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06.02.2013
EB-PST/FOA/22001
FOA Collateral Opinion

Dear Sirs,

You have asked us to give an opinion in respect of the laws of the Republic of Austria ("**this jurisdiction**") in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion (the "**Opinion**"), as sent to us by e-mail on 2 October 2012 (each an "**Agreement**") or under an Equivalent Agreement (as defined below).

Terms used in this Opinion and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this Opinion.

1. Terms of Reference and definitions

- 1.1 Subject as provided at paragraph 1.2, this Opinion is given in respect of
- 1.1.1 persons which are Austrian Corporations, Austrian Investment Firms, Austrian Partnerships; and
- 1.1.2 in respect of paragraph 3.3, the entities referred to in such paragraph,

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All our activities in these jurisdictions, including cooperation with independent attorneys, are in compliance with relevant law and other rules and regulations, in particular rules of professional conduct.

insofar as each may act as a counterparty providing Collateral (as defined in paragraph 1.4) to a member firm of the Futures and Options Association (each a "**Firm**") under an Agreement.

1.2 However, this Opinion is also given in respect of counterparties (together with the parties referred to at paragraph 1.1.1 above the "**Austrian Counterparties**") providing Collateral to a Firm that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

1.2.1 Austrian Credit Institutions (Schedule 1);

1.2.2 Austrian Insurance Undertakings (Schedule 2);

1.2.3 Austrian Individuals (Schedule 3);

1.2.4 Austrian Investment Funds (Schedule 4);

1.2.5 Austrian Sovereign Entities (Schedule 5),

insofar as each may act as an counterparty to a Firm under an Agreement.

1.3 This Opinion, *inter alia*, does **not** apply to:

(i) public law entities (*öffentlich-rechtliche Körperschaften*) (other than Austrian Sovereign Entities), even if having own legal capacity (*eigene Rechtspersönlichkeit*), such as the *Pfandbriefstelle der Oesterreichischen Landes-Hypothekenbanken*, for example; and

(ii) the Austrian National Bank (*Oesterreichische Nationalbank – OeNB*).

1.4 This Opinion is given in respect of cash and account-held securities which are the subject of the Security Interest Provisions to the extent that the cash and account-held securities qualify as financial collateral (*Finanzsicherheit*) pursuant to the Financial Collateral Act (*Finanzsicherheitengesetz – FinSG*)¹ ("**Collateral**"). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

1.5 For the purposes of this Opinion, any reference to "**belief**" or words of similar import means that our assessment is based on our analysis of Austrian law, our professional experience and the relevant legal sources, if any are available. It implies, however, that, for lack of court practice, we cannot exclude that an Austrian court or other authority would take positions that deviate from what we express as our belief.

1.6 This Opinion is solely based on the laws and regulations officially issued and published by any Austrian federal legislative authority, as applied and officially pub-

¹ Implementing Directive 2002/47/EC, as amended by Directive 2009/44/EC (the "**Financial Collateral Directive**"); please see also section 1.2 of Annex 4 for further details.

lished by the Austrian courts and administrative authorities as at the date of this Opinion, all of which are collectively referred to herein as "**Austrian law**". We neither express nor imply any opinion on any laws other than Austrian law and European Community law directly applicable in Austria and we have made no investigation of any other laws which may be relevant in relation to the Agreement, even if, under Austrian law, such laws would have to be applied. Our opinions expressed herein are given on the basis that they represent a fair view of the legal position (*vertretbare Rechtsansicht*) under Austrian law but do not purport to reflect all positions taken by the courts and legal writing (to the extent such decisions or legal writing are available) in the past with respect to a particular legal issue.

1.7 In this Opinion:

1.7.1 "**Security Interest**" means the security interest created pursuant to the Security Interest Provisions;

1.7.2 "**Equivalent Agreement**" means an agreement:

- (i) which is governed by the law of England and Wales;
- (ii) which has broadly similar function to any of the Agreements listed in Annex 1;
- (iii) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and
- (iv) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);

References to the "Agreement" in this Opinion (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement;

1.7.3 A "**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 3;

1.7.4 "**enforcement**" means, in the relation to the Security Interest, the act of:

- (i) sale and application of proceeds of the sale of Collateral against monies owed, or
- (ii) appropriation of the Collateral,

in either case in accordance with the Security Interest Provisions.

- 1.7.5 **"Austrian Corporation"** means corporations (*Kapitalgesellschaften*) (i.e. joint stock corporation (*Aktiengesellschaft – AG*) or limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*)) under Austrian law having their corporate seat and their principal place of management in Austria but does not include regulated entities (Austrian Credit Institutions, Austrian Insurance Undertakings, Austrian Investment Firms, Investment Fund Management Companies and Austrian pension funds, for example), that are operated in the legal form of a corporation (*Kapitalgesellschaft*);
- 1.7.6 **"Austrian Investment Firm"** means investment firms (*Wertpapierfirmen*), as defined in § 3 (2) of the Securities Supervision Act 2007 (*Wertpapieraufsichtsgesetz 2007 – WAG 2007*), which are organized as corporations (*Kapitalgesellschaften*) (joint stock corporations (*Aktiengesellschaften – AG*), limited liability companies (*Gesellschaften mit beschränkter Haftung – GmbH*)) or cooperative associations (*Genossenschaften*) and which are incorporated in Austria and have obtained a license from the FMA. Pursuant to Austrian law, investment firms must not take proprietary positions when providing their services, i.e. must not hold money, securities or other instruments of their clients so that the investment firm at no time becomes the debtor of its client, but may, depending on the scope of their license, only render investment advice, portfolio management services, the receipt and transmission of orders in relation to one or more financial instruments and the operation of a multi-lateral trading facility (§ 3 (2) nos 1 to 4 of the WAG 2007);
- 1.7.7 **"Austrian Partnerships"** means partnerships (*Personengesellschaften*) (i.e. general partnership (*offene Gesellschaft – OG*) or limited partnership (*Kommanditgesellschaft – KG*)) under Austrian law having their seat and their principal place of management in Austria but does not include regulated entities that are operated in the legal form of a partnership;
- 1.7.8 **"Insolvency Proceedings"** means insolvency, bankruptcy or analogous proceedings (where, for the purposes of paragraph 3 of this Opinion, the occurrence of such proceedings in respect of the Austrian Counterparty falls within the definition of Event of Default under the Agreement);
- 1.7.9 in other instances other than those referred to at 1.7.4 above, references to the word **"enforceable"** and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and, except as set out in this Opinion, without risk of successful challenge. We do not opine on the availability of any judicial remedy;
- 1.7.10 terms defined or given a particular construction in the Agreement have the same meaning in this Opinion unless a contrary indication appears;
- 1.7.11 any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation)

shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this Opinion;

1.7.12 certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2; and

1.7.13 headings in this Opinion are for ease of reference only and shall not affect its interpretation.

1.7.14 references to "Core Provisions" include Core Provisions that have been modified by Non-Material Amendments (as defined herein).

2. Assumptions

We assume the following:

- 2.1 That the Agreements are legally binding and enforceable against both Parties under their governing laws.
- 2.2 That the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest.
- 2.3 That each Party and any person signing the Agreement on behalf of such Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement; to perform its obligations under the Agreement; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.
- 2.4 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it to lawfully enter into and perform its obligations under the Agreement and transactions referred to therein and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.
- 2.5 That the Agreement has been properly executed by both Parties.
- 2.6 That the Agreement is entered into prior to the commencement of any Insolvency Proceedings in respect of either Party.
- 2.7 The Agreement has been entered into, and each of the transactions referred to therein is carried out, by each of the parties thereto as a principal in good faith and for *bona fide* commercial reasons, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.8 That the Agreement accurately reflects the true intentions of each Party.
- 2.9 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement.

- 2.10 That no provision of the Agreement that is necessary for the giving of our opinions and advice in this Opinion has been altered in any material respect. In our view, an alteration contemplated in the definition of "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.
- 2.11 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement.
- 2.12 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.
- 2.13 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.
- 2.14 That, except with respect to our opinion at paragraph 3.3, any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions may be located either within or outside this jurisdiction.
- 2.15 That any cash comprising the Collateral is in a currency that is freely convertible internationally under the laws of all relevant jurisdictions and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each Security Interest pursuant to the Security Interest Provisions will have been effectively carried out.
- 2.16 That any securities comprising the Collateral is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each Security Interest pursuant to the Security Interest Provisions will have been effectively carried out.
- 2.17 That the Firm qualifies as entity referred to in § 2 (1) of the Financial Collateral Act (*Finanzsicherheitengesetz – FinSG*)².
- 2.18 That no provisions of the rules, by-laws, or other equivalent set of documents of an exchange or (regulated) market, where Collateral is traded, invalidates the enforceability or effectiveness of the Security Interest Provisions under the governing law of the Agreement and / or the law governing such exchange or (regulated) market.

