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19 December 2013

Dear Sirs

**Netting Analyser Library – Singapore Exchange Derivatives Clearing Limited/
Prudential Regulation/ CCP interim opinion**

1. INTRODUCTION

- 1.1 We refer to our opinion letter addressed to you dated 28 May 2013 entitled "NETTING ANALYSER LIBRARY – CCP Opinion in relation to Singapore Exchange Derivatives Clearing Limited" (the "**Singapore CCP Opinion**").
- 1.2 You have asked us to consider whether there have been any legislative or rule changes that would affect the opinions in the Singapore CCP Opinion.
- 1.3 Unless otherwise stated, capitalised terms not otherwise defined in this letter shall have the same meanings ascribed to them in the Singapore CCP Opinion. In addition:

"approved clearing house" shall have the meaning given to it in the SFA;

"Clearing Facilities Regulations" means the Securities and Futures (Clearing Facilities) Regulations 2013;

"MAS Act" means the Monetary Authority of Singapore Act (Cap. 186);
- 1.4 This letter and the opinions given in it are governed by Singapore law and relate to Singapore law as applied by the Singapore courts as at the date of this letter only.

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2. ASSUMPTIONS

For the purposes of this letter, we have made the assumptions set out in the Singapore CCP Opinion. In addition, we assume that there has not been any new version of the Security Deed.

3. OPINION

- 3.1 On the basis of the terms of reference and assumptions, and subject to the qualifications, in each case as set out in the Singapore CCP Opinion and amended and supplemented as set out below (and read with the definitions above), we confirm that, save as reflected in the amendments to the opinions below, there are no legislative or changes to the Rules¹ since the date of the Singapore CCP Opinion which affect the opinions set out in paragraph 3 of the Singapore CCP Opinion.

- 3.1.1 Paragraph 3.1 of the Singapore CCP Opinion shall be amended by the addition of the following at the end of paragraph 3.1.3:

"In addition, the Clearing House is subject to additional grounds for winding up under Section 30AAP of the MAS Act. This is because the Clearing House is an approved clearing house and accordingly a "pertinent financial institution" pursuant to Regulation 8 of the Monetary Authority of Singapore (Control and Resolution of Financial Institutions) Regulations 2013."

- 3.1.2 Paragraph 3.2 of the Singapore CCP Opinion shall be amended by replacing the words:

- (a) "exchange-traded derivatives products" with the words "futures contracts and derivatives contracts"; and
- (b) "Division 3 (*Regulation of Designated Clearing Houses*)" with the words "Division 2 (*Regulation of Approved Clearing Houses*)".

- 3.1.3 Paragraph 3.7.3 shall be replaced in its entirety with the following:

"3.7.3 The holding of Collateral provided in respect of Contracts registered in Customer Accounts on trust for Customers of Members is also required under the provisions of the SFA and its regulations. Regulations 23(2) and (3) of the Clearing Facilities Regulations require that where a member has notified an approved clearing house that the money or assets are deposited or paid for or in relation to a contract of a customer of the member, the approved clearing house shall ensure that such money is deposited in a trust account to be held for the benefit of the customers of the member. Therefore, the Clearing House must deposit

¹ The wrong cross-reference in the Rules which we pointed out in the Singapore CCP Opinion have now been fixed.

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cash Collateral provided in respect of Contracts registered in Customer Accounts in an account with a third party and hold its rights to that account on trust for the Customers of the relevant Member."

3.1.4 Paragraph 3.8.3 shall be replaced in its entirety with the following:

" 3.8.3 The holding of Non-cash Collateral provided as Collateral in respect of Contracts registered in Customer Accounts on trust for Customers of Members is required under the provisions of the SFA and its regulations. Regulation 23(2) and (3) of the Clearing Facilities Regulations require that where a member has notified an approved clearing house that the money or assets are deposited or paid for or in relation to a contract of a customer of the member, the approved clearing house shall ensure that such assets are deposited in a custody account to be held for the benefit of the customers of the member. Therefore, the Clearing House must transfer such Non-cash Collateral to a custody account with a third party and must hold its interest in that Non-cash Collateral on trust for the Customers of the relevant Member."

3.1.5 References to "Section 81F", "Section 81F(1)", "Section 81F(1)(i)" and "Section 81F(2)" in the Singapore CCP Opinion shall be replaced by references to "Section 81C", "Section 81C(1)", "Section 81C(1)(i)" and "Section 81C(2)", respectively.

3.1.6 References to "designated clearing house" in the Singapore CCP Opinion shall be replaced by references to "approved clearing house".

