Comments by the International Swaps and Derivatives Association, Inc. (ISDA) on Consultation Paper II on Proposed Amendments to the Securities and Futures Act on Regulation of OTC Derivatives issued by the Monetary Authority of Singapore

31 August 2012

ISDA Safe, Efficient Markets

31 August 2012

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Dear Sir/Madam,

Introduction

The International Swaps and Derivatives Association, Inc. ("**ISDA**") welcomes the opportunity to respond to the Consultation Paper II on Proposed Amendments to the Securities and Futures Act ("**SFA**") on Regulation of OTC Derivatives ("**SFA Consultation Paper II**") issued by the Monetary Authority of Singapore ("**MAS**") on 3 August 2012.

ISDA has previously submitted responses to the Consultation Paper on Proposed Regulation of OTC Derivatives ("**OTC Consultation Paper**") and the Consultation Paper on the Transfer of Regulatory Oversight of Commodity Derivatives from IE to MAS, both issued by the MAS on 13 February 2012, as well as the Consultation Paper I on Proposed Amendments to the Securities and Futures Act on Regulation of OTC Derivatives issued on 23 May 2012 ("**SFA Consultation Paper I**").

We also note the MAS's second response to feedback received on the OTC Consultation Paper in respect of the clearing and reporting mandate issued on 3 August 2012 ("**2nd MAS Response**").

Capitalised terms used but not defined herein have the meaning given to such terms as set out in the SFA Consultation Paper II.

General comments

Before we address specific comments on the draft legislative amendments proposed in the SFA Consultation Paper II, we would like to make a few general comments.

Further consultations and timeline

We note from the 2nd MAS Response, and members strongly support, the MAS's proposal to conduct further consultations. The 2nd MAS Response states that further consultations will be held in relation to prescribing products for central clearing, clearing thresholds for non-financial entities, definition of hedging transactions, requirements for intra-group trades, treatment of pension schemes, client clearing, reporting thresholds and operational aspects of the reporting obligation.

In relation to certain issues, such as the prescription of products for central clearing and for reporting, members are of the view that consultation on such issues is imperative and would like the MAS to include in the legislative provisions themselves the requirement for the MAS to have a period of consultation with market participants on such issues and to give due consideration to the results of the consultation.

In any of such consultations, we urge the MAS to take into account international developments on these issues and to provide for regulation that is consistent and not more onerous than those being proposed in other countries and jurisdictions. Further, regulation in Singapore will also need to be complementary to and work with regulation imposed elsewhere.

As an example of a pertinent international development, we wish to draw the MAS's attention to Article 25 of the European Market Infrastructure Regulation ("**EMIR**"), which would prohibit non-EU central counterparties ("**CCPs**") from providing clearing services to clearing members (and trading venues) established in the EU unless and until the CCP is recognised by the European Securities and Markets Authority ("**ESMA**"). In this connection, if the MAS for example were to exercise its power under the proposed Section 6 (*Alternate clearing arrangements*) of Part IIIC (*Clearing Obligation*) of the SFA to require a specified party (e.g. a Singapore branch of an European bank) to clear its trades through a CCP that is not recognized by ESMA, the clearing of such trades would not comply with, and in fact would be contrary to, the requirements under EMIR. As such, we strongly urge the MAS to initiate and reach an understanding with ESMA in relation to an equivalency approach before enacting the proposed changes to the SFA, so as to avoid subjecting an affected party to possible conflicts under the two regulatory systems.

We would also like to mention, in response to paragraph 2.25 of the 2nd MAS Response, that there is discussion in the EU space as to whether there should be special treatment for derivatives concluded with covered bond issuers or with cover pools for covered bonds.

We appreciate that it is a herculean task to keep abreast of all the international developments and hence cannot overemphasize the need for a reasonable period of public consultation on all the open issues.

In terms of the timelines for mandatory clearing and reporting, members are keen that these not be overly aggressive and only be implemented following the introduction of the same in the EU and US.

<u>Revised definition of derivative contracts</u>

We note that the defined terms of "derivatives contract", "forward contract", "option contract", "swap contract", "commodity", "financial instrument" and "underlying" which were introduced in the SFA Consultation Paper I have largely been carried over to the new Part IIIC (*Clearing Obligation*) and Part IIID (*Reporting Obligation*) with minimal changes.

Members continue to have grave concerns about the use of such definitions (for the reasons previously given) and urge the MAS to consider the alternative approach which was suggested in our response to SFA Consultation Paper I. We have come up with a proposed (more generic) definition of "derivatives contract" as set out below for the MAS's consideration.

The use of such a generic definition of "derivatives contract" as suggested would allow for a common definition of "derivatives contracts" to apply across the board at the parent Act level, with relevant exceptions or exemptions being introduced for each category of regulation, either in the relevant Part of the SFA itself or in subsidiary legislation.

