

# ISDA®

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31 March, 2006

China Foreign Exchange Trade System  
No 15, Zhongshandongyi Road  
Shanghai

Attention: Mr. ZHANG Shen Ju, Market Developing Department

**By Fax (86-21-63219065)**

State Administration of Foreign Exchange  
Huarong Plaza  
No.18 Fucheng Road, Haidian District  
Beijing 100037

Attention: Mr. WANG Yungui, Balance of Payments Department

**By Fax (86-10-68519163)**

Dear Sirs,

**Re: Inter-bank Foreign Exchange Market - RMB Forward Master Agreement**

On behalf of its members, the International Swaps and Derivatives Association, Inc ("ISDA") respectfully presents to the China Foreign Exchange Trade System ("CFETS") and the State of Administration of Foreign Exchange ("SAFE") this letter in relation to the revised Inter-bank RMB FX Forward Master Agreement ("Forward Master Agreement").

**Introduction**

As SAFE is aware, ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry. Today it has more than 700 member institutions from 50 countries, including from China. These members include most of the world's major financial institutions that deal in privately negotiated derivatives, as well as many corporations, governmental entities and other end-users that utilise over-the-counter derivatives to efficiently manage the financial market risks inherent in their business activities. Current members of ISDA in the PRC include a number of key financial institutions such as Agricultural Bank of China, Bank of China, China Construction Bank, China Development Bank, CITIC Industrial Bank, Industrial and Commercial Bank of China and the Export-Import Bank of China.

ISDA has drafted and issued the global market standard documentation used by the derivatives industry. ISDA also has a detailed understanding of specific derivative products as it has drafted the market standard product definitions and confirmations used throughout the globe. Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business and is committed to promoting the development of sound risk management practices.

ISDA is extremely pleased that it has worked over the years with a number of regulators in China on the development of laws and regulations as well as sound risk management practices for the derivatives industry. To this end, ISDA has also organised a number of seminars and workshops with regulators in China on topical issues relating to derivatives for promoting sound risk management practices. In particular, our helpful discussions with SAFE representatives in September 2005 and also with Mr Wang earlier this month were very constructive and we very much appreciate the time SAFE and CFETS have already invested in considering the background to the OTC derivatives documentation provided by ISDA.

## **RMB Forward Master Agreement**

We are very pleased to see that swaps have been added to the Forward Master Agreement. We respectfully submit a few further conceptual comments on the revised Forward Master Agreement.

## **Supplemental Contract**

ISDA supports the concept that parties to the Forward Master Agreement may enter into a Supplemental Contract if they wish to do so and we believe that there are a number of issues that counterparties may want to see addressed that are not presently within the scope of the Forward Master Agreement and are more appropriately separately discussed between counterparties as the requirements may differ depending on whom the party is dealing with.

Article 3 of the Forward Master Agreement makes clear that in the event of any inconsistency between the Supplemental Contract and the Forward Master Agreement, the Supplemental Contract shall prevail ("**Hierarchy of Terms**"). ISDA applauds and strongly supports this change. As discussed in our letter dated 8<sup>th</sup> November, 2005, this is consistent with international practice, as reflected not just in the ISDA Master Agreement, but also other important industry documents such as IFEMA, ICOM, GMRA, ISLA and others. It allows both parties to a contract the freedom to add provisions which are considered necessary or desirable to meet their particular requirements, and gives the parties the assurance that such mutually agreed upon provisions will be upheld. The globally applied ISDA Master Agreement is drafted in accordance with this principle – it allows the parties the freedom to modify the ISDA Master Agreement to suit their particular circumstances and provides for such modifications to prevail in the event of any inconsistency, thereby ensuring that two counterparties are always able to agree on a mutually beneficial relationship based on the ISDA Master Agreement, but without being constrained within its four corners.

The Supplemental Agreement and the Confirmations are to supplement the Forward Master Agreement so to the extent of inconsistency they must prevail. In particular, we should note that many provisions in the Forward Master Agreement are stated to be subject to the Supplemental Agreement so this is entirely consistent. This Hierarchy of Terms does not mean that parties can contract out completely from the Forward Master Agreement since mandatory laws and the trading/settlement system requirements will have to be complied with whatever the documentation. This approach also does not undermine the importance of the Forward Master Agreement which is the key document that sets up the umbrella framework of the documentation architecture. We are very supportive of the Forward Master Agreement having adopted this wise approach relating to the Hierarchy of Terms as reflected in other international derivatives documentation.

