Comments by the International Swaps and Derivatives Association, Inc. (ISDA) on Consultation Paper on Draft Regulations Pursuant to the Securities and Futures Act for Trade Repositories and Clearing Facilities issued by the Monetary Authority of Singapore

8 February 2013

ISDA Safe, Efficient Markets

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Dear Sir/Madam,

Introduction

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] welcomes the opportunity to respond to the Consultation Paper on Draft Regulations pursuant to the Securities and Futures Act ("**SFA**") for Trade Repositories and Clearing Facilities ("**SFR Consultation Paper**") issued by the Monetary Authority of Singapore ("**MAS**") on 10 January 2013.

Capitalised terms used but not defined herein have the meaning given to such terms as set out in the SFR Consultation Paper.

General comments

Before we address specific comments on the regulations proposed in the draft SF(TR)R, SF(CF)R and SF(CF)(T&S)R attached to the SFR Consultation Paper, we would like to make a few general comments.

Principles of Financial Market Infrastructure

We support the alignment of the proposed Regulations with the PFMI.

Segregation and Portability of Customers' Money and Assets

ISDA supports the strengthening of the segregation and portability of customers' money and assets held with ACHs or RCHs, including the language imposing a statutory trust over customers' money and assets held with the ACH or RCH. In this regard, the Supreme Court Decision in *Re Lehman Brothers International (Europe) (a company) (in administration) and another* [2012] UKSC 6[2] may be instructive. The questions before the Supreme Court included the point in time at which a trust arose over client money received by Lehman

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

[2] http://www.supremecourt.gov.uk/docs/UKSC_2010_0194_Judgment.pdf

Brothers International (Europe) ("**LBIE**"). Did the trust arise from the time at which LBIE received client money or only at the time when LBIE paid the money into a separate client account? The Supreme Court concluded that the trust arose from the time at which LBIE received client money. Great reliance was placed in particular on the language of Client Assets Sourcebook ("**CASS**") rule 7.7.2R which provides as follows:

"*A firm receives and holds client money as trustee … on the following terms:*

(1) *for the purposes of and on the terms of the client money rules and the client money (MiFID business) distribution rules;*"

With respect to segregation of customers' money and assets, we note that the proposed SF(CF)R provides for an optional LSOC model, allowing members to choose whether to hold customer money and assets under an LSOC account or an omnibus customer account. We also note that the MAS has stated in the SFR Consultation Paper that while the MAS does not require physical segregation of money and assets which can be operationally commingled, "*an ACH or RCH is at liberty to adopt a higher level of segregation of customers' money and assets*". We assume the wording within quotation marks means that an ACH or RCH can go further than the LSOC model and offer full individual segregation (i.e. holding of customer money and assets in separate individual trust or custody accounts as well as maintaining separate books and records). If so, we agree with the MAS's proposed approach, as this will provide maximum flexibility, including enabling both US clearing houses that offer the LSOC model as well as EU clearing houses that offer the individual segregation model to be recognised as RCHs.

We note, however, that the segregation provisions in Regulations 22 and 42 explicitly provides only for the optional LSOC model or omnibus customer account. The regulations could perhaps be clearer if it were to expressly provide for the individual segregation model as a third option.

In the case of certain foreign clearing facilities, such as those provided by a US derivatives clearing organisation ("**US DCO**"), home country regulations would mandate holding of customer money and assets via the LSOC model only and would not allow the holding of customer money and assets via an omnibus customer account. We assume that where such an US DCO is a RCH in Singapore, members of such RCHs would be permitted to opt in all cases to hold customer money and assets via the LSOC model. We would appreciate clarification by the MAS that in such circumstances, the MAS would not expect the RCH to also offer to hold customer money and assets via an omnibus customer account.

We note the MAS's proposal that where a member of an ACH or RCH is a bank, the money and assets of the customers of such a member are to be deposited in an account other than one operated by the member in its role as a bank or custodian. While this would address the risk raised by the MAS in paragraph 14 of the SFR Consultation Paper, this may have additional cost implications for the customers of the member. As such, ISDA would like to suggest that the requirement for customer moneys and assets to be held at a separate bank be an optional requirement, to be determined by the relevant customer. At the very least, there should be a differential treatment for initial margin and variation margin, with only initial margin being required to be held at a third party bank.

