

# MEMORANDUM OF UNDERSTANDING

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**United States Commodity Futures Trading  
Commission**



**Australian Prudential Regulation  
Authority**

COOPERATION AND THE EXCHANGE OF INFORMATION  
RELATED TO THE SUPERVISION OF COVERED FIRMS

13 April, 2015

**MEMORANDUM OF UNDERSTANDING CONCERNING COOPERATION  
AND THE EXCHANGE OF INFORMATION RELATED TO  
THE SUPERVISION OF COVERED FIRMS**

In view of the growing globalisation of the world's financial markets and the increase in cross-border operations and activities of regulated entities, the United States Commodity Futures Trading Commission and the Australian Prudential Regulation Authority (jointly, the "Authorities") have reached this Memorandum of Understanding ("MOU") regarding cooperation and the exchange of information in the supervision and oversight of certain regulated firms that operate on a cross-border basis in both the United States and Australia. The Authorities express, through this MOU, their willingness to cooperate with each other in the interest of fulfilling their respective regulatory mandates regarding derivatives markets, particularly in the areas of: protecting customers; fostering the integrity of and maintaining confidence in financial markets; and reducing systemic risk.

**ARTICLE ONE: DEFINITIONS**

For purposes of this MOU:

1. "Authority" means:
  - a. In the United States, the Commodity Futures Trading Commission ("CFTC"); or
  - b. In Australia, the Australian Prudential Regulation Authority ("APRA").
2. "Requesting Authority" means an Authority making a request under this MOU.
3. "Requested Authority" means the Authority to whom a request is made under this MOU.
4. "Laws and Regulations" means:
  - a. For the CFTC, the Commodity Exchange Act ("CEA"), Dodd-Frank Wall Street Reform and Consumer Protection Act, CFTC regulations, and other applicable legal or regulatory requirements in the United States; and
  - b. For APRA, the Australian Prudential Regulation Authority Act 1998, the Banking Act 1959, regulations made pursuant to those and other applicable laws, prudential standards, and other applicable legal or regulatory requirements in Australia.
5. "Covered Firm" means an entity physically located in either the United States or Australia that satisfies both of the following criteria:
  - a. A swap dealer ("SD") or major swap participant ("MSP") that is, or that has applied to be, registered as such under the CEA; and
  - b. An Authorised Deposit-taking Institution that is, or that has applied to be, regulated and supervised by APRA ("FI").

6. "Derivatives Activities and Conduct" means:
  - a. For the CFTC, activities and conduct of a Covered Firm with respect to: (1) a contract for the purchase or sale of a commodity for future delivery; (2) a security futures product; (3) a swap; (4) any agreement, contract, or transaction described in Section 2(c)(2)(C)(i) or (D)(i) of the CEA; (5) any commodity option authorized under Section 4c of the CEA; (6) any leverage transaction authorized under Section 19 of the CEA; or (7) any cash or forward transaction related to (1)-(6) above; and
  - b. For APRA, the derivatives activities of an FI, including, but not limited to, those transacted through a domestic or overseas clearing and settlement facility, traded on an exchange, or transacted over the counter, and includes cash and forward transactions relating to them.
7. "Covered Matters" means all Derivatives Activities and Conduct of a Covered Firm that are governed by Laws and Regulations.
8. "Person" means a natural person, unincorporated association, partnership, trust, investment company, or corporation, and may be a Covered Firm.
9. "Books and Records" means documents, electronic media, and books and records within the possession, custody, and control of, and other information about, a Covered Firm.
10. "On-Site Visit" means any regulatory visit to the premises of a Covered Firm for the purposes of ongoing supervision and oversight including the inspection of Books and Records.
11. "Local Authority" means the Authority in whose jurisdiction a Covered Firm that is the subject of an On-Site Visit is physically located.
12. "Visiting Authority" means the Authority conducting an On-Site Visit.
13. "Emergency Situation" means the occurrence of an event that could materially impair the financial or operational condition of a Covered Firm.
14. "Governmental Entity or Third Authority" means:
  - a. The U.S. Department of the Treasury or the U.S. Board of Governors of the Federal Reserve System, if the Requesting Authority is the CFTC; and
  - b. The Australian Department of the Treasury, any Minister assigned responsibility for APRA's functions, the Reserve Bank of Australia, or the Australian Securities and Investments Commission, if the Requesting Authority is APRA.

