European Commission Draft Delegated Act specifying the conditions under which commercial terms for clearing services of clearing service providers are considered to be FRANDT

FIA and ISDA response

Date: 7 April 2021

I. Introduction/Executive Summary

FIA and ISDA (the Associations) welcome the opportunity to respond to the European Commission's draft Delegated Regulation supplementing Regulation (EU) No 648/2012 by specifying the conditions under which the commercial terms for clearing services for OTC derivatives are to be considered to be fair, reasonable, non-discriminatory and transparent (FRANDT) and the draft Annex. The Associations would like to thank the European Commission (EC) for considering previous feedback on the ESMA Final Report on FRANDT and for making pragmatic changes and refinements in a number of important areas of FRANDT, which will make the requirements more proportionate.

As mentioned previously, the Associations and their members support fair, reasonable, non-discriminatory and transparent commercial terms for clients and continue to support the policy objective of FRANDT in addressing the clearing access difficulties faced by counterparties with limited OTC derivatives trading activity.

While we appreciate the EC's general approach, the Associations' clearing service provider (CSP) members remain concerned about some critical issues that we would like to bring to the EC's attention for further consideration before the FRANDT rules are finalised. We have set them out in *Section II* below and they cover the following areas:

- Territorial scope;
- Application of FRANDT to new/prospective clients only;
- Implementation period; and
- Refusal of clearing orders, suspension, liquidation or close out of client positions and notice periods.

In *Section III*, we have also provided some further commentary on the specific requirements that are set out in the Annex to the draft Delegated Act.

We hope you find the comments in this response helpful when finalising the FRANDT rules. Although we recognise that we are approaching the end of the legislative process on this important matter, we would be happy to discuss any of the points below.

II. Key concerns from the CSPs' perspective

1. Territorial scope

Recital 2 and the Explanatory Memorandum to the draft Delegated Act seem to suggest that the scope of FRANDT would include third-country CSPs clearing at recognised third-country CCPs if the

client and the relevant transactions are subject to mandatory clearing under EMIR. The Associations' CSP members are of the view that the suggested extra-territorial application of FRANDT is highly problematic for the reasons set out below, and advocate for the scope to be limited to where (i) the client and the OTC derivative transaction are both subject to the EMIR clearing obligation and **(ii) the clearing takes place on an EU CCP**. This would be consistent with the application of other EMIR requirements covering the provision of clearing services. The EMIR segregation requirements and the EMIR and MiFIR indirect clearing rules apply to clearing arrangements on EU authorised CCPs only, and defer to local regulatory frameworks in the home jurisdiction of third-country CSPs and CCPs if the client chooses to clear outside the EU.

The proposed extraterritorial scope for FRANDT would lead to double regulation for impacted third-country CSPs, as they would need to meet their own jurisdictional conduct of business requirements, and then also the (EU) FRANDT requirements. This would be unduly burdensome and in best case duplicative, especially as third-country CCPs' home jurisdictions will have already been considered equivalent for the purposes of EMIR (Article 25), and in worst case conflicting with the local conduct of business requirements of the third-country CSPs.

Please see below for an example of how FRANDT, as proposed to be applied broadly to recognised third-country CCPs, poses significant practical challenges for third-country CSPs. We looked at the CFTC regime that applies to US FCMs and believe similar challenges could arise in other third-country jurisdictions.

Box 1: **High-level analysis/comparison – EU FRANDT and US CFTC requirements that apply to US FCMs**

CFTC regulations already provide for and safeguard the policy objectives of FRANDT, namely, access to clearing, transparency of commercial terms, and disclosures of material risk and fees. CSPs view the cross-border application of FRANDT to US clearing as needlessly duplicative of CFTC regulations, and if not technically in conflict with specific CFTC regulations, then practically in tension with the framework of the US regulatory regime, which eschews highly prescriptive requirements for principles-based rules.