Transitional Measures for Persons Operating Clearing Facilities

We understand that the MAS intends to list any operator of clearing facilities that have notified the MAS of its establishment or commencement of operations prior to the Commencement Date and that has presumably indicated to the MAS that it will be applying to be recognised as an RCH in the Second Schedule of the SF(CF)(T&S)R. We note that "*LCH.Clearnet Limited*" is listed in the Second Schedule but not other operating entities of the LCH.Clearnet Group (i.e. LCH.Clearnet SA or LCH.Clearnet LLC). We further note that no other operators of clearing facilities for OTC derivatives are listed in the Second Schedule. Our members are keen to ensure that foreign clearing facilities through which they currently clear their OTC derivatives (and which may subsequently be subjected to a Singapore mandatory clearing requirement) are included in the Second Schedule and would like to understand how this can best be achieved.

Clarification of the Scope of Section 49(1) of the Amended SFA

Section 49(1) makes it an offence for a person to establish or operate a clearing facility, or to hold himself out as operating a clearing facility unless such person is an ACH or RCH. Where a member of a foreign clearing house offers client clearing services in Singapore, we seek the MAS's confirmation that such offer by the member will not expose the foreign clearing house to a breach of Section 49(1).

Comments on draft Regulations

We set out below our comments on the respective Annexes to the SFR Consultation Paper:

A. Annex 1 – Draft Securities and Futures (Trade Repositories) Regulations 2013

Regulation	**Comment**
9(3) and 17(1)(d)	It is unclear what "*linkage, arrangement or co-operative arrangement*" means. We urge the MAS to issue guidelines to provide clarification and guidance.
11 and 24	We note that the first half of each of these regulations apply to "*user information*" while the second half applies to "*transaction information*". As the provisions are essentially similar, it may be clearer to condense the provisions to apply to both user and transaction information and to separately provide for any provisions which only apply to one but not both types of information (e.g. Regulation 11(5)(c) and Regulation 24(5)(c)).
14 and 26	Section 46B of the amended SFA defines a "*trade repository*" as a "*corporation that collects and maintains information on any transactions relating to any securities, futures contracts or derivatives contracts, or any other transactions or class of transactions that the Authority may prescribe by regulations made under section 341 for the purposes of this definition*". Section 46E(3) of the amended SFA provides that the MAS may impose restrictions on, inter alia, the activities that a LTR or LFTR may undertake. As such, we believe that the wording of these provisions may not be appropriate as the services that can be offered by a LTR or LFTR are circumscribed. In addition, the person to whom the information should be provided should be clarified. We suggest that the provisions be re-worded as follows: "*(a) make available to the Authority upon request; or* *(b) publish in a manner that is accessible to the public, information on –* *(i) the types of transactions that may be reported to the [licensed trade repository]* [3] *[licensed foreign trade repository]*[4]*;* *(ii) the activities that may be undertaken by the [licensed trade repository]*[5]*[licensed foreign trade repository]*[6]*; and* (iii) *applicable fees and charges.*"

[3] For Regulation 14.

15(1) and 27(1)	Please include the words "*and transaction information*" after the words "*including user information*".
16(1) and (7) 28(1) and (7)	Please provide the criteria for determining what types of LTRs and LFTRs and what types of securities, futures contracts or derivatives contracts would be specified in Parts I and II (for LTRs) and Parts III and IV (for LFTRs), respectively, of the Second Schedule. We note that the Second Schedule of the draft SF(TR)R does not specify any trade repositories or contracts.
29(ii)	We understand that a licensed trade repository has to be a Singapore trade repository as defined in Section 46B of the amended SFA (i.e. a trade repository which is incorporated in Singapore). However, this provision seems to imply that a licensed trade repository could be incorporated in a jurisdiction other than Singapore. Please clarify.
First Schedule	Section 46F(1) of the amended SFA provides that a LTR or LFTR shall pay such annual fees as may be prescribed by the MAS. The First Schedule prescribes an annual fee to be paid by a LFTR only. Will there be an annual fee payable by a LTR?
Typographical errors	We note the following typographical errors: 24(1)(a) – "*alleqed*" should be "*alleged*". 24(5)(d) and (e), (6) and (7) – "*user information*" should be "*transaction information*".