Client clearing

We welcome the MAS's confirmation as expressed in the 2nd MAS Response that both direct and indirect (client) clearing will be allowed for the purposes of meeting the clearing obligation. We note that the MAS will consult on the specifics for client clearing at a later stage. However, we cannot stress enough the importance of viable client clearing as we expect the bulk of market participants in Singapore to access central counterparty clearing facilities through client clearing arrangements. In order for market participants to be able to meet the proposed clearing obligation, such client clearing arrangements must be in place prior to the clearing obligation taking effect. This will take time as not only will the relevant clearing houses have to put in place the applicable rule changes to address client clearing, clearing members will also need to agree or where applicable amend existing documentation with their clients. Further, it may be necessary for legislative amendments to be passed to buttress the legal enforceability (particularly, if any participant were to become insolvent) of the client clearing arrangements that are adopted.

We would like to take this opportunity to highlight to the MAS that there are currently two legal structures in use to achieve client clearing. One such structure is based on a principal-to-principal structure whereby the clearing house and clearing member as well as the clearing member and its customer each contract on a principal-to-principal basis. Another structure is based on a principal-to-agent structure whereby the clearing member contracts as agent on behalf of its client with the clearing house. US Futures Commission Merchants ("**FCMs**") achieve client clearing for their clients under a principal-to-agent model while the rest of the world adopts the principal-to-principal model. In both structures, there are legal arrangements put in place to achieve client clearing, including portability of client positions and segregation of collateral. While these legal arrangements are entirely contractual in the case of the principal-to-principal model, in the case of the principal-to-agent model, there are also US statutory provisions. Certain clearing houses (such as LCH.Clearnet) offer client clearing under both such structures. We urge the MAS to bear in mind the different structures and their implications when considering which structure(s) Singapore clearing platforms should or must implement. Having more than one structure available may encourage broader participation on Singapore clearing platforms and thereby enhance both liquidity and stability. On the other hand, where only one structure is available, participation on Singapore clearing platforms may potentially be limited. For example, a principal-to-agent structure may be more appealing to US market participants on the grounds of familiarity, and the unavailability of an FCM/ principal-to-agent type structure may then mean that US market participants choose not to clear their contracts on Singapore clearing platforms. However, if Singapore approved clearing houses were to adopt an FCM/principal-to-agent model, a review of the criteria for clearing membership may be necessary. We understand, for example, that US banks have generally not been permitted by the Office of the Comptroller of the Currency to register as FCMs.

We also urge the MAS to ensure that there is a level playing field for clearing members in Singapore. In reaction to the introduction of mandatory clearing in the EU, US and other jurisdictions (and the recognition of any substituted compliance or comparable regulation), we anticipate that, to allow for the provision of clearing services to clients locally,

international banks with branches in Singapore may wish to obtain clearing memberships with Singapore approved clearing houses for their Singapore branches. We urge the MAS to work together with approved clearing houses in Singapore to undertake a full review of the clearing rules to ensure that locally incorporated banks and Singapore branches of foreign banks are treated on the same footing.

Banking secrecy and other provisions

We previously highlighted that legislative amendments would be required to address the banking secrecy issue. We understand that the MAS is considering this and that the current proposal is that any mandatory reporting required by Singapore law will be exempted from the Banking Act secrecy provisions.

However, due to the cross-border nature of financial activity, members are likely to not only be caught by mandatory reporting requirements under Singapore law, but also reporting requirements under the laws of other jurisdictions which are similarly implementing G20 commitments. Members urge the MAS to consider amending Section 47 of the Banking Act so as to allow for mandatory reporting required by Singapore as well as other laws.

We also highlight that Regulation 47(2) of the Securities and Futures (Licensing and Conduct of Business) Regulations would prevent relevant holders of a capital market services licence from complying with mandatory reporting requirements under other laws (particularly as Regulation 47(2) does not contain a carve-out for customer consent) and urge the MAS to consider amending Regulation 47(2).

In terms of timing, such amendment would need to be effective prior to the introduction of mandatory reporting. We note that the MAS has proposed to impose backloading of outstanding contracts. As such, the amendment to the banking secrecy provisions would also need to allow for market participants to report such backloaded contracts.

In terms of reporting, there is also a scenario where a market participant is required by the Singapore reporting obligation to report a trade involving a counterparty whereby the market participant is prevented by a foreign law (e.g. the law of the place of incorporation of the counterparty) to make certain disclosures regarding the counterparty or the trade. In such a scenario the market participant would, in complying with the Singapore reporting obligation, be in breach of the foreign law. In this connection, we urge the MAS to consider providing for an exemption similar to that in Section 4(3) of Part IIID (*Reporting Obligation*) (modified as proposed below) in the reporting mandate.

