IOSCO's statement that market conditions can prevent dealers capturing envisaged benefits, and that "*the intent of the dealer to benefit the client – and the existence of policies and procedures – is an important element of meeting their responsibilities to the client*." Proving intent by results is challenging, as market movements, timing and liquidity make it impossible to formulaically reduce pre-hedging to a derived financial benefit. In this regard, we consider it important to clarify that "designed to benefit the client" does not import fiduciary-style duties or require the dealer to act in the client's best interests, and instead that this standard can be met by a dealer taking action to facilitate or enable the market participant to have the capacity to trade with a counterparty. This is important as each market participant and counterparty generally act in a principal capacity and face each other as counterparties in the circumstances contemplated by the Draft Regulatory Guide.

(vii) *Market impact*

We refer to the specific guidance in RG 000.60, which is informed by a single unique fact pattern and may not fully reflect the realities of market practice. This can be contrasted to the more general guidance referred to in the IOSCO Final Report, including the guidance given to clients on page 47 such as "*Clients could consider implementing internal controls to monitor market pricing, execution outcome, market activity and assess the quality of execution where pre-hedging has been used by a dealer.*"

We respectfully request that ASIC include in the Regulatory Guide an acknowledgement that clients and dealers may set up arrangements ahead of time which may be subject to change by clients and that, in such a case, requiring the dealer to not pre-hedge the full amount before the time of pricing, or move the pricing call (as contemplated in RG 000.60(f)), could adversely impact the dealer's ability to provide a price quote on, or execute, the transaction.

Proposal B2: Observed Better Practices

Our comments in this section are intended to address ASIC's questions B2Q1, B2Q2, B2Q3 and B2Q4.

Better Practice 1 – Internal post-trade reviews

ISDA strongly supports robust surveillance and review measures generally.

However, ISDA respectfully submits that the Regulatory Guide should be more aligned with Recommendation B4 in the IOSCO Final Report. This includes that the Regulatory Guide should clarify that existing compliance and supervision arrangements can cover pre-hedging activity (rather than market participants being required to establish separate compliance and supervisory arrangements for pre-hedging specifically), and that participants can take a risk-based approach to determining whether their review process is proportionate to the nature of the market and transaction type.

We submit that any guidance from ASIC regarding post-trade reviews (whether or not Better Practice 1 is included in the Regulatory Guide), following further liaison with industry, should:

(a) simplify the terms used in any guidance regarding post-trade reviews; and
(b) contemplate that any post-trade reviews of pre-hedging can fit within a market participant's broader compliance and supervisory arrangements.

(i) *"Large, complex transactions"*

In relation to ASIC's reference to "large, complex transactions", we respectfully submit that what constitutes a large, complex transaction or a higher-risk transaction varies significantly from market to market, dealer to dealer, and client to client - and is subject to interpretation. For example, largeness could refer to notional size in absolute terms, size relative to available liquidity, size relative to the market participant's book, or some combination of these factors. Complexity could refer to the structure of the anticipated client transaction, the complexity of the pre-hedging strategy, the number of related instruments involved, or the market conditions prevailing at the time. Whilst informative in other respects, the reference to the *Australian Securities and Investments Commission v Westpac Banking Corporation (Penalty Hearing)* [2024] FCA 52 does not assist market participants in differentiating large, complex transactions from others because the transaction in that scenario was the largest interest rate swap transaction executed in one tranche in Australian financial market history.

Market participants tend to operate across a diverse range of Australian and international markets. These markets vary significantly in terms of size, liquidity, underlying assets and trade frequency. Consequently, what constitutes a large and complex transaction will differ accordingly.

In any guidance ASIC chooses to include on post-trade reviews, ISDA requests that ASIC remove the reference to "complex" transactions to reduce ambiguity. ISDA respectfully suggests that ASIC avoid over-prescriptive clarification and explicitly allow participants to take their own risk-based approach to their review capability. This could be informed by market characteristics, a participant's trading activities, and whether a review has been requested by a counterparty or regulator. Any guidance as to what constitutes a "large" transaction should emphasise that it is a relative, rather than absolute, concept and may be based on an assessment of liquidity and volatility measures, and consistent with any existing Global Codes.[5]

(ii) *Robustness of existing compliance and supervisory arrangements and obligations*

Members have noted that dealers in principal markets implement controls across business areas and geographic regions for all trade execution and client outcomes through risk-based approaches. These include firmwide controls that are intended to ensure all transactions (whether large or small, hedging or pre-hedging) are subject to rigorous market abuse trade surveillance designed to detect instances of attempted or actual front-running across products.

