Public Consultation on EU-US High-level Working Group on Jobs and Growth

A response by the Futures and Options Association

APRIL 2012

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1. Introduction

1.1 This response is submitted on behalf of the Futures and Options Association ("the FOA"), which is the principal European industry association for 160 firms and organisations engaged in the carrying on of business in futures, options and other derivatives. Its international membership includes banks, financial institutions, brokers, commodity trade houses, energy and power market participants, exchanges, clearing houses, IT providers, lawyers, accountants and consultants (see Appendix 1).

1.2 The FOA notes that the high-level Working Group on Jobs and Growth established by the Transatlantic Economic Council ("TEC") will be looking at such issues as:

- the reduction and elimination or prevention of barriers to trade in services and investments, as well as trade in goods;

- prospects for improving compatibility between EU and US regulation; and

- enhancing transatlantic cooperation as regards the development of rules and principles.

1.3 In general terms, the FOA supports strongly the proposition that enhanced cross-border business in trade in goods and services, including financial services, will help to fulfil the objectives of "creating jobs, increasing economic growth, and driving competitiveness on both sides of the Atlantic" (the Fact Sheet on EU-US high-level Working Group on Growth and Jobs: 28/11/11).

1.4 The FOA is primarily concerned with transatlantic trade in financial services and, in making this response, will draw on the work currently being undertaken by the EU-US Coalition on Financial Services (see Appendix 2) and with the support of the international law firm Clifford Chance in emphasising the post-crisis importance of regulatory recognition and exemptive relief between jurisdictions with compatible regulatory policies, standards and outcomes. There is also a need for targeted rules convergence where there is either (i) insufficient approximation in rules' outcomes to facilitate recognition; or (ii) where convergence would deliver tangible benefits for both the providers and consumers of financial services e.g. increased business efficiency, cost-effectiveness, improved customer understanding or simplified market access.

It is anticipated that the work currently being undertaken by the Coalition will be set out in a report to be published in June 2012.

2. Background

2.1 Transatlantic relationships are founded largely on common commercial and political goals and values and upon the free-flow exchange of ideas, persons, products, services and technology in financial services. These linkages are evidenced by market statistics and by the increasingly transatlantic nature of capital and derivative markets. The EU-US economic relationship dominates the world economy by the sheer size of the combined economies. The population of both the US and Europe approach 800 million people who generate a combined gross domestic product (GDP) amounting to

40% of world GDP in 2010. Combined EU and US trade accounts for over 47% of all world trade. Together, the two regions account for 80% of global financial services business. It is noteworthy that a large part of the prevailing framework of regulation in financial services in European, Canada, Australia, Switzerland and many other jurisdictions is drawn from the original regulatory approach of the United States.

2.2 Unfortunately, despite the good work of a number of international groups, eg the informal transatlantic markets regulatory dialogue (FMRD) and the more formal harmonisation of standards and principles, particularly by IOSCO, the rules, processes and priorities of regulatory authorities continue to be largely geographically based and governed by differentiated national laws. This has resulted in a complex and costly meld of duplicative and sometimes conflicting regulations and processes which sit uneasily with the increasingly global nature of financial markets and services and the importance of the transatlantic market sustaining its international competitiveness.

2.3 In April 2007, the EU-US Summit in Washington, amongst its other conclusions, called for an acceleration towards "*Convergence, equivalence or mutual recognition, where appropriate, regulatory standards based on high quality principles*" and in the subsequent Joint Statement on Mutual Recognition in Securities Markets (1/2/08) the EU Commission and the US SEC agreed "*to intensify work on a possible framework for EU-US mutual recognition for securities in 2008*". As the Joint Statement put it "*The concept of mutual recognition offers significant promise as a means of better protecting investors, fostering capital formation and maintaining fair, orderly and efficient transatlantic securities markets*".

That remains as true today as it was before the crisis and an early resumption of this process will play a major part in achieving the objectives identified by the TEC Working Group on Jobs and Growth.

