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TO:

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Re: OTC derivatives reform: Proposed amendments to ASIC Derivative Transaction Rules (Reporting) 2013

The Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA) welcomes the opportunity to comment on behalf of its members on the Consultation Paper issued by the Australian Securities & Investments Commission (ASIC) on the 25 July 2014.

The GFXD was formed in cooperation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 23 global Foreign Exchange (FX) market participants,[1] collectively representing more than 90% of the FX inter-dealer market.[2] Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

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Introduction

The FX market is the world's largest financial market. Effective and efficient exchange of currencies underpins the world's entire financial system. Many of the current legislative and regulatory reforms have had, and will continue to have, a significant impact upon the operation of the global FX market, and the GFXD wishes to emphasise the desire of our members for globally co-ordinated regulation which we believe will be of benefit to both regulators and market participants alike.

The global FX market presents some unique challenges for trade reporting when compared with other asset classes. FX forms the basis of the global payments system and as such both

1 Bank of America Merrill Lynch, Bank of New York Mellon, Bank of Tokyo Mitsubishi UFJ, Barclays, BNP Paribas, Citigroup, Credit Agricole, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Lloyds, Morgan Stanley, Nomura, Royal Bank of Canada, Royal Bank of Scotland, Société Générale, Standard Chartered Bank, State Street, UBS, Wells Fargo and Westpac

2 According to Euromoney league tables

the number of market participants and the volume of transactions are high. Notional turnover, as recently reported by the Bank of International Settlements, is US$5.3 trillion/day.[3]

The high number and diversity within the participants of the global FX market presents many practical challenges in ensuring that the market participants that are required to report actually can do so. As the FX market is global in nature, the reporting of a transaction will often be required to multiple jurisdictions, and any variation in the trade reporting requirements will be required to be adopted by either one or both parties to the transaction, resulting in increased costs and increased operational risks.

The GFXD has consistently promoted and supported efforts to align global trade reporting standards as we believe that consistent trade reporting requirements offer regulators the best opportunity to oversee trading practices and market transparency.

We note the recent consultation performed by the CFTC on its swap data reporting and record keeping requirements[4] to which the GFXD responded, requesting that the CFTC should help to define a (globally consistent) standardised minimum data set which would allow convergence with other global regulatory trade reporting obligations, allowing for more effective regulatory oversight.

We also note the recent Financial Stability Board's (FSBs) Consultation Paper[5] on data aggregation, which promotes the desire and requirement to standardise the reporting of swaps data, and identified 4 key challenges facing the market today, namely:

- Inconsistencies still exist in trade identifier construct and other key reporting fields
- Inconsistencies exist as to when reporting is required to be submitted to the trade repository (trade date v trade date+)
- Inconsistency remains in who is required to report, including dual v single sided requirements
- Inconsistency in the global treatment of participant confidentiality

Concluding, the GFXD respectfully requests that the on-going trade reporting requirements in Australia and their subsequent refinement are further aligned with those obligations that are currently live, such as those in the US, Europe and Hong Kong as well as the pending trade reporting obligations in Singapore and Canada.

3 https://www.bis.org/publ/rpfx13fx.pdf

4 http://gfma.org/correspondence/item.aspx?id=598

5 http://gfma.org/correspondence/item.aspx?id=575

Executive Summary

- **FX Security Conversions are not FX Derivatives**

    - We request that transactions entered into to fund the purchase/sale of a foreign security are considered to be bona fide FX spot contracts in situations where the settlement period is greater than T+2 banking days and that such trades will not be subject to reporting obligation

    - Such a proposal would bring Australia in-line with the US and Canada (and the GFXD notes that there are on-going regulatory discussions in Europe, Singapore and Hong Kong where the GFXD has requested that FX Security Conversions are also considered to be bona fide FX spot contracts)

- **Counterparty identifier/ Trade identifier construct**

    - We welcome the ASIC's removal of the ABN as a counterparty identifier

    - We consider ESMA's UTI construct as being the global trade identifier standard (and that ASIC could consider and endorse the suggestions made by ISDA with respect to the structure of the UTI as well as the generation, communication and matching of the UTI)

- **Trades entered into in Australia**

    - We urge the ASIC to consider the latest developments in Hong Kong and Singapore on their synchronisation on the conducted in Hong Kong/traded in Singapore requirement, emphasizing the licensing/employment status of the trader in these two countries respectively, and we suggest that a consistent approach is also implemented in Australia

- **Technical Amendments**

    - While the GFXD welcomes some of the technical amendments as put forward by the ASIC, such as expanded foreign entities relief, we are also mindful of the technical/implementation challenges in other areas such as tagging/time stamping/snapshot reporting, and encourage the ASIC to consult with ISDA and DTCC

    - Additionally, we are concerned with the delegated reporting proposals and would like to specifically make reference to the delegated reporting processes in Europe , where only the performance of reporting can be delegated, but not the regulatory obligations of the Reporting Entity

- **Implementation timing**

    - We suggest a 6 month gap between the finalisation of the rules and implementation of the rules to allow for adequate technology testing and roll-out to production

FX Security Conversions

The GFXD would like to recommend that the ASIC consider an FX transaction that is entered into solely to effect the purchase or sale of a foreign security – commonly referred to as an "FX Security Conversion" – to be a bona fide FX spot contract in situations where the settlement period is greater than T+2 banking days, and that any such contract is not a foreign exchange derivative.

