

26 July 2013

Hong Kong Monetary Authority  
55<sup>th</sup> Floor, Two International Finance Centre  
8 Finance Street  
Central, Hong Kong

Attn:

Mr Colin Pou  
Head, Payment Systems Operation Division  
Financial Infrastructure Department

Dear Mr Pou,

**Re Reporting Service Agreement (RSA)**

We refer to our previous letter to Hong Kong Monetary Authority (**HKMA**) dated 5 July 2013 and HKMA's letter response to us dated 18 July 2013.

The International Swaps and Derivatives Association, Inc. (**ISDA**) very much appreciates you taking the time to consider our comments and your feedback to us. We have had further discussions with our members in relation to the RSA and HKMA's feedback. Our members will concede and accept the draft RSA as it currently stands other than in respect of the following two clauses as set out below. This is because these clauses either require our members to provide representations or confirmations that they are not able to give as a matter of fact or which are not consistent with their internal policies. Capitalised terms have the meanings given to them in the RSA, unless otherwise defined in this letter.

**Further Comments on clauses 9.3 and 10.7.2 of the RSA**

**Clause 9.3**

*9.3 The Member shall indemnify HKMA and HKMA's Officers against any liability, claim, loss, damage, action, proceeding, demand, cost, fee or expense of any kind or nature whatsoever and howsoever arising directly or indirectly from:*

[...]

*9.3.3 any failure of the Member (including any User) to comply with this Agreement, any other obligations applicable to the Member, any of its obligations under the Reporting Requirements or any other applicable Law. [emphasis added]*

ISDA understands and appreciates that HKMA TR is providing a service to facilitate trade reporting. Accordingly, our members fully expect to provide an indemnity to HKMA. Although we understand from HKMA that clause 9.3.3 is only intended to cover the Member's failure to comply with the RSA or

any applicable foreign law due to the Member's fault in connection with its performance of the reporting obligations, this indemnity is drafted so widely that it can be interpreted as not only covers HKMA's direct and indirect loss arising from any failure of the Member to comply with the RSA, but also failures of the Member to comply with contractual obligations and legal requirements which are wholly unrelated to the RSA. In addition, there is no cap on the potential liability of the Members under this indemnity and there is no carve-out for HKMA's fraud, wilful default or gross negligence. As a result, due to the internal policies on indemnities and accounting considerations of many of our members, they would not be able to obtain internal approvals for giving this wide and unlimited indemnity.

## **Clause 10.7.2**

*10.7 The Member acknowledges, agrees and confirms that:*

*[...]*

*10.7.2 to the extent (a) the Member owes or may owe any privacy, confidentiality or secrecy obligations to any person to whom the information in a Transaction Record relates and (b) any such privacy, confidentiality or secrecy obligations are not effectively excluded, waived or disapplied under all relevant applicable Laws (including without limitation, the Law governing any contract which creates any such privacy, confidentiality or secrecy obligations) as a result of the Reporting Requirements or otherwise, the Member has obtained any and all necessary consents and approvals required for it to transfer and/or disclose any such information to HKMA under the terms of this Agreement, which may include without limitation, consents on similar terms to those set out in this Clause 10 (Confidentiality);*

ISDA understands that it is HKMA's intention that all Members should comply with all applicable laws at all time. It is indeed the intention of our members to do so too. However, clause 10.7.2 envisages a scenario where there is a potential conflict between the contractual obligations of the Members or applicable privacy laws and the reporting obligations of the Members under Hong Kong law. The Members do not have the power to change the applicable privacy laws. Nor can they unilaterally amend binding contracts with third parties or compel such third parties to provide consents against their will. As a result, Members are unable to make a blanket confirmation that this potential conflict between their contractual obligations and their legal duties can be reconciled and are only able to undertake to use reasonable endeavours to do so.

## **Next Steps**

ISDA would very much appreciate if HKMA could kindly reconsider whether the two clauses mentioned above could be amended as appropriate to address the concerns and difficulties of our members.

If HKMA wishes to sign up the RSA in its current form, our members, in particular those that are not subject to the interim reporting requirements, would like to request a one-month extension of the deadline (currently 5 August 2013) for signing up to the RSA as they need more time to seek internal approvals to enter into the RSA for the reasons stated above.

Further, if the RSA is to be signed in its current form, it is the intention of some of our members to send HKMA a covering letter, together with the signed RSA, stating that (a) notwithstanding Clause 10.7.2 in the RSA, they are as a matter of fact unable to make this confirmation; and (b) notwithstanding the indemnity under Clause 9.3.3 is drafted widely, the members will place reliance that HKMA has no intention to expand its application beyond the RSA and would act reasonably in this respect.



ISDA appreciates the opportunity to provide comments on the draft RSA published by HKMA and looks forward to working with HKMA as it continues to implement the OTC derivatives reform. If you have any questions on this letter, please feel free to contact the undersigned at your convenience.

Yours faithfully,

**For the International Swaps and Derivatives Association, Inc.**

A handwritten signature in black ink that reads "Keith Noyes".

Keith Noyes

Regional Director, Asia Pacific

A handwritten signature in black ink that reads "Jing Gu".

Jing Gu

Assistant General Counsel Asia

Cc: Ms Karen Kemp

Executive Director (Banking Policy)