ISDA® Safe, Efficient Markets

BY EMAIL

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Dear Sirs and Madams

Submissions on recent amendments to the Monetary Authority of Singapore Act, the Securities and Futures Act, the Financial Advisers Act and Related Subsidiary Legislation

We refer to the recent amendments to (a) the Monetary Authority of Singapore Act, Chapter 186 of Singapore (the "**MAS Act**") concerning the resolution regime for Singapore financial institutions, and (b) the Securities and Futures Act, Chapter 289 of Singapore (the "**SFA**") and the Financial Advisers Act, Chapter 110 of Singapore (the "**FAA**").

On behalf of our members, we are writing to seek clarification on certain points pertaining to the foregoing amendments, and to set out our submissions on certain issues on the effect of the changes on the safety and efficiency of the derivatives markets in Singapore. We hope that this submission will highlight certain key concerns of our members and look forward to furthering our dialogue with MAS on these issues. Individual ISDA members may have their own views and may also submit separate submissions.

We have set out our submissions on the MAS Act in Part I of this letter, and the submissions on the SFA and FAA in Part II.

We support MAS' efforts to enhance the credibility and transparency of the derivatives markets through the amendments above. We are grateful to MAS for its consideration of these queries and submissions and welcome further dialogue on any of the points raised. In this spirit, members are currently undertaking compliance measures to the best of their ability pursuant to the new requirements, but would be grateful for MAS' understanding on the difficulty involved in such an endeavour and the time required to do so, particularly in respect of requirements that have come into force with immediate effect on 8 October 2018 without an accompanying transitional period.

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Yours sincerely,
For the International Swaps and Derivatives Association, Inc.

Keith Noyes
Regional Director, Asia-Pacific

Part I

Amendments to the MAS Act

1. We refer to the new Division 2A of the MAS Act which took effect from 29 October 2018 and the Monetary Authority of Singapore (Resolution of Financial Institutions) Regulations 2018 (the "**Resolution Regulations**"), which set out certain resolution powers of MAS and replace the Monetary Authority of Singapore (Safeguards for Compulsory Transfer of Business and Exemption from Moratorium Provisions) Regulations 2018 (the "**Safeguard Regulations**").

2. Division 2A confers powers on MAS to, after a compulsory transfer of business of a financial institution, transfer the whole or any part of the transferred business back to the transferor under section 61 (a "**reverse transfer**") or transfer the whole or any part of the transferred business to a new transferee under section 63 (an "**onward transfer**").

3. By way of background, the Safeguard Regulations had set out certain safeguards in connection with a partial compulsory transfer of business by MAS of a financial institution under resolution. These safeguards have now been moved to the Resolution Regulations and are now contained within regulations 11 to 14 of the Resolution Regulations (the "**transfer safeguards**").

4. Currently, the transfer safeguards apply only to a transfer of business under section 57 of the MAS Act, which refers to the initial compulsory transfer of business. They do not apply to reverse transfers and onward transfers made under sections 61 and 63 of the MAS Act.

5. We are writing to request the extension of the transfer safeguards to cover transfers under sections 61 and 63 of the MAS Act. Both reverse transfers and onward transfers raise the same issues with regards to netting and collateral enforceability that necessitated the implementation of safeguards for compulsory transfers of business -- namely that partial transfers of business (which are possible under both sections 61 and 63 of the MAS Act) can potentially result in a netting set being broken up, or collateral being separated from the obligations that it is intended to secure. This in turn can affect the enforceability of netting and set-off arrangements, as well as collateral arrangements. The transfer safeguards are intended to protect against these issues, and we believe that the same policy rationale for protecting netting, set-off and collateral arrangements should apply equally to reverse transfers and onward transfers.

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Part II

Amendments to the SFA and the FAA

1. Introduction

1.1 Our comments in this part concern:

(a) regulation 54B of the Securities and Futures (Licensing and Conduct of Business) Regulations (the "**SFR**") on exempt persons dealing in non-centrally cleared derivatives contracts on behalf of accredited investors, expert investors or institutional investors;

(b) regulation 46 of the SFR and regulation 22 of the Financial Advisers Regulations (the "**FAR**") on product advertisements;

(c) section 4A of the SFA read with the Securities and Futures (Classes of Investors) Regulations 2018 on the classification of accredited investors; (d) regulation 15(2)(v) and (3) of the SFR on the definition of customer's moneys and assets;

(e) regulations 26 and 27 of the SFR on the receipt of customer's assets;

(f) regulation 34A of the SFR on assets received from retail customers;

(g) regulation 40 of the SFR on provision of statement of account to customers;

(h) regulation 42 of the SFR on contract notes; and

(i) regulation 65 of the SFR on exemptions for foreign companies dealing in specified OTC derivatives contracts.

