

Comments by the International Swaps and Derivatives Association, Inc. (ISDA)  
on the draft Reporting Service Agreement  
published by Hong Kong Monetary Authority

5th July 2013

5th July 2013

Ms Karen Kemp  
Executive Director (Banking Policy)  
Hong Kong Monetary Authority  
55th Floor  
Two International Finance Centre  
8 Finance Street  
Central  
Hong Kong

Dear Ms Kemp,

### **Introduction**

The International Swaps and Derivatives Association, Inc. (**ISDA**) is grateful for the opportunity to comment on the draft Reporting Service Agreement (the **RSA**) to be entered into by Hong Kong Monetary Authority (**HKMA**) and members of ISDA who have signed up to be HKMA's trade repository members.

Consistent with our mission, we support the G20 commitments to bring transparency to the over-the-counter (**OTC**) derivatives markets and improve risk management practices.

As a general comment, it is important that there is certainty, clarity and transparency in relation to the reporting requirements and procedures of a trade repository. As the only reporting service provider in Hong Kong, we urge HKMA to provide greater clarity and certainty in the documentation in relation to OTC derivatives trade reporting in Hong Kong.

Capitalised terms used in this document have the meanings given to them in the RSA, unless otherwise defined in this letter.

### **Comments on the RSA**

We appreciate that HKMA would prefer to sign up standardised RSAs with all Members. In order for potential Members to agree to this standardised agreement and to avoid individual negotiation for every RSA, it is important that the standard RSA offers certainty and clarity and is fair to potential Members. It appears that the RSA as currently drafted is very favourable to HKMA and has a number of uncertainties which make it difficult for Members to operate and ensure compliance with the RSA.

We appreciate that HKMA would like potential Members to sign up the RSAs as soon as possible and therefore have tried to limit the scope of our comments. The comments set out in the table below are essential comments which our members would like the HKMA to consider. We have set out the reasons why we believe certain clauses of the RSA should be amended under the column "Comments" and our suggested amendments to these clauses under the column "Suggested Amendments" (for ease of reference, we have not set out the clause in full and have shown changes in blackline).

**International Swaps and Derivatives Association, Inc.**  
Suite 1502, Wheelock House,  
20 Pedder Street, Central, Hong Kong  
+852 2200 5900  
[www.isda.org](http://www.isda.org)

NEW YORK    WASHINGTON  
LONDON      BRUSSELS  
HONG KONG   SINGAPORE  
TOKYO

Clause	Comments	Suggested Amendments
2 (Using the Reporting Service) & 15 (Termination)	<p>2.3 - as currently drafted, HKMA is entitled to terminate or suspend its trade reporting service if, amongst others, there is a slight problem with a Direction. Paragraph 6 of the Reporting Service Reference Manual (the <b>Manual</b>) indicates that suspension or termination of trade reporting have serious consequences for Members. Therefore, the grounds on which HKMA can terminate or suspend its reporting service should be split out from the grounds on which HKMA can refuse to act on a Direction and should in any case be limited to serious breaches by Members only. In addition, both clause 2.3 and clause 15.2 appear to cover grounds on which HKMA can terminate its service. Consequently, the relationship between clause 2.3 and clause 15.2 should be clarified. We believe that the grounds on which HKMA should be entitled to</p>	<p>2.3 Notwithstanding any other term of this Agreement, HKMA may, in HKMA's sole and absolute discretion, without incurring any liability to the Member whatsoever:</p> <p><del>2.3.1 vary, suspend or terminate the Reporting Service by giving prior written notice to the Member; or</del></p> <p><del>2.3.2</del> refuse to act or refrain from acting on any instruction or information (including any instruction or information in connection with any Transaction Record or disclosure of Confidential Information) submitted by the Member (including any User) (each instruction or information, a "Direction");</p> <p><del>in each case, including without limitation,</del> where HKMA, in HKMA's sole and absolute discretion, determines or believes that:</p> <ul style="list-style-type: none"> <li>(a) a Direction is not given or received in the manner specified by HKMA;</li> <li>(b) HKMA otherwise would or would likely be in breach of, or non-compliance with, any applicable Law;</li> <li>(c) it would not be reasonable or practicable to act on a Direction <del>or provide the Reporting Service;</del></li> <li>(d) a Direction or a set of Directions constitute(s) an abuse or misuse of the Reporting Service, including without limitation, where HKMA, in HKMA's sole and absolute discretion, considers that such Direction or set of Directions is or are given by the Member for any reason(s) other than to fulfil its obligations under the Reporting Requirements;</li> <li>(e) a Direction or the provision of the Reporting Service requires any action by, or information from, HKMA: <ul style="list-style-type: none"> <li>(i) otherwise than on a Business Day;</li> <li>(ii) during a Maintenance Period;</li> <li>(iii) at a time when a Black Rainstorm Warning is issued or may be issued or a typhoon signal No. 8 or greater is hoisted or may be hoisted;</li> <li>(iv) at a time when the Reporting System is, according to the Reference Manual, not scheduled to be in operation;</li> </ul> </li> </ul>

