

**Report of the OTC Derivatives Regulators Group (ODRG)¹ on Cross-Border
Implementation Issues
March 2014**

At the St. Petersburg summit in September 2013, the G20 leaders welcomed the set of understandings of the ODRG Principals on cross-border issues relating to OTC derivatives reforms² as a “major constructive step forward for resolving remaining conflicts, inconsistencies, gaps and duplicative requirements.”³ The G20 Leaders also agreed, and the G20 Finance Ministers and Central Bank Governors later reaffirmed, that “jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulatory regimes.”⁴ The G20 leaders also called on regulators to “report on their timeline to settle the remaining issues related to overlapping cross-border regulatory regimes and regulatory arbitrage.”⁵

As part of the ODRG’s continuing work to address OTC derivatives cross-border implementation issues, the ODRG will produce a series of reports to the G20 over the course of 2014. This initial report identifies the current list of remaining cross-border implementation issues, a summary of their status, and a timetable for addressing them.

¹ The ODRG includes Principals of the following regulatory authorities with responsibility for regulation of over-the-counter (OTC) derivatives markets: the Australian Securities and Investment Commission, the Brazilian Comissao de Valores Mobiliarios, the European Commission (EC), the European Securities and Markets Authority (ESMA), the Hong Kong Securities and Futures Commission, the Japanese Financial Services Agency (JFSA), the Ontario Securities Commission (OSC), the Autorité des marchés financiers du Québec (AMF), the Monetary Authority of Singapore (MAS), the Swiss Financial Market Supervisory Authority, the US Commodity Futures Trading Commission (CFTC), and the US Securities and Exchange Commission (SEC). For the OSC, CFTC and SEC, references to “Principals” and “ODRG members” are to the Chairs of their respective agencies and not the full bodies.

² ODRG Report on Agreed Understandings to Resolving Cross-Border Conflicts, Inconsistencies, Gaps and Duplicative Requirements, August 30, 2013, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/odrgreport.pdf>.

³ G20 Leaders’ Declaration, September 2013, available at https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG.pdf.

⁴ See Communiqué Meeting of Finance Ministers and Central Bank Governors Sydney, 22-23 February 2014, available at https://www.g20.org/sites/default/files/g20_resources/library/Communique%20Meeting%20of%20G20%20Finance%20Ministers%20and%20Central%20Bank%20Governors%20Sydney%2022-23%20February%202014_0.pdf.

⁵ G20 Leaders’ Declaration, September 2013, see note 3 *supra*.

Issues and Their Status

The ODRG is working to develop approaches to address the following cross-border issues:

1. Treatment of branches and affiliates

In ODRG member jurisdictions branches are regulated by authorities in their home country and also may be regulated by authorities in countries in which the branches operate. Foreign affiliates, which are regulated in the country of their incorporation by authorities that are in ODRG member jurisdictions also may be regulated by authorities in the country of the entity providing a guarantee or other form of bailout protection. There may be gaps in requirements or duplicative requirements on branches and affiliates.

Status:

The ODRG continues to work on identifying possible gaps and duplicative requirements in the treatment of foreign branches and affiliates and continues to explore potential solutions for those cases. In its analysis of the treatment of branches and affiliates, the ODRG is considering the clearing obligation and potentially other areas.

The ODRG is analysing how equivalence and substituted compliance apply to branches and affiliates and exploring relying on the foreign regime where the foreign regime has equivalent requirements to the home regime, following a flexible outcomes-based approach. Further, the ODRG is analysing how the stricter-rule approach would apply to the clearing obligation in respect of transactions involving dually regulated branches and subsidiaries.⁶

2. Organised trading platforms and implementation of trading commitment

As some jurisdictions move to register organised trading platforms and further implement the G20 commitment to trade all standardised OTC derivatives contracts on organised trading platforms, where appropriate, through mandatory trading requirements, issues have arisen with regard to the potential for liquidity fragmentation along jurisdictional lines.