1.2 We are grateful for MAS' consideration of our comments. We have been given to understand that MAS may issue further clarification on the implementation of these regulations by way of FAQs and we would very much welcome such additional clarity. In addition, for items (b), (e) and (f), where we have requested for specific carve-outs or exemptions, we would suggest that the clarification be by way of exemption regulations, as such exemptions should have statutory backing. Similarly, for item (d) where we have highlighted concerns regarding the drafting of the regulation, we would like to request that MAS consider amending the regulation itself.

2. SFR Regulation 54B – Exempt Persons Dealing in Non-Centrally Cleared Derivatives Contracts on Behalf of Accredited Investors, Expert Investors, or Institutional Investors

2.1 Regulation 54B sets out requirements for certain exempt persons, i.e. banks, merchant banks and finance companies when dealing in non-centrally cleared derivatives contracts on behalf of accredited investors ("**AIs**"), expert investors ("**EIs**") and/or institutional investors ("**IIs**").

2.2 We are writing to seek clarity on the transitional periods for the application of regulation 54B in respect of derivatives contracts.

2.3 Regulation 63 sets out transitional periods in respect of the application of certain regulations. In particular, regulation 63(b) provides that, despite regulation 54(1), a person mentioned in section 99(1)(a) or (b) of the SFA is, in respect of any business in any regulated activity **<u>other</u>**

<u>than</u> dealing in capital markets products that are specified contracts, exempt from regulation 54B under 8 October 2020.

2.4 "Specified contract" is defined to mean a specified FX contract or a specified OTC derivatives contract.

2.5 "Specified foreign exchange contract" or "specified FX contract" means a foreign exchange OTC derivatives contract that is arranged by any bank or merchant bank, or a spot foreign exchange contract for the purposes of leveraged foreign exchange trading that is arranged by any bank or merchant bank.

2.6 "Specified OTC derivatives contract" means an OTC derivatives contract that is not a securities-based derivatives contract and not a foreign exchange OTC derivatives contract.

2.7 As such, it appears that the transitional period under regulation 63 applies only to capital markets products that are *not* specified contracts. This would mean that for banks and merchant banks:

(a) regulation 54B would apply with immediate effect to specified contracts (i.e. foreign exchange OTC derivatives contracts and spot foreign exchange contracts for the purposes of leveraged foreign exchange trading, and OTC derivatives contracts other than securities-based derivatives contracts); and

(b) the transitional period under regulation 63 would apply only to securities-based derivatives contracts.

By way of comparison, regulation 60 provides a transitional period until either 8 October 2019 or 8 October 2020 for other conduct of business requirements applicable to banks and merchant banks pursuant to regulation 54(1), in respect of specified contracts.

2.8 We would like to clarify if this is the policy intention behind the transitional periods and would like to request that the transitional periods under regulations 60 and 63 be fully harmonised and applied consistently to all classes of non-centrally cleared OTC derivatives contracts (and not just securities-based derivatives contracts) to allow the industry until 8 October 2020 to comply with the requirements under regulations 54B and 54(1). The requirements of regulation 54B and other new conduct of business requirements pursuant to regulation 54(1) will require significant time to operationalise, and the industry would also require time to implement new procedures and systems and to reach out to counterparties. We would respectfully submit that it is not possible for firms to comply with such requirements with immediate effect, especially since most classes of OTC derivatives contracts were not previously regulated.

2.9 Separately, we would also be grateful for MAS' clarification on the following points relating to the risk mitigating requirements under regulation 54B, which had previously been addressed briefly in the Response to Feedback Received – Policy Consultation on Regulatory Framework for Intermediaries Dealing in OTC Derivatives Contracts and Marketing of Collective Investment Scheme dated 26 May 2017 (the "**2017 Feedback Responses**"):

(a) the recognition of members' compliance with equivalent foreign regulatory regimes, as outlined in paragraph 2.10 below; and

(b) the provision of guidelines with examples of material terms for trade relationship documentation, trade confirmation and portfolio reconciliation, as outlined in paragraph 2.11 below.