Penalties

Members urge that any penalties imposed under the new Parts of the SFA should be commensurate with the relevant offence.

We note that contravention of the clearing and reporting obligations are offences and subject to fines. Members request that the level of penalties be comparable to those set in other major jurisdictions. We note this is also the approach proposed to be taken in Hong Kong.

Members also have reservations on the penalties imposed under the proposed power to obtain information and exemption provisions as set out below.

Comments on draft legislative amendments

We set out below our comments on the respective Annexes to the SFA Consultation Paper II:

A. Annex 1 – New Part IIIC (Clearing Obligation) of the SFA

Provision	**Comment**
Definition of "derivatives contract" and related defined terms	Members feel strongly that the current definition of "derivatives contract" and related defined terms do not work and would result in much uncertainty as to whether a particular contract is a "derivatives contract" or not. Members suggest that the better approach would be to use a broad but simple definition of "derivatives contract" in the parent Act that would apply across the various regulatory spheres (i.e. regulation of clearing facilities, regulation of trade repositories, mandatory clearing, mandatory reporting and licensing of OTC derivatives intermediaries). Appropriate carve-outs can then be applied in relevant Parts of the SFA or in the applicable subsidiary legislation. In relation to such carve-outs, we believe that clarity can be achieved through specificity. The above approach will allow the MAS to capture a sufficiently broad range of OTC derivatives contracts for the purposes of the parent Act, while ensuring that the OTC derivatives products that are captured by the mandatory clearing and reporting obligations (which will be specified at a later stage) are consistent with the proposals in the US and EU. We propose (as a starting point) the following definition which is based on the definition of "derivative" in the Australian Corporations Act 2001. You will note that this definition refers to a non-exclusive list of underlyings (assets, rates, indices and commodities) without references to forwards, options and swaps. It also provides for carve-outs from the definition. *(1) "derivatives contract" means an arrangement in relation to which the following conditions are satisfied*[1]: *(a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and*

[1] To resolve a situation where a transaction could be classified as a "derivatives contract", "securities" or "futures contract", we propose that there be included in the definitions of "securities" and "futures contract" the following: "but does not include a derivatives contract". Where a contract would more appropriately be regulated as a security or futures contract, it could then be carved-out of the scope of a derivatives contract by specification under subsection (3) – for example, we think that a credit-linked note should be regulated as a security and not a derivatives contract and this could be carved-out under subsection (3).

Provision	Comment
	(b) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following: *(i) an asset;* *(ii) a rate (including an interest rate or exchange rate);* *(iii) an index;* *(iv) a commodity.* *(2) Without limiting subsection (1), anything declared by the Authority to be a derivatives contract for the purposes of this section is a derivative contract.* *(3) Subject to subsection (2), the following are not derivatives for the purposes [of this Chapter] even if they are covered by the definition in subsection (1):* *(a) [carve outs eg foreign exchange spots, forwards and swaps and contracts relating to commodities that are physically settled etc]* *(b) anything declared by the Authority not to be a derivatives contract.* In the event that the current definition of "derivatives contract" and related defined terms are retained, we reiterate our previous comments on these terms that have not been addressed.
Definition of "market contract"	Members request for clarity as to whether paragraph (b) of the definition of "market contract" would include a derivative contract entered into between a clearing member and its customer that is cleared through the clearing member (i.e. through indirect or client clearing). In a principal-to-principal client clearing model, the original contract between the clearing member and its customer would remain in place following clearing. As such, following clearing, there would be three contracts in place: (1) the contract between the clearing member and its customer (which remains in place notwithstanding clearing having taken place), (2) a contract between the clearing member and the clearing house in the clearing member's "customer

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	account" with the clearing house and (3) a contract between the clearing member and the clearing house in the clearing member's "house account" with the clearing house. We suggest including the following after the words "a transaction" appearing in paragraph (b): "(including a transaction entered into between a member of the approved clearing house or recognized clearing house and its customer)". In addition to any clarifying amendments to paragraph (b) of the definition of "market contract", to reflect client clearing under the principal model as described above, Section 2(1) should be amended to read "…to the effect that the transaction becomes a market contract or a number of separate market contracts".
Definition of "specified clearable derivative contract"	Members have expressed concern about limb (b) of this definition. Please see our comments on Section 7 below. The availability of the power under limb (b) may mean that the factors listed in Section 3(1) would not be considered. As such, please remove limb (b) or ensure that any prescription of specified clearable derivatives contracts take into account the factors listed in Section 3(1). The word "a" should be inserted before "derivatives contract" in limb (a).
Definition of "specified party"	Typographical corrections as follows: - "Banking act" in limb (a) should be "Banking Act". - "Finance Companies act" in limb (c) should be "Finance Companies Act". - "A person" in limb (g) should be "a person".
Section 2(1) (*Fulfilment of clearing obligation)*	We understand that the MAS proposal is to require mandatory clearing for derivative contracts where at least one leg of the contract is booked in Singapore and where either (a) both parties to the contract are resident or have a presence in Singapore; or (b) where one party to the contract is resident or has a presence in Singapore and the other party would have been subject to the clearing mandate if it had been resident or had a presence in Singapore. We were unable to see where this is provided for in Part IIIC. Section 2(1) does not provide for this and in fact imposes an absolute obligation on all specified entities to clear specified clearable derivatives contracts "to which it is a party". Members feel