With regard to the Forward Master Agreement, additional provisions which parties may wish to include could be further events of default in order to deal with the specific risks faced by the parties. In addition, parties may wish to include close-out netting provisions (such as those found in the ISDA Master Agreement) which will greatly reduce each party's risks. Netting not only reduces the individual risks borne by parties but also reduces systemic risk. Consequently, freedom to add to the Forward Master Agreement is

an important risk management tool for the market and can only be relied upon if there is certainty that the additional language will prevail over the language in the Forward Master Agreement.

We understand that further changes to Article 3 are being considered and we would be very grateful if we could have an opportunity to comment on any such further changes before the Forward Master Agreement is finalised.

## **Single Agreement**

Article 3 also states that the Forward Master Agreement, the RMB FX Forward Transaction Confirmation and the Supplemental Contract will constitute an entire RMB FX Forward Transaction Contract. This provision, which seeks to create a single agreement between the various documents, is an approach taken by other market standard master agreements such as the ISDA Master Agreement. The equivalent single agreement provision in the ISDA Master Agreement is a critical element of the netting mechanism in the ISDA Master Agreement. ISDA very much supports this approach but would like to respectfully suggest some additional amendments to Article 3. We suggest that the Forward Master Agreement should clearly state that the Forward Master Agreement together with all swap confirmations, all forward confirmations and the Supplemental Contract (if any) forms a single agreement in respect of all of the transactions. In essence, all these transactions are then inextricably connected. This means that if default under one transaction occurs it is understood that the non-defaulting party should not be under an obligation to perform another transaction. As a matter of credit risk management, all transactions should terminate and should be netted. Accordingly in reality and from a risk management perspective, all transactions are considered as one single agreement and the Forward Master Agreement could provide for this. We would be pleased to discuss with you specific amendments that would help achieve this objective, if that would be helpful.

## **Governing Law**

We note that Article 13 of the Forward Master Agreement states that the Supplemental Contract shall be governed by PRC law. As discussed in our letter dated 8<sup>th</sup> November, 2005, this would prevent market participants from using their existing ISDA Master Agreement as the Supplemental Contract since their existing ISDA Master Agreement would be governed by New York law or English law. Consequently, RMB FX forward and swap transactions will not be netted against other derivative transactions governed by the existing ISDA Master Agreement. As discussed previously, netting reduces the individual risks faced by the domestic and foreign market participants as well as reducing systemic risks. The wider the scope of the netting, the greater the reduction in risk. Further, if such netting were permitted, this would have a large number of consequential benefits such as increased credit lines and ultimately even regulatory capital relief. In an efficient market, such benefits would be passed onto the end users of these products (that is, the trading companies who are clients of market participants). For this and other reasons set out in our letter dated 8<sup>th</sup> November, 2005 we respectfully recommend that Article 13 is amended to allow the parties to choose a foreign governing law for the Supplemental Contract.

Clearly, many parties may choose PRC law as the governing law, for example, when all the elements of the contract are completely domestic. Further, as stated in our letter dated 8<sup>th</sup> November, 2005, we fully understand that RMB forward transactions are highly regulated transactions conducted on a highly regulated market under relevant PRC laws and regulations (and similarly too for RMB swap transactions). However, the choice of a foreign governing law for the contract is not intended to and could not circumvent any such PRC laws and regulations and thus should be an option both parties can agree on if deemed appropriate.

**Conclusion**

ISDA is grateful for the opportunity to comment on the Forward Master Agreement and for your time to consider these further issues. We would be pleased to discuss further the issues highlighted above and the recommended drafting changes or otherwise to assist in any way that you deem appropriate.

If you or your colleagues have any question, please do not hesitate to contact Angela Papesch in Singapore on (65) 6435 7520 or Thomas Jones in Hong Kong on (852) 2974 7130 or send a fax to us at the above number.