2.10 We respectfully submit that establishing two parallel sets of similar compliance processes within the same corporate group would impose an onerous regulatory burden on members who have already established existing processes to comply with the laws of their home jurisdiction or the laws of another jurisdiction as may be applicable. We appreciate that MAS had, in recognition of this issue, previously indicated in the 2017 Feedback Responses that it would "adopt an outcome-based approach in assessing equivalence, with a focus on whether the [risk mitigating requirements] in the foreign jurisdiction achieve the same regulatory objectives as the [risk mitigating requirements] in Singapore". We seek clarification as to whether MAS will be prescribing any foreign regulatory regime as equivalent to Singapore laws for the purposes of such deemed compliance.

2.11 MAS had previously indicated that, for the purposes of regulation 54B, it will be providing examples of material terms to include in the trading relationship documentation, trade confirmation and the portfolio reconciliation, in guidelines to be issued. We would be grateful for clarification on when such guidelines will be issued, and respectfully request that MAS issue the guidelines ahead of the coming into operation of the requirements in regulation 54B so that the industry has sufficient time to put in place measures to comply with the requirements taking into account the guidelines.

3. SFR Regulation 46 and FAR Regulation 22

3.1 SFR regulation 46 and FAR regulation 22 set out requirements on product advertising. Regulation 22(1) of the FAR prohibits a "specified person" from (whether through or in collaboration with another person) disseminating or publishing, or causing to be disseminated or published, any product advertisements on or after 10 December 2018 that do not comply with the requirements stipulated in Regulation 22(2) of the FAR. These requirements set out certain specificities including that relating to font size of the product advertisement and the footnotes contained in such advertisement, as well as a requirement for the product advertisement to be approved by the senior management, agent, or committee of the specified financial adviser in writing. The reasons for approval also have to be recorded in writing. A "specified person" under the FAR in this context refers to a "specified financial adviser", which in turn is defined to mean a licensed financial adviser (a "licensed FA") or an exempt financial adviser under Section 23(1)(a), (b), (c), (e), (ea) or (f) of the Financial Advisers Act (an "exempt FA") and its representatives. A "product advertisement" refers to an advertisement in respect of any investment product, while "advertisement" in turn refers to any dissemination or conveyance of information in connection with a promotion of, or an invitation or a solicitation in respect of, any product or service, by any means or in any form, including by means of (a) a publication in a newspaper, magazine, journal or other periodical; (b) display of posters or notices; (c) circulars, handbills, brochures, pamphlets, books or other documents; (d) letters addressed to individuals or bodies; (e) photographs or cinematograph films; or (f) sound broadcasting, television, the Internet or other media.

3.2 Similar restrictions are imposed on the product advertisements disseminated or published by a "specified person" under the SFR, which in this case, refers to a holder of a capital markets services licence under the SFA ("**CMS licensee**") and its representatives under regulation 46(1) of the SFR. Regulation 46 of the SFR and the related product advertisement requirements apply to banks, merchant banks and finance companies by virtue of regulation 54 of the SFR.

Reference to "specified person" herein for purposes of Regulation 46 will include CMS licensees as well as banks, merchant banks and finance companies.

3.3 An entity which is a "specified person" under both regimes above, such as a bank, will be subject to the product advertisement requirements stipulated under both regimes, unless exemptions apply.

3.4 We are writing to request that the product advertisement requirements in regulation 22 of the FAR and Regulation 46 of the SFR should not apply to a specified person when dealing in derivatives contracts with all classes of non-retail clients, including AIs, IIs and EIs.

3.5 We understand that persons which are exempt from section 26 of the FAA will be exempt from regulation 22 of the FAR. Therefore a specified person under the FAA regime will be exempt from regulation 22 of the FAR in relation to the marketing materials it has prepared when dealing with, inter alia, IIs and related corporations. However, there is no similar general exemption from the requirements of regulation 22 of the FAR for specified persons dealing with AIs or EIs, save in very limited circumstances, for example, where the specified person is advising AIs on bonds (under regulation 22(7)(c)(iii) and (iv)). This would not apply to most forms of derivatives contracts.

3.6 The practical effect of this is that certain communications provided by specified persons to AIs and EIs which fall under the broad definition of "product advertisement" would be subject to the product advertisement requirements. This presents an unduly onerous burden operationally on specified persons in their dealings with AIs and EIs. Whilst we have limited the present submissions specifically to the derivatives context, we understand that individual ISDA members may have their own views and may also submit separate submissions to MAS, particularly in respect of more general issues such as the definition of "product advertisement".