² Substantially corresponding to Article 1(2) (a) to (d) of the Financial Collateral Directive; please see also section 1.1 of Annex 4 for further details.

3. Opinions

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in paragraph 4 below, we are of the following opinion.

In order to facilitate the understanding of our below answers (and the reasons given therefore), we have hereinafter set out the fact pattern on which our answers are based in relation to events of default in respect of Austrian Counterparties. We understand that in case an event of default such that the Liquidation Date occurs or is designated, the Agreement operates in a way that:

- (i) close-out netting occurs under the relevant close-out netting provisions in relation to all outstanding transactions thereunder in accordance with its terms, to the extent that any title transfer provision apply including the relevant default margin amount as gain or cost respectively;
- (ii) the liquidation amount so determined under the Agreement is set-off with any cash margin ; and
- (iii) the proceeds of the enforcement of any Security Interest are applied towards the satisfaction of any obligation of the Austrian Counterparty outstanding following the procedures employed under (i) and (ii) above.

3.1 Valid Security Interest

3.1.1 The Security Interest Provisions would create a valid security interest over the Collateral.

This opinion is qualified as follows:

3.1.1.1 In those instances where according to Austrian conflict of laws rules (see at paragraph 3.1.1.3 below), the laws of a jurisdiction other than Austria were the laws applicable to questions of the creation and perfection of a security interest in respect of Collateral, Austrian law, while not itself decisive for creation and perfection, should recognize the validity of a security interest validly created and perfected under such laws.

3.1.1.2 In those instances where according to Austrian conflict of laws rules (see at paragraph 3.1.1.3 below), the laws of the Republic of Austria were the laws applicable to questions of the creation and perfection of a security interest in respect of Collateral, the opinion statement in paragraph 3.1.1 applies only to the extent that the relevant perfection steps as set out at paragraph 3.1.1.4 below have been satisfied and maintained.

In order to facilitate your understanding as to (i) which law will be the applicable law with respect to creating and perfecting a security interest in

Collateral (paragraph 3.1.1.3) and (ii) which perfection steps would be required if Austrian law was to apply (paragraph 3.1.1.4), please refer to the following high level overview:

3.1.1.3 Applicable Law

The Austrian Act on Private International Law (*Internationales Privatrechtsgesetz – IPRG*) and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("**Rome I**") recognize a contractual **choice of law** governing the obligation to grant security. **No choice of law** is possible with respect to the creation of rights *in rem* (e.g. the transfer of ownership or the perfection of a pledge (*modus*)). While the contractual choice of New York law or English law is, subject to the limitations on choice of law set out at paragraph 4.2.2 below, valid as concerns the parties' obligations under the Agreement (i.e. questions in regard to determining the parties' obligations, interpretation and remedies for breach of the Agreement), the creation of rights *in rem* in the Collateral will be determined in accordance with Austrian conflicts of laws rules.

3.1.1.3.1 Cash in bank account

From an Austrian law perspective, cash credited on an account would qualify as receivable due from the account bank to the account holder. With respect to rights *in rem* over receivables, under Article 14 of Rome I the law governing the receivable (i.e. the law governing the account opening agreement) would, *inter alia*, govern the steps to be taken to perfect a right *in rem* over the receivable.

3.1.1.3.2 Book entry securities collateral (*im Effektengiro übertragbare Wertpapiere*) (i.e. de-materialised securities)

Article 9 of the Financial Collateral Directive has been implemented by § 33a of IPRG which applies to **all** Austrian Counterparties. Pursuant to § 33a IPRG, the legal nature (*Rechtsnatur*) and contents (*Inhalt*) of book entry securities (*im Effektengiro übertragbare Wertpapiere*) (as defined at § 3 (1) no 7 FinSG³) as well as the acquisition of rights *in rem* to such collateral are governed by the **substantive laws of the jurisdiction** in which the **relevant account** (*maßgeb-*

³ Financial collateral provided under a financial collateral arrangement which consists of financial instruments (see at section 1.2 of Annex 5 below), title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary.

liches Konto) (as defined at § 3 (1) no 8 FinSG⁴) is **maintained**.

This law is also relevant for determining (i) whether ownership title or other rights *in rem* to book entry securities are overridden by or subordinated to a competing title or right *in rem* of a third person or whether a good faith acquisition has occurred and (ii) whether, and if so, which steps are required for the realisation of book entry securities following the occurrence of an enforcement event (*Verwertungs- oder Beendigungsfall*) (as defined at § 3 (1) no 12 FinSG⁵).

The applicable law determined in accordance with § 33a IPRG in relation to book-entry securities will according to Austrian legal writing also be decisive for questions of enforcement⁶.

3.1.1.3.3 Securities (*Wertpapiere*) not registered in a book entry system

The prevailing view in Austrian writing is that questions of transfer of ownership of securities not registered in a book entry system (see at paragraph 3.1.1.3.2 above) fall within the scope of § 31 IPRG⁷. § 31 IPRG stipulates that the creation of rights *in rem* in tangible assets (including notes and coins) will be governed by the laws (including the private international law rules) of the *lex rei sitae* (i.e. the laws of the state where such assets are situated at the time of completion of the transfer of rights *in rem*). If that law refers to another law being applicable, such reference is to be taken into account (*renvoi*).

Such securities not registered in a book entry system are, for instance, certificated bonds in bearer form (*Inhaberschuldverschreibungen*) and certificated securities payable to order transferable by delivery and endorsement (*Orderpapiere*).

Deviating from the *lex sitae* principle, the Austrian Supreme Court has held that the transfer of bearer shares (*Inhaberaktien*) would be governed by the laws of the jurisdiction where

⁴ In relation to book entry securities collateral which is subject to a financial collateral arrangement, the register or account — which may be maintained by the collateral taker — in which the entries are made by which that book entry securities collateral is provided to the collateral taker.

⁵ An event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realise or appropriate financial collateral or a close-out netting provision comes into effect.

⁶ See *Verschraegen* in *Rummel*³, IPRG § 33a Rz 8.

⁷ See *Verschraegen* in *Rummel*³, IPRG § 31 Rz 8 and § 33a Rz 1.

the issuing corporation has its principal place of management (*tatsächlicher Sitz der Hauptverwaltung*) (without taking into account the private international law rules of this jurisdiction). Whereas we believe that arguments could be made to the effect that this decision is misplaced on the merits, this decision can nevertheless not be ignored.

3.1.1.3.4 Securities in registered form not transferable by endorsement and delivery (*Rektapapiere* oder *Namenspapiere*)

Certificated securities in registered form not transferable by endorsement and delivery (*Rektapapiere* oder *Namenspapiere*) (only in case such securities are not registered in a book entry system) are usually not transferred by delivery of the certificate or the claims as such but by way of assignment.

According to Article 14 of Rome I, the relationship between the assignor and the assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under Rome I.

The law governing the assigned or subrogated claim shall determine (i) its assignability, (ii) the relationship between the assignee and the debtor, (iii) the conditions under which the assignment or subrogation can be invoked against the debtor and (iv) whether the debtor's obligations have been discharged.

The concept of assignment in Article 14 of Rome I includes (i) outright transfers of claims, (ii) transfers of claims by way of security and (iii) pledges or other security rights over claims.

3.1.1.3.5 Scope of applicable law

Not only the creation of rights *in rem* in collateral will be determined in accordance with the law so determined to be applicable, but also other issues connected to rights *in rem*, such as the coming into existence, the acquisition, the typology, the content, the effects, the protection, the transfer and the termination of rights *in rem*.

Whereas within the scope of § 33a IPRG (see at paragraph 3.1.1.3.2 above) the law applicable in accordance with this provision shall also be decisive with respect to enforcement /

realisation (*Verwertung*)⁸, Austrian scholars are silent whether or not the same is true within the scope of § 31 IPRG (see at paragraph 3.1.1.3.1.1 above). The wording of § 31 and § 33a IPRG is arguably different. Whereas § 33a (2) IPRG explicitly also makes reference to the realisation of rights *in rem*, § 31 IPRG only refers to the acquisition and loss of rights *in rem*. The Explanatory Notes (*Erläuternde Bemerkungen*) of the Austrian legislator to § 33a (2) IPRG suggest that the specific provisions of § 33a (2) IPRG (including the express provision on realisation) is for clarification purposes only (and could thus be considered to be in fact already covered by the more general provision of § 33a (1) IPRG – which is nevertheless differently worded as § 31 IPRG). Further, according to § 1 IPRG, as general rule, the laws of the jurisdiction with the predominant connection to the circumstances of a case shall be the laws applicable. In case of assets situated outside of Austria (at the time of realisation), we believe that arguments could be made that it would be illogical to assume that questions of disposal / realisation shall be subject to the laws of Austria.