Clause	Comments	Suggested Amendments
	<p>terminate service have already been set out in details in clause 15.2 and therefore have deleted this from clause 2.3.</p> <p>2.3 - HKMA should notify the relevant Members as soon as reasonably practicable following any rejection of Directions.</p>	<p>(v) at a time when a Force Majeure Event exists or has occurred in respect of which HKMA is the Affected Party; or</p> <p>(vi) when any other event or circumstance exists or occurs and/or may exist or occur which HKMA determines may have a similar effect to one or more of the events or circumstances set out in paragraphs (i) to (v) above;</p> <p>(f) a Direction <del>or the provision of the Reporting Service</del> would cause a breach of this Agreement and/or any other agreement between HKMA and the Member and/or any agreement between HKMA and one or more members of the Member Group;</p> <p>(g) a Direction <del>or the provision of the Reporting Service</del> is not in accordance with HKMA's usual business practices and procedures or any of HKMA's internal policies;</p> <p>(h) such <del>variation, suspension, termination or</del> refusal is necessary for HKMA to continue to provide (i) the Reporting Service to any member of the Member Group, or (ii) the "Agency Reporting Service" (as defined in the relevant Agency Terms) to any person within the Nominated Agent Group; and/or</p> <p>(i) a Direction (or purported Direction) has not been properly authorised by the Member or a User.</p> <p><u>provided that HKMA should notify the Member of its refusal to act on any Direction as soon as reasonably practicable thereafter.</u></p>
5 (Member's Obligations)	<p>5.1.2(a)&amp;(b) – notification requirements in these sub-clauses are far too wide and it is impracticable for Members to comply with. For example, the shareholders of Members change every day on stock exchanges. It is also not clear as to what is the relevance of</p>	<p>5.1 The Member agrees and undertakes to HKMA that it shall at all times:</p> <p>[...];</p> <p>5.1.2 notify HKMA promptly in writing of any:</p> <p>(a) changes to information previously provided to HKMA, including any change to its name and, if applicable, its <u>substantial</u> shareholders, directors or any material provision of its constitutive documents <u>which have a material impact on the compliance of this Agreement by the Member</u>;</p>

Clause	Comments	Suggested Amendments
	this information to HKMA.	<p>(b) error, dispute, breach of any privacy, confidentiality or secrecy obligation or suspicion of fraud or illegality in connection with the Reporting Service;</p> <p>(c) issue, event or circumstance which may cause, or the Member reasonably believes may cause, the Member to cease being an Eligible Entity; and</p> <p>(d) circumstance in which the Member ceases to be an Eligible Entity.</p> <p>For the avoidance of doubt, this Clause 5.1.2 is in addition, and without prejudice, to any other notification obligations of the Member as set out in the Reference Manual;</p>
7 (Submitting Agency Arrangements)	7.4 - the ability to appoint a reporting agent is crucial for Members to comply with Reporting Requirements. Therefore, if HKMA rejects any agency arrangement application, it should notify the relevant Member of its decision and the reasons for such decision within a reasonable period of time.	7.4 <del>There shall be no time limit within which the</del> HKMA must notify the Member whether it approves such entity to be appointed by the Member as a Submitting Agent to act on behalf of the Member and, if HKMA does not give its approval to such appointment, <del>there shall be no obligation on HKMA to</del> give reasons for not giving such approval <u>within 5 Business Days of such notice.</u>
8 (Representations and Warranties)	8.1 - these representations are very broad and onerous. It will be difficult for Members to give them absolutely. In particular, banking secrecy and confidentiality is a complex area of law. Members are	<p>8.1 The Member represents and warrants to HKMA at all times that:</p> <p>8.1.1 it has the capacity, power and authority to enter into and perform its obligations under this Agreement;</p> <p>8.1.2 this Agreement constitutes the legal, valid, binding and enforceable obligations of the Member;</p> <p>8.1.3 any act <del>or omission</del> of the Member (including any User) in connection with the Reporting Service or the Reporting System (including without limitation, the access to and use of the Reporting Service or Reporting System) does not and</p>