3.7 We respectfully submit that the current position under the FAR and SFR represents a departure from market practice especially in terms of the treatment of non-retail clients in Singapore (where such classes of clients are typically regulated more lightly than retail clients due to their sophistication and knowledge of investment products). Further, under the Securities and Futures (Classes of Investors) Regulations 2018, persons who have been assessed by the specified person to be AIs must be provided with a clear explanation of the consequences of being so treated for the purposes of the relevant consent provisions, and have expressly opted in (or where they have opted in, not opted out) to be treated as AIs. Arguably, since these investors would expressly choose to be treated as AIs, they ought similarly to be regarded as sophisticated and knowledgeable enough investors such that they can safeguard their own interests. This level of sophistication is also reflected in SFR regulation 47DA, which exempts CMS licensees from the requirement to provide risk disclosure statements to customers that are AIs, EIs, IIs or related corporations. As such, we respectfully submit that specified persons dealing with AIs and EIs should also be generally exempted from the requirements specified in regulation 22 of the FAR and regulation 46 of the SFR.

3.8 Additionally, we note that similar requirements for senior management approvals are set out in regulation 18B of the FAR, which specifically carves out AIs, IIs and EIs from the scope of "targeted clients" to whom a financial adviser must carry out a due diligence exercise for, prior to the sale or marketing of a new product to such targeted clients. In our view, regulation 22 and regulation 18B of the FAR should both be similarly treated as additional safeguards in cases where investment products are sold to retail investors. This approach is also congruent with the retail and prescriptive nature of the requirements stipulated in regulation 22 of the FAR.

3.9 The reasons for granting an exemption from regulation 22 of the FAR in this situation apply equally in to regulation 46 of the SFR, which imposes similar requirements – non-retail investors are sophisticated enough that they can safeguard their own interests, and the burdens that FAR regulation 22 and SFR regulation 46 would impose on firms would therefore outweigh the regulatory benefits.

3.10 MAS has recognised this point by granting an exemption from SFR regulation 46 when offers of investments are made to (*inter alia*) AIs and IIs under certain prospectus safe harbours. However, this exemption is not sufficiently broad, particularly for derivatives transactions. In particular, it will not capture the following situations:

(a) it will not capture offers of derivatives contracts that are not securities-based derivatives contracts. The prospectus requirements (and by extension, the safe harbours) apply only to offers of securities and securities based derivatives contracts, and non-securities based derivatives contracts would not have the benefit of these exemptions. This would also result in differential treatment between different asset classes;

(b) it will not capture offers of securities that are made to persons outside Singapore under equivalent prospectus safe harbours in other jurisdictions. In these situations, the SFA prospectus safe harbours will not apply as there is no offer to a person in Singapore and therefore the firm will have to comply with the requirements under regulation 46. It should make no difference as to whether the offeree to whom an offer is made is based in or outside Singapore;

(c) it may not capture transactions in securities or securities-based derivatives contracts which are not "offers" within the meaning of section 239(6) of the SFA, such as situations where the financial institution is transacting as agent and not as principal. This is because an offer is defined under section 239(6) of the SFA with reference to a person who makes an offer if and only if, he makes the offer *as principal*. This creates particular difficulties in the context of exchange traded or centrally cleared derivatives contracts, where brokers may act as agent rather than principal and there is no actual transaction entered into between the broker and the client.

3.11 In addition, other than the exemptions relating to prospectus safe harbours above, regulation 46AB of the SFR and regulation 22B of the FAR also provide exemptions where the product advertisement in question is prepared by another preparer for the specified person. This exemption only applies, however, if the preparer complies with certain conditions including *inter alia* that the preparer has complied with the product advertisement requirements in the SFR and the FAR, and notifies the specified person of this fact. We respectfully submit that it is not always possible for members to obtain such notification from third-party preparers upon receiving marketing materials from such persons. For example, where third-party preparers are not "specified persons" (such as overseas fund managers or issuers), members would not be able to rely on notifications received from such preparers for most types of product advertisements.

3.12 In light of the reasons discussed above, we respectfully submit that adherence to the requirements of FAR regulation 22 and SFR regulation 46 be disapplied for communications distributed to AIs and EIs, and hence propose for MAS to include a general carve-out from the advertisement requirements under these regulations where dealing in derivatives contracts with AIs and EIs.

