

Report of the OTC Derivatives Regulators Group (ODRG)¹ to G20 Leaders on Cross-Border Implementation Issues

November 2014

Background

Jurisdictions have been implementing the G20's OTC derivatives reform agenda through legislative and regulatory action. Since 2011, the ODRG has sought to identify and resolve cross-border issues associated with this implementation.

At the St. Petersburg Summit in September 2013, the G20 Leaders welcomed a set of understandings reached by 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

In this report, the ODRG updates the G20 Leaders on how it has addressed or intends to address identified cross-border issues since the St. Petersburg Summit, as well as on continuing areas of focus for the ODRG, including further progress made bilaterally and in other fora. This report consolidates for the G20 Leaders the substance of previous reports made during 2014 to the G20 Finance Ministers and Central Bank Governors.⁴

Progress since the St. Petersburg Summit

Since the St. Petersburg Summit, ODRG member authorities have continued to make progress in implementing understandings reached previously, including bilaterally, on equivalence and substituted compliance determinations (and associated supervisory cooperation arrangements), and multilaterally including by timely consultations on clearing determinations.

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 Investments Commission (ASIC), the Brazilian Comissão de Valores Mobiliários, the European Commission (EC), the European Securities and Markets Authority (ESMA), the Hong Kong Securities and Futures Commission, the Japanese Financial Services Agency, 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. This report should not be read as reflecting a judgment by, or limiting the choices of, the participating authorities with regard to the content of their proposed or final versions of their relevant rules or standards, nor their timing of implementation.

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_0.pdf (G20 2013 Leaders' Declaration).

⁴ See ODRG Report to the G20, March 2014, available at https://www.g20.org/official_resources/report_otc_derivatives_regulators_group_cross_border_implementation_issues (ODRG March 2014 Report) and ODRG report to the G20, September 2014, available at https://www.g20.org/sites/default/files/g20_resources/library/10%20Report%20of%20the%20OTC%20Derivatives%20Regulators%20Group%20on%20Cross-Border%20Implementation%20Issue_0.pdf (ODRG September 2014 Report).

In addition, the ODRG has continued to work to resolve identified cross-border issues and in this regard further progress has been made by reaching understandings on the topics of organised trading platforms (OTPs) and implementation of the G20 trading commitment, where our key understandings centre on the status of foreign OTPs and OTP eligibility for discharging trading mandates. ODRG members continue to discuss development of a framework for early consultation among authorities on mandatory trading determinations.

With regard to the treatment of branches and affiliates, ODRG members have focused on defining in what circumstances guarantor jurisdictions may extend regulation to transactions undertaken by guaranteed foreign affiliates. While a definitive resolution has not been reached, a range of factors relevant to this issue have been identified and their application to particular cases continues to be explored. The ODRG also intends to explore the treatment of branches and non-guaranteed affiliates going forward.

In August 2014, the ODRG raised with the FSB the issue of barriers to reporting information to trade repositories.⁵ These barriers impede the achievement of the G20's objectives. The FSB welcomed the letter and stressed the importance of rapid action by jurisdictions to remove those barriers.⁶

In addition, in 2014 the ODRG has engaged with the issues of regulatory and supervisory deference. G20 Leaders agreed, and the G20 Finance Ministers and Central Bank Governors have affirmed, 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."⁷ Accordingly, in the context of its work to implement understandings in the area of equivalence and substituted compliance, the ODRG is continuing to consider how deference to foreign regimes will work in practice.

The ODRG Principals remain committed to addressing identified cross-border issues. In addition, as ODRG member authorities continue in the process of implementing their laws and rules for domestic and cross-border transactions ODRG members anticipate additional cross-border issues could be identified that may need to be considered by the ODRG in order to seek resolutions. The ODRG Principals also are committed to addressing such cross-border issues as they are identified.

⁵ A copy of the letter from the ODRG members to the FSB is attached to the ODRG September 2014 Report.

⁶ Press Release: FSB Plenary meets in Cairns, Australia, 18 September 2014, available at http://www.financialstabilityboard.org/press/pr_140918.htm.

⁷ See G20 2013 Leaders' Declaration, and the 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.

