

**IMPORTANT NOTE:** This Notice to Singapore Clearing Clients is provided for information purposes only and does not constitute a full description of the clearing services available to Singapore Clearing Clients (as defined below) through their relevant clearing members, nor a recommendation to such clients to make use of such clearing services. Accordingly, no Singapore Clearing Client may rely upon the contents of this Notice and should make its own decision regarding the clearing services provided by the Clearing House based on independent advice from its professional advisors.

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## Notice to Singapore Clearing Clients

### 1. Introduction

LCH.Clearnet Limited (“**Clearing House**” or “**LCH**”) has obtained recognition from the Monetary Authority of Singapore (“**MAS**”) as a recognised clearing house pursuant to the provisions of the Securities and Futures Act, Chapter 289, of Singapore (“**SFA**”) and the Securities and Futures (Clearing Facilities) Regulations 2013. On the basis of this recognition, the Clearing House proposes to offer certain clearing services, including its SwapClear Clearing Services, ForexClear Clearing Services, and EnClear Clearing Services to clearing clients located in Singapore (“**Singapore Clearing Clients**”).<sup>1</sup> The information contained in this Notice is intended to identify certain important legal, regulatory and contractual aspects of these clearing services.

Singapore Clearing Clients should note that they are required to receive a copy of this notice from their clearing member prior to obtaining access to the Clearing House’s clearing services.

Capitalised terms used, but not otherwise defined, in this Notice shall have the meanings set forth in the Clearing House’s Regulations, Procedures, Default Rules, and Settlement Finality Regulations, each as amended from time to time (collectively, the “**Rulebook**”).

### 2. Clearing Members

A Singapore Clearing Client may establish a client clearing relationship with a clearing member of the Clearing House (“**Clearing Member**”) located in any jurisdiction, provided that the Clearing House has obtained an opinion of counsel as to the validity and enforceability of the segregation, portability and return of assets provisions of the European Markets Infrastructure Regulation (“**EMIR**”) under the laws of that jurisdiction.<sup>2</sup> Each Singapore Clearing Client should carefully review the opinion(s) relevant to their Clearing Member to inform itself of the legal and regulatory implications of its chosen clearing arrangement.

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<sup>1</sup> As used herein, the term “Singapore Clearing Client” also includes a Singapore branch of a non-Singapore entity.

<sup>2</sup> An updated list of opinions is available at: <http://www.lchclearnet.com/members-clients/members/fees-ltd/annual-account-structure-fees>.

A Singapore Clearing Client may also establish a client clearing relationship with a U.S. Clearing Member that is registered with the U.S. Commodity Futures Trading Commission (“**CFTC**”) as a futures commission merchant (“**FCM**”). Unlike other jurisdictions where the Clearing House has obtained a legal opinion supporting the enforceability of EMIR customer protection provisions, clients of FCMs are subject to the cleared swaps customer protection provisions of the U.S. Commodity Exchange Act (“**CEA**”) and Part 22 of the CFTC Regulations.<sup>3</sup> These provisions establish a regime for the segregation of cleared swaps customer funds and assets and a framework for the porting and liquidation of such funds and assets in accordance with the requirements of the U.S. Bankruptcy Code.<sup>4</sup>

Finally, a Singapore Clearing Client may access the Clearing House’s clearing services using a non-FCM Clearing Member that is a company incorporated in Singapore (“**Singapore Clearing Member**”). Any Singapore Clearing Client that accesses the Clearing House’s clearing services through a Singapore Clearing Member should carefully review the contents of Section 7 of this Notice, which provides a brief description of the applicable customer protection regime under Singapore law, and should also review the corresponding legal opinion issued by Singapore counsel.

In all cases, and in addition to reviewing the contents of this Notice, Singapore Clearing Clients should consult with their professional advisors to determine the legal and regulatory requirements that may be applicable when accessing the Clearing House’s clearing services.

The following contains additional information regarding the clearing model under EMIR, pursuant to which a Singaporean Clearing Client may clear through a non-FCM Clearing Member.

### **3. Governing Law**

#### *3.1 In General*

The Clearing House operates a principal-to-principal clearing model, in which the relevant clearing member does not contract with the Clearing House as the agent of an underlying clearing client but instead the clearing member contracts with the Clearing House as principal.<sup>5</sup> There are therefore two separate sets of contracts in a principal-to-principal model: (1) contracts between the clearing member and the Clearing House (“**CCP Contracts**”), which are governed by the provisions of the Rulebook; and (2) “back-to-back” contracts between the clearing client and the clearing member (“**Client Contracts**”), which are governed by the terms of the customer clearing agreement between the clearing client and its clearing member.