The FRANDT requirement regarding not rejecting new trades cuts across the foundations of CFTC Rules 1.73 and 1.74, which together work to require risk management at the same time with straight-through processing as soon as technologically practicable, which requirements equally apply to bunched orders for unidentified customers. Rule 1.73 does not anticipate that an FCM should contractually agree with each of its customers, or trading managers executing on behalf of multiple customers, the "conditions and criteria for the acceptance" of orders, as contemplated by Section 7 of the FRANDT Delegated Act Annex. Such contractual arrangements may conflict with the FCM's risk management obligations. At a minimum, they will make it harder for the FCM to manage risk to itself and the CCP. In addition, Rule 1.73 requires an FCM to conduct weekly stress tests on the positions in each customer account. Implicit in this requirement is an FCM's obligation to adjust a customer's established position limits, if circumstances require. It is not clear if the contractual arrangements contemplated by section 7 of the FRANDT Delegated Act Annex would permit an FCM this flexibility, and in any event would complicate compliance with Rule 1.74.

The extraterritorial application of FRANDT would run counter to the principle of deference across regulatory jurisdictions. Clients who contract with CSPs outside their regulatory jurisdiction (e.g., EU

client contracting with a U.S. FCM) typically do so only on a reverse enquiry basis with the understanding they are signing up to third-country rules.

It would be undesirable if the impact of FRANDT resulted in third-country CSPs restricting their OTC clearing offering such that they no longer offered OTC clearing services to EU clients. This would have an adverse impact on EU clients including preventing them from satisfying their EMIR clearing obligation on recognised third-country CCPs and being able to access important liquidity pools outside the EU, and reap the benefits of global CCP competition. This would ultimately run counter to the ethos of FRANDT to ease issues around access to clearing services for (particularly smaller) EU clients.

We urge the EC to reconsider its guidance on territorial scope of FRANDT, and limit its application to in-scope OTC clearing arrangements where the clearing service is provided on an EU CCP.

2. Application of FRANDT to new/prospective clients only

The Associations' CSP members believe that ***FRANDT should only apply to new/prospective clients***. Given FRANDT's aim to facilitate clearing access, there is arguably no need to implement FRANDT as to existing clients who already have clearing arrangements in place, nor is it possible to apply the proposed FRANDT onboarding arrangements to those existing clients. In other words, applying FRANDT to existing clients does nothing to further the policy of FRANDT, since existing clients already have access to clearing services and this access is the result of a highly and successfully negotiated contractual process between CSPs and clients.

Even with FRANDT applying to new clients only (i.e., those clients that are onboarded after the end of the implementation period), the extent of the work required to implement FRANDT should not be underestimated, not least because the documentation for existing "umbrella" agreements, where new clients accede to terms agreed with an investment manager for multiple underlying clients, would need to be amended. As explained in Section 3 of our response below, we recommend and request an implementation period of 6 months at a minimum (and up to 12 months) for CSPs to be able to prepare the necessary documentation and processes for onboarding new clients in a FRANDT compliant manner.

3. Implementation period

In order to enable CSPs to implement FRANDT, we strongly believe that a sufficiently long implementation period is essential, especially given the delay in the publication of the draft Delegated Act. While CSPs are still assessing the extent of changes needed to implement FRANDT, it is already clear that three months will not be sufficient for CSPs to comply with the FRANDT requirements as proposed in the draft Delegated Act. CSPs will need to draft and publish onboarding guidance and a form for a request for proposal, as well as implement internal processes and procedures around the proposal process. Further, there are changes required to the industry standard client clearing documentation which will need to be considered and agreed with the CSPs and other industry participants, as well as changes to onboarding and risk management processes. ***On this basis, we suggest that at the very minimum the EC introduces a six to twelve month implementation period after the Delegated Act has come into effect.***

In addition, and for the avoidance of doubt, we ask that ***the EC clarify that the CSPs are not expected to comply with the FRANDT requirements set out in the Delegated Act between 18 June***

2021 and the end of the implementation period as provided for in the Delegated Act. This is for the very good reason that it is not possible to comply with requirements that are not known. This would provide the necessary legal certainty to market participants as the FRANDT Level 1 obligation comes into effect on 18 June 2021, while the Level 2 requirements will only start to apply after the end of the implementation period and well after 18 June 2021.