Status:

The ODRG is assessing the circumstances under which registration of foreign organised trading platforms, for purposes of derivatives trading and trading obligations, is required by authorities, and identifying possible approaches to

⁶ As noted in the August 2013 report of the ODRG to the G20, the stricter-rule approach would apply to address gaps in mandatory clearing and trading obligations. Where participants or products are subject to mandatory clearing or trading obligations in one regime but not another, transactions involving such participants or products would need to comply with such obligations, even if the two regimes are otherwise considered equivalent or comparable.

the application of substituted compliance or equivalence to organised trading platforms. In addition, the ODRG is considering differences across jurisdictions in timing and approach to implementation of trading obligations.

ODRG members are working to implement understandings reached to address the following cross-border issues:

1. Equivalence and substituted compliance

In line with the G20 Leaders' declaration of September 2013, as well as the G20 Finance Ministers and Central Bank Governors' communiqué of February 2014, ODRG members reached the following understandings with respect to the use of equivalence and substituted compliance as means of deference: a flexible, outcomes-based approach should form the basis of final assessments regarding equivalence and substituted compliance. The final assessments of a foreign regime for equivalence or substituted compliance should be based on regulatory outcomes of that foreign regime, taking into account the different frameworks, local market practices and characteristics across jurisdictions. An equivalence or substituted compliance assessment also should be based on an understanding that similar regulatory outcomes may be achieved through the implementation of detailed rules or an applicable supervisory framework, or both. Such assessments may be made on a broad category-by-category basis, rather than on the foreign regime as a whole. An equivalence or substituted compliance assessment should fully take into account international standards, where they are appropriate, regulatory arbitrage, investor protection, risk importation, prudential and other relevant considerations.

ODRG members also agreed to consult each other on equivalence and substituted compliance assessments, including timelines, evidence and conclusions, given the important contributions that an assessed country can provide on its own regulatory framework.

Status:

Progress has been made in equivalence and substituted compliance assessments. In 2013, ESMA provided technical advice to the EC regarding the equivalence of the regulatory regimes for central counterparties and trade repositories, and of risk mitigation requirements, for Australia, Canada, Hong Kong, India, Japan, Singapore, South Korea, Switzerland and the United States. This advice is being considered by the EC as it is considering determinations of equivalence for these jurisdictions. Additionally, the EC has begun the process of gathering information from a further seven jurisdictions in order to begin assessing equivalence in respect of requirements for central counterparties.

In 2013, the CFTC approved comparability determinations to permit substituted compliance for Australia, Canada, the European Union, Hong Kong, Japan and Switzerland in respect of a number of entity-level

requirements for swap dealers and approved comparability determinations for the European Union and Japan in relation to certain transaction-level requirements.

ODRG members are continuing to work on implementing these understandings with respect to the use of equivalence and substituted compliance.

2. Clearing determinations

The ODRG has developed a framework for consultation among authorities on mandatory clearing determinations. In the framework, ODRG members agreed to inform each other early in the determination process regarding a derivative or class of derivatives on a clearly identified foreign underlier or on a derivative or class of derivatives the determining authority knows has an active trading market in particular foreign jurisdictions. ODRG members further agreed, where practicable, to review expeditiously derivatives that are subject to a determination in another jurisdiction. This framework is founded on the International Organization of Securities Commissions (IOSCO) recommendations and aims to harmonise mandatory clearing determinations across jurisdictions to the extent practicable and where appropriate, subject to jurisdictions' determination procedures.

Status:

IOSCO has recently established a central information repository to consolidate information on jurisdictions' clearing requirements. Staff of ODRG member organisations will contribute to the IOSCO information repository and continue to consult pursuant to the ODRG framework.

3. Risk mitigation techniques for non-centrally cleared derivatives transactions (margin)

ODRG members agreed on the importance of minimising the divergences, to the extent possible, from the international standards once implemented in each jurisdiction, since such divergences might ultimately have consequences on the application of equivalence / substituted compliance regimes.