Accordingly, the governing law applicable to a Singapore Clearing Client’s Client Contracts will be set out in the customer clearing agreement with its Clearing Member. Singapore Clearing Clients are therefore encouraged to review carefully the provisions of their customer

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<sup>3</sup> The CEA customer protection regime depends on the nature of the product in question; for “swaps” (which include SwapClear and ForexClear products), the cleared swaps customer protection requirements in Section 4d(f) of the CEA and Part 22 of the CFTC Regulations apply.

<sup>4</sup> The Clearing House has obtained a legal opinion in respect of the CEA and the U.S. Bankruptcy Code, available at: <http://www.lchclearnet.com/documents/731485/762528/lch+ltd+legal+opinion+-+usa+-+fcm.pdf>.

<sup>5</sup> For the avoidance of doubt, the discussion in this Notice does not purport to address the accounting treatment of a principal-to-principal clearing model.

clearing agreement in connection with establishing clearing arrangements with the Clearing House.

### 3.2 *Rights and Remedies of Singapore Clearing Clients*

The Rulebook generally provides that Singapore Clearing Clients have no rights or remedies against the Clearing House at any time.<sup>6</sup> Instead, a Singapore Clearing Client only has recourse against its Clearing Member, which may be contractual (which is discussed in this section) or operate pursuant to the applicable law of its Clearing Member's jurisdiction (which, in respect of Singapore law, is discussed below in Section 7).

The terms of such customer clearing agreements are subject to negotiation between the parties, with the exception of certain "mandatory" provisions required by the Clearing House.<sup>7</sup> Many clearing members use industry-standard agreements incorporating customary language to govern the clearing arrangements between the clearing client and the clearing member. For clearing services relating to swaps, these arrangements may take the form of an addendum or amendment to industry-standard customer agreements.<sup>8</sup>

Accordingly, Singapore Clearing Clients may be subject to such customary contractual provisions in connection with their clearing activities at the Clearing House. The discussion below identifies several ways in which industry standard documentation generally demarcates the contractual rights and remedies of a clearing client. This list is not intended to be exhaustive, and it remains each Singapore Clearing Client's responsibility to satisfy itself that the terms of the customer clearing agreement with its Clearing Member are suitable.

#### (a) Limited Termination Rights

The power of a Singapore Clearing Client to terminate Client Contracts with its Clearing Member may be limited. Specifically, termination rights may be narrowed solely to the declaration of a default by the Clearing House (or other relevant CCP), in which case the Singapore Clearing Client may not be permitted to terminate the agreement for a payment default or other event in respect of the Clearing Member.

#### (b) Right of Return of Margin Amounts

Where a customer clearing agreement provides for a clearing member to hold clearing client funds and assets in a custody account, then the clearing client retains ownership of the assets and is in the best position of recovering such assets. By contrast, where a clearing client provides funds and/or assets to a clearing member through a security interest then, to the

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<sup>6</sup> This general prohibition is subject to a significant exception in the event of a clearing member default, which is discussed in greater detail below in Section 4.2(e) of this Notice.

<sup>7</sup> These mandatory provisions that the Clearing House requires its clearing members to include in their customer clearing agreements are set out in Schedule 2 to the Clearing House's Collateral Procedures. See <http://www.lchclearnet.com/documents/731485/762691/Section4-BA-Client+Buffer-05.02.15.pdf>.

<sup>8</sup> For example, the International Swaps and Derivatives Association, Inc. ("ISDA") and the Futures and Options Association ("FOA", now FIA Europe) developed the "ISDA/FOA Client Cleared OTC Derivatives Addendum", which is designed to supplement either an ISDA Master Agreement or the FOA's template futures and options client agreement in order to facilitate clearing OTC derivatives transactions at central counterparties ("CCPs") that use the principal-to-principal client clearing model. The FOA separately introduced an "FOA Clearing Module" to supplement its template futures and options client agreement to facilitate EMIR client clearing.

extent the clearing member has not exercised a right of use over such assets, the clearing client should have a legal right to the return of such assets, subject to set off against any amounts due and owing to the clearing member and potentially subject to the supervening rights of certain preferential creditors. Finally, where a clearing client provides funds and/or assets to a clearing member on a title transfer basis, the clearing member gains legal and beneficial ownership over such funds and/or assets, subject only to an unsecured claim by the clearing client for a return of equivalent collateral, which may expose the clearing client to losses upon the insolvency of its clearing member where the relevant CCP does not declare such clearing member to be in default.