3.13 We would also like to request an extension of the deadline for compliance with these regulations for retail customers to 8 December 2019, to allow sufficient time to implement the necessary procedures.

4. Classification of accredited investors

4.1 The Securities and Futures (Classes of Investors) Regulations 2018 (the "**Investors Regulations**") implement the AI opt-in and opt-out regimes. For existing AIs, regulation 3(4) of the Investors Regulations requires CMS licensees to undertake certain steps vis-à-vis existing AIs in order to treat such counterparties as having opted-in to be treated as AIs. This includes customer outreach – regulation 3 prescribes certain statements and warnings that must be provided to the customers – as well as record keeping requirements.

4.2 Regulations 2, 3, 5(2), (3) and (4) of the Investors Regulations come into force on 8 January 2019. ISDA's members would like to request an additional transitional period to allow firms sufficient time to comply with the requirements.

4.3 The transitional period of 3 months (since 8 October 2018) is extremely tight, given that firms need time to develop the requisite statements and warnings and to reach out to clients. In addition, firms do need time to implement procedures and controls to deal with AIs that opt out, and to evaluate the status of existing clients in light of the amendments to the AI definition.

4.4 Accordingly, ISDA members would like to request an extension of the transitional period for regulations 2, 3, 5(2), (3) and (4) of the Investors Regulations of 3 to 6 months**.**

4.5 Separately, in relation to clients who amend their "opt-in" or "opt-out" preference during the course of a derivatives transaction, we are of the view that a customer who is an AI at the point of entering into a derivatives contract should continue to be treated as such until the maturity date of the same. For example, an existing client who initially does not "opt-out" of AI status but subsequently exercises this right prior to maturity of the relevant derivatives contract and provides notification of the same, should be treated as an AI for that particular derivatives contract, and the opt-out should only affect derivatives contracts entered into after the relevant change in preference. We would be grateful if the MAS could let us know if it disagrees with this interpretation.

5. SFR Regulations 15(2)(v) and (3) – Definition of Customer's Moneys and Assets

5.1 We refer to regulation 15(2)(v) of the SFR. This regulation excludes, amongst others, the following category of moneys from the definition of "money received on account of a customer" for the purposes of Part III of the SFR:

"*[M]oney received from, or on account of, a customer who is an institutional investor, in connection with any OTC derivatives contract which –*

(A) is entered into by the [CMS licensee] with the customer;

(B) is not cleared or settled by a clearing facility; and

(C) is booked in Singapore."

5.2 A similar exclusion is also provided under regulation 15(3) in respect of the definition of "customer's assets" in connection with OTC derivatives contracts.

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5.3 We would like to clarify if the policy intention is for the scope of the exclusions in regulations 15(2)(v) and (3) to only be in respect of institutional investors but not accredited investors or expert investors. For the reasons set out in paragraph 3.7 above, we respectfully submit that the moneys and assets of accredited and expert investors should similarly be excluded under regulations 15(2)(v) and (3). In this regard, we note from the 2017 Feedback Responses that the MAS has previously clarified that the extension of the trust and custody account requirements under Part III of the SFR to OTC intermediaries is "not intended to change the market practice for OTC intermediaries operating in the wholesale segment, where the clientele type typically comprises IIs, EIs or corporate AIs."

6. SFR Regulations 26 and 27 – Receipt of Customer's Assets

6.1 Regulation 26 of the SFR provides that a CMS licensee or exempt person (as defined in paragraph 2.1 above) must comply with certain custody account requirements in respect of their customer's assets:

(a) in respect of retail customers, regulation 26(1)(a)(i)(A) provides that a CMS licensee or an exempt person must deposit such assets "in a custody account held on trust for the customer that is maintained in accordance with regulation 27"; and

(b) in respect of non-retail customers, regulation 26(a)(ii)(A provides that a CMS licensee or an exempt person must deposit such assets "in a custody account held on trust for the customer."

6.2 Prior to 8 October 2018, regulation 26 did not make express reference to regulation 27 and in practice, it was generally understood in the industry that the custody requirement in regulation 26 was subject to regulation 27. We would like to clarify whether the policy intention is for the custody account requirements in regulation 27 to now only apply in respect of retail customers and not non-retail customers, given the express reference to regulation 27 in only regulation 26(1)(a)(i)(A) above.