Finally, the Associations' CSP members support quick adoption of the final Delegated Act to ensure legal certainty as to the conditions under which commercial terms are considered FRANDT, as the EC noted in Recital 8 to the draft Delegated Act.

4. Section 7 - Refusal of clearing orders, suspension, liquidation or close out of client positions and notice periods

The draft FRANDT rules provide that the CSP cannot refuse the client's request for clearing of an OTC derivative contract that fulfils the agreed conditions and criteria for the acceptance of such orders, unless such refusal is 'reasonable and duly justified', in which case the CSP, upon request, provides the client with the reasons for refusal in writing.

The Associations' CSP members recommend that the Section 7 requirements are removed as they do not further the objectives of FRANDT and impinge on the parties' freedoms to negotiate commercial terms. The proposals arguably also conflict, in some respects, with EMIR and may lead to outcomes which do not further the FRANDT objectives. Each of these points is further detailed below.

In the alternative, if the Section 7 requirements are not removed, it should be made clear that:

- The determination of what is 'reasonable and duly justified' is a subjective determination by the CSP, taking into account its understanding of the circumstances prevailing at the time of the decision, its own commercial and risk management interests, and the interests of its other clients. Furthermore, any disputes between the CSP and its clients in connection with 'reasonable and duly justified' should be settled in court in accordance with the applicable dispute provisions in the client clearing agreement between the two parties, rather than by the relevant National Competent Authority (NCA).
- CSPs should be free to agree with their clients in their agreements that CSPs may in good faith make changes to commercial terms (e.g. margin step-ups, rate changes etc). Where these are pre-agreed with a client, there should be no requirement for the CSP to provide additional notice or justify the rationale.
- The minimum notice period for termination of the agreement in the absence of a default should be left to the client and CSP to agree, by reference to the client's profile and specific circumstances.

a. Refusal of clearing orders

The inclusion of an obligation to clear creates new risk to the clearing system. Under industry documentation today, CSPs have discretion whether to accept a request for clearing.[1] Subject to

[1] See, for example, clause 6(c) in the ISDA/FIA OTC Addendum and clause 4.5 in the FIA Terms of Business 2019.

> (c) ***No obligation to consent to clearing.*** *Subject to Section 6(a), nothing in this Addendum imposes any obligation on Clearing Member to consent to the clearing of Clearing Eligible Trades or to enter into Client Transactions or CM/CCP Transactions.*

systems limitations (e.g. the time for adjustments to clearing limits), CSPs transacting on market standard terms are not obliged to accept trades for clearing.

Where a new trade is accepted for clearing, the CSP will become subject to obligations as principal to the CCP (and exposed to market risk on those positions until they can be unwound). The Associations' CSP members are therefore concerned that the inclusion of an obligation to clear (and 6 months' minimum notice period for termination and agreement changes) will amount to an obligation to contract, which is contrary to EMIR Article 4.3a.

Ability to control the risks of clearing services

CSPs' ability to refuse to clear new trades, suspend, liquidate or close out client positions, and terminate commercial relationships are essential tools to manage risk, and crucial to prevent systemic risk in the clearing ecosystem, especially if facing a deteriorating (but not yet defaulted, or defaulting) client or other adverse market conditions (which could include concerns relating to the CCPs). The importance of these tools for market stability has been tested during recent market-wide, issuer and commodity specific episodes of extreme volatility and price variance.

Although CSPs may impose broad conditions for accepting trades for clearing in contractual documentation, it is unlikely that CSPs will be able to foresee all issues at the point of concluding agreements with a new client. Once a trade is allocated to a client and accepted for that client account, then any negotiated contractual terms concerning margin levels and the timing for closeout may materially delay further risk management. Imposing obligations as proposed in the draft delegated acts will therefore conflict with the provisions of EMIR Article 4.3a, which expressly permits CSPs and clients to control the risks of the clearing services they offer.