We believe that the question whether also realisation (*Verwertung*) of pledged assets will be subject to the laws determined in accordance with § 31 IPRG depends on the qualification of realisation (*Verwertung*) as either (i) constituting a right *in rem* or (ii) a right *in personam* (*schuldrechtlicher Anspruch*). In our opinion good arguments could be made to qualify realisation (*Verwertung*) as a question of rights *in rem* (*sachenrechtliche Frage*) which would be covered by § 31 IPRG⁹. We believe that this should in particular be true as regards the process of realisation, whereas we believe that arguments could be made that questions related not primarily to the process of realisation (for instance as regards forfeiture of rights etc) may be subject to the law applicable to the underlying agreement.

3.1.1.4 Perfection steps under Austrian law

The following (i) shall serve as general guideline with respect to Austrian substantive law requirements relating to the perfection of security interests in Collateral and (ii) would apply in all instances where in accordance with paragraph 3.1.1.3 above Austrian law was found to be the law applicable in relation to creation and perfection of a right *in rem*.

⁸ § 33a (2) IPRG, see also *Verschraegen in Rummeß*, IPRG § 33a Rz 8.

⁹ Cf *Verschraegen in Rummeß*, IPRG § 33a Rz 9.

On a general note, under Austrian law the creation of a security interest requires both the obligation to transfer ownership title or to create a security interest (i.e. the agreement between the parties on the transfer of ownership or creation of a security interest) (*titulus*) and the transfer of ownership title / perfection of the security interest (*modus*). Abstract transfers of rights (without *titulus*) are not recognized under Austrian law.

3.1.1.4.1 Cash in bank account

A security interest would generally be perfected by notifying the account bank (even if that was an affiliate of the Firm).

Deviating from this, where (i) the Firm was the account bank and an Austrian Counterparty posted cash to such account or (ii) an Austrian Counterparty transferred cash to an account of the Firm, the security interest would be perfected upon the cash being credited to the relevant account.

3.1.1.4.2 Book entry securities (*im Effektengiro übertragbare Wertpapiere*)

To the extent that the relevant securities qualify as book entry securities (*im Effektengiro übertragbare Wertpapiere*), according to § 4 (2) FinSG transfer of title of, or other rights *in rem* in, such book entry securities (*im Effektengiro übertragbare Wertpapiere*) can be perfected by entry into the relevant account, e.g. custody account.

3.1.1.4.3 Certificated securities in bearer form (*Inhaberpapiere*) and certificated securities payable to order transferable by endorsement and delivery (*Orderpapiere*)

In order to perfect a valid and enforceable security interest, such securities need to be effectively handed over to either the Firm or its custodian.

In case the securities are held by a third party (e.g. a custodian) for the Austrian Counterparty notice must be given to that party or that party must effectively hand over the securities to the Firm or its custodian.

As far as shares in registered form (*Namensaktien*) are concerned, pursuant to § 62 of the Austrian Stock Corporation Act (*Aktiengesetz – AktG*) a security interest may be effected by (blank or pledge) endorsement (*Blanko- oder Pfandindossament*) and handing over the relevant shares to the Firm or its custodian.

3.1.1.4.4 Securities in registered form not transferable by endorsement and delivery (*Rektapapiere oder Namenspapiere*)

A security interest over rights (including also the rights embodied in securities in registered form not transferable by endorsement and delivery (*Rektapapiere oder Namenspapiere*)) will be perfected by (i) notifying the debtor or (ii) an entry into the commercial books (*Geschäftsbücher*) of the collateral provider.

3.1.2 Following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.

We are of this opinion because:

According to § 5 FinSG, upon occurrence of an enforcement event¹⁰, the collateral taker is entitled to realise financial collateral in the following manners (if agreed by the parties):

- (a) financial instruments by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations; and
- (b) cash by setting off the amount against or applying it in discharge of the relevant financial obligations.

Appropriation is possible only if:

- (a) this has been agreed upon by the parties in the collateral arrangement; and
- (b) the parties have agreed in the collateral arrangement on the valuation of the financial instruments and the credit claims.

According to § 6 FinSG, financial collateral may be realised, if so agreed by the parties, without any requirement to the effect that:

- (a) prior notice of the intention to realise must have been given;
- (b) the terms of the realisation be approved by any court, public officer or other person;

¹⁰ For the purposes of the FinSG, an enforcement event is defined in § 3 (1) no 12 FinSG as "*an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realise or appropriate financial collateral or a close-out netting provision comes into effect*".

- (c) the realisation be conducted by public auction or in any other prescribed manner; or
- (d) any additional time period must have elapsed.

Furthermore, § 6 (2) FinSG states that enforcement / realisation of financial collateral shall not be limited by opening of insolvency or reorganisation proceedings of either the collateral taker or collateral provider.

The FinSG contains an autonomous definition of insolvency and reorganisation proceedings. The explanatory notes (*Erläuternde Bemerkungen*) of the Austrian legislator suggest that only reorganisation proceedings under the URG and special receivership as well as regulatory measures against Austrian Credit Institutions are covered by the definition of reorganisation proceedings or reorganisation measures (*Sanierungsverfahren oder Sanierungsmaßnahmen*). However, we believe on the basis of the letter of the law¹¹ that all relevant Insolvency Proceedings of similar nature or effect in respect of Austrian Counterparties should be covered by either the definition of insolvency and liquidation proceeding (*Konkurs- und Liquidationsverfahren*) (§ 3 (1) no 10 FinSG) or reorganisation proceedings or reorganisation measures (*Sanierungsverfahren oder Sanierungsmaßnahmen*) (§ 3 (1) no 11 FinSG).

When realising collateral assets, § 10 FinSG which aims at the protection of collateral providers has to be observed. According to § 10 FinSG, the collateral taker, when exercising the rights granted to him under the FinSG¹², has to act in accordance with the principles of *bona fide* commercial intercourse (*Grundsätze des redlichen Geschäftsverkehrs*) and the agreement between the parties when allocating a value to the financial collateral, when realising it and when determining the amount of the secured obligations. In particular, the collateral taker needs to take into account the appraised value, the fair value or the market value of the financial collateral. Any excess proceeds must be re-delivered or credited to the collateral provider.

- 3.1.3 There is no rule in the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

We are of this opinion because:

¹¹ The definitions of insolvency and liquidation proceeding (*Konkurs- und Liquidationsverfahren*) as well as reorganisation proceedings or reorganisation measures (*Sanierungsverfahren oder Sanierungsmaßnahmen*) as set out by the FinSG are rather broad and we do not see a convincing argument to interpret these definitions in a way to only refer to relevant Proceedings concerning Austrian Credit Institutions.

¹² I.e. rights granted under the Agreement to the extent that the FinSG recognizes such rights.

According to § 6 FinSG the opening of insolvency, liquidation or reorganisation proceedings / institution of regulatory measures shall not affect the ability of a collateral taker to enforce its security interest. On the basis of the Explanatory Notes (*Erläuternde Bemerkungen*) of the Austrian legislator we believe that this provision should prevail over limitations that otherwise might apply (for instance according to § 11 IO, separate liquidation (*Absonderung*)¹³ of assets of a debtor which are essential for the continuation of the debtor's business cannot be requested within a six months period of the opening of the insolvency proceedings).

- 3.1.4 Following exercise of the Firm's rights under the Security Interest Provisions, there are no rules of law of this jurisdiction which would affect the ranking of the Firm's rights to the proceeds of realisation of the Collateral in relation to the interests of the Counterparty and any other person.

This opinion is qualified as follows:

As a general principle, under Austrian law (if that was to apply), the priority of security interests is determined by the principle of *prior tempore prior iure*. Priority will thus be dependent on the time when a security interest was validly created and perfected (see at paragraph 3.1.1 above).

It has further to be noted that under Austrian law a pledge (*Pfandrecht*) is strictly accessory (*akzessorisch*). This means that a valid pledge will depend on the valid existence of the obligations to be secured. This also applies in principle to security assignments (*Sicherungszessionen*) and fiduciary transfers of ownership (*Sicherungsübereignungen*).