7. SFR Regulation 34A - Assets Received from Retail Customer

7.1 We refer to regulation 34A of the SFR. This regulation provides as follows:

"The holder of a capital markets services licence must not, in relation to any assets received from its retail customer, enter into any contract, arrangement or transaction of which the purpose or effect is to transfer any right, interest, benefit or title in those assets to itself or any other person, unless —

(a) the contract, arrangement or transaction is entered into in connection with borrowing or lending of the retail customer's specified products; and

(b) the holder complies with regulation 45(1), (3) and (4) in relation to the borrowing or lending (as the case may be) of the retail customer's specified products."

7.2 We understand from Consultation Paper II on Draft Regulations Pursuant to the Securities and Futures Act dated 26 May 2017 (the "**Draft Regulations CP**") that the policy intent behind regulation 34A is to regulate title transfer collateral arrangements[1]. In Paragraph 4.9 of the Draft

[1] Paragraphs 4.9 and 4.10 of the Draft Regulations CP, and paragraph 2.1.27 of the Response to the Draft Regulations CP.

Regulations CP, a title transfer collateral arrangement was described as "an arrangement by which a customer agrees that full ownership of moneys or assets placed with a CMS licensee as collateral in respect of the customer's existing or future obligations, is to be unconditionally transferred to the CMS licensee".

7.3 We are supportive of the policy intention as set out in the Draft Regulations CP. However, regulation 34B is drafted very broadly and gives rise to concerns that it may affect transfers of interests other than title transfer collateral arrangements.

7.4 Regulation 34B applies to the transfer of "***any right, interest, benefit or title***" in assets. This gives rise to concerns as:

(a) this is not limited to collateral arrangements and can capture any transfer of assets to a CMS licensee that is not for the purpose of borrowing or lending. On a plain reading, this could even prevent a customer from transferring assets to a CMS licensee. The SFA and the SFR contemplate that assets should be held on trust by a CMS licensee for its customer. The creation of a trust requires the customer to transfer legal title to the CMS licensee (or its nominee) as trustee. The customer then retains beneficial interest in the assets. As regulation 34B prevents the transfer of *any* right, this prevents the customer from transferring even legal title to the CMS licensee and thus prevents the CMS licensee from becoming a trustee of the assets.

More generally, there may be other circumstances under which a customer may deliver assets to a CMS licensee or assign rights in assets to the CMS licensee in the general course of business that is not for the purposes of creating a title transfer collateral arrangement. For instance, securities and assets may be delivered to a broker during a sale transaction, during which the CMS licensee would hold on to such assets (in the trust account) until the settlement occurs. Securitisation transactions may also involve the transfers of customer assets and may be adversely affected by this regulation. We do not think that it is the policy intention to prevent such transfers; and

(b) this is not limited to title transfer collateral arrangements and could prevent the creation of security interests. The creation of security interests also involves the transfer of the interests in the asset. A legal mortgage or a legal assignment involves the transfer of assets to the secured party (the mortgagee), subject to a right of the mortgagor to have the assets reconveyed when the obligations are performed or the security lapses (the "**equity of redemption**"). The mortgagor would become the legal owner of the assets. An equitable mortgage or equitable assignment involves the transfer of the beneficial interest to the secured party. The equitable mortgage or assignment may be perfected, and upon perfection, legal title would transfer to the secured party. By preventing the transfer of *any* rights, title or interest in the assets, regulation 34B can also prevent the creation of security interests generally, leaving CMS licensees with no means of creating security.

The distinguishing factor between a title transfer collateral arrangement and a security interest is that, under a title transfer collateral arrangement, all rights, interest, benefit and title move from the transferor to the transferee. This includes both legal and beneficial interest in the asset, such that the transferee becomes the owner of the assets. The transferor retains only a contractual right to the return of equivalent assets. As highlighted in the Draft Regulations CP, this means that the assets form part of the CMS licensee's estate in insolvency, leaving the transferor as an unsecured creditor.

In contrast, under a security interest, the security provider continues to have rights in the assets (such as the equity of redemption mentioned above). However, as mentioned, security interests still involve the transfer of rights and interests in the assets to the secured party.

7.5 We would respectfully submit that for this reason, regulation 34B goes beyond the policy intent and creates substantial difficulties for CMS licensees dealing with retail customers. We would submit that the language of regulation 34B should be limited to title transfer collateral arrangements as described in the Draft Regulations CP – i.e. this should only capture arrangements where all the rights, interest and title in the assets are transferred to a CMS licensee for the purposes of securing or collateralising obligations owed by the customer to the CMS licensee, in exchange for which the customer acquires a right of return of equivalent assets from the CMS licensee. MAS may also wish to consider the inclusion of express carve-outs or clarificatory language to prevent regulation 34B from limiting the ability of CMS licensees to deal with assets outside of title transfer arrangements. We would be happy to work with MAS on the specific language of the regulation.