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	that the conditions for mandatory clearing as originally proposed by the MAS are sufficiently important to justify their inclusion in the parent Act level. We also note that the MAS's proposal is to impose mandatory clearing on "non-financial entities above a clearing threshold" but the current provisions do not provide for this. Would such entities be prescribed for under limb (h) of "specified party"? As mentioned and for the reasons explained above, Section 2(1) should be amended to read "…to the effect that the transaction becomes a market contract or a number of separate market contracts".
Section 2(2) (*Fulfilment of clearing obligation)*	The level of penalties imposed should be comparable to those set in other major jurisdictions. The reference to "specified person" should be to "specified party" and "shall, on conviction" should be deleted.
Section 2(3) (*Fulfilment of clearing obligation)*	The current drafting only provides for the contract not being "voidable or void" which may be too narrow. We would suggest amending the provision to read as follows, which we believe is in line with the legislative intent: "Except where there is an express agreement otherwise, the contravention by a party of subsection (1) with respect to a specified clearable derivatives contract shall not invalidate the specified clearable derivatives contract or affect any rights or obligations arising under, or relating to, the specified clearable derivatives contract."
Section 3(1) (*Power of Authority to prescribe derivative contracts*)	As mentioned above, prior consultation by the MAS on the types of derivatives contract to be prescribed as a specified clearable derivatives contract is imperative and a reasonable period of prior consultation should be allowed. Members propose that the requirement for the MAS to have such prior consultation with market participants and to give due consideration to the results of the consultation be included in the legislative provisions. The MAS also mentioned in the 2nd MAS Response that there would be a periodic review of the list of products mandated for central clearing. Legislative provisions for such review and removal of derivatives contracts as specified clearable derivatives contracts should be included. The definition of "specified clearable derivatives contract" should be amended to exclude such removed products.

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	The consideration of the factors listed in Section 3(1) are important and we suggest that the MAS must have regard to the listed factors by amending the first part of Section 3(1) to read: "shall have regard to the factors set out below and may have regard to any other matters that the Authority considers relevant". With respect to Section 3(1)(a), we propose that the words "to Singapore" should be inserted at the end of the sentence. With respect to Section 3(1)(f), it would be helpful to include the availability of access to such approved clearing houses or recognised clearing houses to cover client clearing. We propose the following amendment: "the availability (including availability of access by a specified party to clearing facilities) of approved clearing houses or recognised clearing houses with which the derivatives contract or class of derivatives contracts may be cleared." With respect to embedded derivatives and paragraph 2.11 of the 2nd MAS Response, members request for more detailed guidance by the MAS as to how to approach this issue. We understand for example in relation to a structured note (i.e. a security with derivative components) that the intent is that the structured note itself is not affected but if the note issuer separately enters into specified clearable derivatives contracts in order to hedge the structured note, those specified clearable derivatives contracts would need to be cleared. However, this does not help to clarify the MAS's approach to embedded derivatives as the specified clearable derivatives contracts separately entered into are transactions additional to the structured note and as such, are clearly subject to the clearing mandate. It would be helpful if the MAS could give some examples of when a structured note or other structured product would itself have to be disaggregated into its components and if those components are specified clearable derivatives contracts, that those components be cleared. The concern is that there could be no limit to the range of structures that could be said to be capable of disaggregation. An example (albeit extreme) is that a floating rate loan could be considered a fixed rate loan plus an interest rate swap.
Section 3(2) (*Power of Authority to prescribe derivative contracts*)	Members would like to request that notice be given prior to the effective prescription of a specified clearable derivatives contract. A minimum notice period of 6 months is proposed. In addition to prior notice, members request for a reasonable implementation lead time or phase-in period.
Section 4 (*Power of Authority to obtain*	There are concerns over the extensive reach of this provision and members request that this provision be removed in its entirety.