(c) Limited Recourse on Client Contracts

Generally, customer clearing agreements provide for the termination of Client Contracts at the same time as the termination of the corresponding CCP Contracts. However, this arrangement also generally provides that the clearing client's claims against the clearing member in respect of Client Contracts under the customer clearing agreement are limited to the amounts received by the clearing member in relation to the corresponding CCP Contracts.

(d) No Guarantee of Performance

Customer clearing agreements generally provide that the clearing member does not guarantee performance (or non-performance) by the relevant CCP or for the failure or breakdown of any services used by the relevant CCP, the clearing member or the related settlement systems. These limitations on liability may also restrict a clearing client's right to claim for special, punitive or consequential damages.

(e) Indemnity

The terms of a customer clearing agreement may also require a clearing client to indemnify its clearing member for various losses that may occur due to the action (or inaction) of the clearing client. The scope of the indemnity may also be broad enough to include losses incurred by the clearing member in the event of a particular CCP's insolvency.

(f) Excess Margin

Where a clearing client elects individual segregation (as described in greater detail below in Section 4.3 of this Notice), its clearing member is required under EMIR to transfer such excess to the relevant CCP, provided the form of such margin is permitted by the CCP. Otherwise, any excess amounts deposited by a clearing client with its clearing member may continue to be held by the clearing member and may therefore be at greater risk in the event of such clearing member's insolvency.

(g) Non-Default Porting

Clearing clients may also be permitted to port their positions and related funds and assets to a replacement clearing member, subject to any conditions or restrictions set out in the customer clearing agreement.

#### **4. EMIR Customer Protection Provisions**

Singapore Clearing Clients will deposit funds and assets with their Clearing Members in connection with their clearing activities at the Clearing House, which will be governed by the

customer protection provisions required by the law of the Clearing Member's jurisdiction.<sup>9</sup> In turn, the Clearing Member will deposit funds and assets on behalf of its Singapore Clearing Clients with the Clearing House, which will be governed by the customer protection requirements of EMIR and relevant secondary European legislation.<sup>10</sup>

A brief description of the Clearing House's EMIR-compliant customer account segregation options is set out below, along with a summary of the treatment of such accounts in the event of a clearing member insolvency. Singapore Clearing Clients are encouraged to review the more detailed explanation provided in the Clearing House's EMIR account segregation disclosure document available on its public Website.<sup>11</sup>

#### 4.1 *General Requirements*

Article 39(2) and Article 39(3) of EMIR require the Clearing House to offer omnibus client segregation and individual client segregation. The Clearing House does this through two broad types of account: Omnibus Segregated Accounts (“**OSAs**”) and Individual Segregated Accounts (“**ISAs**”) (together, “**Client Accounts**”). The Clearing House provides for such accounts to be opened on a Service-by-Service basis, meaning that a clearing member may have a particular combination of one or more OSAs and/or one or more ISAs in respect of one Service and a different combination of Client Accounts in respect of another Service.

#### 4.2 *Omnibus Segregation*

Omnibus client segregation distinguishes between a clearing member's house/proprietary positions and assets and the positions and assets held by the clearing member on behalf of multiple clearing clients in the same account. Consequently, there will be a mutualisation of losses and a pooling of risk (in terms of both exposures relating to positions and the application of assets covering the positions) between the clients sharing in the relevant OSA.

OSAs may be margined on a “net” or “gross” basis. For each net OSA (“**NOSA**”), the Clearing House will ordinarily call margin on a net basis and call for a single amount of collateral in respect of all clearing clients in the relevant NOSA. The Clearing House will also hold collateral on an unallocated basis. Therefore, a clearing client will be exposed to potential losses due to the adverse performance of the positions of other clearing clients in the relevant NOSA; a clearing client may also face losses due to fluctuations in the value of the collateral posted by other clearing clients in the relevant NOSA.

The Clearing House also permits clearing members to open gross OSAs (“**GOSAs**”) for its SwapClear Service. For each GOSA, the Clearing House will calculate the gross margin requirement in respect of the positions recorded in the relevant account and call the clearing member for an amount of collateral in respect of the positions of each client in the GOSA, or

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<sup>9</sup> Please see Section 7 of this Notice below for a description of the customer protection requirements under Singapore law that would apply if a Singapore Clearing Client used a Singapore Clearing Member.

<sup>10</sup> As noted in Section 2, *supra*, the Clearing House obtains opinions of counsel to support the enforceability of these EMIR requirements under the laws of any jurisdiction in which a clearing member is organised or incorporated, with the exception of the United States, where U.S. FCMs are subject to a specific customer protection regime under the CEA, CFTC Rules and the U.S. Bankruptcy Code.