ISDA has received feedback that the implementation of post-trade reviews for pre-hedging specifically, outside of existing compliance and supervisory arrangements, would not deliver a benefit or utility proportionate to ASIC's stated aim of managing conflicts of interest and minimising the impact of pre-hedging. This is because (i)

[5] This adopts the approach of the FICC Market Standards Board, *Standard for the execution of Large Trades in FICC markets*, acknowledging that this definition was intended to apply to FICC markets only.

conflicts of interest are better managed at a firm-level, in respect of all trading activity, and (ii) the causes of market outcomes cannot be specifically demonstrated.

We respectfully request that the Regulatory Guide clarify that firms:

(a) can apply their existing risk management, surveillance and governance frameworks to pre-hedging, and can determine whether to conduct an internal post-trade review for any large transaction in line with that framework, taking into account prevailing market conditions and liquidity conditions (and any review processes for pre-hedging transactions may be incorporated in such frameworks and do not need to be stand-alone);

(b) if they so determine, have the ability to conduct post-trade reviews on pre-hedging for large transactions, as needed to comply with existing market abuse regulatory requirements, without any specific additional obligations directly focused on pre-hedging;[6] and

(c) are not required to demonstrate how they did in fact minimise the market impact of pre-hedging. This is because actual minimisation of market impact cannot be reliably achieved as the causes of market outcomes cannot be specifically demonstrated. This issue was identified in the consultation process which led to the IOSCO Final Report.

These clarifications would ensure the Regulatory Guide better aligns with the statements in the IOSCO Final Report. In relation to post-trade reviews, and the Draft Regulatory Guide more generally, ISDA has received feedback requesting that ASIC clarify how ASIC's pre-hedging guidance should apply to foreign banks, which often only have sales functions in Australia and have trade execution and pre-hedging done offshore.

Better Practice 2 – Explicit and informed trade-by-trade consent

We respectfully request that ASIC's proposed Better Practice 2 should not be included in the Regulatory Guide. This is because this Better Practice goes beyond the statements on client consent/disclosure in the IOSCO Final Report and industry standards, which could lead to an uneven playing field across Australian markets compared to international markets and reduced competitiveness for Australian markets.

ASIC's guidance that "explicit and informed trade-by-trade client consent" is a "better practice", even limited as it is by "where practical", indicates that a more onerous

[6] This better aligns with the statements in the IOSCO Final Report such as "*Appropriate compliance and supervisory arrangements help the dealer ensure the effective implementation of any policies, procedures, and controls, including for pre-hedging. Compliance and supervisory arrangements for pre-hedging do not need to be stand alone and could be incorporated into firms' existing compliance arrangements, such as those for managing conflicts of interest or preventing market abuse*.": IOSCO Final Report, page 31.

requirement may apply in the Australian context than was contemplated in the IOSCO Final Report. Further, the current description of Better Practice 2 gives rise to some uncertainty as to when ASIC expects trade-by-trade consent, and what constitutes a "larger complex transaction" or a "relatively low-liquidity market". As noted above, some feedback has indicated that the reference to "complex" transactions should be removed, to simplify the assessment of what trades should be subject to this guidance.

We welcome ASIC's recognition that trade-by-trade consent may be impractical in high-frequency markets. We agree that explicit consent on a trade-by-trade basis is not practicable in many circumstances due to the speed at which markets move, the associated client outreach required, and different time zones. Additionally, we have received feedback that there are not currently electronic protocols in the principal dealing space that facilitate the requesting or obtaining of pre-hedging disclosure or consent. If dealers must satisfy trade-by-trade pre-hedging requirements before they can work an order, they may need to quote wider prices to compensate for execution uncertainty, delay, and market risk, which can adversely affect the client and market efficiency more broadly.

Furthermore, as noted in the ISDA/FIA IOSCO Response, clients can prohibit pre-hedging outright, or request consent or disclosure in respect of some or all transactions.[7] Indeed, the ISDA/FIA IOSCO Response notes that "*many members generally accept FMSB guidance on trade-by-trade disclosure for bi-lateral negotiated large trades if the liquidity/price provider determines that additional disclosure is warranted based on the sophistication of the client and frequency of trading*".