Clause	Comments	Suggested Amendments
	<p>unable to make a blanket confirmation that all the necessary consents for disclosure have been obtained and are only able to undertake to use reasonable endeavours to do so.</p> <p>8.1.3 and 8.1.6 - based on our understanding that HKMA would not expect Members to report any trades to the extent that such action would result in a breach of any applicable Laws in any jurisdiction or any privacy, confidentiality or secrecy obligations which Members owe to any party, we refrained from inserting additional qualifications to these clauses. Please advise if our understanding is incorrect, in which case we would have to reconsider our position in relation to clauses 8.1.3 and 8.1.6.</p> <p>8.1.8 - In addition, Members are bound by their bank wide data policy, under which consent obtained from data</p>	<p>will not breach any applicable Laws;</p> <p>8.1.4 it is an Eligible Entity;</p> <p><del>8.1.5 it is not aware of any matter which might or will adversely affect its ability to perform its contractual obligations under this Agreement;</del></p> <p>8.1.6 the execution of this Agreement by it, the performance by it of its obligations and duties under this Agreement and its use of the Reporting Service (including without limitation any submission of any data by it to HKMA under the terms of this Agreement) do not and will not breach the terms of any agreement to which it is a party, or by which it is otherwise bound or any privacy, confidentiality or secrecy obligations which it owes to any party;</p> <p>8.1.7 it is entering into this Agreement as principal for its own benefit and not for the benefit of another person;</p> <p>8.1.8 it has <u>used reasonable endeavours to obtain</u> all licences, authorisations, consents, approvals and permits required by all applicable Laws in order to perform its obligations under this Agreement, including without limitation, all consents required for:</p> <p>(a) any transfer or disclosure (whether or not in accordance with this Agreement) of Personal Data by the Member to HKMA; <u>and</u></p> <p><del>(b) any use, handling or storage of such Personal Data by HKMA in accordance with this Agreement; and</del></p> <p><del>(eb)</del> any transfer or disclosure of such Personal Data by HKMA to:</p> <p>(i) any Authority in Hong Kong or otherwise;</p> <p><del>(ii) any person in connection with HKMA's provision of the Reporting Service to the Member;</del></p> <p><del>(iii)</del> any person in connection with HKMA's compliance with any Law (including, without limitation, any Reporting Requirements) or any order, judgment, decision, directive or request of any Authority, for any purpose whatsoever (including without limitation, the prevention of money laundering, terrorist</p>