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information)	While members can understand that the MAS would wish to obtain market information, the powers given to the MAS under this provision appear to be excessive in the context of the reason behind it: - the power allows the MAS to require "any person" to provide the relevant information or document. The reference to "any person" would invoke an extraterritorial reach. Is this the intention of the MAS? - the scope of the information or document that may be requested is effectively unlimited. As it extends beyond specified clearable derivatives contracts and specified reportable derivatives contracts, the granting of such powers is akin to extending the mandatory reporting obligation through the back door. - contravention of this provision is not only an offence but the relevant person is liable to a fine as well as possibly imprisonment. This seems draconian considering the relevant "offence" (which is essentially a breach of an obligation to supply information). What is the reason for imposing a custodial penalty here whereas the other penalties in this Part merely comprise fines? - the safeguards listed in Sections 4(3) and (4) may not be sufficient as parties may also be under secrecy or confidentiality obligations under foreign law (while "written law" is defined in Section 2 of the Interpretation Act to refer to the Singapore Constitution and Singapore statutory laws) or contractual confidentiality obligations. If Section 4 is retained, we would request the following changes: - replace the reference to "any person" with a reference to "any specified party". - qualify the power by imposing a reasonableness test. This can be done by re-wording the second line of Section 4(1) to read "… as may be reasonably required by…". - amend Section 4(3) to read as follows: "No person shall by virtue of subsection (1) be obliged to disclose any particulars as to which he is under an obligation to observe secrecy, or is otherwise prohibited from disclosing, under any written law or any applicable foreign law or regulation, or any order by a court, tribunal or

Provision	Comment
	regulatory authority in accordance with which it is required or accustomed to comply or any legally binding contractual arrangement." - the reference to "advocate and solicitor" in Section 4(4) be changed to "legal professional adviser" as defined in Section 131(2) of the Evidence Act so as to include in-house legal counsel as well. In Section 4(2), we presume that "fine not exceeding $10,000" where it first appears should be "fine not exceeding $100,000".
Section 5 (*Exemption*)	This section allows the MAS to exempt a specified party or parties from the provisions of Section 2, subject to such conditions or restrictions as may be determined by the MAS. If such specified party contravenes such conditions or restrictions, Section 5(2) goes on to impose an offence and fines. It would appear that such a specified party may in such circumstances be subject to penalties under both Section 2(2) and Section 5(2). This does not seem right. Presumably the contravention of such conditions or restrictions would obviate any exemption granted by the MAS, and if so subject the specified party to potential penalties under Section 2(2) only. Section 5(2) should be removed.
Section 6 (*Alternate clearing arrangements*)	Members have serious reservations about this provision and request that these provisions be removed. As far as we are aware, similar provisions have not been proposed in other jurisdictions. The provisions provide that if the MAS determines that a clearing house is not available with whom a specified party is required to clear a contract or is incapable of clearing a contract, the MAS may issue directions specifying the specified party to clear with "such party as the Authority may specify in such form or manner as the Authority may specify" or "refrain from entering into relevant contracts for such period as the MAS may specify". We have the following concerns: - a counterparty to a trade is not responsible for the inability of a clearing house to clear and it would seem harsh that a party may be asked to stop entering into such trades. Apart from potentially causing significant business disruption, this may increase systemic risk as parties that need to enter into such trades to manage the market risk of their existing trading portfolios are prevented from doing so.

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	- the requirement for a party to clear with another party is also impracticable as market participants may not be set up (or it may be inordinately expensive) to clear with the clearing house that the MAS specifies. In the circumstances, we submit that it would be more appropriate for the clearing obligations to be suspended. - compliance with the MAS's directions under this section could result in a substantial increase in costs for a transaction which cannot be foreseen or managed by a specified party because it cannot be anticipated what adjustments are required to be made to its internal systems in order to comply. If it is not possible to remove this provision: - members would like to understand in what situations the MAS envisages this provision to be used. Is its use in a financial distress situation contemplated, and if so, how could this operate? In a distress situation, would not perhaps a suspension of the clearing obligation represent a better mechanism for the regulator to avoid further market dysfunction? - Section 6(1)(i) should be qualified such that a specified party should not be forced to clear the contract with such party as the MAS may specify if it is "impossible" or "impracticable" (without incurring material costs) for such specified party to clear the contract with such party. - a grace period should be allowed for compliance with Section 6(1)(i). - Section 6(1)(ii) is strongly objected to and should be removed. A direction to refrain from entering into relevant contracts or transactions may subject a specified party to hardship, especially if the direction is issued to only one specified party as opposed to all specified parties. Further, as the clearing mandate would still apply under Section 2(1), the penalty for non-clearance should be enough of an incentive. - The words “contract or” should be inserted before the word “transaction” in Section 6(2). “Any of the person” in Section 6(5) should be “Any person”.
Section 7 (*Anti-avoidance*)	Members have expressed concern that this provision is drafted very widely and could potentially be triggered by structuring or