Annex

Progress on Cross-border issues

This Annex sets out in greater detail the progress made by the ODRG since the last G20 Leaders' Summit in September 2013. It covers:

- (a) ODRG reports to the G20 since the 2013 Leaders' Summit;
- (b) identified cross-border issues the ODRG has addressed or intends to address;
- (c) identified cross-border issues on which ODRG members continue to work to implement understandings reached previously; and
- (d) progress on issues identified by the ODRG as appropriate for other fora or bilateral engagement.

A. ODRG reports to G20 since the 2013 Leaders' Summit

In March 2014 the ODRG delivered a Report to the G20 Finance Ministers and Central Bank Governors that set out a list of remaining identified cross-border implementation issues, a summary of their status, and a timetable for addressing them.⁸

This was followed by the ODRG's Report delivered to the G20 Finance Ministers and Central Bank Governors in September, providing a further update on the development of new understandings relating to the treatment of OTPs and their use for compliance with mandatory trading commitments. The report also outlined progress in implementing understandings previously reached by the ODRG, and noted an issue relating to barriers to reporting data to trade repositories that may require legislative change in some jurisdictions.⁹

B. Identified cross-border issues the ODRG has addressed or intends to address

The ODRG previously identified two areas in which it was working to develop approaches to address cross-border issues: (i) potential gaps and duplications in the treatment of branches and affiliates; and (ii) the treatment of OTPs and implementation of the G20 trading commitment. The ODRG is also discussing how deference to foreign regimes will work in practice in the context of equivalence assessments and substituted compliance determinations.

⁸ Report of the OTC Derivatives Regulators Group on Cross-Border Implementation Issues, March 2014, available at https://www.g20.org/official_resources/report_otc_derivatives_regulators_group_cross_border_implementation_issues (ODRG March 2014 Report).

⁹ ODRG Report to the G20, September 2014, available at https://www.g20.org/sites/default/files/g20_resources/library/10%20Report%20of%20the%20OTC%20Derivatives%20Regulators%20Group%20on%20Cross-Border%20Implementation%20Issue_0.pdf (ODRG September 2014 Report).

(i) Treatment of branches and affiliates

The ODRG has discussed the treatment of guaranteed affiliates as part of its work on addressing regulatory conflicts, inconsistencies, gaps and duplicative requirements in the treatment of branches and affiliates in cross-border situations.

Pursuant to these discussions, the ODRG has identified the issues set forth below concerning the treatment of guaranteed affiliates with respect to (i) clearing obligations; (ii) trading obligations; and (iii) risk mitigation techniques for non-centrally cleared transactions, including margins:¹⁰

1. Guaranteed affiliates¹¹ may potentially channel risk into the jurisdiction of the guarantor (“guarantor jurisdiction”).
2. The guarantor jurisdiction may determine to extend its regulation to guaranteed affiliates. In making this determination, a jurisdiction may have regard to various considerations, including, among other things, the existence of an equivalent or comparable regime in the jurisdiction in which the guaranteed affiliate is located (“local jurisdiction”), the level of risk channelled into the guarantor jurisdiction as a result of relevant transactions, the need to ensure the appropriate regulation of guaranteed affiliates, the ability to rely on or coordinate with relevant authorities to carry out oversight and supervision of the guaranteed affiliate, with due regard to avoiding to the extent practicable regulatory conflicts, inconsistencies, gaps and duplicative requirements.

The ODRG is considering the approaches to apply in cases involving guaranteed affiliates, in particular in the case where a guarantor jurisdiction determines to extend its regulation to guaranteed affiliates. The group is exploring the extent to which alternative means of compliance may be made available including, as a starting point, the case where a transaction takes place wholly within the local jurisdiction and does not involve a transacting counterparty from the guarantor jurisdiction or a third jurisdiction or a transacting counterparty guaranteed by an entity established in the guarantor jurisdiction or a third jurisdiction.

The different approaches to cases involving guaranteed affiliates may depend on a number of factors including (i) the particular mandate in question, e.g. clearing or trading obligations; (ii) whether the local jurisdiction is equivalent or comparable to the guarantor jurisdiction by way of equivalence or substituted compliance based on a flexible, outcomes-based approach; (iii) whether there are any gaps between the rules of the guarantor jurisdiction and the local jurisdiction that could result in regulatory arbitrage; (iv) an assessment of the level of risk the

¹⁰ “Risk mitigation techniques” refers to documentation, trade confirmation, portfolio reconciliation, portfolio compression, valuation and dispute resolution, and as specifically noted, margin. As for margins for non-centrally cleared contracts, it should be noted that not all ODRG members are the responsible or the sole responsible authorities. Therefore any understandings reached among the ODRG to avoid overlaps will need to be discussed at the national level with the relevant authorities.