<sup>11</sup> See <http://www.lchclearnet.com/documents/731485/762528/article+39%287%29+wording-+english+rulebook.pdf/>; see also <http://www.lchclearnet.com/documents/731485/762508/Account+Structure+Brochure>.

in respect of any grouping of clients that have elected to be treated collectively as a single client (i.e., on a net basis) within the GOSA.

The Clearing House records collateral received in respect of a GOSA on a shared basis. Therefore, each client in a GOSA (including groupings of clients that elect to be treated as a single client) is assigned a portion of the collateral pool with a value equal to the margin requirement relating to such client's positions. Clients in a GOSA are not, however, entitled to specific assets in the collateral pool (other than excess collateral deposited with the Clearing House specifically delivered on behalf of a particular client). Clients in a GOSA face a mutualisation of loss and a pooling of risk *inter se* due to fluctuations in the value of the collateral posted by other clearing clients in the relevant GOSA.

#### 4.3 *Individual Segregation*

Individual client segregation distinguishes between positions and assets held on behalf of a specific clearing client and the positions and assets of the clearing member and of all other clearing clients of the clearing member. Therefore, individual client segregation is offered on a per client basis – no individually segregated clearing client is exposed to, or has its assets applied in respect of, the positions of any other clearing client or of the clearing member.

The Clearing House calls margin based on all of the positions recorded in the relevant ISA. In addition, EMIR requires that all excess margin held by a clearing member on behalf of an ISA be passed up to the Clearing House and recorded as being held in the relevant ISA. Collectively, these arrangements provide that an individually segregated clearing client will not be exposed to fluctuations in the value of other clearing client positions or losses on those positions in the event of a default. Individually-segregated clearing clients are also assured that the specific items of collateral attributed to their respective ISAs at the Clearing House will not be applied to cover exposures of other clearing clients of the same clearing member.

#### 4.4 *Porting / Liquidation*

Where a clearing member defaults, the Clearing House will attempt to port the positions and associated assets (or a cash value in respect of those assets) of the clearing clients in an OSA to a Backup Clearing Member. Clearing clients in a GOSA will be able to identify individual Backup Clearing Members, whereas clearing clients in a NOSA must all agree on a single Backup Clearing Member.<sup>12</sup> Porting will proceed only if the Backup Clearing Member(s) accept the ported contracts and the transfer can be effected within a given period of time, usually not less than 24 hours, established by the Clearing House for such purpose (“**Porting Window**”). The Clearing House may establish multiple Porting Windows for different types of OSAs.

Where porting is not possible for a GOSA, the Clearing House will close out the relevant positions and liquidate the collateral and calculate an amount representing each clearing client's entitlement to amounts due in respect of the close out values of its positions and to the portion of collateral (or its liquidation value) covering those positions minus certain

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<sup>12</sup> The Clearing House may also attempt to identify the identifies, and entitlements to positions and collateral, of clearing clients in a NOSA, in which case the NOSA will become eligible for porting in accordance with the provisions applicable to GOSAs.

amounts including the costs of hedging (the “**Client Clearing Entitlement**”).<sup>13</sup> All clearing clients remaining in the GOSA would generally face a prorated allocation of loss related to the liquidation and application of collateral to the relevant non-ported positions.

In the case of a NOSA, the Clearing House will calculate a single “**Aggregate Omnibus Client Clearing Entitlement**” in respect of all clients sharing in the relevant account on a collective basis. The Aggregate Omnibus Client Clearing Entitlement represents the aggregate entitlement of those clients to amounts due in respect of the close out values of their positions and to the collateral (or its liquidation value) held in the relevant account, after deducting certain amounts including the costs of hedging the relevant positions as well as any amounts due to the Clearing House in respect of all clearing client positions in the NOSA, pro-rated across all clearing clients in the NOSA.

The Clearing House may, subject to the satisfaction of certain conditions, return the Client Clearing Entitlement in respect of a GOSA directly to the relevant clients; otherwise, the Client Clearing Entitlement will be returned to the defaulting clearing member’s insolvency officer for the account of the clearing clients in the GOSA. The Clearing House will always return the Client Clearing Entitlement in respect of a NOSA to the defaulting clearing member’s insolvency officer for the account of the clearing clients in the NOSA.

For an individually-segregated clearing client of a defaulting clearing member, the Clearing House would seek to port the positions and the associated assets (or a cash value in respect of those assets) recorded in the relevant ISA to a Backup Clearing Member during the relevant Porting Window. As in the case of OSA porting, however, porting of individually-segregated clearing clients may only proceed where the Backup Clearing Member accepts the ported contracts and the transfer can be effected within the relevant Porting Window.