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	restructuring of transactions for legitimate business reasons. It is quite possible that a transaction may be booked with a part-purpose that it is not required to be cleared in accordance with the Singapore requirements. This may be desirable because, for example: - the transaction is required to be cleared in another jurisdiction and it is not possible to meet both the foreign requirements and the Singapore requirements. - clearing in accordance with the Singapore requirements may be very costly to implement if foreign clearing houses are not recognized under the Singapore regime. Other comments on this provision: - it is unclear whether Section 7(1)(a) and (b) are cumulative (i.e. both limbs have to be satisfied before the MAS can prescribe a person as a "specified party" or a contract as a "derivatives contract" or "specified clearable derivatives contract") or in the alternative. - we do not think Section 7(1)(a) and (b) should be in the alternative, as Section 7(1)(a) is currently drafted too widely and should at the minimum be amended as follows: - including the word "sole" before "purpose or effect". - including a similar commercial carve-out as in Section 7(1)(b)(i). Following from the above, we suggest to instead combine both limbs (a) and (b) of Section 7(1) so that this section only applies where the contracts are not being carried out for bona fide commercial reasons and one of the main/the sole purpose is the avoidance of the clearing obligation. - there is concern that the MAS could decide that structured notes fall within the scope of Section 7(1)(a). - there are two typographical errors in Section 7(1)(b)(ii) – the word "not" should be deleted and the reference to "section 2(2)" should be to "section 2(1)". If this provision is not removed, in the interests of market certainty, members request that the MAS provide, either in the legislation or some form of interpretive guidance, some parameters around which this provision could be used.

Provision	Comment
Section 8 (*Deemed Compliance*)	Members support the proposal to allow for deemed compliance under Section 8 (*Deemed Compliance*) of Part IIIC (*Clearing Obligation*) (and Section 7 (*Deemed Compliance*) of Part IIID (*Reporting Obligation*)), subject to the comments set out below. Comments on this provision are as follows: - the definition of "designated counterparty" as currently drafted in Section 8(8)/7(8) is too narrow. It is not sufficient for "designated counterparty" to be limited to persons "incorporated, formed or established under the laws of a designated jurisdiction" as a person need not be such and yet could be subject to the mandatory requirements of that designated jurisdiction. For example, an entity established in Country A could have a branch in Country B. The branch in Country B would be subject to the laws of Country B, due to its regulated activities, for example. Further the entity , even if it did not have a branch in Country B, could be subject to the laws of Country B due to the extraterritorial effect of the laws of Country B, for example, it trades with a counterparty from Country B. - following from the above, we suggest expanding the definition of "designated counterparty" to read as follows: "…means a person who is incorporated, formed or established under or subject to the laws or regulation of, or by a regulatory authority of, a designated jurisdiction." - please confirm that "foreign jurisdiction" would also contemplate regional jurisdictions such as the EU. - Section 8(3)/7(3) contemplates that a designation by the MAS may be withdrawn. Any such withdrawal should not affect existing transactions and we request the MAS to provide for "grand-fathering" of legacy transactions if the designation of a designated jurisdiction is withdrawn. - Section 8(6)(c)/7(6)(c) – the reference to "all specified parties" should instead be to the parties referred to in Section 8(6)(b)/7(6)(b) Further, the reference to "equivalent" requirements and obligations is not appropriate. We propose that the subsection be re-worded as follows: "the parties referred to in paragraph (b) that are parties to the specified clearable/reportable derivatives contract referred to in paragraph (a) are in compliance with obligations and requirements that are comparable to the obligations and requirements under this Part imposed by the designated

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	jurisdiction;" - Section 8(7)/7(7) – members request that this provision be removed as it would detract from the principle of acknowledging foreign jurisdictions' laws and avoiding conflicts and impasses. If however it is to be retained, members request for some guidance as to the situations in which this provision could be invoked. - as a drafting comment, could the definitions in Section 8(8)/7(8) be set out in Section 1 instead? Members have also queried whether the MAS could give an indication of which jurisdictions the MAS would likely find to be comparable. It would also be useful to know if the designation of jurisdictions would depend on whether the MAS has executed memorandum of understanding with the regulators in such jurisdictions.