Yours faithfully,

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



**Robert Pickel**  
Executive Director and CEO



**Angela Papesch**  
Director of Policy and Head of Asia-Pacific Office

**(Chinese translation attached)**

Encl



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(中文翻译)

2006年3月31日

中华人民共和国  
上海市中山东一路15号  
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致：张生举先生，市场开发部

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中华人民共和国  
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国家外汇管理局

致：王允贵先生，国际收支司

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尊敬的先生们，您们好！

关于：全国银行间外汇市场人民币外汇远期交易主协议

国际掉期及衍生工具协会（以下简称“ISDA”）代表其成员，就最近修订的《全国银行间外汇市场人民币外汇远期交易主协议》（以下简称“远期交易主协议”），谨向中国外汇交易中心（以下简称“交易中心”）和国家外汇管理局（以下简称“外管局”）呈送此函。

介绍

贵局可能知道，ISDA 是代表场外衍生产品的主要交易商的国际性行业组织。今天，ISDA 的机构成员有 700 多家，来自于 50 多个国家（包括中国）。这些成员包括世界上从事场外衍生产品交易的绝大多数主要金融机构，以及许多企业、政府实体及其它利用场外衍生

产品来有效管理其经营过程中的金融市场风险的最终用户。目前 ISDA 的中国成员包括若干主要的金融机构，比如国家开发银行、中国进出口银行、中国工商银行、中国农业银行、中国银行、中国建设银行以及中信银行。

ISDA 一直致力于编制并发布衍生产品行业所采用的国际市场标准合约。正因为 ISDA 编制了在全球市场上被广泛采用的标准产品定义以及确认书，ISDA 对于具体的衍生产品也具有深层次的理解。自成立以来，ISDA 一直致力于帮助各界识别衍生产品和风险管理业务中存在的风险来源并加以规避，以及推动良好风险管理的实践发展。

在最近几年，就衍生工具方面的法律法规以及良好风险管理制度的发展，ISDA 与中国的不同行业的监管者已进行过多次合作，ISDA 对此感到非常荣幸。另外，为促进在中国发展良好风险管理，ISDA 还组织过多次与衍生产品有关的研讨会并邀请了监管机构参加。特别地，我们于 2005 年 9 月和外管局的代表的会面以及本月早些时候同王局长进行的讨论都极富建设性；对 ISDA 所提供的有关衍生工具场外交易文件的背景材料，外管局和交易中心也给予了关注和考虑，ISDA 对此表示深切感谢。

## 人民币外汇远期交易主协议

我们很高兴地看到，掉期交易的安排已经被包含在远期交易主协议当中。在此，我们就修订后的远期交易主协议谨提交若干建议如下。

## 补充协议

ISDA 支持远期交易主协议的各方可依其自愿选择来缔结补充协议，并且我们相信，在当事人之间确实存在某些问题是需要进行约定的、但又没有被包括在远期交易主协议里面，并且这些问题可能更适合由具体的交易对手在彼此之间协商，因为与不同的交易对手进行交易，所产生的问题也是不同的。

远期交易主协议的第三条清楚规定，当补充合同与远期交易主协议条款不一致时以补充合同为准（“条款优先顺序”），ISDA 对此项修订表示十分赞赏并且强烈支持。如同 2005 年 11 月 8 日我们致您的信中所述，这一修订将使得远期交易主协议和衍生金融交易的国际市场惯例保持一致，因为条款优先顺序的规定不仅体现在 ISDA 主协议当中，也体现在国际外汇交易主协议（IFEMA），国际货币期权市场主协议（ICOM），全球市场回购主协议（GMRA），国际融券协会主协议（ISLA）和其它的标准协议里。这将允许合同当事人有权增添它们认为适合其独特需求的合适条款，并使得合同当事人确信，经双方达成的合意必将得到确认与支持。在全球广为使用的 ISDA 主协议亦采取这样的原则，允许合同当事人对 ISDA 主协议进行修改以适合其具体需求，并规定当主协议和当事人的修改不一致时应以当事人修改后的结果为准，如此就可以保证双方当事人总是能够在 ISDA 主协议的基础上建立双方互利的关系，而不是被 ISDA 主协议的字句严格束缚。