¹¹ For the purposes of these discussions, “guaranteed affiliates” are entities, referred to as affiliates under the applicable different domestic laws, which may include subsidiaries, which benefit from a form of explicit and legally enforceable guarantee in respect of the relevant transactions. The ODRG recognizes that in some jurisdictions there are arrangements that effectively support payment obligations or back the discharge of obligations, other than explicit guarantees, that may channel risk into a guarantor jurisdiction. These discussions do not address such arrangements.

relevant activity poses to the guarantor jurisdiction; and (v) any other factors that could potentially inform jurisdictions of the appropriate law to apply in certain circumstances.

The ODRG members remain committed to discussing acceptable understandings that balance the decision making processes of each authority, the development of their individual legal frameworks and the desire to agree on approaches that state a clear position.

The ODRG also will continue to consider whether any of the understandings reached in respect of guaranteed affiliates may also be appropriate in the case of branches.

(ii) Organised trading platforms and implementation of the G20 trading commitment

The ODRG Principals have agreed that one or more of the following or different approaches should be considered to avoid unnecessary burdens and unintended consequences for foreign OTPs, consistent with our respective statutory and other legal requirements: (a) recognition, (b) registration and substituted compliance, or (c) registration categories and exemptions. The ODRG Principals recognised that there are different ways to regulate OTPs and agreed that OTPs, regardless of their location, that are recognised or have an applicable license, registration, permission, or exemption in a jurisdiction should be able to be used to comply with a trading commitment of that jurisdiction. They also agreed that whenever possible, and consistent with applicable laws and regulations, the details of laws and regulations applicable to foreign OTPs, including registration requirements, should be made clear before their implementation. Enhancing clarity and predictability of the details of applicable laws and regulations for various stakeholders should help reduce regulatory uncertainty and avoid unnecessary burdens and unintended consequences. The ODRG Principals further agreed that there should be appropriate transitional measures and a reasonable but limited transition period for foreign OTPs.

In addition, while there is variation in timing among ODRG members in implementing the G20 trading commitment,¹² the ODRG Principals agreed to discuss development of a framework for early consultation among authorities on mandatory trading determinations, to the extent practicable and where appropriate, subject to jurisdictions' determination procedures. They also agreed to discuss how ODRG members could work closely and coordinate bilaterally or multilaterally, as appropriate, to avoid unnecessary burdens and unintended consequences, including towards alignment of the timing of implementation where practicable.

ODRG members continue to discuss development of a framework for early consultation among authorities on mandatory trading determinations and are discussing how ODRG members could work closely and coordinate bilaterally or multilaterally.

(iii) Deference

The ODRG has begun working on practical aspects of deference, building on the survey work of the FSB, by drawing out themes and identifying potential common approaches. The ODRG is continuing to consider how deference to foreign regimes will work in practice.

¹² The "trading commitment" refers to the G20 Leaders' agreement in Pittsburgh in 2009, that among other things, all standardized OTC derivatives contracts should be traded on exchanges or electronic trading platforms, where appropriate.

C. Identified cross-border issues on which ODRG members continue to work to implement understandings reached previously

The ODRG previously identified four areas in which it was working to implement understandings reached previously: (i) equivalence and substituted compliance; (ii) clearing determinations; (iii) risk mitigation techniques for non-centrally cleared derivatives transactions (margin); and (iv) data in trade repositories and barriers to reporting to trade repositories.¹³

(i) Equivalence and substituted compliance

Understandings:

In line with the G20 Leaders' Declaration of September 2013, ODRG members reached the following understandings with respect to the use of equivalence and substituted compliance as a 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.

The ODRG also is considering (a) how to monitor the continued effectiveness and comparability of foreign legal regimes after equivalence or substituted compliance has been granted and (b) how deference to foreign regimes will work in practice.

Progress:

There has been significant bilateral progress between jurisdictions on substituted compliance and equivalence assessments.