B. Annex 2 – New Part IIID (Reporting Obligation) of the SFA

Provision	Comment
Definition of "derivatives contract" and related defined terms	The comments set out above in respect of Part IIIC (*Clearing Obligation*) of the SFA apply here as well. In addition, we note that the definition of "market contract" is missing.
Definition of "specified party"	The comments set out above in respect of Part IIIC (*Clearing Obligation*) of the SFA apply here as well.
Definition of "specified reportable derivatives contract"	In what circumstances would limb (b) of this definition apply instead of limb (a)? The availability of the power under limb (b) may mean that the factors listed in Section 3(1) would not be considered. As such, please remove limb (b) or ensure that any prescription of specified reportable derivatives contracts take into account the factors listed in Section 3(1).
Section 2(1) (*Fulfilment of reporting obligation*)	We understand that the reporting obligation will apply both on a "booking" and a "trading" basis and this requirement will be set out in subsidiary legislation (to be subject to further public consultation). With respect to what should be captured by "traded in Singapore", members suggest that a similar test as that proposed by Hong Kong be used (i.e. that a trade must be "originated or traded" out of the Singapore entity/branch and also have a nexus with Singapore (e.g.

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	SGD or in due course a Singapore reference entity or Singapore listed share). However, we believe that further clarity needs to be given as to the level of involvement that is required by a person employed and based in Singapore before the trade is deemed to be "traded" out of Singapore. It may perhaps be instructive to look at the tests applied in the context of the withholding tax exemption for "qualifying debt securities" and to try to apply such tests *mutatis mutandis* in this context - e.g. that staff employed and based in Singapore must play a "leading and substantial role" in the origination or structuring of the trade for it to be "traded" out of Singapore.
Section 2(2) (*Fulfilment of reporting obligation*)	Members request that this provision be removed. Members are of the view that no reporting obligation should be imposed on an entity other than a party to a contract. This is consistent with other jurisdictions such as the EU and US under the EMIR and Dodd Frank regimes, respectively. Members are concerned that it will be very difficult operationally for a participant to deal with the consequence of a reporting obligation extending to trades in which its role is less than that of a party to the trade. Such a requirement would make the Singapore regime inconsistent with the approaches taken in other jurisdictions and could make compliance with the Singapore requirements expensive without a corresponding resulting gain. If this provision cannot be removed, we propose that this provision should be amended so as to narrow its scope as much as possible. For example: - the agent reporting obligation should not apply to pure broking, as has been suggested in Hong Kong. - the agent reporting obligation should not apply to back office operations that are performed by the Singapore office as part of central booking functions. - the term "agent" should be defined with sufficient detail to avoid capturing unintended participants. As an example, it is unclear if this provision would apply to a situation involving a foreign bank with a Singapore-licensed branch, where a trader in the Singapore branch enters into trades (i.e. specified reportable derivatives contracts) which are booked by/in an offshore branch of the foreign bank. From the strict legal perspective, the Singapore branch (as the specified party) would arguably not be an "agent" (in the legal sense) given that it is the same legal entity as the offshore branch. The concept of "agent" should be clarified so as not to

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	capture such a scenario. - we understand that the main intent of this provision is to apply to Singapore fund managers of foreign funds. If so, this provision should be amended to explicitly cover this situation only, or this provision removed with relevant provisions included in the definitions of "specified party" and/or "specified reportable derivatives contract". If Section 2(2) is not removed, the reference to "section 3" in paragraph (a)(ii) should instead be to "section 5".
Section 2(3) (*Fulfilment of reporting obligation*)	We note from the 2nd MAS Response that the MAS intends to hold the specified party responsible for the timeliness and accuracy of information reported even where a third party service provider is engaged to carry out reporting. Members would like to request the MAS to re-consider its position and to only hold parties liable for breaches arising from their own actions, which has similarly been proposed in Hong Kong. The words ", in accordance with subsection (1) or (2) as may be applicable" at the end Section 2(3) should be deleted (it is repetitious).
Section 2(4) (*Fulfilment of reporting obligation*)	Notwithstanding Section 2(4), the application of Section 2(1) would mean that each specified party would still be responsible for the timeliness and accuracy of information reported, even where another party has reported information. From a compliance point of view, if an entity were required to ensure that the reporting was timely and correct, it would no doubt rather have a policy of always reporting itself. This underscores the need to understand how the Singapore regime proposes to deal with the issue of duplicate reporting. If the intention of this section is truly to facilitate reporting by a single entity, then it should be clear that other entities do not incur any responsibility or liability in connection with the reporting of that trade. Otherwise, the purpose of allowing single-sided reporting may be defeated. Both the EU and US regimes try to address the issue of duplicity in reporting and try to incorporate the concept of a reporting party. Members urge the MAS to consider how this issue is dealt with in other jurisdictions and to be consistent with international developments.
Section 2(5) (*Fulfilment of*	If Section 2(2) is not removed, "subsection (1)" in the last line should instead be "subsections (1) and (2)".