3. Post-crisis importance of transatlantic regulatory recognition

3.1 One of the key lessons of the crisis has been that global business carries global risk i.e. risk which, when it materialises, is no respecter of jurisdictional borders or types of markets. It is not surprising therefore that some regulatory authorities are of the view that they can enhance their controls over domestic financial activity and contain the risk of that activity by restricting the ability of overseas institutions doing business within their jurisdictions. However, this "Balkanisation" of financial services to regulation will increase the cost of financial services, reduce choice in terms of raising capital, investing and managing business risks and undermine economic growth i.e. it is a direct trade-off between regulatory certainty and economic growth.

3.2 These issues have been considered at the G20 level and, perhaps not surprisingly, the G20 has rejected protectionism in a number of post-crisis statements, namely:

- "… *we underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty*" (G20 Leaders' Summit, November 2008);

- "…*Vigilance is also needed to ensure open capital markets and avoid financial protectionism*" (the Fourth Toronto Summit, June 2010).

For its part, the European Commission has emphasised:

- "..*the need to maintain the EU's commitment to open markets in trade and services and deeper multilateral cooperation, fighting against protectionist tendencies and pursuing a positive outcome of the WTO Doha Round*" (October 2008 Communication "From Financial Crisis to Recovery: A European Framework for Action);

- that "… p*rotectionism and a retreat towards national markets can only lead to stagnation, a deeper and longer recession and lost prosperity*" (Communication "Driving Economic Recovery": 4 March 2009).

3.3 In terms of pursuing the objective of regulatory recognition/exemptive relief between regulatory compatible jurisdictions, it is inevitable that there will be differences – sometimes significant – between market practices, overarching legal systems and in the detail of their respective rules, but an approach based on shared regulatory outcomes and policies in key areas should provide a sufficient foundation for building regulatory recognition e.g.

(a) common standards in fitness of controllers and senior managers;

(b) shared standards and objectives in terms of assessing the training and competence of staff;

(c) procedures for ensuring compliance with all applicable laws and regulations relating to the relevant business;

(d) common objectives towards sustaining the financial strength of authorised firms and ensuring compliance with all applicable liquidity and capital requirements;

(e) shared approaches towards investor protection;

(f) maintenance of high standards in market and business conduct, including the management of conflicts of interest;

(g) shared policy and capability in the area of supervision, investigation and enforcement.

3.4 In the context of identifying the key attributes of regulatory systems and the observance of minimum standards, IOSCO published, in 1998, its "Objectives and Principles of Securities Regulation" which established 30 principles of securities regulation. These (now 38) IOSCO Principles, which were updated in June 2010, provide a sound basis for measuring rules' outcomes and establishing a common set of regulatory values sufficient to deliver regulatory recognition insofar as its members, between them, are responsible for the regulation of over 100 jurisdictions and 90% of the world's securities and other financial markets. They have already endorsed these Principles and jurisdictional assessments carried out by IOSCO and the IMF on a significant number of IOSCO members since 1998 have shown high levels of compliance. However, observance of common principles alone will not be a sufficient means of measurement and reference is often made to the concept of "IOSCO Plus" (eg the need for rules and regulations to be transparent, accessible, intelligible, properly enforced and market-flexible), and inter-jurisdictional reliance will vary from country to country to take account of differing priorities, expertise and resources.

4. **Conclusion**

4.1 The FOA is strongly of the view that international regulatory coordination and timely and comprehensive sharing of information between regulatory authorities and greater degrees of inter-reliance as regards supervision, investigation and enforcement is key to reducing regulatory overlap, conflict and duplication, avoiding the imposition of needless cost and the unnecessary consumption of regulatory and industry resource.

4.2 The FOA recognises that the TEC Working Group is looking to identify policies and measures which can increase transatlantic trade and investment and support mutually beneficial job creation, economic growth and international competitiveness. While the focus of this response has been largely on the value of Transatlantic regulatory recognition and exemptive relief, it is precisely this kind of coordinated and cost-effective approach to regulation which will lead to enhancement in all of those objectives.