For these purposes, we suggest that an FX Security Conversion transaction be defined as the purchase, sale or exchange of a foreign currency for the sole purpose of effecting a purchase or sale of a security denominated in a foreign currency when the settlement period for such FX transaction is within the settlement cycle for such security.

Many of our members act as custodian for the securities of, in the case of broker-dealers, their customers and, in the case of banks, for their customers and those of their affiliated broker-dealers. Due to the increased access and investor interest in foreign markets, growing numbers of these customers are invested in foreign securities. To facilitate the purchase or sale of these foreign securities, bank custodians and broker-dealers, as part of their duties, often enter into a FX transaction that is incidental to and for the sole purpose of effecting the foreign securities transaction. For example, when a non-US customer wishes to purchase a US dollar-denominated security, its broker-dealer or bank custodian will enter into a corresponding FX transaction to have US dollars on hand to meet the cash currency requirements necessary for the customer to complete its purchase of the securities. These FX transactions are an integral part of the settlement process. Typically, the settlement cycle for most non-EUR denominated securities is trade date plus three days (T+3).[6] Accordingly, the bank custodian or broker-dealer would enter into a FX transaction on a T+3 basis as well. In some securities markets, for example in South Africa, the settlement cycle can take up to seven days (T+7).

To date, regulatory authorities in each of the United States and Canada have defined transactions used solely to fund the purchase or sale of a foreign security where the settlement period is greater than T+2 days as an FX spot contract and are thus outside the scope of OTC derivatives regulation within those jurisdictions. Hence, we consider that ASIC will apply the same treatment to these transactions and not consider them as foreign exchange derivatives.

Subjecting these transactions that are incidental to related securities transactions to OTC derivatives regulation would expose bank custodians, broker-dealers and their customers to needless operational, price, credit and other risks. As a result, participants may restrict FX Security Conversions to T+2 FX spot contracts, even when the securities settlement takes longer, thereby exposing the customer to FX risk while exposing the bank to certain operational risks and changing – and disrupting – the long-standing and well-functioning settlement processing for the systemically relevant securities markets that exists today.

OTC derivatives regulation simply should not be applied to the types of incidental transactions at issue here and will not provide any meaningful protection to participants (in the form of disclosures) or meaningful information to the regulatory authorities (in the form of regulatory reporting). Inconsistent treatment of these transactions globally should be avoided to ensure that the lack of an exclusion for FX Security Conversions from OTC derivatives regulation in some jurisdictions (e.g. Australia) doesn't create unnecessary disincentives from transacting in securities in those jurisdictions by raising their transactional costs relative to other jurisdictions which have excluded them (e.g. in the United States and Canada).

6 See www.sec.gov/investor/pubs/tplus3.htm

Trades entered into in Australia

The GFXD understands from our previous discussions that a trade is required to be reported if it is executed on an Australian entity and we also understand that is the responsibility of the counterparty to an OTC derivative to determine whether a reporting obligation arises under the derivative transaction rules (reporting). The GFXD is also given to understand that under Australian law, a contract may be interpreted as "entered into" in the place where the acceptance of the offer to enter into the contract is received, and where an instantaneous form of communication is used to communicate the acceptance. The GFXD believes that the approach where a market participant has to determine where a trade was "entered into" could present practical challenges – for instance it could be argued that a salesperson that is geographically mobile could have "entered into" a transaction that may/may not require reporting in Australia.

The GFXD would like to respectfully suggest that instead of the "entered into" method discussed above, that the ASIC could consider the recent approach proposed by the Hong Kong and Singapore regulators. In addition to the trades booked on entities within each jurisdiction, both Hong Kong and Singapore are now proposing that if the trade is conducted by the trader who is generally employed in Hong Kong/Singapore then that trade is required to be reported. This refined approach provides more clarity to the markets in determining which trades will be required to be reported. Whilst the GFXD welcome the efforts by the Hong Kong and Singapore regulators in enhancing and aligning their requirements, we would be grateful if the ASIC could consider adopting a similar approach.

In addition, the GFXD understands that banks have been experiencing challenges from sovereign country funds, who have specifically been questioning the necessity of having their trades be reported due to their unique background, and suggest that the ASIC considers such challenges in the refinement of their reporting rules.