## ARTICLE TWO: GENERAL PROVISIONS

15. This MOU is a statement of intent to consult, cooperate, and exchange information in connection with the supervision and oversight of Covered Firms with respect to their Covered Matters. The cooperation and information sharing arrangements under this MOU should be interpreted and implemented in a manner that is permitted by, and consistent with, the laws and requirements that govern each Authority. With respect to cooperation pursuant to this MOU, as at the date this arrangement is executed, each Authority believes that no domestic secrecy or blocking laws or regulations should prevent an Authority from providing assistance to the other Authority. The Authorities anticipate that cooperation primarily will be achieved through ongoing consultations, supplemented as needed, including through mutual assistance in obtaining information related to Covered Firms. The provisions of this MOU are intended to support both consultations and cooperation, as well as to facilitate the written exchange of non-public information in accordance with applicable laws.
16. This MOU does not create any legally binding obligations, confer any rights, or supersede domestic laws. This MOU does not confer upon any Person the right or ability directly or indirectly to obtain, suppress, or exclude any information or to challenge the execution of a request for assistance under this MOU.
17. This MOU is not intended to limit or condition the discretion of an Authority in any way in the discharge of its regulatory responsibilities or to prejudice the individual responsibilities or autonomy of any Authority. This MOU does not limit an Authority to taking solely those measures described herein in fulfillment of its supervisory functions. Nor does this MOU preclude Authorities from sharing information or documents with respect to Persons that are not Covered Firms but may be subject to regulatory requirements in the United States and in Australia. In particular, this MOU does not affect any right of any Authority to communicate with, conduct an On-Site Visit of (subject to the procedures described in Article Five), or obtain information or documents from any Person subject to its jurisdiction that is physically located in the jurisdiction of another Authority.
18. This MOU is intended to complement but does not alter the terms and conditions of existing arrangements.
19. To facilitate cooperation under this MOU, the Authorities hereby designate contact persons as set forth in Appendix A, which may be amended from time to time by an Authority transmitting revised contact information in writing to the other Authority.

## **ARTICLE THREE: SCOPE OF SUPERVISORY CONSULTATION, COOPERATION, AND EXCHANGE OF INFORMATION**

### **General**

20. The Authorities recognise the importance of cooperation concerning Covered Matters and intend to consult regularly, as appropriate, regarding:
  - a. General supervisory issues, including regulatory, oversight, or other related developments insofar as they relate to Covered Matters;
  - b. Issues relevant to the operations, activities, and regulation of Covered Firms insofar as they relate to Covered Matters; and
  - c. Any other areas of mutual supervisory interest.
21. The Authorities recognise in particular the importance of close cooperation in the event that a Covered Firm, particularly one whose failure likely would be systemically important to an Authority, experiences, or is threatened by, a potential financial crisis or other Emergency Situation.
22. Cooperation will be most useful in, but is not limited to, the following circumstances where issues of common regulatory concern may arise:
  - a. The initial application for registration as an SD or MSP by a Covered Firm that is an FI, or the initial application to APRA for authorisation as an FI by a Covered Firm that is an SD or MSP;
  - b. The ongoing supervision and oversight of a Covered Firm, with respect to Covered Matters, including compliance with Laws and Regulations in either jurisdiction; and
  - c. Regulatory or supervisory actions or approvals taken in relation to a Covered Firm by the CFTC or APRA that may impact Covered Matters of the entity in the jurisdiction of the other Authority.

### **Event-Triggered Notification**

23. As appropriate in the particular circumstances, each Authority will endeavor to inform the other Authority promptly, and where practicable in advance, of:
  - a. Pending regulatory changes that may have a significant impact on the operations, activities, or reputation of a Covered Firm, including those that may affect the rules or procedures of a Covered Firm;
  - b. Any material event of which the Authority is aware that could adversely impact the financial or operational stability of a Covered Firm. Such events include the failure of the Covered Firm to satisfy any of its requirements for continued registration or incorporation where that failure could have a material adverse effect in the jurisdiction of the other Authority, as well as any known adverse

- material change in the ownership, operating environment, operations, financial resources, management, or systems and controls of a Covered Firm; and
- c. Enforcement actions or sanctions or significant regulatory actions, including the revocation, suspension, or modification of registration or incorporation, concerning a Covered Firm.
24. The determination of what constitutes “significant impact”, “material event”, “adversely impact”, “material adverse effect”, “adverse material change”, or “significant regulatory actions” for purposes of Paragraph 23 shall be left to the reasonable discretion of the relevant Authority that determines to notify the other Authority.