Clause	Comments	Suggested Amendments
	<p>subjects do not expressly extend to any use, handling or storage of Personal Data by a regulator or the further transfer of Personal Data by a regulator to third parties and are therefore unable to, as a matter of fact, represent 8.1.8(b)&amp;(c)(ii). To obtain such consent of such scope would require all Members to change their data policy which is an operationally intensive and time-consuming process. We believe HKMA has its own data policy to govern the use of personal data they receive and it is unduly onerous to contractually require Members to provide a representation of such a wide scope (which, as a matter of fact, Members cannot provide).</p> <p>8.1.11 – it is difficult for Members to prove a negative statement. In addition, Members are unable to find out whether HKMA is able to ascertain certain</p>	<p>financing and other criminal activities); and</p> <p>(<del>iv</del><sup>vii</sup>) otherwise in accordance with this Agreement (including, without limitation in accordance with the terms of Clause 10 (Confidentiality));</p> <p>8.1.9 it has <del>used reasonable endeavours to procure that it will</del> not provided, transferred or submitted any Personal Data to HKMA except where, and to the extent, necessary for the Member to fulfil its Reporting Requirements; <del>and</del></p> <p>8.1.10 any Personal Data provided by the Member to HKMA (whether in accordance with this Agreement or otherwise):</p> <p>(a) has been collected by lawful means; and</p> <p>(b) is accurate in all material respects so far as the Member is aware; <del>and</del></p> <p><del>8.1.11 there is no:</del></p> <p><del>(a) publicly available information; or</del></p> <p><del>(b) information provided directly or indirectly by the Member to HKMA (save for information provided to HKMA at the request of HKMA in accordance with Clause 12.4 (Personal Data));</del></p> <p><del>which would allow HKMA to be able to ascertain from the Personal Codes the identity of any counterparty to a Transaction who is an individual.</del></p> <p>8.2 HKMA does not make, <del>and hereby expressly disclaims,</del> any representation, warranty or undertaking:</p> <p><del>8.2.1 in respect of the Reporting Service or the Reporting System;</del></p> <p><del>8.2.2 that any method of accessing the Reporting System is secure;</del></p> <p>8.2.<del>13</del> that any Transaction or Transaction Record:</p> <p>(a) will constitute enforceable, legal, valid and binding obligations, or will otherwise give rise to any duly-</p>

Clause	Comments	Suggested Amendments
	<p>information from the data reported.</p> <p>8.2 – as HKMA is the only service provider in relation to mandatory trade reporting and charges a fee for providing such service, Members rely on HKMA to discharge their trade reporting obligations. Therefore, it is not reasonable for HKMA to completely disclaim its obligations in relation to the Reporting System and 8.2.1 and 8.2.2 are too wide.</p>	<p>formed and legally binding contract under any Laws;</p> <p>(b) will evidence any Transaction in accordance with any applicable documentation or master document;</p> <p>(c) is accurate or complete; or</p> <p>(d) will be successfully completed or performed;</p> <p>8.2.<del>24</del> that any Transaction Record or any other data held by HKMA will be admissible in a court of Law or other proceeding;</p> <p>8.2.<del>35</del> that any Transaction is:</p> <p>(a) required to be reported to HKMA under the Reporting Requirements or otherwise in accordance with any applicable Law; or</p> <p>(b) compliant with any and all applicable Laws and does not breach or violate any applicable Law;</p> <p>8.2.<del>46</del> that any party to a Transaction will fulfil its obligations under such Transaction to the other party; or</p> <p>8.2.<del>57</del> in respect of the creditworthiness or financial position of any member of the Member Group or any other party to a Transaction.</p>
9 (Liability)	<p>9.1 – as mentioned above, HKMA is the only service provider in relation to mandatory trade reporting and charges a fee for providing such service. Therefore, a complete disclaimer will be inequitable to Members. Any loss</p>	<p>9.1 HKMA and HKMA's Officers shall not be liable to the Member for any liability, claim, loss, damage, action, proceeding, demand, cost, fee or expense of any kind or nature whatsoever and howsoever caused in connection with the operation by HKMA of the Reporting Service or the Reporting System or any part thereof (whether or not resulting from a failure to satisfy the Member's obligations under the Reporting Requirements), including, without limitation, any liability, claim, loss, damage, action, proceeding, demand, cost, fee or expense (whether or not resulting from a failure to satisfy the Member's obligations under the Reporting Requirements) arising directly or indirectly from or as a result of:</p> <p>9.1.1 any inadequacy, deficiency, defect or error of the Reporting Service, the Reporting System or any linking or validation of Transaction Records in relation to the Reporting Service;</p>