B. Annex 2 – Draft Securities and Futures (Clearing Facilities) Regulations 2013

Provision	**Comment**
11(3) and 28(1)(h)	It is unclear what "*linkage, arrangement or co-operative arrangement*" means. We urge the MAS to issue guidelines to provide clarification and guidance.

[4] For Regulation 26.
[5] For Regulation 14.
[6] For Regulation 26.

17 and 37	Section 51(4) of the amended SFA provides that the MAS may impose restrictions on, inter alia, the activities that an ACH or RCH may undertake. As such, we believe that the wording of these provisions may not be appropriate as the services that can be offered by an ACH or RCH are circumscribed. In addition, the person to whom the information should be provided should be clarified. We suggest that the provisions be re-worded as follows: *"(a) make available to the Authority upon request; or* *(b) publish in a manner that is accessible to the public, information on –* *(i) all products available on the clearing facility established or operated by the [approved clearing house][7] [recognised clearing house][8];* *(ii) the activities that may be undertaken by the [approved clearing house][9] [recognised clearing house][10]; and* (iii) *applicable fees and charges.*"

[7] For Regulation 17.
[8] For Regulation 37.
[9] For Regulation 17.
[10] For Regulation 37.

22 and 42	Regulation 22(1)(c)/42(1)(c) states that only in the case of a market contract which is a transaction in derivatives contracts is the member required to notify the ACH/RCH whether the books for money or assets deposited or paid for or in relation to a contract of a customer is to be separate from the books for money or assets deposited or paid for or in relation to contracts of other customers of that member. Regulation 22(2)/42(2) as drafted only applies if the member has notified the ACH/RCH, amongst other things, that the books for money or assets deposited or paid for or in relation to a contract of a customer are not to be separate from the books for other customers of that member. Regulation 22(3)/42(3) as drafted only applies if the member has notified the ACH/RCH, amongst other things, that the books for money or assets deposited or paid for or in relation to a contract of a customer are to be separate from the books for other customers of that member. Thus, neither Regulation 22(2)/42(2) nor 22(3)/42(3) will apply in the case of market contracts that are not transactions in derivatives contracts. There appears to be a gap in the regulations as the obligations in relation to segregation and dealing with customer money and assets would not apply to market contracts that are not transactions in derivatives contracts. As we understand that the LSOC model, as envisaged by Regulation 22(3)/42(3), would only be applicable in respect of market contracts which are transactions in derivatives contracts, Regulation 22(2)/42(2) should be extended to apply in all cases, including where the market contract is not a transaction in derivatives contracts (i.e. securities or futures contracts). Please also see our general comments above under "Segregation and Portability of Customers' Money and Assets".
22(2)(b) and 22(3)(b) 42(2)(b) and 42(3)(b)	Please consider amending each of these provisions to read: "*ensure that such money or assets are kept separate from all money and assets received from members by the [approved clearing house]* [11] *[recognised clearing house]* [12] *in respect of which the approved clearing house]*[13] *[recognised clearing house]*[14] *has been notified by such members pursuant to paragraph (1) that such money or assets are not being deposited or paid for or in relation to contracts of customers of such members; and*"

[11] For Regulations 22(2)(b) and 22(3)(b).
[12] For Regulations 42(2)(b) and 42(3)(b).
[13] For Regulations 22(2)(b) and 22(3)(b).
[14] For Regulations 42(2)(b) and 42(3)(b).