Status:

As discussed in the report of the Basel Committee on Banking Supervision (BCBS) and IOSCO, *Margin requirements for non-centrally cleared derivatives*, BCBS and IOSCO will set up a monitoring group in 2014 to evaluate the margin requirements set out in that report. The evaluation will focus on assessing progress on the national implementation of margin requirements, reviewing industry implementation of margin, reviewing the relation and consistency of the margin standards with related regulatory initiatives, and assessing the liquidity impact of margin requirements. The

monitoring group will identify any significant differences in approaches that are being considered or taken by national authorities as the margin requirements are implemented, including the treatment of cross-border transactions.

Consistent with the work of the BCBS and IOSCO monitoring group, ODRG members agreed that early consultation should be established in order to seek consistent approaches, to the extent possible, to the implementation of the international standards. Discussion and findings at BCBS and IOSCO would provide a useful basis for the discussions in the ODRG.

4. Data in Trade Repositories

ODRG members agreed to explore direct access as the preferred approach to ensuring that regulators have access to relevant data held in trade repositories consistent with their mandates. However, direct access to trade repository data may not be available at this time in all circumstances. ODRG members agreed to explore and develop approaches for indirect access to data held in trade repositories while the conditions for ensuring direct access are being established.

Status:

ODRG members are discussing access issues on a bilateral basis and will continue to work to develop practical solutions to trade repository data access issues as authorities in their respective jurisdictions implement arrangements for the sharing of data held in trade repositories.

The ODRG is monitoring the following cross-border issues identified by the ODRG as appropriate for other fora or bilateral engagement:

1. Risk mitigation techniques for non-centrally cleared derivatives transactions (non-margin)

ODRG members agreed with the importance of having standards set at an international level on risk mitigation techniques for non-centrally cleared derivatives transactions, including documentation, timely confirmation, portfolio reconciliation and compression, valuation, and dispute resolution.

Status:

IOSCO is in the process of establishing a working group on risk mitigation requirements. ODRG members plan to participate in the IOSCO working group along with other IOSCO members.

2. Access to registrant's books and records

With respect to regulator access to a registrant's books and records in the supervisory context, ODRG members agreed to continue bilateral negotiations of MOUs between regulators to take into account local specificities, while leaving flexibility for ad-hoc arrangements between regulators. It was agreed that the bilateral negotiations should consider appropriate involvement of the local authority, such as notification, regarding direct access to information of foreign registered entities in the supervisory context and on-site examinations.

Status:

ODRG members are engaging, or will engage, in such bilateral negotiations, as access issues arise in the course of implementation of reforms.

3. Barriers to reporting to trade repositories

There are barriers, including data protection laws, blocking statutes, state secrecy laws and bank secrecy laws, which can prevent reporting to trade repositories. Barriers to reporting in certain jurisdictions will continue to affect the effectiveness of reporting obligations unless these barriers are removed. ODRG members agreed that jurisdictions should remove barriers to reporting to trade repositories by market participants with particular attention to removing barriers to reporting counterparty data.

Barriers should be removed so that participants can report trades with foreign counterparties pursuant to the participants' reporting requirements and without breaching applicable laws. ODRG members do not believe providing exemptions to participants from reporting information to trade repositories concerning foreign counterparties (e.g., on the basis that reporting is restricted by foreign law) is an acceptable arrangement, other than on an interim basis.

Status:

The Financial Stability Board's (FSB) OTC Derivatives Working Group is reporting on the progress by each FSB member jurisdiction to remove such barriers. Advancements in this regard have been reported in the OTC Derivatives Market Reforms – Progress Report on Implementation published by the FSB on a half-yearly basis. Furthermore, the FSB will conduct a peer review on trade reporting, which will aim to obtain a better understanding of the outstanding issues across jurisdictions. The ODRG will continue to monitor progress on this issue.