### **Request-Based Information Sharing**

25. To the extent appropriate to supplement consultations, upon written request, the Requested Authority intends to provide the Requesting Authority with the fullest possible cooperation subject to the terms in this MOU in assisting the Requesting Authority’s supervision and oversight of Covered Firms, including assistance in obtaining and interpreting information that is relevant to ensuring compliance with the Laws and Regulations of the Requesting Authority and that is not otherwise available to the Requesting Authority. Such requests shall be made pursuant to Article Four of this MOU, and the Authorities anticipate that such requests will be made in a manner that is consistent with the goal of minimising administrative burdens.
26. The information covered by Paragraph 25 includes:
- a. Information relevant to the financial and operational condition of a Covered Firm with respect to Covered Matters, including, for example, financial resources, risk management, and internal control procedures;
  - b. Relevant regulatory information and filings that a Covered Firm is required to submit to an Authority with respect to Covered Matters, including, for example, interim and annual financial statements and early warning notices; and
  - c. Regulatory reports prepared by an Authority, including, for example, examination reports, findings, or information contained in such reports regarding Covered Matters.

### **Consultations**

27. Representatives of the Authorities intend to consult periodically, as appropriate, to update each other on their respective functions and regulatory oversight programs and to discuss issues of common interest relating to the supervision of Covered Firms with respect to Covered Matters, including: contingency planning and crisis management, systemic risk concerns, the adequacy of existing cooperative arrangements, and the possible improvement of cooperation and coordination

between the Authorities. Consultations may be conducted by conference call or on a face-to-face basis, as appropriate.

#### **ARTICLE FOUR: EXECUTION OF REQUESTS FOR INFORMATION**

28. To the extent possible, a request for information pursuant to Article Three should be made in writing (which may be transmitted electronically), and addressed to the relevant contact person(s) identified in Appendix A. A request generally should specify the following:
- a. The information sought by the Requesting Authority;
  - b. A general description of the matter that is the subject of the request;
  - c. The purpose for which the information is sought; and
  - d. The desired time period for reply and, where appropriate, the urgency thereof.

Information provided by a Requested Authority in response to the request, as well as any subsequent communication among Authorities, may be transmitted electronically. Any electronic transmission should use means that are appropriately secure in light of the confidentiality of the information being transmitted.

29. The Authorities expect each other to mark all non-public documents provided under this MOU: “Confidential – Provided under Memorandum of Understanding between APRA and the CFTC”.
30. In an Emergency Situation, the Authorities will endeavor to notify each other as soon as possible of the Emergency Situation and will cooperate as appropriate in the particular circumstances, taking into account all relevant factors, including the status of efforts to address the Emergency Situation. During an Emergency Situation, requests for information may be made in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification.

#### **ARTICLE FIVE: ON-SITE VISITS**

31. In fulfilling its respective supervision and oversight responsibilities pursuant to, and to ensure compliance with, its Laws and Regulations in connection with Covered Matters of a Covered Firm, an Authority may need to conduct On-Site Visits to a Covered Firm physically located in the jurisdiction of the other Authority. Each Authority will consult and work collaboratively with the other Authority in conducting an On-Site Visit.
32. It is intended that an On-Site Visit by an Authority be conducted in accordance with the following procedure:

- a. The Visiting Authority intends to provide advance notice to the Local Authority of its intent to conduct an On-Site Visit and the intended timeframe for, and the purpose and scope of, the On-Site Visit. Other than in exceptional circumstances, the Visiting Authority will notify the Local Authority prior to notifying the Covered Firm.
- b. The Local Authority will endeavor to share any relevant reports, or information contained therein, related to examinations it may have undertaken of the Covered Firm.
- c. The Authorities intend to assist each other regarding On-Site Visits, including providing information that the Visiting Authority may request and that is available prior to the On-Site Visit; cooperating and consulting in reviewing, interpreting, and analysing the contents of public and non-public Books and Records; and obtaining information from directors and senior management of a Covered Firm.
- d. The Authorities will consult with each other, and the Local Authority may in its discretion accompany or assist the Visiting Authority during the On-Site Visit, or the Authorities may conduct joint On-Site Visits where appropriate.

#### **ARTICLE SIX: PERMISSIBLE USES OF INFORMATION**

33. The Requesting Authority may use non-public information obtained under this MOU solely for the supervision and oversight of Covered Firms with respect to Covered Matters pursuant to, and to ensure compliance with, the Laws and Regulations of the Requesting Authority.
34. Before using non-public information furnished under this MOU for any purpose other than that stated in Paragraph 33, the Requesting Authority must first consult with and obtain the written consent of the Requested Authority for the intended use. If consent is denied by the Requested Authority, the Authorities will consult as to the reasons for withholding approval of such use and the circumstances, if any, under which the intended use by the Requesting Authority might be allowed.
35. If an Authority (“Receiving Authority”) receives, via a party that is not a signatory to this MOU, non-public information originally provided by the other Authority (“Disclosing Authority”) that is related to the Disclosing Authority’s supervision and oversight of a Covered Firm that the Receiving Authority is aware was obtained by the third party from the Disclosing Authority on a confidential basis, the Receiving Authority will use and treat the information in accordance with the terms of this MOU.
36. The restrictions in this Article do not apply to an Authority’s use of information it obtains directly from a Covered Firm, whether during an On-Site Visit or otherwise. However, where non-public information is provided to the Requesting Authority in response to an information-sharing request pursuant to Article Four of this MOU, the

restrictions in this MOU apply to the use of the information by that Requesting Authority.