Furthermore, Austrian law provides for certain preferred liens / rights in favor of certain third-party custodians (and these (preferred) liens / rights might be of relevance whenever a third party custodian in Austria was to hold Collateral for a Firm or an Austrian Counterparty):

- (i) According to § 77 of the Austrian National Bank Act (*Nationalbankgesetz – NBG*) the Austrian National Bank (*Österreichische Nationalbank*) has a preferential right in all moveable assets (moneys, bills of exchange (*Wechsel*) and other assets) of its debtors in its possession.
- (ii) According to § 369 (1) of the Austrian Entrepreneur Code (*Unternehmensgesetzbuch – UGB*) an entrepreneur (*Unternehmer*) has a retention right (*Zurückbehaltungsrecht*) in, *inter alia*, securities (*Wertpapieren*) in his possession as security of his due claims against his debtors arising out of a commercial transaction (*unternehmensbezogenen Geschäften*). According to § 369 (2) UGB rights

¹³ Under Austrian law, a validly created and perfected security interest grants the right to separate liquidation (*Absonderung*) of the collateral assets in case of opening of insolvency proceedings under the IO.

in rem of third parties will supersede this retention right; however, this will only apply if the right *in rem* of the third party has been perfected prior to the existence of the retention right under § 369 (1) UGB¹⁴.

- (iii) According to § 397 UGB, a broker (*Kommissionär*) has a statutory pledge (*gesetzliches Pfandrecht*) over the objects of his brokerage (*Kommissionsgut*) in his possession.
- (iv) In case the Austrian Custody Act (*Depotgesetz – DepG*) is applicable and a custodian (*Verwahrer*) deposits securities (*Wertpapiere*) with a sub-custodian (*Drittverwahrer*), such sub-custodian may acquire a pledge (*Pfandrecht*) or a retention right (*Zurückbehaltungsrecht*) only in respect of his claims attributable to said security (§§ 9, 21 DepG).

Further, the standard terms and conditions of Austrian credit institutions (*Allgemeine Geschäftsbedingungen der Österreichischen Kreditinstitute – ABGKr*) issued by the Austrian Bankers' Association (*Verband österreichischer Banken und Bankiers*) (which are widely used by Austrian Credit Institutions) provide for a pledge in favour of the respective Austrian Credit Institution over the assets of its customers, including account balances. Such pledge according to a Bank's standard terms and conditions (*Allgemeine Geschäftsbedingungen*) would likely take priority over security interests (*dingliche Sicherungsrechte*) created after the respective assets have been deposited with a Austrian Credit Institution.

3.2 Further acts

No further acts, conditions or things – to the extent Austrian law was applicable as to questions relating to the creation and perfection of a security interest (see at paragraph 3.1.1.3), other than those required under Austrian law concerning the creation and perfection of the security interest (see at paragraph 3.1.1.4 above) – would be required by the law of this jurisdiction to be done, fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

3.3 Foreign Collateral Providers

Moreover, the opinions given at paragraphs 3.1 and 3.2 also apply in respect of any counterparty that is not an Austrian Counterparty (i.e. not established or resident in this jurisdiction), where any accounts and / or the assets expressed to be subject to a Security Interest pursuant to the Security Provisions are located within this jurisdiction (for details as to applicable law see at paragraph 3.1.1.3 above).

¹⁴ See *Schuhmacher* in *Straube* zum UGB (I⁴) § 369 Rz 20.

3.4 Right of re-use

With respect to the Eligible Counterparty Agreement 2011, the Retail Client Agreement 2011, the Professional Client Agreement 2011 (or an Equivalent Agreement in the form of one of the foregoing), the Rehypothecation Clause would be effective in accordance with its terms, such that that Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes all non-cash Collateral, subject to the further rights and obligations set out in the Rehypothecation Clause.

The opinion given at this paragraph 3.4 does not apply in respect of an Equivalent 2011 Agreement without Core Rehypothecation Clause.

4. Qualifications

4.1 The opinions expressed in this Opinion are subject to the following limitations:

- 4.1.1 The purpose of this Opinion is to provide assistance to The Futures & Options Association and its members in understanding the issues that may be of relevance as a matter of Austrian law. This Opinion shall not be relied upon by any person with respect to, or in connection with, any specific transaction or act undertaken or omitted to be undertaken.
- 4.1.2 In this Opinion Austrian legal concepts are expressed in English terms and not in the original Austrian legal terms. The concepts concerned may not be identical to the concepts described by the same English term as they exist under the laws of any other jurisdiction. This Opinion may thus only be relied upon under the express conditions that (i) any issues of interpretation or liability hereunder will be governed by the laws of Austria and as interpreted by Austrian courts and (ii) the courts competent for the first district of Vienna are to have exclusive jurisdiction in respect of all disputes which may arise out of or in connection with this Opinion. Our aggregate liability under or in connection with this Opinion is limited to an amount of EUR 2,000,000.
- 4.1.3 Little to no legal writing or court rulings are available on the opinions expressed in this Opinion. While we believe that the opinions expressed are well founded and justifiable, we cannot exclude that an Austrian court or administrative authority would take views that deviate from the opinions expressed in this Opinion.
- 4.1.4 This Opinion is solely given in connection with the Agreement and is limited to the opinions explicitly expressed therein and herein and shall not be construed to express an implied opinion on any other matters in connection with the Agreement, the transactions and / or the Austrian Counterparties.

4.1.5 We do not express an opinion on the effects provisions of statutory law that are referred in the Agreement may have on the opinions expressed herein.

4.2 The opinions expressed in this Opinion are subject to the following qualifications:

4.2.1 Certain transactions contemplated by the Agreement may be affected by:

- (i) avoidance laws (as summarized in Annex 5 and as further detailed in paragraph 4.2.3 below) or similar laws of general application relating to or affecting the enforcement of creditors' rights and remedies;
- (ii) the unavailability of, or limitation on the availability of, a particular right or remedy because of equitable principles of general applicability or a requirement as to commercial reasonableness or good faith. This includes (without limitation) that in cases where a party is vested with a discretion, may determine a matter in its opinion or is granted the right to unilaterally determine essential terms of a contract, such discretion is to be exercised reasonably, such opinion is to be based on reasonable grounds and such determination needs to be adequate and not arbitrary under the then prevailing circumstances; and
- (iii) the exception of abuse of law or similar concepts.

4.2.2 Limitations with respect to the choice of law

4.2.2.1 Notwithstanding the recognition of English law or the laws of the State of New York as the law governing the Agreement:

- (i) effect may be given to the overriding mandatory provisions of the law of Austria, in so far as those overriding mandatory provisions would render the performance of the Agreements unlawful;
- (ii) the courts of the Republic of Austria will apply Austrian law insofar as it is mandatory irrespective of English or New York law governing the Agreement;
- (iii) the application of English or New York law may be refused to the extent it is incompatible with public policy (*ordre public*) of the Republic of Austria;
- (iv) regard will be given to the law of the jurisdiction in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance; and
- (v) certain, in particular the *in rem*, aspects of the Security Interest Provisions will not be determined by the law

chosen but by the laws applicable pursuant to Austrian private international law (see at paragraphs 3.1.1.3 and 3.1.1.4 above).

4.2.2.2 Where all other elements relevant to the situation at the time of entry into the Agreement are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

4.2.3 Avoidance of transactions

Under §§ 27 et seq. IO certain actions taken, in particular also the securing (*Sicherstellung*) of a creditor, by persons / companies that are held to be **detrimental to their creditors** may be **set aside** by the courts if a avoidance action is filed in insolvency proceedings by the receiver. Please refer to Annex 5 concerning a brief summary of Austrian avoidance rules.

Avoidance may relate to both the conclusion of the Agreement and / or each subsequent posting of Collateral / creation and perfection of a Security Interest. For the purposes of this Opinion, we consider in particular all cases of avoidance due to "**preferential treatment**" (§ 30 (1) IO) and all cases of avoidance due to "**knowledge of insolvency**" under § 31 IO to be of importance (for details on §§ 30 and 31 IO as well as other avoidance scenarios see Annex 5).

For instance, § 30 (1) no 3 IO gives rise to avoidance due to an intention of the insolvent party to preferentially treat certain of its creditors. However, it is a pre-requisite for avoidance under § 30 (1) no 3 IO that it can be established on the part of relevant collateral taker that the collateral taker knew or should have known about the (insolvent) collateral provider's intent to preferentially treat the collateral taker.

For instance, § 31 IO gives rise to avoidance due to the collateral takers knowledge of the collateral provider's insolvency (*Zahlungsunfähigkeit*). However, it is a pre-requisite for avoidance under § 31 IO that it can be established on the part of relevant collateral taker that the collateral taker knew or should have known about the collateral provider's insolvency at the time of the relevant disadvantageous transaction.

4.2.4 Also early termination of the Agreement can be qualified as challengeable transaction if the other conditions (as summarised in Annex 5) are met. Selection of automatic early termination of the Agreement could serve as argument in order to mitigate the risk of avoidance under Austrian insolvency law.