In line with IOSCO's guidance in the IOSCO Final Report, we respectfully request that ASIC provide guidance that participants should seek informed consent at the outset of the client relationship through robust upfront disclosures and/or clear bilateral agreements, and that clients have the ability to withdraw consent at any time (but not require transaction-specific consent or sign-offs). In this regard, IOSCO's

[7] ISDA received member feedback highlighting that in case of competitive requests for quotes where multiple dealers compete on pricing, trade-by-trade consent was debated but ultimately not supported in the IOSCO consultation process. In these scenarios, if a client is concerned that dealers, while pre-hedging in good faith based on prior disclosures, may still negatively affect pricing in requests for quotes, they can request that no pre-hedging occur in respect of that transaction, or employ a range of strategies in accordance with the guidance set out by the Global Foreign Exchange Committee, *Commentary on Principle 11 and the role of pre-hedging in today's FX landscape*, including to minimise information leakage or engage in alternative dealing protocols (for example, dealing on an instruction basis, or utilising market price or agency execution instead of risk transfer price).

Recommendation B3 adopted a framework of prior consent at the outset of the relationship with a clear process to modify or revoke consent with reasonable notice.[8]

If ASIC is not minded to take this approach, an alternative could be for ASIC to provide principles-based guidance that emphasises flexibility for market participants around the form, timing and frequency of client disclosure or consent, depending on the product, market, client type and risk profile of the transaction. Any conduct deemed "better practice" by ASIC should proportionate to the relevant dealer, market and client circumstances, and it should be clear that this does not constitute a minimum requirement under Australian law. For example, for large transactions, instead of consent, ASIC could consider whether a notification about pre-hedging is sufficient to satisfy ASIC's expectations (where the nature of this notification may vary based on the sophistication of the counterparty, size and volume of the transaction). This could include, if the dealer considers it necessary, transaction-specific disclosure as appropriate for large trades negotiated over time, including event-driven transactions such as M&A or loan/bond financing and deal-contingent transactions, having regard to prevailing market conditions. Additional consent or disclosure may be more appropriate for clients (eg smaller corporate clients) who are less sophisticated and aware of pre-hedging practices, whereas additional consent or disclosure may be less necessary for other types of clients (eg financial institutions) who are more sophisticated and familiar with the workings of the financial markets and understand that pre-hedging is a normal risk management practice.

If Better Practice 2 is included in the Regulatory Guide, we respectfully request that:

(a) the Regulatory Guide expressly state that any better practice of trade-by-trade disclosure or consent is not a requirement under Australian law;

(b) consistent language on consent be used throughout the Regulatory Guide, particularly where ASIC intends consent to be sought only "where appropriate". ISDA has received feedback that the current wording in the Draft Regulatory Guide can be read as requiring both relationship-level consent and transaction-specific consent by default. ASIC could address this by, for example, clarifying the interaction between RG 000.82 and Better Practice 2 so firms are not required to obtain overlapping forms of consent unless appropriate in the circumstances;

(c) the guidance be market-agnostic and principles-based, to allow for multiple approaches depending on market sector and client requirements. The diversity

[8] The IOSCO Final Report referred to feedback IOSCO received from respondents throughout IOSCO's consultation which resulted in IOSCO making "*some changes to its Recommendation from the consultation report to incorporate feedback that dealers should seek to receive prior consent to pre-hedge from the client at the outset of the relationship and give the client a clear process to modify or revoke that consent at any time with reasonable notice*".

of buy-side feedback received throughout consultation processes internationally on pre-hedging demonstrates that a one-size-fits-all approach to transparency will not serve all market participants;

(d) ASIC acknowledge that market participants may reference upfront disclosures in terms and conditions or conflict management disclosures; and

(e) ASIC clarify whether an expectation for consent exists in the context of funds with multiple layers of clients and that any expectation for consent is practicable.

Similarly, ISDA submits that:

(i) RG 000.25(e) ("obtaining prior informed client consent") and RG 000.55(e) go beyond the statements regarding client consent in the IOSCO Final Report and should be removed;

(ii) RG 000.55(f) and (g) could be clarified to demonstrate that firmwide controls that monitor trade execution and client outcomes in principal markets can be sufficient for the purposes contemplated in RG 000.55; and

(iii) the references to "transparency" in these provisions could be amended to make clear that dealers are not required to disclose live principal risk positions, inventory or hedging strategy or other information that could give rise to legal or regulatory issues (including regarding market conduct and competition laws). Transparency should instead relate to policies, governance, consent, opt-out rights and client-facing pre-hedging terms.