8. SFR Regulation 40 – Statement of Accounts

8.1 Regulation 40(2)(b) and (3), read together with regulation 54, of the SFR provide that:

(a) in the monthly statement of account sent to customers, the CMS licensee or exempt person (as defined in paragraph 2.1 above) must set out a list of derivatives contracts entered into by the customer and spot foreign exchange contracts for the purposes of leveraged foreign exchange trading entered into by the customer that are outstanding and have not been liquidated, the prices at which such contracts were acquired, and the net unrealised profits or losses of the customer in all such contracts marked to the market; and

(b) in the quarterly statement of account sent to customers, the CMS licensee or exempt person must set out the assets, derivatives contracts of the customer and spot foreign exchange contracts for the purposes of leveraged foreign exchange trading of the customer that are outstanding and have not been liquidated and cash balances (if any) of the customer as at the end of that quarter of the calendar year.

8.2 We note that regulation 40(6) provides for a carve-out from the statement requirements where a CMS licensee or exempt person has customers which are only IIs, if the CMS licensee or exempt person performs periodic reconciliation between its own records and its customers' records, in respect of its customers' transactions and positions in capital markets products.

8.3 ISDA would like to request for a similar carve-out from the requirements of regulations 40(2)(b) and (3) in respect of non-centrally cleared derivatives contracts where an exempt person deals with AIs, EIs or IIs (even if the exempt person's other customers are not AIs, EIs or IIs).

8.4 Firms generally send valuation and other statements to customers to keep them updated concerning their derivatives transactions. In addition, regulation 54B(1)(c) requires exempt persons to perform portfolio reconciliation at regular intervals with each counterparty that is an AI, EI or II in respect of each non-centrally cleared derivatives contract, thereby providing such customers the opportunity to raise any discrepancies that may become apparent as a result of such periodic reconciliations. This should address the information requirements under regulation 40, and accordingly, we would respectfully submit that in view of these investor safeguards it is not necessary to include an additional requirement to include such information on derivatives transactions in the regulation 40 statements where exempt persons deal in non-centrally cleared derivatives contracts on behalf of AIs, EIs, or IIs. On this basis, we would be grateful if the MAS could consider an extension of the scope of the exemption under regulation 40(6) to also include transactions with AIs and EIs, in addition to IIs.

8.5 Pending MAS' consideration of our request above, and in parallel with the same, we would also like to request for a harmonised transitional period to be provided to enable firms to have time to operationalise and implement new procedures and systems as may be necessary for the purposes of regulation 40. Regulations 60 and 63 currently provide certain exemptions for banks and merchant banks as follows:

(a) in respect of any business in dealing in specified contracts, banks and merchant banks are exempted from all the requirements under regulation 40 until 8 October 2020; and

(b) in respect of any regulated activity other than dealing in specified contracts, banks and merchant banks are exempted from regulation 40(1B) until 8 October 2020.

As such, it appears that the transitional period for all the requirements under regulation 40 (save for regulation 40(1B)) have come into force with immediate effect for banks and merchant banks dealing in capital markets products that are *not* specified products, such as securities-based derivatives contracts. We would like to clarify the policy intention behind these transitional periods, and would be grateful if the MAS could consider implementing a transitional period that is applied uniformly in relation to derivatives contracts in the event MAS does not implement the request for an exemption described in paragraphs 8.1 to 8.4 above. As is the case with regulation 54B above, firms will require significant time to operationalise and implement new procedures and systems to comply with the requirements under regulation 40, where applicable.

9. SFR Regulation 42(1AA) – Contract notes

9.1 Regulation 42(1) of the SFR sets out a requirement for a CMS licensee to provide its counterparty with a contract note. Pursuant to regulation 42(1AA), this requirement does not apply to a sale or purchase of OTC derivatives contracts if the CMS licensee gives to its counterparty a confirmation in respect of the transaction. This submission concerns the requirement under regulation 42(1AA) for the confirmation to for CMS licensees acting as principal to state that the CMS licensee is so acting.