4.2.5 Limitations concerning the substitution of Collateral

4.2.5.1 Substitution by the collateral provider

Under Austrian Law the substitution of Collateral by the Austrian Counterparty with concurrent preservation of identity and priority of the Security Interest that a Firm has in the Collateral under the Agreements will **not** be possible. In case of a substitution of the Collateral, such interest will have to be **newly created** in respect of the new Collateral upon each exchange.

Normally, the consent of the Firm to re-transfer the Collateral that served as Collateral is a prerequisite for validly transferring title to the Austrian Counterparty. However even if the Firm consented to such substitution, the Security Interest in the Collateral will be surrendered by the Firm upon losing possession to the Collateral (e.g. by transferring it to an account of the Austrian Counterparty), irrespective if the Firm intends to / consents to surrender title.

4.2.5.2 Avoidance of a substitution of Collateral

Any substitution of Collateral by the Austrian Counterparty must be seen as separate (and potentially voidable) transaction. A substitution of Collateral could be challenged, if the substitution was disadvantageous to the other creditors, which will be determined by comparing the value of the substitute assets with the value of the assets they were replacing. The relevant point in time for such evaluation is not the time of substitution but the end of the trial at the court of first instance. From this it follows that e.g. an increase of the value of the new Collateral or a decrease in the value of the initial Collateral subsequent to the substitution might cause an (indirect) disadvantage of the creditors, which triggers a substantial risk that the substitution can be successfully avoided.

4.2.6 In case claims (for instances such claims remaining unpaid following the enforcement of the Security Interest) would have to be filed with the Insolvency Representative, such claims would be converted into a payment claim in Euro. § 14 (1) IO provides that claims expressed in a foreign currency must be converted into Euros, applying the exchange rate valid at the date of the opening of the insolvency proceedings¹⁵.

¹⁵ According to Austrian legal writing and the Austrian Supreme Court, the applicable exchange rate will be the rate published by the Vienna Stock Exchange (*Briefkurs der Wiener Börse*), currently available under <http://en.wienerborse.at/forex/euro/>. It is somewhat unclear which exchange rate shall be applied in case that for the respective currency no exchange rate is published by the Vienna Stock Exchange. According to

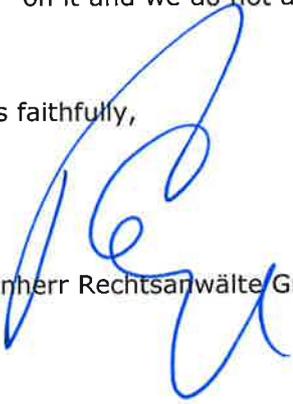
4.2.7 Any proceeds resulting from the enforcement of a Security Interest exceeding the amount of the secured obligations will have to be surrendered to the Austrian Counterparty.

There are no other material issues relevant to the issues addressed in this Opinion which we draw to your attention.

5. Addressees

This Opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this opinion). This Opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation, provided that they may not rely on it and we do not accept a contractual duty or duty of care to them.

Yours faithfully,


Schönherr Rechtsanwälte GmbH

legal writing, in such case the exchange rate can be determined by way of other convertible currencies such as the USD, CHF or Yen (*Schwarzer/List/Gerharter*, Die österreichische Währungsordnung in der EU, 319; *Schubert* in *Rummel*³, § 987 Rz 3). However, it remains unclear how this should work on a practical level. We believe that good arguments could be made to apply the exchange rates published by the European Central Bank (currently available under <http://www.ecb.int/stats/exchange/eurofxref/html/index.en.html>) in case that the Vienna Stock Exchange does not provide for an exchange rate in the respective currency (there is also case law available to the effect that the exchanges rates of the ECB may be applied; see OGH 3 Ob 161/09m).

SCHEDULE 1

Austrian Credit Institutions

Subject to the modifications and additions set out in this Schedule 1 (*Austrian Credit Institutions*), the opinions, assumptions and qualifications set out in this Opinion will also apply in respect of Parties which are Austrian Credit Institutions. For the purposes of this Opinion, "**Austrian Credit Institution**" means credit institutions (*Kreditinstitute*), as defined in § 1 (1) BWG which are incorporated in Austria and have obtained a license from the Financial Markets Supervisory Authority (*Finanzmarktaufsichtsbehörde – FMA*) pursuant to § 4 BWG to conduct (one or more of) the banking businesses set forth in § 1 (1) BWG, which are organized as joint stock corporations (*Aktiengesellschaft – AG*), limited liability companies (*Gesellschaft mit beschränkter Haftung – GmbH*), cooperative associations (*Genossenschaften*) or savings banks (*Sparkassen*)¹⁶.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the Opinion (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1 ADDITIONAL ASSUMPTIONS

We assume:

- 1.1 Any transactions are not entered into by the Austrian Credit Institution for purposes of such Transactions serving as cover pool hedges under the Mortgage Banks Act (*Hypothekbankgesetz – HypBG*), the Mortgage Bonds Act (*Pfandbriefgesetz – PfandbriefG*) and the Covered Bonds Act (*Gesetz betreffend fundierte Bankschuldverschreibungen – FBSchVG*) and no Collateral will be taken from such cover pool assets.

¹⁶ § 1 (1) BWG covers undertakings which are, pursuant to §§ 4 or 103 no 5 BWG or other federal statutory provisions entitled to conduct banking business (as specified in the BWG). § 4 BWG (setting forth the obligation to obtain a license from the FMA) applies to undertakings having their head office and main place of management in Austria (which have to fulfill certain other requirements as to their legal form and their share capital, for example, in order to be licensed by the FMA). § 4 BWG, in principle, also covers foreign banks (which are defined as undertakings licensed to conduct banking business outside the EEA) which intend to establish a branch in Austria. In this context, however, foreign banks are not covered by this Opinion. § 103 no 5 BWG sets forth that credit institutions licensed to conduct banking businesses prior to the entry into force of the BWG need not apply for a license under § 4 (1) BWG. Other federal statutory provisions entitling undertakings to conduct banking businesses in Austria include the Act on the National Bank (*Nationalbankgesetz – NBG*) and the Postal Savings Bank Act (*Postsparkassengesetz – PSK-G*), for example.

SCHEDULE 2

Austrian Insurance Undertakings

Subject to the modifications and additions set out in this Schedule 2 (*Austrian Insurance Undertakings*), the opinions, assumptions and qualifications set out in this Opinion will also apply in respect of Parties which are Austrian Insurance Undertakings. For the purposes of this Opinion, "**Austrian Insurance Undertakings**" means insurance undertakings (*Versicherungsunternehmen*), as defined in § 1 (1) of the Austrian Insurance Supervision Act (*Versicherungsaufsichtsgesetz – VAG*), which are organized as joint stock corporations (*Aktiengesellschaft – AG*) or mutual insurance companies (*Versicherungsverein auf Gegenseitigkeit*)¹⁷.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the Opinion (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1 ADDITIONAL QUALIFICATIONS

The opinions expressed in this Opinion are subject to the following additional qualifications.

- 1.1 To safeguard / protect the interest of the Austrian Insurance Undertaking's customers, the **power of disposal** (*Verfügungsberechtigung*) as regards Allocated Assets (as defined in section 6.1 below) is severely **limited**¹⁸. In accordance with § 22 (1) VAG the FMA appoints a **trustee** for each reserve fund (*Deckungsstock*) which supervises the Austrian Insurance Undertaking with respect to its obligations under the VAG.

As regards the reserve fund (*Deckungsstock*) relating to **life insurance**, the Austrian Insurance Undertaking may only dispose of, including encumber with a security interest or pledge, such Allocated Assets upon the **prior written approval by this trustee** in each **individual case**. In this respect it has to be noted that such trustee approval must specifically relate to a single transaction (disposal or encumbrance) or a limited number of single transactions (if specified clearly). An anticipatory¹⁹ or blanket approval will not create a valid right of the Austrian Insurance Undertaking to dispose of such Allocated Assets.

In case such prior written approval by the trustee is not in place, the disposal or encumbrance of the respective Allocated Assets (i.e. Collateral taken from the cover pool) would not be valid and thus the Security Interest would not be enforceable.

¹⁷ § 1 (1) VAG covers undertakings which have their head office in Austria and whose business activity consists of the conduct of the insurance contract business. It is to be noted that, pursuant to § 2 (2) VAG, § 1 (1) VAG does not apply to Insurance Undertakings exclusively licensed to conduct reinsurance business.

¹⁸ Including the ability of the Austrian Insurance Undertaking to use such Allocated Assets as Collateral under the Agreement.