4.3 It is equally important, however, to ensure that all the “stakeholders”, particularly financial intermediaries, market infrastructures, customers of financial services as well as the regulatory authorities themselves, are consulted on an open and regular basis to ensure that enhancement of those objectives are achieved in fact as well as in theory.

APPENDIX 1

LIST OF FOA MEMBERS

FINANCIAL INSTITUTIONS
ABN AMRO Clearing Bank N.V.
ADM Investor Services International Ltd
Altura Markets S.A./S.V
AMT Futures Limited
Jefferies Bache Limited
Banco Santander
Bank of America Merrill Lynch
Banca IMI S.p.A.
Barclays Capital
Berkeley Futures Ltd
BGC International
BHF Aktiengesellschaft
BNP Paribas Commodity Futures Limited
BNY Mellon Clearing International Limited
Capital Spreads
Citadel Derivatives Group (Europe) Limited
Citigroup
City Index Limited
CMC Group Plc
Commerzbank AG
Crédit Agricole CIB
Credit Suisse Securities (Europe) Limited
Deutsche Bank AG
ETX Capital
FOREX.COM UK Limited
FXCM Securities Limited
GFI Securities Limited
GFT Global Markets UK Ltd
Goldman Sachs International
HSBC Bank Plc
ICAP Securities Limited
IG Group Holdings Plc
International FC Stone Group
JP Morgan Securities Ltd
Liquid Capital Markets Ltd
Macquarie Bank Limited
Mako Global Derivatives Limited
Marex Spectron
Mitsubishi UFJ Securities International Plc
Mizuho Securities USA, Inc London
Monument Securities Limited
Morgan Stanley & Co International Limited
Newedge Group (UK Branch)
Nomura International Plc
Rabobank International
RBC Europe Limited
Saxo Bank A/S
Scotia Bank
S E B Futures
Schneider Trading Associates Limited
S G London
Standard Bank Plc
Standard Chartered Bank (SCB)
Starmark Trading Limited
State Street GMBH London Branch
The Kyte Group Limited
The RBS
UBS Limited
Vantage Capital Markets LLP
Wells Fargo Securities
WorldSpreads Limited

EXCHANGE/CLEARING HOUSES
APX Group
CME Group, Inc.
Dalian Commodity Exchange
European Energy Exchange AG
Global Board of Trade Ltd
ICE Futures Europe
LCH.Clearnet Group
MCX Stock Exchange
MEFF RV
Nasdaq OMX
Nord Pool Spot AS
NYSE Liffe
Powernext SA
RTS Stock Exchange
Shanghai Futures Exchange
Singapore Exchange Limited
Singapore Mercantile Exchange
The London Metal Exchange
The South African Futures Exchange
Turquoise Global Holdings Limited

SPECIALIST COMMODITY HOUSES
Amalgamated Metal Trading Ltd
Cargill Plc
ED & F Man Capital Markets Ltd
Engelhard International Limited
Glencore Commodities Ltd
Koch Metals Trading Ltd
Metdist Trading Limited
Mitsui Bussan Commodities Limited
Natixis Commodity Markets Limited
Noble Clean Fuels Limited
Phibro GMBH
J.P. Morgan Metals Ltd
Sucden Financial Limited
Toyota Tsusho Metals Ltd
Triland Metals Ltd
Vitol SA

ENERGY COMPANIES
BP Oil International Limited
Centrica Energy Limited
ChevronTexaco
ConocoPhillips Limited
E.ON EnergyTrading SE
EDF Energy
EDF Trading Ltd
International Power plc
National Grid Electricity Transmission Plc
RWE Trading GMBH
Scottish Power Energy Trading Ltd
Shell International Trading & Shipping Co Ltd
SmartestEnergy Limited