The ODRG notes bilateral progress between ODRG members on issues as follows:

Organised Trading Platforms

Progress has been made in finding solutions to address timing differences in the regulatory frameworks for organised trading platforms in the European Union and the United States. In February 2014, CFTC Acting Chairman Wetjen and European Commissioner Barnier announced CFTC and EC staffs had made significant progress toward harmonising a regulatory framework for CFTC-regulated swap execution facilities and EU-regulated multilateral trading facilities, through the issuance of no-action letters by CFTC staff providing temporary relief for EU venues and firms from CFTC requirements.⁷ This framework was contemplated under the *Path Forward* statement issued by CFTC and EC Principals in July 2013 regarding their joint understandings on a package of measures for how to approach cross-border derivatives.

Cooperative Oversight

In order to enhance cooperation and information sharing, regulators from various jurisdictions are negotiating supervisory arrangements with respect to regulated entities that operate on a cross-border basis. The CFTC executed an arrangement with the MAS in December 2013,⁸ the JFSA in March 2014,⁹ and the Alberta Securities Commission, the British Columbia Securities Commission, the OSC and the AMF in March 2014,¹⁰ and currently is negotiating arrangements with regulators in a number of jurisdictions.

Timetable

For the September 2014 Finance Ministers and Central Bank Governors meeting, the ODRG will report to the G20 on further progress in resolving cross-border

⁷ CFTC Letter No. 14-15, Time Limited No-Action Relief with respect to Swaps Trading on Certain Multilateral Trading Facilities Overseen by Competent Authorities Designated by European Union Member States, February 12, 2014, available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-15.pdf> and CFTC Letter No. 14-16, Conditional No-Action Relief with respect to Swaps Trading on Certain Multilateral Trading Facilities Overseen by Competent Authorities Designated by European Union Member States, February 12, 2014, available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-16.pdf>.

⁸ CFTC and MAS Sign Memorandum of Understanding to Enhance Supervision of Cross-Border Regulated Entities, December 27, 2013, available at <http://www.cftc.gov/PressRoom/PressReleases/pr6811-13>.

⁹ CFTC and JFSA Sign Memorandum of Cooperation to Enhance Supervision of Cross-border Regulated Entities, March 10, 2014, available at <http://www.cftc.gov/PressRoom/PressReleases/pr6876-14> and <http://www.fsa.go.jp/en/news/2014/20140311-1/01.pdf>.

¹⁰ CFTC, Alberta Securities Commission, British Columbia Securities Commission, OSC, and AMF signed a Memorandum of Understanding to enhance supervision of cross-border regulated entities on March 25, 2014, related press release available at www.cftc.gov.

implementation issues, including identification of any cross-border issues that cannot be resolved without legislative change.

The September report will include an update on the ODRG's progress in its work to develop approaches to address the treatment of branches and affiliates and organised trading platforms and implementation of the trading commitment. The report also will include an update on ODRG members' progress regarding understandings reached on equivalence and substituted compliance, clearing determinations, risk mitigation techniques for non-centrally cleared transactions (margin), and access to data in trade repositories. The September report will provide updates, as needed or appropriate, on issues being addressed in other fora or through bilateral engagement, including non-margin risk mitigation techniques for non-centrally cleared derivatives transactions, access to registrants' books and records, and barriers to reporting to trade repositories.

For the November 2014 G20 Leaders Summit, the ODRG will report how it has addressed or intends to address the treatment of branches and affiliates and organised trading platforms and implementation of the trading commitment and a timetable for implementing these approaches. The ODRG also will provide an update on ODRG member progress on existing understandings and, as necessary, a timetable in those areas. As with the September report, the November report will include updates, as needed or appropriate, on issues being addressed in other fora or through bilateral engagement.

In connection with preparing these reports, the Principals are committed to meeting, as necessary.