

17 January 2012

BY COURIER

Ministry of Finance

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Indonesia

Attn.: Mr. Agus D.W. Martowardojo – Minister of Finance

Bank Indonesia

Jl. M.H. Thamrin No. 2
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Attn.: Mr. Darmin Nasution – Governor of Bank Indonesia

Dear Sirs,

Law No. 7 of 2011 (“Currency Law”)

The International Swaps and Derivatives Association, Inc. (“**ISDA**”) is one of the world’s largest global financial trade associations, with over 800 member institutions from 56 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. Information about ISDA and its activities is available on ISDA’s web site: www.isda.org.

Over the years, ISDA has worked with regulatory and legislative authorities in many jurisdictions to support initiatives aimed at enhancing legal and regulatory certainty as it relates to the OTC derivatives industry.

First, we would like to state that the publication of the booklet “*Sosialisasi Undang-Undang Nomor 7 Tahun 2011 Tentang Mata Uang*” (“**Socialization Booklet**”) by the Directorate General of Treasury at the Ministry of Finance (“**MoF**”) and the session conducted by the MoF and Bank Indonesia on December 6 are very useful and constitute a significant step in the right direction.

However, our members continue to have certain concerns with regard to the impact of the Currency Law on OTC derivative transactions and we would like to bring these to your attention.

1. Socialization Booklet does not have the force of law

The Socialization Booklet is a helpful indication of MoF's and Bank Indonesia's current implementation policy in regard to the Currency Law. However, we understand that it is not legislation (*produk hukum*) under Law 12/2011 on Establishment of Laws and Regulations. As such, it does not have the force of law and neither enforcement agencies nor the courts are bound by its provisions.

Given that breach of the Currency Law is a penal offence punishable by imprisonment of up to 1 year, we respectfully submit that the ambiguities surrounding the Currency Law need to be resolved in a manner that provides legally binding clarity and certainty. Statements of policy that can be disregarded do not provide an adequate solution where the price to be paid is personal incarceration.

There is also the risk that the ambiguities surrounding the Currency Law will encourage a disgruntled party to attempt to renege from his contractual obligations by invoking a breach of the Currency Law. This may discourage the entry into commercial arrangements with Indonesian parties or at the least, this risk will be "priced in" so that Indonesian parties will find that they are quoted a higher price for a transaction.

2. Transactions covered by Article 21

2.1 Article 21(1) suggests that any transaction that is conducted within Indonesia must use the Rupiah, unless it falls within an exception set out in Article 21(2). While the distinction in Article 2(2) of "Rupiah Variants" into "paper Rupiah and metal Rupiah" suggests that transactions that are covered by Article 21(1) are limited to transactions that involve physical payment in bank notes and coins, the excepted transactions set out in Article 21(2) suggests that transactions that are covered by Article 21(1) are not limited to physically-settled transactions (since for example, international trade transactions and international financing transactions will rarely be physically-settled, but will instead involve bank transfers and other forms of electronic payments).

2.2 We note that the Socialization Booklet clarifies that the transactions covered by Article 21 are limited to transactions that involve physical payment in bank notes and coins. However, as the language in Article 21 is open to either interpretation and given that the Socialization Booklet does not have the force of law, this is a critical point that does need to be confirmed in a legally binding manner.

2.3 Once the position set out in the Socialization Booklet is confirmed in a legally binding manner, the bulk of our members' concerns will be addressed as OTC derivative transactions rarely involve settlement by physical delivery of bank notes and coins.

3. Reliance on exceptions

3.1 Absent the confirmation set out in paragraph 2.3 above, our members will need to rely on the exceptions provided in Article 21(2) or Article 23(2).

- 3.2 In relation to Article 21(2), the applicable exception for OTC derivative transactions will be the “international trade transactions” exception provided that “trade” includes trade in services as well as goods. While some Indonesian law firms have opined to this effect, this is again a point that is open to interpretation.
- 3.3 Some doubt has been voiced on whether to qualify for the “international trade transactions” exception, one party has to be wholly outside Indonesia, for example, whether an OTC derivative transaction between say the Singapore branch of a bank and an Indonesian corporate would fall within the “international trade transactions” exception if any of the bank’s Indonesian branch employees had been involved in the transaction.
- 3.4 Article 23(2) exempts the mandatory use of Rupiah for payment or settlement of transactions that occur within Indonesia where the parties have so agreed in writing. First, the scope of application of Article 23(2) is unclear. Some have opined that Article 23(2) is limited only to transactions that require physical payment in bank notes and coins (as Article 23(1) deals with the rejection of Rupiah tendered when there is doubt as to the authenticity of the Rupiah tendered) and has no application to transactions that do not require physical payment. If this view is correct, the exemption provided in Article 23(2) will generally be of no assistance to participants in OTC derivative transactions.
- 3.5 Secondly, it is unclear from Article 23 whether this applies only to written agreements entered into after the enactment of the Currency Law. While we note that the Socialization Booklet has clarified that Article 23(2) applies to any written agreement whether entered into before or after the enactment of the Currency Law, we reiterate our concern that the Socialization Booklet does not have the force of law.
- 3.6 Thirdly, it remains unclear how explicit the “contracting out” language in the written agreement needs to be. This doubt is in fact reinforced by the Socialization Booklet. The aim of the Currency Law is to promote the use of Rupiah in Indonesia and while the MoF implicitly acknowledged that parties should be free to contract as they wish, the Socialization Booklet does go on to say that the freedom of contract principle should not legalize the use of foreign currency in Indonesia to such an extent that it results in the Rupiah being weakened.

We look forward to discussing our members’ concerns with you and working with you to arrive at a solution that would address these concerns and yet achieve Indonesia’s goal of promoting the use of the Rupiah onshore. Please feel free to contact Jacqueline Low (jlow@isda.org, +65 6538 3879) or Keith Noyes (knoyes@isda.org, +852 2200 5909) at your convenience.

Yours faithfully,

For the International Swaps and Derivatives Association, Inc.


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