Better Practice 3: Implement internal controls to identify pre-hedging

We respectfully request that ASIC's proposed Better Practice 3 should not be included in the Regulatory Guide. Member feedback emphasised the practical challenges associated with identifying and distinguishing pre-hedging transactions from other trading activities as a routine procedure. This is particularly the case given the broad definition of pre-hedging adopted by IOSCO (that does not incorporate a requirement for specificity and certainty when it comes to knowledge of the client's proposed trade).

Commercially speaking, dealers do not attribute a particular underlying purpose to each trade, whether this be pre-hedging, risk management or inventory hedging, and systems do not necessarily tag individual transactions as pre-hedging transactions or not. More generally, it is difficult, and perhaps impossible, to effectively identify with a high level of certainty whether transactions are genuinely pre-hedging or inventory/risk management, particularly in highly connected markets like the rates and FX markets. This is particularly the case because:

(a) dealers in principal markets typically run an inventory of financial products to support their market making and risk management activities to support their overall client franchise, and accordingly are active in managing this inventory at all times. This includes managing risk related to transactions for which clients have given a firm instruction, anticipating near term client demand (ie pre-hedging) and managing the potential impact of market events on the resulting execution; and

(b) dealers do not necessarily cease their principal market making and related hedging activity for other clients, and some transactions that could constitute pre-hedging for a proposed transaction may also be inextricably linked to such other activity, particularly when a dealer is hedging its risk at a portfolio level.

Members estimated that implementing functionality to identify and tag pre-hedging activity on a trade-by-trade basis would require significant custom development and expense. This capability may only be feasible on a post-trade basis, and even then, the tagging process would involve substantial judgment given that individual trades often serve multiple purposes. The implementation burden would be disproportionate in terms of cost and time to any benefit achieved from building this functionality for the Australian market because such data would already be available, and standalone recording would not bring material additional benefits. This is particularly the case given that market participants already maintain extensive compliance monitoring, surveillance, and record-keeping arrangements that cover pre-hedging activity (but which do not require the separate identification and recording of pre-hedging transactions).

ISDA respectfully requests that ASIC does not impose an expectation that market participants identify pre-hedging transactions at a trade-by-trade level. Instead, ISDA supports allowing dealers to have mechanisms in place to enable review and monitoring of trading activity, including pre-hedging. Accordingly, we respectfully suggest that ensuring robustness of the policies and procedures that govern overall risk management and conflict mitigation, with a focus on requirements associated with undertaking pre-hedging, may more effectively achieve the policy objectives of the Regulatory Guide than requiring system-enforced segregation or transaction-level tagging.

Implications for compliance

Noting the apparent intent of RG 000.41, ISDA would welcome clarification in the Regulatory Guide that, where a market participant undertakes pre-hedging which satisfies the definition in the Regulatory Guide, ASIC will not generally consider those activities to warrant enforcement action for a breach of the Australian requirements set out in RG 000.41. We respectfully submit that framing RG 000.41(a) in this manner would better align with the policy intent of the Draft Regulatory Guide, which recognises the legitimate role of pre-hedging in prudent risk management, and would provide market participants with clearer direction as to the conduct that ASIC considers to be compliant, without requiring significant commentary from ASIC on the application of insider trading laws to pre-hedging. ISDA would be grateful for the opportunity to engage with ASIC on this topic before the Regulatory Guide is updated and finalised.

We would be very grateful for the opportunity to provide ASIC with any further detail that ASIC may require on these key matters and would be delighted to engage with ASIC further on these issues. Any further guidance ASIC may be able to provide as to ASIC's approach on implementing this guidance and enforcing the requirements discussed in the Draft Regulatory Guide would be welcome by ISDA. Our members and other industry associations may also choose to make their own individual submissions in relation to the Consultation.

We would be very happy to discuss the matters set out in this letter, the Consultation Paper and the Draft Regulatory Guide at your convenience. Should you have any questions or desire further clarification on the matters discussed in this letter, please do not hesitate to contact the undersigned.

Yours faithfully,

For the **International Swaps and Derivatives Association, Inc**.