Where porting is not possible, the Clearing House will close out an individually-segregated clearing client’s positions and calculate the Client Clearing Entitlement related to the relevant ISA. Subject to deductions for losses attributable to the clearing client’s positions and for the costs of hedging, the amount of the Client Clearing Entitlement reflects the value of the positions and assets attributable to the relevant individually-segregated clearing client only and is in no way referable to the positions or assets of other clearing clients. The Clearing House may, subject to the satisfaction of certain conditions, return the Client Clearing Entitlement directly to the client; otherwise, the Client Clearing Entitlement will be returned to the defaulting clearing member’s insolvency officer for the account of the individually-segregated clearing client.

#### 4.5 *Right to Instruct Clearing House*

Generally, under the principal-to-principal clearing model, a Singapore Clearing Client will have no rights or remedies against the Clearing House because there is no contractual privity between the parties (the Singapore Clearing Client is only a party to Client Contracts, whereas the Clearing House is only a party to CCP Contracts). However, EMIR requires a departure from this arrangement by permitting a clearing client to instruct a recognised CCP (here, the Clearing House) in respect of such clearing client’s positions and assets following the default of its clearing member. This right arises only following the default of a clearing

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<sup>13</sup> Note that, in the case of groupings of clients that elect to be treated as a single client in a GOSA, the Client Clearing Entitlement will also be reduced by any amounts due to the Clearing House in respect of other positions held on behalf of other clients in the same group, prorated between the relevant clients.

member and cannot be exercised otherwise, and remains subject to any restrictions on the ability of a clearing client to issue instructions set out in the Rulebook.

The Clearing House has implemented this EMIR requirement in the “Client Clearing Annex” to its Default Rules, which covers porting of customer positions and assets as well as the return of the Client Clearing Entitlement. As identified in the Client Clearing Annex, the ability of a clearing client of a defaulting clearing member to instruct the Clearing House may be limited by the nature of the level of segregation chosen. For example, as noted above, all clearing clients in an OSA must agree on a single willing Backup Clearing Member, whereas it may be more straightforward for an individually-segregated clearing client to identify a willing Backup Clearing Member. Similarly, in a liquidation, clearing clients in a NOSA are generally exposed to fellow-customer risk whereas customers in a GOSA or ISA are generally less exposed. The nature and extent of these protections is discussed in greater detail above, and in the Clearing House’s EMIR account segregation disclosure document.

#### 4.6 *Security Deed*

Under the Clearing House’s principal-to-principal client clearing model, porting of positions and assets to a Backup Clearing Member and the return to (or for the account of) a client of a Client Clearing Entitlement both involve acts by the Clearing House on behalf of clearing clients but in respect of property to which the defaulting clearing member has title. Accordingly, the Clearing House’s porting arrangements described above, and its authority to return Client Clearing Entitlements, rely upon some form of protective mechanism which entitles the Clearing House to deal with the relevant positions and assets in a way which recognises the beneficial entitlement of the clearing client while keeping such positions and assets outside of the defaulting clearing member’s estate.

For certain clearing members, this protective mechanism has been adopted in the law or regulation of their home jurisdiction. Where the Clearing House determines that no such protective mechanism is available under local law, the affected clearing member(s) will be required to enter into a Security Deed in favour of their clearing clients. The Security Deed creates a security interest in favour of the clearing client(s), which is enforceable in the event of a default of the clearing member, over: (i) the clearing client’s share of the balance held in the relevant account (where porting occurs); or (ii) the clearing client’s Client Clearing Entitlement.

Each Singapore Clearing Client should carefully review the opinion(s) relevant to their Clearing Member to determine whether entry into a Security Deed is required and to identify the applicable requirements for the creation, attachment and perfection of security interests under the law of the relevant jurisdiction.

### **5. Clearing House Insolvency**

In the event of the Clearing House’s insolvency, any rights against the Clearing House under the principal-to-principal clearing model remain with clearing members only. Accordingly, Singapore Clearing Clients may only rely on applicable rights and remedies available through the customer clearing agreement with their clearing member.

As noted above, the terms of customer clearing agreements are subject to negotiation and there will not necessarily be a uniform outcome for each Singapore Clearing Client; nevertheless, a very general discussion of certain industry-standard provisions is set out



below. Singapore Clearing Clients should consult with their professional advisors to determine the appropriate provisions to include in their customer clearing agreements.

In the event of the Clearing House's insolvency, the general approach taken in customer clearing agreements would be to link as closely as possible the amounts due and owing between the clearing client and the clearing member following close out of the relevant Client Contracts with the amounts due and owing between the clearing member and the Clearing House following close out of the related CCP Contracts. As regards the close out of CCP Contracts, the Clearing House has adopted Regulation 45 ("**Netting Rule**") that requires each clearing member, upon the Clearing House's insolvency, to calculate a termination amount in respect of the losses and gains attributable to the cleared positions in each of its client accounts and house accounts with the Clearing House.