Information to be Reported

Complex and Bespoke

The GFXD would like to comment that there are still operational constraints on reporting complex and bespoke products, with these constraints impacting trade reporting in all jurisdictions. Complex and bespoke products are not traded electronically, cleared or confirmed through electronic matching platforms. There is limited standardisation of representation for these products in the marketplace and limited support in Financial products Markup Language (FpML) for trade reporting. Market participants are currently reporting these products using the Generic Product Template in FpML for US and European regulatory requirements, and we understand that this is currently the case in Australia too.

The FX industry is continuing to work on standardising the representation of complex and bespoke products in FpML and the GFXD has recently commissioned work to develop the FpML representation of 20+ products. Once completed, these new FpML templates will be available to all market participants for implementation. It is however important to recognise the complexity of standardising such products and it is unlikely that any impact from this work will be seen before early 2016.

Inter-affiliate trades

The GFXD requests clarity on the requirement to report inter-affiliate trades, i.e. back-to-back trades and trades executed at arm's length. The GFXD believes that the reporting of inter-affiliate trades does not provide any additional regulatory transparency, but does incur increased operational risks and increased costs to those who report such transactions. The GFXD also believes that such transactions cause unnecessary volume to be reported to the trade repositories which could cause unnecessary spikes in volumes and potential performance issues.

Counterparty identifier/ Trade identifier

Counterparty identifier: The GFXD welcomes the ASICs decision to remove the ABN as an entity identifier, and recommend that the ASIC adopts an identifier that is recognised globally, such as those described by ISDA.

Trade identifier: We believe that the European Unique Transaction Identifier (UTI) construct provides the most complete method in promoting the concept of a global UTI –such as the UTI construct being a 20 character Legal Entity identifier (LEI) followed by a 32 character trade reference number, or a 10 character LEI followed by 42 character trade reference number (and to be confirmed as per the development of the ISDA working group in this respect).

The GFXD suggests that the ASIC should define a UTI construct to prevent any confusion in the market place, such as that seen in Europe post the go live of trade reporting obligations under the European Markets infrastructure Regulation (EMIR).[7] Specifically, given the dual sided reporting requirements in Europe, trades with different UTIs cannot be matched at the trade repository, resulting in considerable reconciliation challenges, ultimately impacting the ability for the European Securities and Markets Authority (ESMA) and the National Competent Authorities in Europe to use the data as originally intended.

Other technical amendments

Snapshot reporting/ Time stamping

The GFXD welcomes the consideration by the ASIC of only requiring a single end of day position report and not requiring the reporting of intra-day modifications and lifecycle events. We would anticipate that this change would reduce implementation and on-going maintenance costs for firms and simplify the reporting required for firms if offering delegated reporting.

Regarding time-stamping, the GFXD would like to suggest that instead of the reference to Australian Eastern Standard Time (AEST) or Australian Eastern Daylight Time (AEDT), that the UTC (Co-ordinated Universal Time) should be the preferred format. This format is already being used in other jurisdictions and will help to promote global consistency.

Delegated reporting

The GFXD understands the rationale proposed by the ASIC in that the use of delegated reporting could significantly reduce compliance costs for reporting entities, in particular, those entities in the wealth management centre. We would like to emphasize that only the performance of reporting should be delegated, but not the regulatory obligations of the Reporting Entity whose data is being reported. We believe that the Reporting Entity (and not the Delegate) should maintain responsibility for the breaching of any rules for a reportable transaction, such as incomplete or inaccurate reporting. The GFXD believes that all market participants who have regulatory obligations should be required to be compliant and that delegated reporting should be the means as to which data is reported, rather than absolving the Reporting Entity of any responsibility.

The GFXD understands that this is currently the situation in Europe and proposes that a similar position is adopted in Australia.

Expanded foreign entities relief/ Tagging

The GFXD welcomes the relief to be provided by the ASIC for foreign reporting entities that report in other Foreign Jurisdictions which have substantially equivalent reporting requirements to the reporting requirements in Australia.

7 Regulation (EU) No 648/2012

Regarding the 'tagging' of those trades that are reported under alternative reporting, the GFXD would like to suggest that as 'tagging' is not yet required to be reported to other jurisdictions, it is very unlikely that market participants, trade repositories and infrastructure providers have built, tested etc. this additional field. We respectfully suggest that additional fields, such as 'tagging' be introduced at a later date, or subject to DTCC's readiness in this respect.

Implementation timelines

The GFXD would like to suggest that the ASIC considers providing a minimum of 6 months between the date of the finalisation of the rules and the implementation of additional reporting obligations. This will allow the banks to implement and roll out all necessary technology prior to their fulfilling of reporting obligations notwithstanding, the concession and grace period provided.

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We appreciate the opportunity to share our views on this Discussion Paper. Please do not hesitate to contact, David Ngai at 852-5699 9976 / dngai@gfma.org or Andrew Harvey at +44 (0) 207 743 9312 / aharvey@gfma.org should you wish to discuss any of the above.

Yours sincerely,

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