¹⁹ *Braumüller*, Versicherungsaufsichtsrecht, 265.

2 Excursus: Reserve funds (*Deckungsstöcke*) of an Austrian Insurance Undertaking

- 2.1 By way of background information to what is said at section 1.1 above, we note that with respect to certain classes of insurance (*Versicherungszweige*) under the VAG an Austrian Insurance Undertaking must keep specific pools of assets as part of its cover for the actuarial reserve funds (*zur Bedeckung der versicherungstechnischen Rückstellungen*)²⁰ ("**Allocated Assets**"). For this purpose, an Austrian Insurance Undertaking must maintain reserve funds (*Deckungsstöcke*) and in certain cases even particular divisions to such reserve fund (*Abteilungen eines Deckungsstocks*).

We believe that the assets of an Austrian Insurance Undertaking which are not allocated to a specific reserve fund (*Deckungsstock*) and which do not serve as cover for the actuarial reserve funds (*zur Bedeckung der versicherungstechnischen Rückstellungen*) may freely be used by the Austrian Insurance Undertaking ("**Un-allocated Assets**").

²⁰ § 77 VAG.

SCHEDULE 3

Austrian Individuals

Subject to the modifications and additions set out in this Schedule 3 (*Austrian Individuals*), the opinions, assumptions and qualifications set out in this Opinion will also apply in respect of Parties which are Austrian Individuals. For the purposes of this Opinion, "**Austrian Individuals**" means natural persons having their centre of main interests, as defined in Article 3 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings in Austria.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the Opinion (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1 ADDITIONAL ASSUMPTIONS

We assume:

- 1.1 The Austrian Individuals when entering into Transactions do **not** qualify as consumers (*Verbraucher*) pursuant to § 1 (1) no 2 of the Austrian Consumer Protection Act (*Konsumentenschutzgesetz – KSchG*) but rather qualify as entrepreneurs (*Einzelunternehmer*) pursuant to § 1 (1) no 1 KSchG and § 1 UGB and the Transactions are entered into in the course of their business (*im Betrieb ihres Unternehmens*).

SCHEDULE 4

Austrian Investment Funds

Subject to the modifications and additions set out in this Schedule 4 (*Austrian Investment Funds*), the opinions, assumptions and qualifications set out in this Opinion will also apply in respect of Parties which are Austrian Investment Funds. For the purposes of this Opinion, "**Austrian Investment Fund**" means exclusively undertakings for collective investment in transferable securities (UCITs) (*Organismen zur gemeinsamen Veranlagung in Wertpapieren – OGAWs*), as defined in § 2 of the Austrian Investment Fund Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*), which are managed by management companies (*Verwaltungsgesellschaften*), as defined in § 3 (2) of the InvFG 2011 (i) which are incorporated in Austria and have following 1 September 2011 obtained licenses from the FMA pursuant to § 1 (1) no 13 BWG icw § 6 (2) InvFG 2011 or (ii) which had prior to 1 September 2011 already held a license from the FMA pursuant to § 1 (1) no 13 BWG and which are organized as joint stock corporations (*Aktiengesellschaften – AG*) or limited liability companies (*Gesellschaften mit beschränkter Haftung – GmbH*) ("**Investment Fund Management Companies**"). Austrian Investment Funds are arrangements under the law of contract (as common funds managed by a management company) without legal personality pursuant to Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast) (the "**UCITS Directive**"). Trust funds or corporate funds (as described in the UCITS Directive) cannot be established under the InvFG 2011.

An Austrian Investment Fund may also be established as feeder fund or master fund²¹. A feeder or master fund itself qualifies as Austrian Investment Fund under the InvFG 2011 ("**Feeder Investment Fund**" or "**Master Investment Fund**").

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the Opinion (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1 ADDITIONAL ASSUMPTIONS

We assume:

- 1.1 The Investment Fund Management Company when entering into transactions for Austrian Investment Funds on account of the unitholders in the Austrian Investment Fund will comply with all relevant provisions of the InvFG 2011 and / or ancillary legislation as regards the use of derivative instruments for an Austrian Investment Fund.

2 ADDITIONAL QUALIFICATIONS

The opinions expressed in this Opinion are subject to the following additional qualifications.

²¹ See Article 58 et seq of the UCITS Directive.

- 2.1 According to § 81 InvFG 2011, an Investment Fund Management Company may not pledge or otherwise encumber (including by way of title transfer under the Title Transfer Provisions) assets of an Austrian Investment Fund, unless it is expressly permitted under the InvFG 2011.

However, this restriction shall not apply to the extent the assets of the Austrian Investment Fund shall be used as collateral in relation to derivatives transactions which were concluded in conformity with the provisions of the InvFG 2011, in particular with § 73 InvFG 2011²².

In case that the requirements as set out in § 81 InvFG 2011 are not met, a disposal of an Austrian Investment Fund's assets (including any form of granting of security, pledge, title transfer, assignment etc) is invalid vis-à-vis the Unitholders.

According to legal writing, the underlying claims against the Investment Fund Management Company (which is always acting in its own name, but for the account of the Unitholders in the Austrian Investment Fund) should, however, not be affected and the Investment Fund Management Company would have to use its own assets to fulfil such obligations (see *Oppitz* in *Macher/Buchberger/Kalss/Oppitz*, Investmentfondsgesetz, § 4 Rz 14).

²² Whereas we believe that an exhaustive enumeration of the assets concerned is beyond the scope of this Opinion, we note that according to the Explanatory Notes (*Erläuternde Bemerkungen*) of the Austrian legislator these OTC derivatives should include OTC derivatives whose underlying figures among the securities, financial instruments or money market instruments, and complies with the respective conditions, referred to in the Austrian law rules implementing:

- (i) Article 50 (1) of the UCITS Directive;
- (ii) Article 50 (1) (g) of the UCITS Directive icw Articles 8, 9 and 10 of Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions;
- (iii) Article 50 (1) (a), (b) and (c) of the UCITS Directive icw Article 50 (1) (g) of the UCITS Directive;
- (iv) Article 50 (1) (d) of the UCITS Directive;
- (v) Article 51 (2) and (3) of the UCITS Directive;
- (vi) Article 39 (6) of the UCITS Directive; and
- (vii) other provisions on a European Union law level to the extent that these are referred to in the provisions set out under (i) to (vi).

SCHEDULE 5

Austrian Sovereign Entities

Subject to the modifications and additions set out in this Schedule 5 (*Austrian Sovereign Entities*), the opinions, assumptions and qualifications set out in this Opinion will also apply in respect of Parties which are Austrian Sovereign Entities. For the purposes of this Opinion, "**Austrian Sovereign Entities**" means the Austrian Federal State (*Bund*)²³, the Austrian States (*Bundesländer*) and Austrian municipalities (*Gemeinden*).

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the Opinion (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1 ADDITIONAL QUALIFICATIONS

The opinions expressed in this Opinion are subject to the following additional qualifications.

1.1 Restrictions on enforcement

1.1.1 Austrian municipalities

Pursuant to § 15 of the Austrian Enforcement Code (*Exekutionsordnung – EO*) debt enforcement against municipalities (*Gemeinden*) and non profit institutions under public law (*gemeinnützige öffentliche Anstalten*) is limited to those assets, which can be used for paying of the municipalities' or the institutions' creditors without interfering with their duties to serve public interest (*Erfüllung öffentlicher Interessen*). This limitation of debt enforcement does, however, not apply to the enforcement of contractual liens (*vertragliche Pfandrechte*).

1.1.2 Austrian Federal State (*Bund*) and Austrian States (*Bundesländer*)

Since there is no established case-law on the applicability of § 15 EO to the Federal State and the Austrian States²⁴, we cannot rule out that an Austrian Court would come to the conclusion that an enforcement against the Austrian Federal State (*Bund*) or Austrian States (*Bundesländer*) is limited to those assets (claims), which were contractually pledged or can be used for paying of the creditors of the Republic of Austria without interfering with its duties to serve public interest (*Erfüllung öffentlicher In-*

²³ More commonly referred to as the "Republic of Austria".

²⁴ In a former decision the Austrian Supreme Court (*Oberster Gerichtshof – OGH*) (28.6.1930, SZ 12/155) ruled that § 15 EO also applies to the Federal State (*Bund*). In a more recent decision (14.10.1992, 3 Ob 77/92) the Austrian Supreme Court explicitly refused its former ruling and decided that § 15 EO does not apply to the Federal State (*Bund*) and the States (*Länder*). They would, however, be indirectly protected by § 15 EO, if they transfer their assets to a non profit institution under public law.

teressen) even if these assets were not transferred to a non profit institution under public law.