A Singapore Clearing Client's Clearing Member would therefore be required under the Netting Rule to determine a termination amount in respect of such clearing client's Client Contracts. Ordinarily, a customer clearing agreement provides that the termination value of such clearing client's Client Contracts equals the amount calculated by the clearing member under the Netting Rule in respect of closing out the related CCP Contracts. This value is then netted against the value of the collateral held by the clearing member in respect of the clearing client's Client Contracts, which then determines the amount of any final payment amount due between the clearing member and the clearing client. Implicit in this arrangement, and as noted above in Section 3.2(c) of this Notice, a Singapore Clearing Client is likely to have only limited contractual recourse in the event of the Clearing House's insolvency on the basis that the Singapore Clearing Client will only receive amounts in respect of Client Contracts to the extent that its Clearing Member receives amounts from the insolvent estate of the Clearing House in respect of CCP Contracts.

Each Singapore Clearing Client should also consult with its professional advisors to identify the applicable customer protection provisions under the law of its Clearing Member's jurisdiction, which may offer additional, non-contractual remedies in respect of Client Contracts, and the funds and assets deposited in respect thereof, in the event of the Clearing House's insolvency.

## **6. Taxation**

***IMPORTANT NOTE:** The comments in this section are of a general, high level nature and relate to the possible United Kingdom or Singaporean (as the case may be) tax treatment of financial traders who are a party to derivative contracts ("**DCs**") as principal (and not as trustee, agent, nominee or other capacity) and which are constituted as corporate entities and separate legal persons (excluding partnerships, trusts or similar vehicles or entities) that are trading in the relevant DCs which are cleared through the Clearing House. The comments are based on the legislation and generally published practice of HM Revenue and Customs ("**HMRC**") and the Inland Revenue Authority of Singapore ("**IRAS**") as at the date of this document. Persons reading this general disclosure should note that the following statements are not to be regarded as advice on the tax position of any financial trader or counterparty to a DC and any financial trader and/or counterparty to a DC should consult their own professional tax advisors as to any tax implications that may arise from the execution or performance of DCs and their clearing of DCs through the Clearing House.*

### **6.1 Corporate / Income Taxes**

(a) United Kingdom

A counterparty to a DC transaction will be subject to UK corporation tax in respect of its profits derived from the transaction if it is within the scope of UK corporation tax generally (currently at the rate of 20%, reducing to 19% in 2017 and 18% in 2020).

(1) UK Tax Residence

If the DC counterparty is tax resident in the UK, it will be taxable on its worldwide profits and gains, including any profit from its DC transactions. As a corporate entity, it would be UK tax resident if it were UK-incorporated or UK centrally managed and controlled (subject to effect of any applicable treaty tie-breaker). However, without more, a DC trader's residence should be unaffected by virtue of clearing DC transactions through LCH.

(2) Trading in the UK through a UK Permanent Establishment (“**UK PE**”)

A non-UK tax resident DC trader that uses a UK based agent or broker or otherwise books its trades through a UK branch or office (in any such case, constituting a UK PE of the DC trader) would be subject to UK corporation tax on any profits derived from trading through that UK PE. On the assumption that the LCH clearing process does not involve any explicit or implied agency arrangements, a DC trader should not generally acquire a UK taxable PE solely by virtue of clearing DC transactions through LCH. In this regard, it should be noted that the OECD's ongoing work on “Base Erosion and Profit Shifting” may lead to changes of law and HMRC practice in the UK and may have an impact on the UK's approach to PEs generally.

(3) UK Tax Treatment for DC Transactions

Where the DC trader is taxable in the UK, the UK's DC Tax Regime (Part 7 of the Corporation Tax Act 2009) will most likely apply, with the effect that credit and debit amounts arising under the DCs will be taxed or relieved as income, broadly in accordance with their accounting treatment. In certain cases (for example, certain types of equity and real property based DCs), capital gains, rather than income, treatment is prescribed. The DC Tax Regime is a complex area of law and it is currently under review with a view to updating and clarifying its application, but in general, its application should be unaffected by virtue of clearing DC transactions through LCH.

(b) Singapore

A DC trader will generally be subject to Singapore income tax in respect of its income or profits derived from DC transactions if the income or profits are considered to be accrued in or derived from Singapore (or deemed as such) (“**Singapore-sourced income**”), or if the profits or income are accrued or derived from outside Singapore (“**foreign-sourced income**”) and received in Singapore (or deemed as such), unless otherwise exempted and subject to certain exceptions.