Imposition of conditions and refusal of clearing where "reasonable and duly justified"

Once a client has been onboarded, the CSP is incentivised by its commercial interests to accept trades for clearing; consequently, CSPs are unlikely to reject a trade or terminate a relationship unless they consider that they have a legitimate reason for doing so. As an additional protection for clients, the Associations note that EMIR already requires that CSPs take measures to identify and prevent conflicts of interest, in particular between the trading unit and the clearing unit.

The concept of 'reasonable and duly justified' is subjective and varies from a client and a CSP perspective taking into account the different risks and that the CSP is ultimately just an intermediary / conduit for the client to access the CCP. This lack of clarity could open up floodgates for clients challenging CSP clearing terms as being FRANDT non-compliant to local NCAs or private action. Such a subjective concept will substantially increase the litigation risks of dynamic risk management in the OTC derivatives clearing service area in a way which is inconsistent with other derivatives and financial service offerings. As noted below, at worst it may disincentivise a CSP to continue to provide clearing services to clients.

The Associations' CSP member further note that commercial agreements are typically challenged in courts, so we think that any potential disputes arising out of or in relation with clearing agreements should be resolved in accordance with the dispute and jurisdiction clauses in those agreements, and not by the relevant NCA.

> *4.5* ***Right not to accept transactions:*** *The Firm may choose not to accept any transaction for clearing. If the Firm declines to accept any transaction for clearing, the Firm will promptly notify the Client but the Firm is not obliged to give a reason.*

Against this background, the additional requirement for CSPs to justify that their decisions are 'reasonable and duly justified' is unlikely to provide additional meaningful protections for clients, however it may inhibit CSPs from taking prudent actions promptly in order to address emerging risks, which could lead to slower/poorer risk decisions and poorer outcomes for the market at large. If the requirement for CSPs to provide rationale for its decisions to reject transactions for clearing is retained, it must be qualified to ensure that CSPs are not obliged to do so when it would not be appropriate to disclose due to regulatory concerns or investigations, or on confidentiality grounds.

Unintended consequences – impact to clients

Introducing a regulatory obligation on commercial firms to commit to undertake trades at a client's request by specifying the conditions and criteria for the acceptance of transactions submitted by clients for clearing (and only being able to deviate where 'reasonable and duly justified') will represent a significant change to CSPs' operating models and will have capital, balance sheet as well as other commercial costs. The requirements may have cost impacts for CSPs who need to leave collateral buffers at the CCP – i.e., sufficient margin to enable trades to clear intra-day in case all clients wish to trade to the extent of their limits.

If the Section 7 requirements are not removed, CSPs may be incentivised to keep clients' limits low, to enable them to manage risk more flexibly, however, this is less helpful to clients as there is more chance that their trades will be rejected if they are trading near the top of their limit, and would not further the FRANDT objectives.

As currently proposed, the Section 7 requirements may impact the CSPs' ability to support smaller clients as it would reduce CSPs' appetite to clear for them (and therefore have the opposite effect that FRANDT is intending). This would reduce competition as fewer firms offer their services to certain clients (thereby reducing the number of participants in the market): if CSPs are unable to manage their risk as they deem appropriate, it will deter CSPs taking on smaller clients due to their potentially higher risk profile.

b. Six-month notice period for termination and agreement changes

As noted above, it is crucial that the legislation makes clear that the CSP is entitled to balance its own commercial interests and risk management requirements, and/or the interests of the majority of its clients (e.g., other clients in the same omnibus account as the client about which the CSP has concerns) against those of any specific client: the determination of what is 'reasonable and duly justified' should therefore be a subjective assessment made by the CSP on the basis of the information that it has available to it, and not imply an objective standard. If this principle is not reflected in the final Delegated Act, it could result in poorer/slower decision making by CSPs because they are concerned to ensure that their decisions are permitted under FRANDT; this could lead to systemic issues, not only by introducing risk for CSPs but also for CCPs, where the CSP has memberships, and for other clients who clear through the CSP.