The applicability of § 15 EO may affect pre-insolvency enforcement of claims against the Austrian Federal and Austrian States in the (however unlikely) event that a court comes to the conclusion that certain claims that shall be subject to enforcement are excluded from execution / enforcement pursuant to § 15 EO. § 15 EO may also affect post-insolvency enforcement since it limits the scope of the assets that are subject to insolvency proceedings. According to § 1 of the IO the bankrupt's estate comprises of all assets that are subject to execution / enforcement according to the Enforcement Act.

1.2 Legislative power of the Republic of Austria

The Republic of Austria and its legislative bodies do have legislative power as to the national secured transactions legislation. Such legislative power may be used to restrict the enforceability of the Security Interest Provisions under the Agreement in a pre-insolvency and a post-insolvency scenario. The legislative bodies of the Republic of Austria may e.g. decide that § 15 EO (see at section 1.1.1 above) is extended to also protect the Austrian Federal State (*Bund*) or the Austrian States (*Bundesländer*). In this case, enforcement of the Security Interest Provisions against the Republic of Austria may be impaired.

1.3 Capacity of Austrian Sovereign Entities to enter into Transactions

When dealing with Austrian Sovereign Entities, counterparties should carefully scrutinize whether restrictions as to the relevant Sovereign Entity's capacity to enter into transactions and post margin / grant Security Interests exist. In case that a Sovereign Entity would not be permitted to enter into specific transactions (including as regards collateralisation) under the Agreement, enforceability of the whole Agreement and / or transactions contemplated thereunder may be affected.

ANNEX 1 FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (Margin and Collateral) (the "**Professional Client Agreement 2007**")
2. Professional Client Agreement (2009 Version), including Module G (Margin and Collateral) (the "**Professional Client Agreement 2009**")
3. Professional Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Professional Client Agreement 2011**")
4. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "**Retail Client Agreement 2007**")
5. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "**Retail Client Agreement 2009**")
6. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Retail Client Agreement 2011**")
7. Eligible Counterparty Agreement (2007 Version) including Module G (Margin) (the "**Eligible Counterparty Agreement 2007**")
8. Eligible Counterparty Agreement (2009 Version) including Module G (Margin) (the "**Eligible Counterparty Agreement 2009**")
9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the "**FOA Published Form Agreement**") expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement.

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).
2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).
3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).
4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.
5. "**Core Provisions**" means:
 - (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and
 - (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.
6. "**Rehypothecation Clause**" means:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (**Rehypothecation**);
 - (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (Rehypothecation);
 - (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (Rehypothecation); and
 - (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
7. "**Security Interest Provisions**" means:
 - (a) the "**Security Interest Clause**", being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (*Security interest*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (*Security interest*);

- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (*Security interest*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (*Security interest*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (*Security interest*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (*Security interest*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (*Security interest*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (*Security interest*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (*Security interest*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (b) the "**Power to Charge Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (*Power to charge*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (*Power to charge*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (*Power to charge*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (*Power to charge*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (*Power to charge*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (*Power to charge*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (*Power to charge*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (*Power to charge*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (*Power to charge*); and

- (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (c) the "**Power of Sale Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (*Power of sale*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (*Power of sale*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (*Power of sale*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (*Power of sale*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (*Power of sale*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (*Power of sale*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (*Power of sale*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (*Power of sale*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (*Power of sale*); and
 - (x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (d) the "**Power of Appropriation Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (*Power of appropriation*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (*Power of appropriation*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (*Power of appropriation*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (*Power of appropriation*);

- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (*Power of appropriation*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (*Power of appropriation*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (*Power of appropriation*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (*Power of appropriation*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (*Power of appropriation*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (e) the "**Lien Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (*General lien*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (*General lien*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (*General lien*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (*General lien*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (*General lien*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (*General lien*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (*General lien*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (*General lien*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (*General lien*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the forego-

ing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and

- (f) the "**Client Money Additional Security Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).
8. "**Two Way Clauses**" means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011.

ANNEX 3 NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B") provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.
4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.
5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.
6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.
7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).
8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.

ANNEX 4 THE AUSTRIAN FINANCIAL COLLATERAL ACT

1. Scope of application of the Financial Collateral Act

1.1 Personal scope

The **Act on Financial Collateral Arrangements** (*Finanzsicherheiten-Gesetz – FinSG*) implementing Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended by Directive 2009/44/EC (the "**Financial Collateral Directive**") applies to collateral takers and collateral providers mentioned in § 2 (1) of the FinSG²⁵. Collateral takers and collateral providers mentioned in Art 1 (2) point (e) of the Financial Collateral Directive (i.e. corporations, entrepreneurs (*Einzelunternehmer*) and partnerships (*Personengesellschaften*)) are covered by the FinSG provided that the other party is an institution as defined in § 2 (1) FinSG (corresponding to the entities referred to in Article 1(2) (a) to (d) of the Financial Collateral Directive).

In order for a Firm entering into an Agreement to benefit from the FinSG (i.e. to fall within the scope of application of the FinSG) such entity (a "**Qualifying Entity**") will need to qualify as market participant within the meaning of § 2 (1) FinSG, i.e. as one of the entities referred to in Article 1(2) (a) to (d) of the Financial Collateral Directive.

The FinSG, therefore, applies to financial collateral arrangements between a Qualifying Entity and Austrian Credit Institutions, Austrian Corporations, Austrian Insurance Undertakings, Austrian Individuals, Austrian Investment Firms, Austrian Investment Funds, Austrian Partnerships and Austrian Sovereign Entities.

1.2 Type of collateral assets

The FinSG covers financial collateral arrangements in the form of (i) **title transfer financial collateral arrangements** including repurchase agreements under which full ownership of a financial collateral is transferred and (ii) **security financial collateral arrangements** under which the collateral is provided as security interest being a limited *in rem* right (i.e. the ownership remains with the collateral provider).

Financial collateral under the FinSG is defined as:

- (i) **cash** (*Barsicherheiten*) in the form of **money credited to an account** in any currency, or similar claims for the repayment of money such as money market deposits;
- (ii) **financial instruments** (*Finanzinstrumente*) being shares in companies and other securities equivalent to shares in companies and bonds and other

²⁵ Corresponding to Article 1(2) (a) to (d) of the Financial Collateral Directive.

forms of debt instruments²⁶ if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including interest in undertakings for collective investments, money market instruments and claims relating to or rights in or in respect of any of the foregoing; and

- (iii) **credit claims** (*Kreditforderungen*), being pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4 (1) of Directive 2006/48/EC, including the institutions listed in Article 2 of Directive 2006/48/EC, grants credit in the form of a loan, excluding claims the debtor of which is (i) a consumer (*Konsument*) pursuant to § 1 (1) no 2 and (3) of the Austrian Consumer Protection Act (*Konsumentenschutzgesetz – KSchG*) or (ii) a micro or small enterprise (*Kleinstunternehmen oder kleines Unternehmen*) as defined in Article 1 and Article 2 (2) and (3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, save where the collateral taker or the collateral provider of such credit claims is one of the institutions referred under § 2 (1) Z 2 FinSG²⁷.

Any financial collateral arrangement under the FinSG must be evidenced in writing and must be sufficiently clear as to identify the financial collateral. For this purpose it will suffice when securities are entered into a custody account (§ 4 (1) FinSG).

Under the FinSG as far as book entry securities (*im Effektingiro übertragene Wertpapiere*) collateral is concerned, ownership title and other rights in rem may be transferred by means of an entry (*Buchung*) in the register or an entry in the custody account (§ 4 (2) FinSG).

²⁶ The BWG contains a definition of debt instruments. According to § 2 no 40 BWG, debt instruments are defined as securities which evidence debt claims as well as the financial instruments derived from them. In this respect legal writing holds that this definition shall also cover credit linked notes or a credit default swaps (*Schütt in Dellinger (Hrsg)*, BWG, § 2 Rz 223).

²⁷ I.e. superordinate institutions of the financial market (*übergeordnete Finanzmarkteinrichtungen*): central banks, the European Central Bank, the Bank for International Settlements, multilateral development banks (as referred to in Annex VI, Part 1, Section 4 of Directive 2006/48/EC), the International Monetary Fund and the European Investment Bank.

ANNEX 5 SUMMARY OF AUSTRIAN AVOIDANCE RULES

1. Introduction

1.1 In insolvency proceedings the insolvency administrator can void and undo legal actions and legal transactions concerning the debtor's assets that have taken place within certain suspect periods prior to the opening of insolvency proceedings. Such reversal of legal transactions is referred to as avoidance.

