

Sent by email to consultation-05-2021@iosco.org

Public Comment on the Principles for the Regulation and Supervision of Commodity Derivatives Markets

The GFMA Commodities Working Group welcomes the opportunity to respond to IOSCO's consultation paper on changes to its Principles for the Regulation and Supervision of Commodity Derivatives Markets.

The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, visit <http://www.gfma.org>. GFMA is registered on the EU Transparency Register, registration number 898223513605-51.

Executive summary

We believe it would be helpful for IOSCO to address concerns that have arisen with respect to the implementation of the Principles around market surveillance and access to information. In particular focussing on whether powers of market surveillance and access to information should be imposed on local regulators or on the commercial entities that operate local markets or trading venues. The international nature of commodity markets has meant that requirements in one jurisdiction for participants to provide certain information may create problems for participants or their counterparties who are located in another jurisdiction. In our response below we encourage IOSCO to consider changes to the Principles to help ensure that national implementing legislation does not create difficulties for cross-border business.

Do you think the revised Principles reflect appropriately the changes, trends and activities in the commodity derivatives markets over the last decade since the publication of the original Principles in 2011? Are there any areas that are missing and/or merit IOSCO consideration? Do the Principles continue to serve as a sound framework for the regulation of the commodity derivatives markets?

The GFMA Commodities Working Group agrees that now is a good opportunity to update the Principles to reflect changes, trends and activities in the commodities markets over the last decade, and we agree with the high level developments that IOSCO has identified, including increased data transparency, technological developments (including direct electronic access and HFT) and access by investors to information on the relevant markets.

However, we also consider that this is an opportunity for IOSCO not just to add to the Principles but also to revisit the existing Principles to assess whether they still appropriately address the concerns that they were intended to address, or whether implementation of the Principles into regulation and legislation in various jurisdictions may have given rise to challenges or difficulties that could potentially be addressed by amendments to the Principles.

We would like to bring to IOSCO's attention some concerns that have arisen with implementation of the Principles around market surveillance and access to information. We appreciate that the Principles are intended to set out a high-level outline of best practice for regulation in this area, and that the intention is for individual jurisdictions to implement the Principles in a way that is appropriate for the market in their jurisdiction. However, we do consider that there are some areas that frequently present challenges in national implementing legislation and where international standards can provide helpful guidance to ensure that national implementing legislation does not create difficulties for cross-border business.

One key area that can create difficulties for cross-border business is the scope of market surveillance powers and access to information. Commodity markets are international and a requirement in one jurisdiction for participants to provide certain information may create problems for participants or their counterparties who are located in another jurisdiction. IOSCO acknowledges these issues in its Principle on public disclosure of information, but it may also be useful to address these issues in the context of other Principles.

One point that it may be helpful to address is whether market surveillance powers and requirements to be able to access information should be imposed on local regulators or on the commercial entities that operate local markets or trading venues. If it is appropriate to grant these powers or impose these requirements on both regulators and market operators, it may be helpful to have IOSCO guidance on the limits of the obligations on a commercial entity, in contrast to the obligations on a regulator. For example, in some jurisdictions, including the EU and UK, we have seen commercial market operators interpret applicable regulations very broadly to mean that they are required to undertake extremely wide-ranging surveillance of not just activities on their own market but also of the global activities of their market participants and clients outside of their market. These obligations (as the market operator has interpreted them) are then passed on to the commercial market operator's participants (as it has no jurisdiction to exercise direct supervision of global activities outside of its market). However, participants may face restrictions on the extent to which they are permitted to provide this information to a commercial entity (rather than a regulator) and may also face challenges in trying to obtain the requested information from their clients and counterparties in other jurisdictions. In our view, while clearly a commercial market operator should be required to exercise surveillance over its own market and ensure orderly trading, these requirements should be limited to the market operator's own market. Any broader surveillance or information gathering should be carried out by local regulators, who should have greater powers to obtain information (as well as being able to obtain information from other regulators or trade repositories). It is also more likely that exemptions from any confidentiality obligations or restrictions on disclosure of information would be available in relation to a surveillance or information request from a regulator, rather than a request from a commercial entity.

We consider that there are two main ways in which these issues could potentially be addressed in the Principles:

- The Principles use the term "Market Authorities", defined to mean both regulators and commercial market operators. As a result, it is unclear in many cases whether the intention

is for a regulator to have a particular power, or whether the intention is for the commercial market operator itself to have the power. This is not a new issue, but as the Principles become more granular it becomes more important to indicate where it is appropriate for responsibility to lie (particularly in the case of proposals for access to information / data requests). We would welcome use of different terms to distinguish between regulatory authorities (who actually regulate and supervise a particular market) and commercial market operators.

- Some of the Principles (in particular Principles 10 and 12) cover the need for a "Market Authority" to have access to information on a trader's entire (on and off-market) position, including OTC trades and positions in the underlying. When read in conjunction with the wide definition of "Market Authority" discussed above, this creates the potential for confusion over whether a local regulator should have access to this information (with all the associated protections around confidentiality that would then be available for the information) or whether this information should be available to commercial market operators (where similar protections around confidentiality are not typically available unless set out contractually in the venue's rulebook, and where concerns may arise if a venue imposes extensive information requirements on participants as a condition of access to the venue).

These issues could be addressed by defining "Market Authority" more narrowly to mean only regulatory authorities, or they could be addressed by changes to the Principles themselves. Either way, we would welcome IOSCO's attention to this issue and would be very happy to set up a call to discuss this further if that may be helpful.

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