In 2013, ESMA provided technical advice to the EC regarding the equivalence of the regulatory regimes for central counterparties (CCPs) 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. The EC has recently adopted determinations of equivalence for Australia, Hong Kong, Singapore and Japan in respect of CCP requirements.

Additionally, the EC has begun the process of reviewing a further eight jurisdictions from which CCPs have applied for recognition in the European Union (EU), in order to begin assessing equivalence in respect of requirements for CCPs.

¹³ See the ODRG March 2014 Report for a description of these issues. In the March 2014 Report the ODRG identified reporting information to trade repositories as an issue the ODRG was monitoring.

EU equivalence determinations in respect of transaction requirements are expected to follow.

In December 2013, the CFTC approved comparability determinations to permit substituted compliance for Australia, Canada, the EU, Hong Kong, Japan and Switzerland in respect of a number of entity-level requirements for swap dealers and approved comparability determinations for the EU and Japan in relation to certain transaction-level requirements.

In June 2014, ASIC published regulatory guidance that states ASIC considers a number of jurisdictions' trade reporting requirements are equivalent to the Australian requirements, including the requirements of the EU, Japan, and CFTC.

In June 2014, the OSC published amendments to its OTC derivatives trade reporting rule (OSC Rule 91-507) to permit certain market participants subject to Ontario trade reporting obligations to benefit from substituted compliance when they report trades pursuant to CFTC swap data reporting rules. The OSC conducted a comparability analysis using an outcomes-based approach to determine whether CFTC rules and regulations are sufficiently equivalent for the purposes of the substituted compliance provision of the Ontario rule. The OSC is engaging in similar equivalency processes in respect of OTC derivatives data reporting rules of other foreign jurisdictions for substituted compliance treatment.

In June 2014, the SEC adopted rules and guidance to address the application of several key cross-border requirements including, among other things, a definition of "U.S. person" (to be used by certain market participants to determine which regulatory requirements apply to cross-border security-based swap transactions) that reflects a territorial approach. The SEC also adopted a rule setting the procedures for submission of applications for substituted compliance determinations.

The AMF has adopted amendments to its Regulation 91-507 Respecting Trade Repositories and Derivatives Data Reporting so that the AMF can establish a list of jurisdictions whose laws, regulations and instruments are considered equivalent. The AMF has determined that the CFTC and ESMA have equivalent trade reporting regimes.

In September 2014, ASIC granted the first Australian derivative trade repository licence to a trade repository that is already licensed and operating in Singapore and subject to supervision by MAS. As part of the licensing, ASIC deferred to Singapore rules where the rules are equivalent to ASIC rules, and applied a number of conditions on the trade repository. ASIC will also perform the role of supervising the trade repository by relying on MAS supervision of the trade repository and through cooperative arrangements in place between ASIC and MAS.

There are no trade repositories physically located in Canada. In September 2014, the OSC and the AMF designated and recognised, respectively, three U.S. trade repositories to carry on business in Ontario and Quebec for the purposes of the trade reporting rules under Ontario and Quebec law. Ontario and Quebec counterparties will report to these three repositories from 31 October 2014.

(ii) Clearing determinations

Understandings:

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.

Progress:

Consistent with the previously agreed framework, ODRG members are actively consulting each other on mandatory clearing determinations, including sharing drafts of proposed determinations.

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

Understandings:

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.¹⁴

Progress:

As part of the process of implementing these understandings, ODRG members have been consulting among themselves, including sharing drafts of proposed rules, in order to seek consistent approaches, to the extent possible, to the implementation of the international standards.

The ODRG also is liaising with the Basel Committee on Banking Supervision (BCBS) and IOSCO group that has been established to monitor implementation of the standards set out in the BCBS and IOSCO report, *Margin requirements for non-centrally cleared derivatives*, as discussions and findings of BCBS and IOSCO would provide a useful basis for the discussions in the ODRG. In August 2014, the ODRG sent a letter to the monitoring group indicating its interest in developments in implementation of the margin requirements.

(iv) Data in trade repositories and barriers to reporting to trade repositories

The ODRG identified two issues with respect to data and trade repositories: (a) reporting information to trade repositories and (b) authorities accessing information from trade repositories.