1.2 General requirements for avoidance are:

- (i) the avoidance must result in an increase of the insolvent's estate (*Befriedigungstauglichkeit*);
- (ii) the challenged legal action or challenged legal transaction must have caused a direct or indirect²⁸ discrimination of the other creditors (*Gläubigerbenachteiligung*); and
- (iii) the avoidance claim must be filed by the insolvency administrator within one year after the opening of the insolvency proceedings.

1.3 The grounds for avoidance regulated in § 28 and § 29 of the IO apply regardless of whether the debtor was insolvent (i.e. illiquid or over-indebted) or not at the date of the transaction. As to the grounds for avoidance regulated in § 30 and § 31 of the IO, insolvency (i.e. illiquidity or over-indebtedness) is a pre-requisite.

Insolvency in this context means illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness in terms of insolvency law (*Insolvenzrechtliche Überschuldung*). A debtor is considered to be illiquid (*zahlungsunfähig*) if he is unable to pay his debts in due time (i.e. when they fall due), and is not in a position to acquire the necessary funds to satisfy those due liabilities (i.e. liabilities that are due at that very point in time) within a reasonable period of time. The debtor is considered to be over-indebted in terms of insolvency law, if the company's liabilities exceed its assets and the company has a negative prospect (*negative Fortbestehensprognose*).

2. Grounds for avoidance

The IO sets forth several grounds for avoidance in § 28 et seq. of the IO:

2.1 Avoidance due to intent to discriminate (*Anfechtung wegen Benachteiligungsabsicht*):

2.1.1 Pursuant to § 28 of the IO, legal acts of the debtor concluded with the intention to discriminate other creditors may be avoided.

²⁸ See the requirement of objective predictability of such indirect discrimination in case of § 31 IO.

The intention to discriminate requires knowledge as well as intention on behalf of the debtor to discriminate a creditor / creditors by concluding the legal act. It is nonetheless sufficient if the debtor suspects the result (discrimination) and accepts it. Intention to discriminate is fulfilled not only if the satisfaction of another creditor is prevented but also when it is delayed or aggravated.

The debtor's intention to discriminate does not have to be directed against certain or all of the debtor's creditors. The legal act may even be challenged if the debtor has no creditors at the time of the transaction.

The debtor's intention to discriminate must be present at the time of the transaction.

- 2.1.2 Depending on the extent of the other party's knowledge the timeframe when legal acts prior to the opening of insolvency proceedings must have been concluded in order to be avoided varies.
- 2.1.3 If the other party **knew** about the debtor's intention to discriminate, the transaction may be challenged if it was entered into within a period of **ten years** prior to the opening of insolvency proceedings (§ 28 no 1 of the IO).
- 2.1.4 If the other party was not aware but **should have been aware** of the debtor's intention to discriminate his creditors the period is shortened to **two years** prior to the opening of the insolvency proceedings (§ 28 no 2 of the IO). Slight negligence (*leichte Fahrlässigkeit*) of the other party is sufficient.
- 2.1.5 If the legal act was concluded with or for the benefit of a related party (as described by law) the burden of proof regarding the knowledge of the intention to discriminate is shifted to the related party i.e. the related party must prove that he had no knowledge and was not negligent in having no knowledge respectively (§ 28 no 3 of the IO). Should the debtor be a legal entity capable of being a party in a lawsuit then
 - (i) members of the managerial and supervisory bodies;
 - (ii) shareholders with unlimited liability; as well as
 - (iii) shareholders pursuant to § 5 EKEG (controlling or at least 25% shareholder)are deemed to be related parties.

2.2 Avoidance due to squandering of assets (*Anfechtung wegen Vermögensverschleuderung*):

- 2.2.1 Pursuant to § 28 no 4 of the IO, avoidance may apply to certain contracts, including purchase and exchange contracts, entered into by the debtor

that are considered a squandering of assets at the expense of other creditors, if the counterparty to the contract had or should have knowledge of such squandering.

- 2.2.2 Squandering of assets is assumed if an obvious incongruity exists between performance and consideration.
- 2.2.3 § 28 no 4 of the IO applies to transactions that took place within one year prior to the opening of insolvency proceedings.
- 2.3 Avoidance of dispositions with no consideration and analogous transactions (*Anfechtung unentgeltlicher Verfügungen und ihnen gleichgestellter Verfügungen*):
 - 2.3.1 Dispositions of the debtor that were concluded free of charge or equated with such dispositions may be challenged.
 - 2.3.2 A disposition free of charge requires that the disposing person acts with the intention not to receive any consideration in return. The disposition amounts to a sacrifice by the debtor. Examples of such dispositions are: donations, acknowledgement of a debt, granting security for liabilities, and payment of someone else's debt. If the debtor receives an adequate consideration in return (*angemessenes Entgelt*) the disposition may not be challenged pursuant to § 29 of the IO. Any economic benefit or interest may qualify as a consideration.
 - 2.3.3 § 29 of the IO applies to dispositions concluded within two years prior to the opening of insolvency proceedings.
- 2.4 Avoidance due to preferential treatment (*Anfechtung wegen Begünstigung*):
 - 2.4.1 Pursuant to § 30 (1) of the IO, the collateralization or satisfaction of a creditor carried out after insolvency²⁹ or after the request for the opening of insolvency proceedings or within 60 days preceding may be avoided if:
 - (i) the creditor obtained security or satisfaction which he was not or not in that way or at that time entitled to, unless he was not favoured by this transaction (objective preferential treatment); and
 - (ii) the transaction took place for the benefit of a creditor who knew or should have known about the debtor's intention of the preferential treatment (subjective preferential treatment).

If the preferred creditor is a related party of the debtor, he must prove that he had no knowledge of the debtor's intention.
 - 2.4.2 Objective preferential treatment does not require any subjective elements on part of the counterparty. In particular the counterparty's knowledge of the financial state of the debtor is irrelevant. The creditor is considered

²⁹ Regarding the definition of insolvency see 1.4.

"not entitled" to the satisfaction/security if his claim is for instance an *obligatio naturalis*. "**Not in that way**" can be a satisfaction/security by assignment on payment (*Zession zahlungshalber*) or the return of goods instead of cash payment. A satisfaction/security "**not at that time**" is for instance a payment before the due date.

2.4.3 Subjective preferential treatment requires the debtor's intention and the creditor's knowledge of the debtor's intention to favour a creditor. As insolvency is a prerequisite and the debtor in insolvency is bound by the principle of equal creditor treatment, the debtor's intention to satisfy/secure a particular creditor **before** another creditor is sufficient to be considered subjective preferential treatment. Courts usually consider the debtor's perception of his own financial situation when judging whether a debtor intended to favour a creditor. The debtor must therefore know of his (imminent) insolvency in order to favour a creditor.

2.4.4 Transactions carried out more than **one year** before the opening of the insolvency proceedings may not be contested pursuant to § 30 of the IO.

2.5 Avoidance due to knowledge of insolvency (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*):

2.5.1 Pursuant to § 31 of the IO legal acts carried out after insolvency (see 1.4 above) or after filing for the opening of insolvency proceedings may be challenged if (i) the legal act constitutes satisfaction or securing of a creditor (*Befriedigung oder Sicherstellung*) or (ii) is considered a disadvantageous legal transaction (*nachteiliges Rechtsgeschäft*).

2.5.2 Satisfying or securing a creditor:

The legal act by which a creditor's claim is satisfied or secured may be challenged if the creditor knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition. Also the termination of a contract and/or the creation of a set-off situation can be qualified as challengeable transaction.

2.5.3 Disadvantageous legal transactions:

Disadvantageous legal transactions of the debtor that are **directly** disadvantageous to the creditors may be challenged if the other party knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition. Legal transactions are considered as being directly disadvantageous if the parties' considerations are objectively unbalanced.

Disadvantageous legal transactions of the debtor that are **indirectly** disadvantageous to creditors may only be challenged if the other party (i) knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition **and** (ii) the disadvantage for the insolvency estate was objectively predictable at the time of the transaction. Such objective

predictability is in particular on hand if a restructuring plan is obviously unqualified (*offensichtlich untaugliches Sanierungskonzept*). A legal transaction is considered as indirectly disadvantageous (*mittelbare Nachteiligkeit*) if the transaction is objectively balanced at the time of its conclusion but becomes objectively unbalanced later on.

If the contracting party and thus beneficiary of the satisfaction/securing or disadvantageous act is a related party, he must prove that he had no knowledge of the debtor's illiquidity or insolvency petition. In case of an indirectly disadvantageous transaction the contracting party must in addition prove the disadvantage to the insolvency estate was objectively unpredictable.

- 2.5.4 Transactions carried out more than **six months** before the opening of the insolvency proceedings may not be contested pursuant to § 31 of the IO.