PROFESSIONAL SERVICE COMPANIES
Ashurst LLP
ATEO Ltd
Baker & McKenzie
Berwin Leighton Paisner LLP
BDO Stoy Hayward
Clifford Chance
Clyde & Co
CMS Cameron McKenna
Deloitte
Dewey & LeBoeuf LLP
FfastFill
Fidessa Plc
Freshfields Bruckhaus Deringer
Herbert Smith LLP
ION Trading Group
JLT Risk Solutions Ltd
Katten Muchin Rosenman LLP
Linklaters LLP
Kinetic Partners LLP
KPMG
Mpac Consultancy LLP
Norton Rose LLP
Options Industry Council
Orrick, Herrington & Sutcliffe (Europe) LLP
PA Consulting Group
R3D Systems Ltd
Reed Smith LLP
Rostron Parry Ltd
RTS Realtime Systems Ltd
Sidley Austin LLP
Simmons & Simmons
SJ Berwin & Company
SmartStream Techologies Ltd
SNR Denton UK LLP
Speechly Bircham LLP
Stellar Trading Systems
SunGard Futures Systems
Swiss Futures and Options Association
Traiana Inc
Travers Smith LLP
Trayport Limited

APPENDIX 2

BRIEFING NOTE ON THE EU-US COALITION ON FINANCIAL REGULATION

APPENDIX 2

BRIEFING NOTE ON THE EU-US COALITION ON FINANCIAL REGULATION

1.1 In early 2005, a group of transatlantic trade associations in the financial services sector established the EU-US Coalition on Financial Regulation to encourage governments and regulatory authorities on both sides of the Atlantic to progress inter-jurisdictional regulatory recognition and exemptive relief on the basis of regulatory compatibility and, where possible and appropriate, rules' convergence. They comprise:

- American Bankers Association Securities Association (ABASA)
- Association of Financial Markets in Europe (AFME)
- Bankers' Association for Finance and Trade (BAFT)
- British Bankers' Association (BBA)
- Futures Industry Association (FIA)
- Futures and Options Association (FOA)
- International Capital Market Association (ICMA)
- Investment Industry Association of Canada (IIAC)
- International Swaps and Derivatives Association (ISDA)
- Securities Industry and Financial Markets Association (SIFMA)
- Swiss Bankers Association (SBA)

- *Observer: European Banking Federation (EBF)*

1.2 Their objective, in coming together, was not to undermine acceptable standards of market integrity or investor protection, but to increase the efficiency and coherence of applicable regulation and rules governing transatlantic cross-border trade in financial services, facilitate customer choice and simplify market access.

1.3 On 8 September 2005, the Coalition launched a major two-volume study "The Transatlantic Dialogue in Financial Services: the case for Regulatory Simplification and Trading Efficiency" which focussed on licensing and business conduct rules in financial services and included a comparative legal analysis of the then applicable i.e. pre-crisis EU and US legislative and regulatory requirements.

1.4 Noting the positive reaction to its 2005 Report, the Coalition issued a second Report on 1 April 2008 "Mutual Recognition: Exemptive Relief and "targeted" Rules' Standardisation: the Basis for Regulatory Modernisation". This Report re-emphasised the importance of the three "gateways" to modernising the regulation of global business i.e. regulatory recognition, exemptive relief and targeted rules' convergence and set out the key criteria for establishing a durable basis for transatlantic regulatory recognition.

1.5 The emergence of the financial crisis meant that, despite transatlantic consensus on the urgent need to establish regulatory recognition, the negotiating process was suspended in order to allow the regulatory authorities on both sides of the Atlantic to concentrate on the priority objectives of implementing changes to regulatory structures, rules and practises in response to the lessons of the crisis. However, a growing trend, in certain areas of regulatory repair, towards regulatory protectionism and the extra territorial application of domestic rules energised the Coalition to commission the international law firm, Clifford Chance, to produce a report on the post-crisis benefits of regulatory recognition for all “stakeholders”, including the providers and consumers of financial services and the regulatory authorities. That Report will be published in June this year.