3.1.7 References to "Section 62(2) of the SFA" and "Section 62 of the SFA" in the Singapore CCP Opinion shall be replaced by references to "Regulation 23 of the Clearing Facilities Regulations".

3.1.8 References to "Section 81M", "Section 81M(2)" and "Section 81M(3)" in the Singapore CCP Opinion shall be replaced by references to "Section 81J", "Section 81J(2)" and Section 81J(3)", respectively.

3.1.9 Paragraph 4.9.2 shall be replaced in its entirety with the following:

"4.9.2 The Monetary Authority of Singapore (the "MAS") may, in certain circumstances under Sections 81S and 81SAA of the SFA, direct the Clearing House to take certain actions. Under Section 81S of the SFA, where the MAS has reason to believe that an emergency exists, or thinks that it is necessary or expedient in the interests of the public or a section of the public or for the protection of investors, the MAS may direct the Clearing House to take such actions as it considers necessary to maintain or restore safe and efficient operations of the clearing facilities operated by the Clearing House. These actions may include, without limitation, modifying or suspending any of the Rules. Section

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81SAA allows the MAS to exercise certain powers in the case of a failing clearing house. These wide powers entitle the MAS to require the Clearing House to take any action or to do or not to do any act or thing in relation to its business (which includes the affairs and property of the Clearing House) as the MAS may consider necessary. Under Rule 1.05, the Clearing House may effect amendments to the Rules in such manner as directed by the MAS or pursuant to the SFA."

3.1.10 The following shall be included as an additional qualification:

"Part IVB of the MAS Act provides for various remedies for a failing approved clearing house, which include :

- (a) under Section 30AAO of the MAS Act, the power of the High Court, on the application of the MAS to make one or more orders, including an order that no steps be taken by any person, other than a specified person, to sell, transfer, assign or otherwise dispose of any property of the approved clearing house and any such disposal in contravention of such order is void;
- (b) under Section 30AAS of the MAS Act, the power of the MAS to make a determination that the whole or any part of the business of an approved clearing house shall be transferred, whereupon during the prescribed period, amongst other things, any sale, transfer, assignment or other disposition of the specified business is void.

Accordingly, we express no opinion as to whether or not an obligation incurred after the making of the order or during the prescribed period could properly be included in an aggregation or a set-off pursuant to the Netting Provision or Statutory Insolvency Set-Off, but this would not impair the effectiveness of the Netting Provision or Statutory Insolvency Set-off in respect of obligations entered into before the making of the order.

Further Section 30AAS of the MAS Act is drafted widely to permit the MAS to make a determination that the whole or any part of the business of an approved clearing house is to be transferred to a transferee. Any such transfer which includes the Contracts may affect the effectiveness of the Netting Provision (in particular where some but not all the Contracts are to be transferred).

There has been no known exercise by the MAS of its powers under Section 30AAS of the MAS Act. From a legal perspective, the statutory provision could be read to include a transfer of some but not all Contracts or only assets but not liabilities of an approved clearing house. However, such wide powers should be considered against the policy statements by the MAS, such as set out in the MAS's response to public feedback to the Consultation Paper on Proposed Amendments to the Monetary Authority of Singapore Act of December 2012 (wherein the MAS proposed to extend the resolution regime

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applicable to banks and insurers, including similar compulsory transfer of business provisions, to other regulated financial institutions). The MAS stated that "the MAS(A) Bill will be amended to expressly reflect that the exercise of resolution powers is not intended to defeat bilateral netting arrangements. MAS will also provide in the MAS(A) Bill, a general power to prescribe safeguards to the exercise of the resolution powers. This would enable the Minister to expressly provide in subsidiary legislation that bilateral netting arrangements, as well as other similar arrangements warranting carve-out, will not be affected by the exercise of resolution powers under the MAS Act."

As such, we are of the view that it is unlikely that the MAS would use its powers under Section 30AAS of the MAS Act to "cherry pick" Contracts (such that some but not all Contracts are transferred pursuant to an exercise of its powers under that section)."

4. **ADDRESSEES**

This opinion is given for the sole benefit of the Futures and Options Association (the "FOA"). This opinion may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

- (a) such of the FOA's members (excluding associate members) as subscribe to the FOA's opinions library and whose terms of subscription give them access to this opinion (each a "**subscribing member**") and the officers, employees, and professional advisors of such subscribing member;
- (b) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, and professional advisors of such affiliate;
- (c) any competent authority supervising a subscribing member or an affiliate of such subscribing member in connection with their compliance with their obligations under prudential regulation;
- (d) the officers, employees and professional advisors of the FOA; and

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made..

Yours faithfully



Clifford Chance Pte Ltd