## **ARTICLE SEVEN: CONFIDENTIALITY OF INFORMATION AND ONWARD SHARING**

37. Except as provided in Paragraphs 38 and 39, each Authority will keep confidential, to the extent permitted by law, non-public information shared under this MOU, requests made under this MOU, the contents of such requests, and any other matters arising under this MOU.
38. As required by law, it may become necessary for a Requesting Authority to share non-public information obtained under this MOU with a Governmental Entity or Third Authority in its jurisdiction. In these circumstances and to the extent permitted by law:
  - a. The Requesting Authority intends to notify the Requested Authority; and
  - b. Prior to the Requesting Authority sharing the non-public information, the Requesting Authority will provide adequate assurances to the Requested Authority concerning the Governmental Entity or Third Authority's use and confidential treatment of the information, including, as necessary, assurances that:
    - i. The Governmental Entity or Third Authority has confirmed that it requires the information for a purpose within the scope of its jurisdiction; and
    - ii. The information will not be shared by the Governmental Entity or Third Authority with other parties without getting the prior written consent of the Requested Authority.
39. Except as provided in Paragraph 38, the Requesting Authority must obtain the prior written consent of the Requested Authority before sharing non-public information received under this MOU with any non-signatory to this MOU. The Requested Authority will take into account the level of urgency of the request and respond in a timely manner. During an Emergency Situation, consent may be obtained in any form, including orally, provided such communication is confirmed in writing as promptly as possible following such notification. If consent is denied by the Requested Authority, the Requesting and Requested Authorities will consult to discuss the reasons for withholding approval of such disclosure and the circumstances, if any, under which the intended disclosure by the Requesting Authority might be allowed.
40. To the extent possible, the Requesting Authority intends to notify the Requested Authority of any legally enforceable demand for non-public information furnished under this MOU. When complying with the demand, the Requesting Authority

intends to assert all appropriate legal exemptions or privileges with respect to such information as may be available.

41. The Authorities intend that the sharing or disclosure of non-public information, including deliberative and consultative materials, such as written analysis, opinions, or recommendations relating to non-public information that is prepared by or on behalf of an Authority, pursuant to the terms of this MOU, will not constitute a waiver of privilege or confidentiality of such non-public information.

#### ARTICLE EIGHT: AMENDMENTS

42. The Authorities will periodically as appropriate review the functioning and effectiveness of this MOU with a view, *inter alia*, to expanding or altering the scope or operation of this MOU should that be judged necessary. This MOU may be amended with the written consent of the Authorities referred to in Paragraph 1.

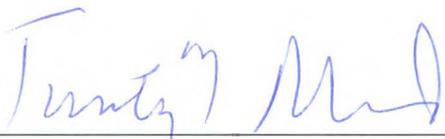
#### ARTICLE NINE: EXECUTION OF THIS MOU

43. Cooperation in accordance with this MOU will become effective on the date this MOU is signed by the Authorities.

#### ARTICLE TEN: TERMINATION

44. Cooperation in accordance with this MOU will continue until the expiration of 180 days after an Authority gives written notice to the other Authority of its intention to terminate the MOU. If either Authority gives such notice, the parties will consult concerning the disposition of any pending requests. If consensus cannot be reached through consultation, cooperation will continue with respect to all requests for assistance that were made under the MOU before the expiration of the 180-day period until all requests are fulfilled or the Requesting Authority withdraws such request(s) for assistance. In the event of termination of this MOU, information obtained under this MOU will continue to be treated in the manner prescribed under Articles Six and Seven.

This MOU is executed in duplicate, this 13<sup>th</sup> day of April 2015.



Timothy G. Massad  
Chairman  
U.S. Commodity Futures Trading Commission



Wayne Byres  
Chairman  
Australian Prudential Regulation Authority

## **APPENDIX A**

### **CONTACT PERSONS**

*In addition to the following contact information, the CFTC and APRA will exchange confidential emergency contact telephone information.*

#### **CFTC**

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