A mandated notice period for termination and agreement changes is concerning given that a common reason the CSP may look to terminate the relationship is potential credit/exposure concerns to a client (particularly in light of the obligation to accept trades for clearing, as noted above). Clients are not similar and require different approaches to risk mitigation, particularly on termination and modification of clearing agreements. A blanket 6 month period, which would be a new and unique requirement in the market, as there are no other wholesale trading agreements subject to a similar restriction, puts an already small population of CSPs at greater risk by allowing a

client to temporarily cure a default which would otherwise be a valid indicator that a client is in distress; signals prior to a default that a client is in danger of defaulting could not be acted on (without the CSP considering potential litigation risk) and would lead to an increase in systemic risk. It would also mean that a CSP could terminate its bilateral derivatives and other bilateral relationships with the counterparty in question, assuming it had the contractual right to do so, before it could terminate the clearing relationship. This is undesirable from a holistic risk management perspective.

Furthermore, without clarification in the legislation, the market may expect or demand corresponding time periods in restricting when the CSPs may change required margin levels (i.e. the key mitigant of systemic risk) to ensure the client can use the full time frame accorded by FRANDT without increased margin. Such a demand would only further increase potential systemic risk in the market.

Having a blanket notice requirement therefore runs contrary to good risk management principles, as the CSP would now have to balance prudent risk management concerns against litigation risk from the client. This could lead to CSPs keeping on clients for longer than they otherwise would, and this approach taken across the market would increase systemic risk. In relation to the ability to change terms, under the principles of freedom to contract the parties should be able to negotiate this between themselves and agree to a set period – this should not be something that is regulated by legislation.

When providing clearing services, CSPs also need to consider the relevant risks of facing the relevant CCPs. A CSP could determine that it no longer wishes to provide clearing services on a particular CCP due to risk concerns with such CCP, particularly following the default of one or more other clearing members. In such a situation, a CSP should be able to cease to providing clearing services to all of its clients in a quick and efficient manner.

III. Other comments on the requirements set out in the Annex to the draft Delegated Act

FRANDT requirements – Annex	Member feedback / Questions and recommendations for EC
Section 1 - Transparency of the on-boarding process	
1.1. The clearing service provider publishes on its website a description of the process leading to the agreement on contractual terms and setting up operational processes for clearing services ('on-boarding process'). The description includes the following: (a) the different steps of that process; (b) the estimated timeline to complete the different steps of that process; (c) a form to request a proposal from the clearing service provider to become a client ('form for a request for proposal'), as set out in point 2; ~~(d) the key documentation that the prospective client is to submit to the clearing service provider together with the form for a request for proposal~~.	CSPs assume this section is seeking clarification of onboarding processes for purposes of clearing services only, as the clearing onboarding web page would not be the appropriate place to detail a firm's full KYC processes. We propose striking item 1.1(d) of the Annex (as indicated in the left-hand column) on the basis that this point is part of the form described in point 2 and will be covered there.