补充协议和成交单都是对远期交易主协议进行补充的，因此当彼此间发生不一致时应以补充协议和成交单为准，我们特别注意到，在远期交易主协议里有许多处都规定了仅在补充合同没有进行约定的情况下才予适用，因此这和远期交易主协议的精神也是一致的。这一条款优先顺序的规定并不意味着合同当事人可以完全地脱离远期交易主协议，因为有强制效力的法律、交易系统的规则，以及清算系统的规则是无论使用什么文件都必须遵守的。条款优先顺序的规定也不会削弱远期交易主协议的重要性，因为远期交易主协议建立了整个文件结构的框架基础。我们非常支持远期交易主协议在条款优先顺序方面采用了与国际上其它衍生工具交易文件相同的立场。

交易各方愿意增加的补充条款可能会包括更多的违约事件方面的规定，以妥善处理各方所面临的具体风险。此外，交易各方还可能希望包含终止净额结算条款（如 ISDA 主协议所规定者）从而显著地降低每一方的风险。净额结算不仅能够降低具体合同当事人的个体风险，也能降低系统性风险。因此，修改远期交易主协议的缔约自由对市场而言实属一项重要的风险控制工具，而且只有在可以确信补充协议的条款应比远期交易主协议的条款优先适用的情况下，才能发挥这一风险控制工具的效用。

我们理解，对第三条的进一步修改正在考虑当中，在远期交易主协议最终定稿之前，如果我们能被给予机会对经进一步修改的第三条发表意见，我们将不胜感激。

## 单一协议

第三条规定远期交易主协议，人民币外汇远期交易成交单及补充合同将构成一个完整的人民币外汇远期交易合同。其他市场标准合同(例如 ISDA 主协议)也采用了类似方法以便将不合的文件合为一个单一合同。ISDA 主协议中的相应单一协议条例是净额结算机制中的重要组成部分。ISDA 十分支持该条款，但我们建议对第三条稍加修改。我们建议远期交易主协议应明确说明远期交易主协议，所有的掉期交易成交单，所有的远期交易成交单以及补充合同(如有)一起构成就所有交易的一个单一协议。这样一来，所有交易将有机地结合在一起。如果就其中一笔交易发生违约，非违约方就不必履行其在其他交易下的义务。从信用风险的角度来说，所有的交易相对被终止并以净额结算。因此，从实践及风险管理来说，远期交易主协议应规定所有交易视为一个单一协议。如果需要的话，我们非常愿意与您就具体条款修作改进一步探讨。

## 适用法律

根据远期交易主协议第十三条，补充协议应适用中国法律。我们在 2005 年 11 月 8 日的信中提到，这一规定将使市场参与者无法用他们现有的 ISDA 主协议来做为补充合同，因为现有的 ISDA 主协议的适用法律是英格兰或纽约法。因此，人民币外汇远期及掉期交易无法与 ISDA 主协议管辖下的其它衍生产品交易进行净额结算。净额结算既能减少国内及国外

市场参与者的个体风险，也能减少系统性风险。净额结算机制的范围越广，就能减少风险。此外，如果净额结算机制存在，这将会带来许多益处比如更大的信用额度甚至更好的资本充足。在一个有效的市场中，这些好处的最终受益人将是这些产品的终端用户（即市场参与者的客户）。基于以上原因以及我们 2005 年 11 月 8 日的信中提及的其它原因，我们诚意建议对第十三条做出修改以允许合同方就补充合同适用外国法律。

当然如果所有合同要件都发生在中国，或在其它情况下，许多当事方也会选择中国法做为适用法。另外，正如 2005 年 11 月 8 日信中所述，人民币外汇远期交易及掉期交易是一项受高度管制的交易，并且是在受到中国法律法规严格监管的市场上进行的。然而，选择适用外国法律的目的，并非要规避而且也不能规避中国法律法规的监管，因此对方应有权选择较合适的适用法。

## 结语

ISDA 非常感谢您们给予我们机会对远期交易主协议的草稿提出建议，并感谢您们拨出宝贵的时间进一步考虑以上提出的问题。我们愿就上述问题继续进行探讨，或以您们认为合适的任何方式提供协助。

如果您或您的同事有何疑问，敬请与新加坡的 Angela Papesch（电话：(65)6435 7520）或香港的 Thomas Jones（电话：(852) 2974 7130）联系，或向信头所示号码发送传真件。

谨致敬意！

国际掉期及衍生工具协会

**Robert Pickel**  
执行董事及首席执行官

**Angela Papesch**  
政策主任及亚太地区办公室负责人

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