22(3)(a) 42(3)(a)	Please consider amending the last part of this provision to read: "*to be held for the benefit of such customer of the member and disposed of or used only for or in relation to contracts of such customer of the member;*"
22(4) 42(4)	Please see our general comments above under "Segregation and Portability of Customers' Money and Assets".
22(5) 42(5)	Please clarify that the ACH/RCH is not permitted to commingle money and assets received in respect of market contracts of customers of a member with the members' or the ACH/RCH's own money and assets. Please consider amending to read as follows: "*Nothing in paragraphs (2)(a) and (3)(a) shall prevent [an approved clearing house][15][a recognised clearing house][16] from commingling all money or assets received from members by the [approved clearing house][17][recognised clearing house][18] that are deposited or paid for or in relation to contracts of customers of members pursuant to those provisions in the same trust account or custody account, as the case may be, provided that the [approved clearing house] [19] [recognised clearing house] [20] shall not commingle such money and assets with:* *(i) money or assets deposited or paid for or in relation to a contract of a member; or* *(ii) money or assets of the [approved clearing house][21][recognised clearing house][22].*"

[15] For Regulation 22(5).
[16] For Regulation 42(5).
[17] For Regulations 22(5).
[18] For Regulations 42(5).
[19] For Regulation 22(5).
[20] For Regulation 42(5).
[21] For Regulations 22(5).
[22] For Regulations 42(5).

23(1) 43(1)	We assume that Regulation 23/43 should apply where the failure of a member arises from a single contract of a customer of a member. To make this clear, please consider amending the first part of Regulation 23(1)/43(1) to read as follows: "*For the purpose of [section 60(1)][23] [section 77(1)(b)][24] of the Act, where a member of [an approved clearing house][25] [a recognised clearing house][26] fails to meet its obligations to the [approved clearing house][27] [recognised clearing house][28] that arise from one or more contracts of one or more customers of the member,*" and to consider amending Regulation 23(1)(a)/43(1)(a) to read as follows: "*the [approved clearing house][29] [recognised clearing house][30] is of the opinion, formed in good faith, that the failure of the member to meet the subject obligations is directly attributable to the failure of that customer or those customers of the member to meet that customer's or those customers' obligations under any market contract;*"
23(2) 43(2)	This provision deals with the situation where a member fails to meet its obligations that arise from contracts of a customer that has its money and assets held under an LSOC model. There should also be a provision to make clear that in the situation where a member fails to meet its obligation that arise from contracts of a customer that has its money and assets held under an omnibus customer account, the approved clearing house should not use any money and assets held by the approved clearing house in accordance with Regulation 22(3)/42(3) (i.e. the LSOC model) to meet such obligations.

[23] For Regulation 23(1).
[24] For Regulation 43(1).
[25] For Regulation 23(1).
[26] For Regulation 43(1).
[27] For Regulation 23(1).
[28] For Regulation 43(1).
[29] For Regulation 23(1).
[30] For Regulation 43(1).

11(1)(c) 33(1)(c) 33(1)(g)	We note that Regulation 33(1)(c) refers to "*material change*" while Regulation 11(1)(c) refers to "*significant change*". Please clarify whether the difference is intentional and if so, please provide guidance as to the kind of changes that would be considered material and significant. Regulation 33(1)(g) is unclear in its application. Is this provision intended to apply only to changes in the clearing services provided? It is not clear who is the "*such person*" referred to. As such, we urge the MAS to revise this provision to provide clarity.
39	Please provide criteria for determining what types of RCHs would be specified in the Third Schedule. We note that the draft SF(CF)R does not specify any RCHs in the Third Schedule.
40(1) and (7) 40(3) and (4) Part III Second Schedule	Please provide criteria for determining what types of RCHs and what types of securities, futures contracts or derivatives contracts would be specified in Parts III and IV, respectively, of the Second Schedule. We note that in relation to the analogous provisions in Regulation 20 relating to ACHs, only The Central Depository (Pte) Limited has been specified in Part I of the Second Schedule and only certain securities has been specified in Part II of the Second Schedule. Significantly, the Singapore Exchange Derivatives Clearing Limited and the Singapore Mercantile Exchange Clearing Corporation Pte Ltd have not been specified in Part I of the Second Schedule nor has any futures contract or derivatives contract cleared by either of them been specified in Part II of the Second Schedule. We note that Parts III and IV of the Second Schedule of the draft SF(CF)R do not specify any RCHs or contracts. Given that no ACH and no futures contract or derivatives contract cleared by an ACH have been specified, we believe that an elaboration of the MAS's intention with regard to RCHs and futures contracts and derivatives contracts cleared by RCHs would be helpful. We assume that the reference to "*Part II*" in Regulation 40(7)(c) is a typographical error and that this should instead be a reference to "*Part IV*". References to "*approved clearing house*" in Regulations 40(3) and 40(4) should instead be to "*recognised clearing house*". In Part III of the Second Schedule, the reference to "*Regulation 40(1), (7) and (12)*" should instead be to "*Regulation 40(1), (7) and (11)*".