1.2. Prospective clients have a choice to use the form for a request for proposal set out in point 2, or any other form for a request for proposal. 1.3. A clearing service provider that decides not to make a proposal in reply to the request for proposal informs the prospective client thereof without undue delay.	
Section 2 - Form for a request for proposal	
2.1. The form for a request for proposal includes the following: (a) information about the prospective client: (i) legal name; (ii) legal entity identifier (LEI); (iii) whether the prospective client is a financial or non-financial counterparty and whether it is subject to the clearing obligation in accordance with Articles 4a or 10 of Regulation (EU) No 648/2012; (iv) the sector of activity; (b) information about the documentation that the prospective client is to provide to the clearing service provider as part of the on-boarding process; (c) information about the OTC derivative contracts concerned, including whether those contracts are subject to the clearing obligation in accordance with Article 4 of Regulation (EU) No 648/2012; (d) any information or documentation that is to be provided by the prospective client to the clearing service provider to enable the clearing service provider to make a well-informed and detailed proposal on the following: (i) the scope of any clearing service in terms of OTC derivative contracts; (ii) the fees, costs and discounts; (iii) the result of the assessment referred to in Article 25 of Delegated Regulation (EU) 2017/589; (iv) the contractual terms and conditions; (v) the collateral accepted; (vi) the applicable haircuts; (vii) the criteria for acceptance of orders; (viii) the conditions for the suspension of any clearing services or the liquidation or close out of any positions; (ix) the conditions for the termination of the agreement for the provision of clearing services; (x) IT requirements.	The RFP process is likely to be an iterative process for clients who are new to clearing. CSPs understand that this list is a minimum list of information which should be expected, and if a CSP would require additional information in order to make an informed proposal, it will include that in its form. Where the client indicates that it is not subject to the clearing obligation, CSPs understand that the FRANDT conditions do not apply, although the CSPs may decide to apply FRANDT also to other clearing arrangements. If so, it will limit potential confusion about scope if the RFP required the prospective client: - ~~whether the prospective client~~ to confirm that **it** **is** a financial or non-financial counterparty ~~and whether it~~ which is subject to the clearing obligation in accordance with Articles 4a or 10 of Regulation (EU) No 648/2012 - to specify the OTC derivative contracts concerned which are subject to the clearing obligation in accordance with Article 4 of Regulation (EU) No 648/2012 As mentioned in our comments to the 'Transparency of the on-boarding process' section above, there appears to be overlap between 1.1(d) and 2.1(b). We do not think it is intentional to require the same information in two places on the CSP's website, so we would propose striking 1.1(d) to avoid duplication. Finally, we think this should be a flexible / evolving document while the client is on-boarding, to allow both parties through-out the on-boarding life cycle to update and provide the necessary documentation. Some of the information will take longer to be provided by the client. For example, many start-up clients may not have their LEI or KYC documentation at the early on-boarding stage.
Section 3 - Disclosure of commercial terms	
3.1. A~~ny~~ proposal made by the clearing service provider in reply to a formal ~~the~~ request for	The reference to "any proposal" in 3.1 is not helpful as the proposal "process" may be conducted in

proposal includes, in a clear and structured manner, the following: (a) the information referred to in the following provisions: (i) Article 38(1) of Regulation (EU) No 648/2012; (ii) Article 39(7) of Regulation (EU) No 648/2012; (b) the conditions under which the clearing service provider offers its clearing services~~, including any contractual terms which are specific to the prospective client or that deviate from the standard contractual terms~~; (c) the collateral accepted; (d) the applicable haircuts; (e) the criteria for acceptance of orders; (f) the conditions for the suspension of any clearing services or the liquidation or close out of any positions; (g) the conditions for the termination of the contract; (h) any applicable IT solutions and requirements.	stages, depending on whether the CSP has approached the client or vice versa. Some clients may just be making initial soundings, rather than seeking a "formal proposal". It should not be considered a breach of FRANDT if the CSP responds to a more limited information request in this way. We have suggested a couple of minor drafting changes in the Annex at Section 3.1. We would also request a clarification that: - the disclosures may continue to be made through links on the CSP's webpage. - some due diligence may need to continue after the client has accepted the CSP's proposal. It would not be cost effective, for example, for the CSP to obtain netting or capacity opinions until the client has accepted the CSP's pricing and is proceeding with the engagement of the CSP's services. Moreover, there may need to be changes to pricing as a consequence of the negotiation process. - given this is an iterative process, there will be multiple exchanges between the prospective client and CSP before the CSP is able to provide the information detailed in this section. We would propose to strike the wording indicated in 3.1(b) on the basis that all of the contractual terms are specific to the particular client.
Section 4 - Risk control assessment	
4.1. The clearing service provider makes an assessment of the prospective client or the client in accordance with Article 25 of Delegated Regulation (EU) 2017/589. 4.2. The clearing service provider informs the prospective client or the client of the outcome of the assessment referred to in point 4.1. Where that outcome is negative, the clearing service provider informs the prospective client or the client, upon request, of the main reasons for the negative assessment and of the criteria laid down in Article 25(1) of Delegated Regulation (EU) 2017/589 which have not been fulfilled.	Obligation to disclose details of risk assessment to client if negative may be subject to confidentiality and also if there are regulatory concerns / investigations, a CSP may not be permitted to disclose details. All requirements in the Annex, which require the CSP to provide the client with rationale / reasons for a particular action should be qualified to ensure that CSPs are not obliged to do so when it would not be appropriate to disclose due to regulatory concerns / investigations or on confidentiality grounds.
Section 5 - Commercial terms	
5.1. The commercial terms for the provision of clearing services agreed between the clearing service provider and the client are laid down in writing in a contract which is clear and complete and includes all the essential terms and conditions for the provision of the clearing services.	CSPs / clients should be able to continue to detail certain commercial terms in a schedule, which can be updated as required in accordance with an agreed process, rather than incorporating all of these provisions into the body of the written contract itself. This is how these matters are routinely addressed today for clearing and other financial services, and doing so ensures that timely updates can be made