Clause	Comments	Suggested Amendments
	<p>incurred as a result of HKMA’s fraud, wilful default or gross negligence should not be covered by this disclaimer.</p> <p>9.3 – the indemnity should be limited in the following areas: (i) indirect loss should not be covered, (ii) loss caused by Members’ breach of “other obligations applicable to the Member” and “its obligations under... any other applicable Law” should not be covered and (iii) HKMA fraud, wilful default or gross negligence should be carved out. These limitations are required by Members as the indemnity is otherwise too broad and many Members have internal policies which mean that such wide indemnities are not acceptable.</p>	<p>9.1.2 any discrepancy between any Transaction Record and the corresponding actual trade data or any other relevant document or data (including without limitation, any confirmation or evidence of the relevant Transaction);</p> <p>9.1.3 any delay in providing or failure to provide the Reporting Service or the Reporting System;</p> <p>9.1.4 any interruption, variation, suspension or termination of the Reporting Service or the Reporting System (including, without limitation, arising directly <del>or indirectly</del> from HKMA exercising HKMA's rights under Clause <del>152.3</del> (Using the Reporting Service) or otherwise);</p> <p>9.1.5 where HKMA relied, acted or refused to act or refrained from acting on any instruction (or purported instruction) from a User or any person HKMA believes in good faith to be a User (including in circumstances where such instruction or purported instruction is unauthorised or given by an unauthorised person) or any person HKMA suspects may not be a User, including, without limitation, any reliance by HKMA in good faith on any instructions or other communication in person or by telephone, facsimile, email or other electronic means;</p> <p>9.1.6 any information howsoever provided to HKMA or any of HKMA's Officers in any form, including any Transaction Record, that is incomplete, erroneous or inaccurate;</p> <p>9.1.7 any Transaction or Transaction Record not being legal, valid, binding and/or enforceable (including, without limitation, where a Transaction is not capable of being enforced);</p> <p>9.1.8 any Transaction Record:</p> <p>(a) not complying with the Reporting Requirements or any other applicable Law;</p> <p>(b) not complying with and/or being consistent with the relevant ISDA Master Agreement or any other master agreement and/or any relevant ISDA-published or other definitions or protocols;</p> <p>(c) not being admissible in a court of law or other proceedings; and/or</p> <p>(d) being incorrect, including where it has been incorrectly submitted, recorded or stored;</p>

Clause	Comments	Suggested Amendments
		<p>9.1.9 any virus, default, defect, deficiency or malfunction in or any breakdown, disruption or failure of any telecommunications, computer or other electronic equipment or system (whether or not owned, operated or maintained by HKMA or for the purpose of, or in connection with, the Reporting Service or the Reporting System);</p> <p>9.1.10 the security, confidentiality, accuracy and reliability (or lack thereof) of any document, email, transaction record and any other information transferred through or using the Reporting System;</p> <p>9.1.11 the transfer and/or disclosure of any information by HKMA to any party in compliance with and/or under the terms of this Agreement, including without limitation under Clause 10 (Confidentiality) of this Agreement;</p> <p>9.1.12 the transmission or quality of the data, the quality and availability of any data transmission network or any service interruption, blockage, suspension or interruption in any method of transmission or means of telecommunication (including SWIFT), any communication line, modem connection or other transmission facility, including without limitation as a result of the connection or lack thereof to any website or any internet and/or browser-based system used in relation to the Reporting Service or the Reporting System;</p> <p>9.1.13 the failure by the Member to follow <del>the most current version of</del> this Agreement or any notice, guideline or other document communicated to it in accordance with Clause 23 (Notices);</p> <p>9.1.14 requiring or, as the case may be, not requiring, the Member or any Submitting Member to provide a Consent Confirmation under Clause 10.6 (Confidentiality) (or the equivalent of such clause in the reporting service agreement entered into by a Submitting Member);</p> <p>9.1.15 the occurrence of any Force Majeure Event;</p> <p>9.1.16 any act or omission of any third party including, without limitation, any other Authority;</p> <p>9.1.17 any act and/or omission of any Submitting Agent when effecting any Agency Arrangement or Agency Terms;</p> <p>9.1.18 any breach of any of the Member's obligations under this Agreement, whether or not such obligation should have been performed by a Submitting Agent on behalf of the Member in accordance with any Agency Arrangement or</p>

Clause	Comments	Suggested Amendments
		<p>Agency Terms;</p> <p>9.1.19 HKMA's compliance with any applicable Law in connection with this Agreement, the Reporting Service, any other Member of the Member Group, any person within the Nominated Agent Group and/or any Transaction Record; and/or</p> <p>9.1.20 any act or omission of any User (including without limitation, such User's use or disclosure of any data it has obtained from, or in connection with, the Reporting Service (including any Transaction Record data)),</p> <p>unless incurred directly due to the <u>fraud, gross negligence</u>, wilful default or reckless disregard of HKMA in respect of HKMA's obligations under this Agreement.</p> <p>[...]</p> <p>9.3 The Member shall indemnify HKMA and HKMA's Officers against any liability, claim, loss, damage, action, proceeding, demand, cost, fee or expense of any kind or nature whatsoever and howsoever arising directly <del>or indirectly</del> from:</p> <p>9.3.1 HKMA's provision of the Reporting Service to the Member;</p> <p>9.3.2 any act or omission of the Member, its Officers and/or its Users (or any person HKMA reasonably believes to be the Member, its Officer or its User) in connection with the Reporting Service; and</p> <p>9.3.3 any failure of the Member (including any User) to comply with this Agreement, <del>any other obligations applicable to the Member, or</del> any of its obligations under the Reporting Requirements <del>or any other applicable Law.</del></p> <p><u>unless such any liability, claim, loss, damage, action, proceeding, demand, cost, fee or expense of any kind or nature whatsoever is caused by the fraud, wilful default or gross negligence of HKMA.</u></p>
10 (Confidentiality)	10.1 – Confidential Information should be restricted to information disclosed in relation to this	10.1 In this Clause, "Confidential Information" means all information from time to time disclosed (whether in writing, orally or by another means and whether directly or indirectly) <u>in relation to this Agreement</u> by a Party (the "Disclosing Party") to the other Party (the "Receiving Party") whether before, on or after the date of this Agreement including, without limitation:

Clause	Comments	Suggested Amendments
	<p>Reporting Service Agreement only</p> <p>10.2.5 - the data Members will report to HKMA is sensitive market information and may involve trade secrets and proprietary information of Members, therefore Members would like to make sure that the information will not be disclosed to a third party or made public unless it is absolutely necessary.</p> <p>10.7.2 – banking secrecy and confidentiality is a complex area of law. Members are unable to make a blanket confirmation that all the necessary consents for disclosure have been obtained and are only able to undertake to use reasonable endeavours to do so.</p>	<p>[...]</p> <p>10.2.5 HKMA may use and/or disclose any Confidential Information <u>to other regulatory authorities</u> to the extent necessary <del>and/or desirable</del> for HKMA to carry out any of HKMA's functions and duties.</p> <p>10.7 The Member acknowledges, agrees and confirms that:</p> <p>[...]</p> <p>10.7.2 to the extent (a) the Member owes or may owe any privacy, confidentiality or secrecy obligations to any person to whom the information in a Transaction Record relates and (b) any such privacy, confidentiality or secrecy obligations are not effectively excluded, waived or disapplied under all relevant applicable Laws (including without limitation, the Law governing any contract which creates any such privacy, confidentiality or secrecy obligations) as a result of the Reporting Requirements or otherwise, the Member <del>has</del> <u>will use its reasonable endeavours to</u> <del>obtained</del> any and all necessary consents and approvals required for it to transfer and/or disclose any such information to HKMA under the terms of this Agreement, which may include without limitation, consents on similar terms to those set out in this Clause 10 (Confidentiality);</p>
20 (General)	20.2 – HKMA should not be able to amend the Agreement unilaterally. If this unilateral right is retained, it must exclude such amendments that would affect the ability	20.2 HKMA may, at any time, amend, restate or supplement the Substantive Provisions or any Annex by giving the Member no less than <del>20</del> <u>205</u> Business Days' written notice of such amendment, restatement or supplement, <u>provided that such amendments or supplements would not adversely affect the Member's ability to comply with Reporting Requirements and other rights under this Agreement.</u>

Clause	Comments	Suggested Amendments
	of Members to fulfil their obligations with respect to the Reporting Requirements.	

ISDA appreciates the opportunity to provide comments on the draft RSA published by HKMA and looks forward to working with HKMA as it continues to implement the OTC derivatives reform. If you have any question on this submission, please feel free to contact the undersigned at your convenience.

Yours faithfully,

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



Keith Noyes  
Regional Director, Asia Pacific



Jing Gu  
Assistant General Counsel Asia