On the matter of reporting information to trade repositories, the ODRG delivered a letter to the FSB in August 2014 noting the existence of barriers that prevent reporting of

¹⁴ As for margins for non-centrally cleared contracts, it should be noted that not all ODRG members are the responsible or the sole responsible authorities. Therefore any understandings reached among the ODRG on margins will need to be discussed at the national level with the relevant authorities.

counterparty-identifying information to trade repositories.¹⁵ The ODRG letter noted that these barriers contravened the G20's objectives as outlined in the Leaders' 2009 Pittsburgh communiqué.

The ODRG requested that the FSB make a clear and unambiguous statement that jurisdictions need to remove all barriers that prevent reporting of counterparty-identifying information and discuss the setting of an ambitious but realistic deadline by which such barriers are addressed. In addition, the ODRG noted that it is considering the possibility of having a deadline by which the masking of counterparty identifying information in reports to trade repositories would not be permitted. The ODRG further called on the FSB to make the issue of barriers to reporting to trade repositories a key point of assessment for its Standing Committee on Standards Implementation's Thematic Peer Review on Reporting of OTC Derivatives Transactions to Trade Repositories.

The FSB welcomed the letter from the ODRG and stressed the importance of rapid action by jurisdictions to remove those barriers.¹⁶

On the issue of authorities' access to data in trade repositories, ODRG members continue to explore direct access as the preferred approach to ensuring authorities have access to relevant data held in trade repositories. As reported previously, direct access to trade repository data may not be available at this time in all circumstances. Accordingly, ODRG members continue to discuss access issues on a bilateral basis and are working 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.

In March 2014, the CFTC, the AMF, the OSC, the Alberta Securities Commission and the British Columbia Securities Commission reached a memorandum of understanding regarding cooperation in the exchange of information in the supervision and oversight of regulated entities that operate on a cross-border basis between the signatories' jurisdictions.

In September 2014, ASIC and MAS signed a data sharing MOU facilitating access by the two authorities to trade reporting data held in trade repositories licensed in each other's jurisdictions.

D. Progress on issues identified by the ODRG as appropriate for other fora or bilateral engagement:

(i) Risk Mitigation Standards for Non-Centrally Cleared Derivatives Transactions (Non-Margins)

Understandings:

ODRG members agreed with the importance of having standards set at an international level for risk mitigation techniques for non-centrally cleared derivatives transactions, including

¹⁵ A copy of the letter is attached to the ODRG September 2014 Report. See also OTC Derivatives Market Reforms, Fifth Progress Report on Implementation, April 2013, available at http://www.financialstabilityboard.org/publications/r_130415.pdf ("Jurisdictions should remove barriers to trade reporting by market participants, with particular attention to removing barriers to reporting of counterparty information and to information access by authorities.").

¹⁶ Press Release: FSB Plenary meets in Cairns, Australia, 18 September 2014, available at http://www.financialstabilityboard.org/press/pr_140918.htm.

documentation, timely confirmation, portfolio reconciliation and compression, valuation, and dispute resolution.

Progress:

In April 2014, IOSCO approved the mandate for a working group to develop risk mitigation standards for non-centrally cleared derivatives. ODRG members are part of the working group.

IOSCO released a consultation report Risk Mitigation Standards for Non-Centrally Cleared OTC Derivatives on 17 September 2014,¹⁷ proposing nine standards in the areas of: (1) Scope of Coverage; (2) Trading Relationship Documentation; (3) Trade Confirmation; (4) Valuation with Counterparties; (5) Reconciliation; (6) Portfolio Compression; (7) Dispute Resolution; (8) Implementation; and (9) Cross-border Transactions. The proposed standards were developed in consultation with the BCBS and the Committee on Payments and Market Infrastructures, and would complement the margin requirements developed by the BCBS and IOSCO in September 2013 in strengthening the non-centrally cleared OTC derivatives market.

The IOSCO working group is reviewing feedback received from the consultation, and targets to finalise the report in December 2014.

(ii) Access to registrant's books and records

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.

ODRG members are engaging or will engage in bilateral negotiations of MOUs within the framework of the agreed approach.

¹⁷ Risk Mitigation Standards for Non-Centrally Cleared OTC Derivatives, Consultation Report (September 2014), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD450.pdf>.