41	Regulation 41 limits the application of Division 2 of the SF(CF)R to Singapore corporations which are RCHs. We note that Regulation 41 is a departure from the MAS's previous consultation on the regulation of clearing houses and Section 77 of the amended SFA, which does not distinguish between Singapore incorporated and foreign incorporated RCHs. We also note that Division 4 of Part III of the amended SFA containing the insolvency protection provisions (read with Regulation 48) apply to RCHs without distinction between Singapore-incorporated and foreign-incorporated RCHs. The effect of Regulation 41 would appear not to be in line with the MAS's general policy of a level playing field in so far as business conduct requirements are concerned. Further, given that Division 2 of the SF(CF)R deals with the protection of customer money and assets held by the RCH, the consequences of disapplying Division 2 in relation to foreign-incorporated RCHs is a matter deserving of further discussion. For example, will the MAS satisfy itself of the robustness of the foreign customer money and assets protection rules to which the foreign-incorporated clearing house may be subject before granting recognition? Will the foreign-incorporated RCH be required to issue a disclosure statement to its members who will in turn be required to make such disclosure to their customers of the position with regard to the protection of customer money and assets held by the RCH?
50	We note that Regulation 50 does not make contravention of Regulations 22 to 24 or 42 to 44 an offence. We note that under Section 70 of the unamended SFA, contravention of Sections 62(2) or (4), 63(2) and 64(2) (dealing with the segregation and permissible use and investment of customer money and assets) were offences. Please extend Regulation 50 to make contravention of Regulations 22 to 24 and 42 to 44 an offence.
Others	We note that Section 62(4) of the unamended SFA obliged a designated clearing house that had been convicted of a breach of Section 62(2) to repay the money to the trust account or return the asset to the custody account (or if such asset cannot be returned, to deposit an amount equivalent to the monetary value of the asset at the time of breach into the trust account). We note that there is no equivalent provision in the proposed Regulations under the SF(CR)R. We request that language analogous to Section 62(4) of the unamended SFA be incorporated into Regulations 22 and 42.

51	Please provide clarification or further guidelines as to the factors that will be relevant in determining: (a) whether the clearing systems of the linked clearing facilities are "*not significantly integrated*"; (b) whether the positions of members or their customers held at the foreign clearing facility by virtue of the clearing linkage are "*not significant*".
Typographical errors	26(a)(ii) and (b)(iii) – insert "*and*" before "*are not commingled*". 27(1) – insert "*books for*" before "*money or assets*" in the 2nd line. 44(3) and (4) – references to "*authority*" should be changed to "*Authority*". 46(a)(ii) and (b)(iii) – insert "*and*" before "*are not commingled*". 47(1) – insert "*books for*" before "*money or assets*" in the 2nd line.

C. Annex 3 – Draft Securities and Futures (Clearing Facilities) (Transitional and Savings Provisions) Regulations 2013

Provision	**Comment**
Second Schedule	Please see our general comments above under "Transitional Measures for Persons Operating Clearing Facilities".
Typographical errors	3 and 4 – references to "*Section 50(2) of the Act*" should also be included so as to include foreign corporations applying to be recognized as RCHs. 4(2)(a) – the reference to "*regulated clearing house*" should be amended to read as "*recognised clearing house*".

ISDA appreciates the opportunity to provide comments on the SFR Consultation Paper and looks forward to working with the MAS as it continues the regulatory process. If you have any questions on this submission, please feel free to contact the undersigned at your convenience.

Yours sincerely,

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