There is no statutory test as to what comprises Singapore-sourced income and what comprises foreign-sourced income. Broadly speaking, one would look to where the activities giving rise to the income are carried out to determine the jurisdictional source of the income.

The profits of a non-Singapore DC trader who uses a Singapore based agent or broker or who otherwise carries out the trade involving activities, or an office, in Singapore may be regarded (in whole or in part) as taxable Singapore-sourced income, or (where a double taxation treaty applies) as taxable income attributable to a Singapore permanent establishment of the non-Singapore DC trader. As a further illustration, if a non-Singapore DC trader does not carry out any activities in Singapore when trading with LCH in London, and LCH carries out all activities outside Singapore when trading with this non-Singapore DC trader, the profits of this non-Singapore DC trader from trading with LCH in London should not be subject to Singapore income tax.

The prevailing corporate income tax rate in Singapore is 17% (with a partial tax exemption for the first SGD300,000 of taxable income) and concessionary tax rates may be available under certain circumstances and for certain taxpayers.

## 6.2 *Withholding Tax (“WHT”)*

### (a) United Kingdom

In principle, UK WHT (tax deducted by a payer on account of UK income tax) can potentially apply to UK source payments made under DCs on the basis that those amounts constitute interest or “annual payments”. However, the UK’s DC Tax Regime provides an exemption from UK WHT in respect of all payments made under DCs which fall within the DC Tax Regime. On the basis that LCH-cleared DCs should generally fall within the DC Tax Regime, UK WHT should not apply to payments made under those DCs.

To the extent that LCH-cleared DCs fall outside the DC Regime, further consideration would need to be given to the nature of the relevant payments (e.g. whether income or capital for tax purposes) and whether those payments have a UK source for tax purposes (including the impact on the latter, if any, of clearing through UK based LCH participants acting as principal). If UK WHT potentially applies, specific UK WHT exemptions may apply to eliminate the WHT and/or relief may be available under an applicable double taxation treaty.

### (b) Singapore

Singapore WHT may apply to payments made under the DCs by Singapore parties to non-Singapore tax resident parties (for example, an LCH participant in London) if the payments comprise certain types of payments that attract Singapore WHT, for example, interest or other payments in connection with any loan or indebtedness. In relation to LCH cleared DCs, further analysis should be conducted to determine whether the payments (for example, the payments to be made to an LCH participant in London) fall within the Singapore WHT regime, and if so, whether any Singapore WHT exemption is available and/or whether relief is available under an applicable double taxation treaty.

## 4.3 *Financial Transactions Tax (“FTT”)*

Following failed attempts to achieve unanimous EU-wide agreement on an EU-wide FTT, in January 2015, 11 EU Member States issued a Joint Statement reiterating their commitment to implement an FTT. There was little information on the proposed scope of the FTT beyond calling for a wide tax base and low tax rates.

Reports of progress since that time have been very limited. Accordingly, whilst the relevant EU finance ministers remain publicly committed to a commencement date of 1 January 2016, the likelihood of an FTT being introduced within that time frame appears doubtful.

If agreed, the enactment of an EU-wide FTT would fundamentally change the taxation of DCs, including DCs cleared through the Clearing House. Singapore Clearing Members should therefore inform themselves of the progress of the develop of an EU-wide FTT regime.

## **7. Singapore Customer Protection Provisions**

***IMPORTANT NOTE:*** The contents of this Section 7 are relevant only to a Singapore Clearing Client that accesses the Clearing House's clearing services through a Singapore Clearing Member. Other legal and regulatory requirements will apply where a Singapore Clearing Client enters into a clearing arrangement with a Clearing Member from another jurisdiction.

### *7.1 Application to the Clearing House*

The SFA generally provides that proceedings of recognised clearing houses will take precedence over Singapore insolvency law. In particular, dispositions of property in accordance with the "business rules" of a recognised clearing house relating to the application of property provided as market collateral, as well as default proceedings, will not be invalid by reason only of inconsistency with any written law or rule of law relating to the distribution of the assets of a person on insolvency, bankruptcy or winding-up. Further, where any property is subject to a market charge or has been provided as market collateral, no execution or other legal process for the enforcement of any judgment or order may be commenced or continued, and no distress may be levied, against the property by a person not seeking to enforce any interest in, or security over, the property, except with the consent of the recognised clearing house in favour of which the market charge was granted.

The Clearing House is a recognised clearing house for purposes of the SFA. Accordingly, while funds and assets deposited by a Singapore Clearing Client directly with its Singapore Clearing Member will be held in accordance with applicable Singapore law (described in Section 7.2 below) and the terms and conditions of the customer clearing agreement, Singapore Clearing Clients should not expect that the Clearing House will hold funds and assets received from its Singapore Clearing Members on trust for its Singapore Clearing Clients.