9.2 With regards to OTC derivatives contracts entered into under a master agreement such as the ISDA Master Agreement, parties usually agree that the confirmation would form a single agreement with the master agreement. For instance, section 1(c) of the ISDA Master Agreement provides that "all Transactions are entered into in reliance on the fact that this Master Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this "Agreement"), and the parties would not otherwise enter into any Transactions". The master agreement would generally set out the capacity in which parties would act, and as such, the confirmations would not explicitly contain such language. For this reason, standard industry confirmations do not contain a statement that the CMS licensee is acting as principal.

9.3 If CMS licensees need to amend their confirmation templates to set out the capacity in which parties are acting even where this has already been set out in the master agreement, this would require a substantial amount of work to operationalise this change as it is not market practice to include such a statement in confirmations. Furthermore, we would submit that there is little benefit to counterparties where the parties have already set out this information in the master agreement. We would also highlight regulation 47DA(2), which requires a CMS licensee to inform its customer if it is acting in a transaction as a principal or agent. Regulation 47DA(2) allows the CMS licensee to either inform a client that it intends to act as principal in *all* transactions of sale or purchase of specified capital markets products or inform the customer that it is acting in a particular transaction as principal. In short, regulation 47DA(2) permits a once-off disclosure to be made in respect of all transactions and we would submit that the same approach should be permitted for regulation 42.

9.4 In light of the above, where a confirmation forms part of a master agreement (including a set of brokerage terms and conditions) and the master agreement states that the CMS licensee is acting as principal or the CMS licensee has otherwise notified the customer pursuant to regulation 47DA(2) that it is acting as principal in respect of transactions governed by the master agreement, we would respectfully submit that this should fulfil the requirements of regulation 42(1AA)(c), and that the CMS licensee should not be required to further state this in the confirmation. We would be grateful if MAS can let us know if it has any objections to this view.

9.5 In addition, as noted above, regulation 47DA(2) requires a CMS licensee to inform a customer whether it is acting as principal or agent in respect of a transaction for the sale or purchase of any specified capital markets products. However, pursuant to regulation 47DA(3), this requirement does not apply to customers which are AIs, EIs, IIs or a related corporation of the CMS licensee. In contrast, there is no similar carve out for regulation 42(1AA)(c), which means that the CMS licensee would not be able to obtain the benefit of the exemption under regulation 47DA(3). For consistency with regulation 47DA, we would like to request a similar exemption from the requirement under regulation 42(1AA)(c) where the customer is an AI, EI, II or related corporation of the CMS licensee.

10. SFR Regulation 65 – Exemptions for foreign companies

10.1 We appreciate the MAS' intentions in providing in regulation 65 of the SFR for grandfathering arrangements for foreign companies that were carrying on business in dealing in specified OTC derivatives contracts before 8 October 2018. However, our members have provided feedback that regulation 65 as drafted does not meet its intended objective since regulation 65 requires there to be an existing "arrangement" in place between a foreign company (on the one hand) and a Singapore licensed financial institution (on the other hand). Given that dealing in OTC derivatives contracts was not previously a regulated activity, foreign affiliates of banks may have been entering into OTC derivatives trades with Singapore counterparties in the past, either without having formal arrangements in place with their Singapore affiliates or without having any arrangement in place at all (i.e. the foreign affiliate would deal directly with Singapore counterparties).

10.2 Further, regulation 65 applies only to any foreign company which is a "related corporation" of a Singapore licensed financial institution, and would therefore not apply to the head offices or foreign branches of Singapore licensed financial institutions. Many OTC derivatives trades with Singapore counterparties are entered into by the head office (rather than a related corporation) of banks in Singapore, as many of our members operate in Singapore as a branch, rather than a subsidiary.

We are concerned that this may affect the vibrancy of the derivatives markets in Singapore. In addition, the latter creates an uneven playing field between banks operating in Singapore as a subsidiary as opposed to banks operating in Singapore as a branch. We respectfully recommend that MAS can:

(a) remove the requirement under regulation 65 of the SFR for there to be an existing "arrangement" in place, and instead allow for the grandfathering of existing OTC derivatives trading activity as long as the foreign entity puts in place an "arrangement" with a Singapore related corporation after 8 October 2018 (and possibly subject to an end date for the transitional period); and

(b) extend or clarify that the grandfathering arrangements in regulation 65 of the LCB Regulations to the OTC derivatives trading activity of the head office and foreign branches of foreign banks operating in Singapore as a branch.