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reporting obligation)	
Section 2(6) (*Fulfilment of reporting obligation*)	Please refer to our comments on banking secrecy above.
Sections 2(7) and (8) (*Fulfilment of reporting obligation*)	If Section 2(2) is removed, Section 2(8) will not be needed. Even if Section 2(2) is not removed, as an "agent" under Section 2(2) must be a specified party, we do not think that it is necessary to have two offence provisions for Sections 2(1) and 2(2) separately. Section 2(7) would suffice by changing "subsection (1)" in the first line thereof to "subsection (1) or (2)". The level of penalties imposed should be comparable to those set in other major jurisdictions.
Section 2(9) (*Fulfilment of reporting obligation*)	The current drafting only provides for the contract not being "voidable or void" which may be too narrow. We would suggest amending the provision to read as follows, which we believe is in line with the legislative intent: "Except where there is an express agreement otherwise, the contravention by a party of subsection (1) [or subsection (2)]* with respect to a specified reportable derivatives contract shall not invalidate the specified reportable derivatives contract or affect any rights or obligations arising under, or relating to, the specified reportable derivatives contract." * If subsection (2) is not deleted.
Section 3 (*Power of Authority to prescribe derivative contracts*)	As mentioned above, prior consultation by the MAS on the types of derivatives contract to be prescribed as a specified reportable derivatives contract is imperative and a reasonable period of prior consultation should be allowed. Members propose that the requirement for the MAS to have such prior consultation with market participants and to give due consideration to the results of the consultation be included in the legislative provisions. Will there be publication of notice in the Gazette of such prescription? Members would like to request that notice be given prior to the effective prescription of a specified reportable derivatives contract. A minimum notice period of 6 months is proposed. In addition to prior notice, members request for a reasonable implementation lead time or phase-in period. The consideration of the factors listed in Section 3(1) are important and we suggest that the MAS must have regard to the listed factors

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	by amending the first part of Section 3(1) to read: "shall have regard to the factors set out below and may have regard to any other matters that the Authority considers relevant ".
Section 4 (*Power of Authority to obtain information*)	The comments set out above in respect of Section 4 (*Power of Authority to obtain information*) of Part IIIC (*Clearing Obligation*) of the SFA apply here as well.
Section 5 (*Exemption*)	The comments set out above in respect of Section 5 (*Exemption*) of Part IIIC (*Clearing Obligation*) of the SFA apply here as well.
Section 6 (*Alternate reporting arrangements*)	Members have reservations about this provision. As far as we are aware, similar provisions have not been proposed in other jurisdictions. The provisions provide that if the MAS determines that a trade repository is not available to whom a specified party is required to report a contract or is incapable of receiving information to be reported, the MAS may issue directions specifying the specified party to maintain records, or report to such party as the Authority may specify or provide information or access to information or records to such party and in such form or manner as the Authority may specify. Members have the following concerns: - a counterparty to a trade is not responsible for the inability of a trade repository to receive information to be reported. Setting up new reporting and record-keeping arrangements is a costly and time-consuming exercise for market participants. We thus propose that some requirement of reasonableness and cost-benefit analysis be built into the provision. We also propose that the power of the MAS to suspend the reporting obligations be provided for as this may be the right solution in certain circumstances. - members are also concerned with the power to require reporting, or to provide information or access to "such party as the Authority may specify". Some parameters should be put around this to ensure the confidentiality and security of information in the hands of such party. In addition: - members would like to understand what sort of parties the MAS may require a specified party to report information to. - instead of reporting to any party as the MAS may specify, would the MAS be amenable to revising this requirement to

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	provide for information to be directly reported to the MAS instead? Please note the typographical errors in the clause numbering (second "(i)" should be "(ii)" and "(ii)" should be "(iii)"). In the re-numbered Section 6(ii), "what frequency" should instead be "such frequency". "Any of the person" in Section 6(5) should be "Any person". If Section 2(2) is not removed, we presume the intention is to apply this provision to Section 2(2) as well. In that case, the references to "section 2(1)" in Sections 6(1)(a) and (b) and Section 6(2) should be extended to "sections 2(1) and 2(2)".
Section 7 (*Deemed Compliance*)	The comments set out above in respect of Section 8 (*Deemed Compliance*) of Part IIIC (*Clearing Obligation*) of the SFA apply here as well. In addition, Section 7(6) provides that only a specified party who is a party to the contract may avail itself of this deemed compliance provision. As an agent would not be a party to the contract, it would not be able to take advantage of this deemed compliance provision. If our request for the removal of the agent reporting obligation in Section 2(2) is not met, this should be rectified.

ISDA appreciates the opportunity to provide comments on the SFA Consultation Paper II and looks forward to working with the MAS as it continues the regulatory process. If you have any questions on this submission, please feel free to contact the undersigned at your convenience.

Yours sincerely,

For the International Swaps and Derivatives Association, Inc.

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