Instead, Singapore Clearing Clients should expect that the funds and assets deposited by their clearing member with the Clearing House in relation to client clearing business will be subject to the EMIR customer protection regime, including in respect of porting and liquidation, in the event of their clearing member's insolvency.<sup>14</sup> Each Singapore Clearing Client should therefore assure itself that its arrangements for the deposit of funds and assets with its Singapore Clearing Member, on the one hand, and the onward transfer of such funds and assets by its Singapore Clearing Member to the Clearing House, on the other, comply with applicable legal and regulatory requirements.

### *7.2 SFA Customer Protection Provisions – Summary*

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<sup>14</sup> See <http://www.lchclearnet.com/documents/731485/762528/article+39%287%29+wording+-+english+rulebook.pdf/>; see also <http://www.lchclearnet.com/documents/731485/762508/Account+Structure+Brochure>.

Under the SFA, the clearing members of the Clearing House who deal with Singapore Clearing Clients should be holders of capital markets services licenses (“**CMSL**”) or exempt persons (such as banks) that are subject to the business conduct requirements that CMSL holders are subject to in respect of handling customer’s moneys and assets under the Securities and Futures (Licensing and Conduct of Business) Regulations (the “**LCB Regulations**”).

Under the LCB Regulations, a Singapore Clearing Client’s cash assets must be segregated from other cash assets and deposited into a trust account with certain specified financial institutions (e.g. licensed banks, approved merchant banks and licensed finance companies in Singapore) by the business day following the day on which the CMSL holder receives such cash assets. The cash assets may in certain circumstances be deposited with a clearing house or invested in certain ways. Otherwise, the cash assets cannot be withdrawn unless the withdrawal is for one of the purposes set out in regulation 21 of the LCB Regulations (e.g. making a payment to any other person or account in accordance with the written direction of the customer).

The CMSL holder is also required, when opening a trust account with a financial institution, to give written notice to the financial institution and obtain its acknowledgement that: (a) the cash assets deposited are held on trust for its customers and the financial institution cannot exercise set-off rights against such cash assets for any debt owed by the CMSL holder to the financial institution; and (b) the account is designated as a trust account which would be maintained separately from any other account where the CMSL holder deposits its own cash assets.

Further, under the LCB Regulations, a Singapore Clearing Client’s non-cash assets must be segregated from other non-cash assets and deposited in a custody account (held on trust for the customer) with certain specified financial institutions (e.g. licensed banks, approved merchant banks and licensed finance companies in Singapore) by the business day following the day on which the CMSL holder receives the non-cash assets. The non-cash assets may in certain circumstances be deposited with a clearing house or pledged. Otherwise the assets cannot be withdrawn unless the withdrawal is for one of the purposes regulation 35 of the LCB Regulations (e.g. transferring the asset to any person or account in accordance with the customer’s written directions).

When the CMSL holder opens a custody account with the custodian, it must give written notice to the custodian and obtain its acknowledgement that the non-cash assets deposited are held on trust for its customers, and must enter into a written agreement with the custodian which addresses a list of specified matters. The CMSL holder must also have conducted due diligence (and must keep written records thereof) as to the custodian’s suitability for its customers.

Accordingly, in any insolvency of a clearing member, the effect of the cash and non-cash assets being held on trust is that such assets do not belong to the clearing member and would not be available for distribution to the general body of creditors of the clearing member. There may, however, be realised or paid out of the proceeds of such assets costs and expenses and other amounts due or payable by a Singapore Clearing Client to its clearing member. The key, however, is and remains the case that save for amounts properly payable by the Singapore Clearing Client to the clearing member, the basic position remains that the assets are by reason of the trust available and are to be returned to the Singapore Clearing Client in the event of the insolvency of its clearing member.

## **8. Other**

Initial margin requirements for all SwapClear products, including those denominated in Singapore Dollars, are calculated in Pounds Sterling (for clients of FCMs, the requirement is calculated in Pounds Sterling and expressed in US Dollars). The Clearing House does not accept cash or securities denominated in Singapore Dollars as initial margin. Clearing members acting for Singapore Clearing Clients will therefore face a foreign exchange risk as they will have to provide cash or securities denominated in other currencies as collateral for margin liabilities on client positions in Singapore Dollar-denominated instruments. Clearing members acting for Singapore Clearing Clients must also operate payment arrangements in London and New York and ensure that their Protected Payment System (“**PPS**”) banks are able to act upon margin call and payment instructions issued in accordance with the rules of the PPS.