	without requiring formal amendments to the clearing agreement. CSPs will continue existing practice of incorporating CCP rulebooks and applicable law / regulation into their clearing agreements by reference. CSPs do not expect to include in their clearing agreements with clients the items listed in 3.1(a) and (h), as these are not provisions suitable for inclusion in a contractual agreement.
Section 6 - Fees and pass-on costs	
6.1. Fees, prices and discounts are transparent and based on objective criteria. 6.2. Information is provided in the written contract referred to in point 5.1 about any costs charged to the client ('pass-on costs'), clearly distinguishing between the following types of costs: (a) costs directly related to the provision of clearing services to the client concerned; (b) costs related to the provision of clearing services in general, separately for each item to which the cost relates. 6.3. All fees, prices, discounts and the pass-on costs, as agreed between the clearing service provider and the client, are clearly specified in the written contract referred to in point 5.1.	Information about fees is typically set out in a separate schedule. There is no reason to conclude that fees separately detailed are less transparent than if they were included in the clearing agreement. Some costs may not be capable of being specified upfront (for example, tax levies etc.). The CSP should not be prevented from recovering costs which are not specified, which the CSP has incurred through performing clearing services. It is not clear to the CSPs as to what is meant by "pass on costs" – is this something different than clearing fees (i.e., per lot / trade charge, account maintenance charge)? A concern here is that sometimes the fees are a blended rate of the two types of fee set-out in the draft rules, and it will not always be straightforward to separate fees out in this way as the calculation can be quite complicated. Forcing CSPs to do this could therefore increase costs to the client (as these would be passed on) and we feel the costs of doing this would be disproportionate to any benefit the client receives. Would the EC consider providing clarification on what is a cost 'directly' related to the provision of clearing services and that which is related 'in general'? The CSPs only see a vague distinction between the two at present. As mentioned in our previous advocacy efforts, we would like to reiterate the point that taking fixed costs (e.g. IT costs) and apportioning to individual clients will be arbitrary. There are several references to 'prices' in addition to fees. Are they meant to be synonymous or addressing different points?
Section 7 - Refusal of clearing orders, suspension, liquidation or close out of client positions and notice periods	
7.1. The clearing service provider cannot refuse the client's request for clearing of an OTC derivative contract ('clearing order') that fulfils the agreed conditions and criteria for the acceptance of such	See FIA and ISDA comments on these proposals in Section II of our response above.

orders, unless such refusal is reasonable and duly justified, in which case the clearing service provider, upon request, provides the client with the reasons for refusal in writing. 7.2. The clearing service provider can only suspend clearing services, liquidate or close out positions of the client where the agreed conditions and criteria for such suspension, liquidation or close-out are fulfilled, unless such suspension, liquidation or close out is reasonable and duly justified, in which case the clearing service provider, upon request, provides the client with the reasons for doing so in writing. 7.3. The client is informed, at least six months in advance, unless a shorter notice period is reasonable and duly justified, of the following: (a) the termination of the contract; (b) any change to the contractual terms that materially affect the terms and conditions under which the clearing service is provided.	

About FIA:

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

FIA's mission is to:

- support open, transparent and competitive markets,
- protect and enhance the integrity of the financial system, and
- promote high standards of professional conduct.

As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets.

About ISDA:

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 925 member institutions from 75 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube.