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EB-HÖ-PST/FOA/22001

FOA Netting Opinion issued in relation to the FOA Netting Agreements, FOA Clearing Module and ISDA/FOA Clearing Addendum

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 enforceability and validity of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision contained in a FOA Netting Agreement or a Clearing Agreement.

We understand that your fundamental requirement is for the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision to be substantiated by a written and reasoned opinion. Our opinions expressed in this opinion letter (the "**Opinion**") on the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision is given in paragraph 3 of this Opinion.

Further, this Opinion covers the enforceability of the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision and the Title Transfer Provisions.

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 Austrian Corporations;

1.1.2 Austrian Partnerships;

1.1.3 Austrian Banks; and

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1.1.4 generally, in respect of Parties incorporated or formed under the laws of another jurisdiction which are companies or credit institutions and which have a branch or branches located in this jurisdiction (see at paragraph 3.15 below).

1.2 This Opinion is also given in respect of Parties (together with the Parties referred to at 1.1.1 through 1.1.3 above the "**Austrian Counterparties**") 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 Investment Firms (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);

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

(i) public law entities (*öffentlich-rechtliche Körperschaften*), 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 We should emphasize that we do not express an opinion whether the parties to which this Opinion applies may enter into any or all of the Transactions listed in Annex 2 under applicable Austrian laws, their constitutional documents and / or their licenses.

1.5 This Opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the FOA Netting Agreement and the Clearing Agreement are expressed to be governed by English law.

1.6 This Opinion is given in respect of only such of those Transactions which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.

1.7 This Opinion covers all Transactions listed in Annex 2 to this Opinion whether entered into on an exchange, any other forms of organised market place or multilateral trading facility, or over the counter. In case the Provisions on Netting Agreements do not apply (see at paragraph 3.2.2.2 below), the enforceability under Austrian substantive insolvency law of the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision

in respect of the Transactions mentioned at Sections A (v), (B), (C), (D), and (E)[1] of Annex 2 to this Opinion depends on whether they are Transactions referred to in § 20 (4) IO (including by reference to Annex 2 to § 22 BWG; see Annex 7)[2].

1.8 In this Opinion, 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.

1.9 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.

1.10 This Opinion is solely based on the laws and regulations officially issued and published by any Austrian federal legislative authority, as applied and officially published 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 FOA Netting Agreement, the Clearing Agreement, the FOA Clearing Module or the ISDA/FOA Addendum, 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.

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[1] With respect to the Transaction referred to in (E) of Annex 2, we believe that certain transactions mentioned under paragraph (4) of Section C of Annex 1 to Directive 2004/39/EC would not be covered by § 20 (4) IO to the extent that they relate to "other derivatives instruments, financial indices or financial measures". Transaction relating to precious metals and gold will only be covered by § 20 (4) IO to the extent that such Transactions would be of the type as referred to in section 2 and 4 of Annex ./2 to § 22 BWG (see Annex 7).

[2] As of 1 January 2014, in case that the Provisions on Netting Agreements do not apply (see at paragraph 3.2.2.2 below), the law will be less clear whether all Transaction will be covered by the netting safe haven of § 20 (4) IO. Please refer to paragraph 3.3.2.1 in this respect.

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1.11 Definitions

Terms used in this Opinion and not otherwise defined herein shall have the meanings ascribed to them in the FOA Netting Agreement or the Clearing Agreement, unless the context specifies otherwise. Where, in an FOA Netting Agreement or, as the case may be, a Clearing Agreement, a defined term has been changed but the changed term corresponds to a term defined in a FOA Published Form Agreement or, as the case may, the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or this Opinion, this Opinion may be read as if terms used herein were the terms as so changed.

1.11.1 The laws and procedures referred to in paragraph 3.1.1.2, 3.1.2.3, 3.1.2.4 and 3.1.2.5 are together called "**Proceedings**".

1.11.2 The laws and procedures referred to in paragraphs 3.1.1.1 and 3.1.2.2 are together called "**Insolvency Proceedings**";

1.11.3 "**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction.

1.11.4 "**FOA Member**" means a member (excluding associate members) of the Futures and Options Association which subscribes to the Futures and Options Association's Netting Analyser service (and whose terms of subscription give access to this Opinion); and

1.11.5 A reference to a "**paragraph**" is to a paragraph of this Opinion.

1.11.6 "**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*).

1.11.7 "**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

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are organized as joint stock corporations (*Aktiengesellschaft – AG*), limited liability companies (*Gesellschaft mit beschränkter Haftung – GmbH*), cooperative associations (*Genossenschaften*) or savings banks (*Sparkassen*)[3].

1.11.8 "**Austrian Partnerships**" means partnerships (*Personengesellschaften*) (i.e. unlimited 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.

Annex 3 contains further definitions of terms relating to the FOA Netting Agreement and the Clearing Agreement.

2 Assumptions

We assume:

2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this Opinion has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.

2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws.

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[3] § 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, such foreign banks are not covered. § 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.

2.3 That each Party and any person signing the FOA Netting Agreement or, as the case may be, the Clearing Agreement or a Transaction on behalf of such Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

2.4 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction.

2.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement has been properly executed by both Parties.

2.6 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any Proceedings or Insolvency Proceedings against either Party.

2.7 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.

2.8 The FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, 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.

2.9 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.

2.10 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates, and (b) will be an Austrian Credit Institution.

2.11 That the obligations assumed under the FOA Netting Agreement or, as the case may be, the Clearing Agreement and the Transactions are "mutual" between the Parties, in the sense that the Parties are each personally and solely liable as re-

gards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party.

2.12 In relation to the opinions set out at paragraphs 3.8 and 3.9 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.

2.13 That each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).

2.14 That all margin transferred pursuant to the Title Transfer Provision 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 transfer of margin pursuant to the Title Transfer Provisions will have been effectively carried out.

2.15 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

2.16 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions thereunder are entered into by a non-Austrian Party and an Austrian Counterparty.

2.17 Specifically with respect to the opinion given in paragraphs 3.10 below, that the Firm qualifies as entity referred to in § 2 (1) of the Financial Collateral Act (*Finanzsicherheitengesetz – FinSG*)[4].

2.18 As regards the opinion given in paragraph 3.10 below, that the non-cash margin qualifies as financial collateral under FinSG[5].

2.19 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

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[4] Substantially corresponding to Article 1(2) (a) to (d) of 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**").

[5] See also section 1.2 of Annex 7 in this respect.[6] The term financial institutions is defined in § 1 (2) BWG. Financial institutions do not hold a banking license but are authorized to engage in the activities set out in § 1 (2) nos 1 to 8 BWG (for instance conclusion of leasing contracts). Financial institutions are not authorized, however, to engage in the banking activities set out in § 1 (1) BWG (including for instance trading in securities, financial instruments or derivative contracts).

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(*Hypothekenbankgesetz – HypBG*), the Mortgage Bonds Act (*Pfandbriefgesetz – PfandbriefG*) and the Covered Bonds Act (*Gesetz betreffend fundierte Bankschuldverschreibungen – FBSchVG*) and no margin will be taken from such cover pool assets.

2.20 No Austrian Counterparty will be a CCP.

3 Opinion

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications, limitations and explanations set out in paragraph 4 below and, where applicable, in the relevant paragraph of this Opinion specifically with respect to an opinion statement, we are of the following opinion.

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which an Austrian Credit Institution, an Austrian Corporation or an Austrian Partnership would be subject in this jurisdiction are described in paragraphs 3.1.1 to 3.1.2.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings and Proceedings, if supplemented or amended as follows:

"[(•)] [you]/[a party] or a creditor of [you]/[a party] applies to the competent insolvency court seeking the opening of insolvency proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[such party];"

"[(•)] [you]/[a party] appl[y]/[ies] to the competent court seeking opening of reorganisation proceedings (*Reorganisationsverfahren*) under the Austrian Business Reorganisation Act (*Unternehmensreorganisationsgesetz – URG*) against [you]/[such party];"

"[(•)] the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) or during effective special receivership proceedings (*Geschäftsaufsichtsverfahren*) the receiver (*Aufsichtsperson*) applies to the competent insolvency court seeking the opening of bankrupcty proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

"[(•)] [you]/[a party] or the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) applies to the competent court seeking the opening of special receivership proceedings (*Geschäftsaufsichtsverfahren*) under the Austrian Banking Act (*Bankwesengesetz - BWG*) against [you]/[a party];"

"[(•)] regulatory measures (*aufsichtsbehördliche Maßnahmen*) under the Austrian Banking Act (*Bankwesengesetz – BWG*) are implemented by the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) against [you]/[a party];"

3.1.1 Types of Proceedings under Austrian law in respect of Austrian Corporations and Austrian Partnerships

3.1.1.1 Insolvency Proceedings

The Insolvency Code (*Insolvenzordnung – IO*) governs insolvency proceedings (*Insolvenzverfahren*) against debtors such as, *inter alia*, Austrian Corporations and Austrian Partnerships. Depending on whether or not a restructuring plan (*Sanierungsplan*) is presented with the application for the opening of insolvency proceedings, insolvency proceedings are called **restructuring proceedings** (*Sanierungsverfahren*) or **bankruptcy proceedings** (*Konkursverfahren*). The term insolvency proceedings used in the Insolvency Code covers both, restructuring proceedings and bankruptcy proceedings.

Bankruptcy proceedings must be opened by the court upon a petition filed by the debtor or any of his creditors whenever it has been established that a debtor is **illiquid** (*zahlungsunfähig*) or is **overindebted** in the meaning of insolvency law (*insolvenzrechtlich überschuldet*).

Restructuring proceedings may also be initiated if the risk of the debtor's inability to pay its debts is at least imminent (*drohende Zahlungsunfähigkeit*) and the debtor files an application for the opening of restructuring proceedings.

Restructuring proceedings intend to discharge the debtor from a part of his debts and to enable the debtor to continue his activities. The debtor has to offer at least a **quota of 20 %** to the unsecured creditors, payable within two years. A qualified simple majority of unsecured creditors must approve the restructuring plan. Qualified simple majority means that the simple majority of unsecured creditors in number present at the hearing must vote in favour of the restructuring plan and that the total sum of these unsecured creditors' claims must amount to 50 % of the unsecured claims present at the hearing. If the restructuring plan is accepted by the creditors, confirmed by the court and fulfilled by the debtor, the latter is released from the rest of his debts.

If the debtor offers a quota of at least 30% and provides certain qualified documents, he is entitled to self administration (*Eigenverwaltung*). In this case he is monitored by a court appointed restructuring administrator (*Sanierungsverwalter*) to whom certain powers are reserved.

Unless the debtor meets the requirements for self administration, the debtor is **deprived of his rights** to dispose of the assets subject to insolvency, i.e. the insolvent's estate (*Insolvenzmasse*). After the opening of insolvency proceedings without self-administration legal acts of the debtor in relation to the insolvent's estate take no effect towards the creditors (§ 3 para 1 IO). The court appoints an **insolvency administrator** (*Insolvenzverwalter*) along with its decision on the opening of insolvency proceedings. After the opening of insolvency proceedings without self administration only the **insolvency administrator** is entitled to act on behalf of the insolvent's estate.

If neither a restructuring plan nor the sale of the debtor's business is possible, the insolvency administrator will break up the company and the bankruptcy proceedings will ultimately lead to the sale and distribution of the debtor's assets, the debtor remaining liable for his residual debts.

The opening of insolvency proceedings takes effect as of 0:00 hours of the day following the publication of the receiving order in the official insolvency data base (www.edikte.justiz.gv.at).

3.1.1.2 Reorganisation proceedings

A debtor who is neither illiquid nor overindebted but is in need of reorganisation (*Reorganisationsbedarf*) (which will be assumed, if he does not meet certain financial ratios) has to file for the initiation of **reorganisation proceedings** (*Reorganisationsverfahren*) under the Business Reorganisation Act (*Unternehmensreorganisationsgesetz – URG*). Contrary to insolvency (bankruptcy and restructuring proceedings), reorganisation proceedings do **not** lead to a mandatory reduction of the creditors' claims to a certain quota. Reorganisation

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proceedings do **not apply** to Austrian Credit Institutions, pension funds, Austrian Insurance Undertakings, Austrian Investment Firms and financial institutions[6] such as leasing companies.

An **application** for the opening of reorganisation proceedings can only be filed by the debtor. Within 60 days after the initiation of reorganisation proceedings, the debtor has to present a **reorganisation plan** (*Reorganisationsplan*) containing measures to improve its financial and earnings status. The court appoints a reorganisation auditor (*Reorganisationsprüfer*) to examine and assess the reorganisation plan. The opening of such proceedings is not made public.

According to § 18 URG, the "suspect periods" under Austrian insolvency law are extended for the term of pending reorganisation proceedings.

Pursuant to § 19 URG, a contractual stipulation providing for automatic termination or a contractual right to terminate an agreement in the event reorganisation proceedings are opened will be unenforceable (if this was the only reason for terminating that agreement). This is a mandatory provision of Austrian law.

3.1.2 Types of Proceedings under Austrian law with respect of Austrian Credit Institutions

3.1.2.1 General

The rules governing insolvency of **Austrian Credit Institutions** are set forth in §§ 82 to 91 of the Austrian Banking Act (*Bankwesengesetz – BWG*). Pursuant to § 82 (1) BWG, **only bankruptcy proceedings** (*Konkursverfahren*) but not restructuring proceedings (*Sanierungsverfahren*) may be instituted against an Austrian Credit Institution. Also Austrian

[6] The term financial institutions is defined in § 1 (2) BWG. Financial institutions do not hold a banking license but are authorized to engage in the activities set out in § 1 (2) nos 1 to 8 BWG (for instance conclusion of leasing contracts). Financial institutions are not authorized, however, to engage in the banking activities set out in § 1 (1) BWG (including for instance trading in securities, financial instruments or derivative contracts).

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Credit Institutions cannot be subject to reorganisation proceedings.

In addition to bankruptcy proceedings the BWG provides for **special receivership proceedings** (*Geschäftsaufsichtsverfahren*) that may be instituted against an illiquid or overindebted Austrian Credit Institution (§§ 83 to 91 BWG) as well as **regulatory measures** according to § 70 (2) BWG (*aufsichtsbehördliche Maßnahmen*) or § 148 (1) InvFG 2011. Special provisions which may be relevant for certain aspects of the insolvency of Austrian Credit Institutions are also contained in other statutes including the Act on Custody (*Depotgesetz – DepotG*), the Act on Mortgage Bonds (*Pfandbriefgesetz – PfBrG*) and the Act on Cooperative Associations (*Gesetz über Erwerbs- und Wirtschaftsgenossenschaften – GenG*).

3.1.2.2 Bankruptcy proceedings

As regards bankruptcy proceedings of an Austrian Credit Institution, the rules of the **BWG refer** to the provisions of the **IO**.

Pursuant to § 82 (3) BWG, **only** the **Austrian Financial Market Authority** (*Finanzmarktaufsichtsbehörde – FMA*) in its capacity as banking supervisory authority may file for the institution of bankruptcy proceedings against an Austrian Credit Institution. When special receivership proceedings are instituted against the Austrian Credit Institution, only the court appointed receiver (and not the FMA) may file for the institution of bankruptcy proceedings.

3.1.2.3 Special receivership proceedings

Austrian Credit Institutions that are overindebted or illiquid may, if the overindebtedness or illiquidity is likely to be cured, apply for **special receivership proceedings** with the competent court.

Such application may also be made by the FMA. If receivership is ordered, the court appoints a receiver (*Aufsichtsperson*) who supervises the management of the Austrian Credit Institution. Unless the court orders otherwise, the Austrian Credit Institution may continue its business operations under the supervision of the receiver. For the conduct of business which does not belong to its normal business opera-

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tions, the consent of the receiver is required. Special receivership according to §§ 83 et seq. BWG can last for up to one year. It is not possible for the Austrian Credit Institution's business partners to set off claims originating prior to the institution of receivership against claims of the Austrian Credit Institution under supervision originating after the institution of such proceedings.

Special receivership proceedings take effect as of 0:00 hours of the day following publication of the receiving order in the insolvency data base.

3.1.2.4 Regulatory measures

If an Austrian Credit Institution's obligations towards its creditors are endangered, in particular if the assets entrusted to it are at risk, the FMA can order, by way of decree, **measures** limited in time prior to bankruptcy proceedings and special receivership proceedings in order to avoid such risk (§ 70 (2) BWG) but bankruptcy proceedings or special receivership proceedings may still follow.

For this purpose, a **government commissioner** (*Regierungskommissär*) with expert experience can be appointed who shall prohibit the Austrian Credit Institution from conducting any business which might increase the risk referred to above. The FMA may even take more far-reaching measures and prohibit the Austrian Credit Institution from conducting its business in whole or in part. In this event, the Austrian Credit Institution may conduct only individual transactions expressly approved by the government commissioner that do not increase the risk for the Austrian Credit Institution's creditors. Current practice allows the government commissioner to **comprehensively interfere** with the business activities of an Austrian Credit Institution. The government commissioner may prohibit transactions or, if the Austrian Credit Institution was already prohibited from conducting such transactions, may allow individual transactions. Within the scope of his powers, the government commissioner may prevent the Austrian Credit Institution from satisfying its legal obligations. In particular, the government commissioner's possibilities to interfere with the Austrian Credit Institution's business do not (necessarily) include insolvency measures because his activities do not depend on overindebtedness or illiquidity of an Austrian Credit Institution.

Whether regulatory measures instituted by the FMA will be made public, is up to the discretionary decision of the FMA (§ 70 (7) BWG). The institution of regulatory measures will take effect as of the date specified by the FMA in its decree.

Based on the text of the Insolvency Events of Default Clause, we would take the view that regulatory measures against Austrian Credit Institutions would not in any case fall within the events specified in the Insolvency Events of Default Clause. In case that a government commissioner (*Regierungskommissär*) was appointed, we believe that good arguments could be made to qualify such event as "appointment" of a "trustee" or "administrator". Such reasoning could in our opinion, however, not be relied on in instances where no government commissioner (*Regierungskommissär*) was appointed. In case that a regulatory measure would involve a restriction for the Austrian Credit Institution to satisfy its legal obligations, we believe that good arguments could be made to qualify such event as "freeze" or "moratorium" under "regulatory or supervisory law". Whether indeed this is the case will also depend on the interpretation of such term(s) under the laws governing the FOA Netting Agreement and the Clearing Agreement. However, as there are a variety of regulatory measures available to the FMA, we do not believe that regulatory measures pursuant to § 70 (2) BWG against Austrian Credit Institutions would in general be adequately referred to in the Insolvency Events of Default Clause.

3.1.2.5 Regulatory measures against Investment Fund Management Companies

If an Austrian Investment Fund's obligations towards the unit holders or customers of the Investment Fund Management Company[7] are endangered, in particular if the assets entrusted to it are at risk, the FMA can order, by way of decree, **measures** in order to avoid such risk, limited in time for 18 months (§ 148 (1) InvFG 2011).

[7] An Investment Fund Management Company qualifies as Austrian Credit Institution; please see also Schedule 5.

These measures are similar to § 70 (2) BWG (see at paragraph 3.1.2.4 above) and may include:

(i) prohibition of withdrawal of capital or profits of the Investment Fund Management Company;

(ii) requesting that units in the Austrian Investment Fund shall not be issued, redeemed or paid out;

(iii) appointment of a **government commissioner** (*Regierungskommissär*) with expert experience who shall, *inter alia*, prohibit the Investment Fund Management Company from conducting any business which might increase the risk referred to above;

(iv) bar the managing directors of the Investment Fund Management Company from conducting business for the Investment Fund Management Company; or

(v) prohibit the Investment Fund Management Company from conducting business at all.

3.2 Recognition of choice of law

3.2.1 The choice of English law to govern the FOA Netting Agreement, or as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England.

3.2.2 Within the Scope of the Provisions on Netting Agreements (as defined at paragraph 3.2.2.2 below) an Insolvency Representative or court in this jurisdiction would have regard exclusively to English law as the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, in determining the enforceability or effectiveness of the FOA Netting Provisions, the Clearing Module Netting Provision and the Addendum Netting Provision.

3.2.3 Outside the Scope of the Provisions on Netting Agreements (as defined at paragraph 3.2.2.2 below) an Insolvency Representative or court in this jurisdiction would have regard to Austrian law in determining the enforceability or effectiveness of the FOA Netting Provisions, the Clearing Module Netting Provision and the Addendum Netting Provision, even if these are expressed to be governed by English law.

3.2.4 Notwithstanding the choice of English law as the law governing the FOA Set-Off Provisions, the Clearing Module Set-Off Provisions and the Addendum Set-Off Provisions, in case of Insolvency Proceedings, pursuant to § 221 (1) IO and Art 2 (2) item (d) of Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (the "**Regulation**"), Austrian substantive insolvency law would, subject to as otherwise explained in

this paragraph 3.2 and in paragraph 3.7.1.1.2 below, be relevant to determine the conditions under which set-off may be invoked.

We are of this opinion because:

3.2.4.1 Applicable law with respect to the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision

Austrian international insolvency law is governed by the Regulation, several bilateral insolvency treaties[8] and the provisions on international insolvency law in §§ 217 to 251 IO (the "**Provisions on International Insolvency Law**").

The Provisions on International Insolvency Law shall only apply to insolvency proceedings having a **cross-border effect** ("**International Insolvency Proceedings**") as far as the Regulation or international law do not provide otherwise (§ 217 IO). Insolvency proceedings without a cross-border effect are solely governed by Austrian substantive insolvency law excluding the Regulation and the Provisions on International Insolvency Law.According to § 221 (1) IO, as a general principle, **Austrian substantive insolvency law** shall be applicable to International Insolvency Proceedings and their effects, if Insolvency Proceedings are **opened in Austria**. In respect of these proceedings Austrian substantive insolvency law shall determine *inter alia* the conditions under which set-offs may be invoked and the effects of insolvency proceedings on current contracts to which the debtor is party.

§§ 222 to 235 IO contain exemptions to that general principle by providing conflict of law rules identical to those set out in the Regulation (§ 221 IO) ("**Conflict Rules**").

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[8] Austria has entered into bilateral insolvency treaties with Belgium (1969), France (1979), Germany (1985), Italy (1990) and the UK (1962). All insolvency treaties cover insolvency proceedings. The treaties with Belgium and France also cover special receivership proceedings and bankruptcy proceedings of credit institutions. Insolvency proceedings of credit institutions are expressly excluded from the scope of application of the bilateral treaties with Germany and Italy. Insurance Undertakings are only covered by the treaty with France. In general, these treaties provide that all assets and liabilities are combined and handled as part of the proceedings in the country of the debtor's headquarters. After its entry into force, the Regulation replaced, in respect of the matters referred to therein, the above mentioned bilateral insolvency treaties (the bilateral treaties still have some application to peripheral issues though).

The Provisions on International Insolvency Law also implement Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of banks ("**Directive 2001/24/EC**") and Directive 2001/17/EC of 4 April 2001 on the reorganisation and winding-up of insurance undertakings ("**Directive 2001/17/EC**") into Austrian law. The legislator adopted special provisions in §§ 243 to 251 IO, which apply exclusively to Austrian Credit Institutions and Austrian Insurance Undertakings ("**Special Provisions for Banks and Insurance Undertakings**"). Further amendments in application of these Directives were made in the **BWG** and the **VAG**. They deal with the international aspects of special receivership proceedings in respect of Austrian Credit Institutions and regulatory measures in respect of Austrian Credit Institutions and Austrian Insurance Undertakings.

3.2.4.2 Austrian law provisions on Netting Agreements

§ 233 IO ("Netting agreements") applies to bankruptcy proceedings opened in Austria against Austrian Credit Institutions or Austrian branches of banks domiciled outside the EEA ("**Foreign Banks**"). The identical provision in § 81l BWG ("Netting agreements") applies to special receivership proceedings and – pursuant to § 70 (2b) BWG – regulatory measures instituted in Austria in respect of Austrian Credit Institutions or Austrian branches of Foreign Banks

In respect of Austrian Corporations, Austrian Partnerships, Austrian Insurance Undertakings, Austrian Investment Firms, Austrian Individuals and Austrian Sovereign Entities **§ 233 IO** applies. § 233 IO contains an exemption in respect of netting agreements to the general principle that Austrian substantive insolvency law shall apply to insolvency proceedings and their effects if insolvency proceedings are opened in Austria.

Whilst Directive 2001/24/EC only applies to Austrian Credit Institutions and Directive 2001/17/EC only applies to Austrian Insurance Undertakings, § 233 IO generally applies to **all types of parties to netting agreements** which are within the scope of the Conflict Rules set out in §§ 221 to 235 IO. § 233 IO does **not apply** to **regulatory measures** in respect of Austrian **Insurance Undertakings** though (§ 98 (6) VAG).

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§ 233 IO[9] reads (in English translation) as follows:

"*Netting agreements shall be governed solely by the law of the contract which governs such agreements*".

Neither the explanatory remarks of the Austrian legislator to § 233 IO nor Directive 2001/24/EC in respect of the underlying provision of Article 25 provide guidance for a definition of the term "netting agreement".

The BWG contains a definition of "contractual netting agreements". Pursuant § 2 no 71 BWG such contractual netting agreements are defined as "*bilateral contracts for novation and other bilateral netting agreements*". A "*bilateral contract for novation is considered to exist where mutual claims and obligations are automatically amalgamated in such a way that this novation fixes one single net amount each time novation applies and thus creates a legally binding, single new contract extinguishing former contracts*". Austrian legal writing holds that there is no indication that the application of § 233 IO shall be limited exclusively to such contractual netting agreements as defined in the cited provision. We believe that this assessment is convincing, in particular considering that the definition in § 2 no 71 BWG arguably mainly serves solvency purposes (and was prior to the 2006 implementation of Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) ("**Directive 2006/48/EC**") contained in § 22 (6a) BWG (in relation to minimum capital requirements)).

On a more general note, we believe that any agreement aimed at benefitting from § 233 IO would have to fall within the following understanding of **close-out netting**: the netting mechanism under such agreement would need to provide for a process involving

(i) the termination of all open transactions on the occurrence of a pre-defined event;

[9] See also § 81l BWG.

(ii) the liquidation of those transactions so as to attribute to them a value (usually either by reference to their market value or to the cost of replacing them); and

(iii) the aggregation of the values attributed to those transactions, giving rise to a single net debt owed by one party to the other.

This understanding of a netting-agreement is also consistent and in line with §§ 256 (1), 257 (1) and 257 (2) no 2 of the Austrian Regulation of the Financial Market Authority (FMA) on the Solvency of Credit Institutions (Solvency Regulation (*Solvabilitätsverordnung – SolvaV*)).

In our opinion, the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision constitute netting agreements within the meaning of § 233 IO. If § 233 IO and – in respect of special receivership proceedings and regulatory measures against Austrian Credit Institutions – the identical provision of § 81l BWG apply ("**Provisions on Netting Agreements**"), it is a **matter of the law governing the FOA Netting Agreement and the Clearing Agreement** whether close-out netting is enforceable in Insolvency Proceedings over the assets of an Austrian Counterparty.

The **Provisions on Netting Agreements apply** to:

(i) **insolvency proceedings** opened in Austria against the assets of **Austrian Corporations, Austrian Sovereign Entities, Austrian Individuals** and **Austrian Partnerships**;

(ii) **bankruptcy proceedings** opened in Austria against the assets of **Investment Firms**;

(iii) **bankruptcy proceedings** opened in Austria against the assets of **Austrian Insurance Undertakings**; and

(iv) **bankruptcy proceedings** and **special receivership proceedings** opened in Austria against the assets of an **Austrian Credit Institution** as well as **regulatory measures** instituted in Austria against a **Austrian Credit Institution** or the **Austrian branch** of a **Foreign Bank**

provided that the above mentioned insolvency proceedings and reorganisation measures have a **cross-border effect.**

The level of international element that needs to be present in order to apply the Provisions on Netting Agreements remains yet to be clarified by the Austrian courts. In the various scenarios that are conceivable (ranging from a "true" cross-border environment in transactions between an entity having its head or home office abroad and an Austrian entity, via scenarios where the foreign entity would operate via its Austrian branch, scenarios where two Austrian entities contract but one of them has at least one foreign branch (that may or may not be involved in the Transaction) to scenarios where the only foreign element – leaving aside the choice of a foreign law governing the FOA Netting Agreement or Clearing Agreement – is to be seen in some of the assets underlying the Transactions, for example) it is difficult to predict where the line will finally be drawn by the Austrian courts. The stronger the nexus to Austria (and, conversely, the more remote the international element) gets on the aforementioned sliding scale, the higher the likelihood that Austrian courts will finally not resort to the law applicable by virtue of the Provisions on Netting Agreements and Austrian private international law, but will apply the Austrian substantive netting privileges set out in § 20 (4) IO (see at paragraph 3.3.2.1 below).

The Provisions on Netting Agreements **do not apply**:

(i) if the above mentioned insolvency proceedings and reorganisation measures have **no cross-border effect**;

(ii) to **regulatory measures** in respect of **Austrian Insurance Undertakings**;

(iii) to **liquidation procedures** with respect to **Austrian Investment Funds** under the InvFG 2011; and

(iv) to **special receivership proceedings** opened in Austria against the assets of an **Investment Firm** as well as **regulatory measures** instituted in Austria against an **Austrian Investment Firm**.

3.3 Enforceability of FOA Netting Provision

In relation to an FOA Netting Agreement, or in relation to a Clearing Agreement where the Defaulting Party acts as Client, the FOA Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following an Event of Default, including as a result of the opening of any Insolvency Proceedings or Proceedings:

3.3.1 the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and

3.3.2 the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because:

Within the scope of the Provisions on Netting Agreements (see at paragraph 3.2.2.2 above) the effectiveness of the FOA Netting Provision depends on the laws **governing the relevant FOA Netting Agreement or Clearing Agreement (as the case may be)**, i.e. **English law**.

If the Provisions on Netting Agreements do not apply, the enforceability of the FOA Netting Provision is governed by Austrian substantive insolvency law. If so, the following applies:

3.3.2.1 Insolvency Proceedings

Under the **provisions of the IO,** claims and obligations for payment of an insolvent person are generally recognized in the insolvency proceedings as they existed at the effective date of institution of insolvency proceedings (*Insolvenzverfahren*).

Pursuant to § 21 (1) IO, the **insolvency administrator** has the right to rescind the contract not yet fully performed upon institution of insolvency proceedings over the debtor. § 21 (1) IO allows parties to contractually stipulate automatic termination of the contract or a right of rescission of the **creditor** in case insolvency proceedings are instituted against the debtor.

However, according to § 25b (1) IO, agreements pursuant to which a non-defaulting party may terminate a contract upon opening of insolvency proceedings are not enforceable. Pursuant to § 25b (2) IO, agreements providing for a right of termination or automatic early termination are only enforceable in case the transactions concerned qualify as transactions under § 20 (4) IO.

§ 20 (4) IO expressly provides that claims arising out of contracts involving

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(i) the special off-balance sheet financial transactions referred to in Annex ./2 to § 22 BWG including derivative instruments for the transfer of credit risks;

(ii) interest rate, currency, precious metal, raw material, stock and other securities options sold and index options;

(iii) trades (*Handelsgeschäfte*) relating to listed goods and commodities pursuant § 1 (4) of the Austrian Stock Exchange Act (*Börsegesetz – BoerseG*) as long as they do not serve for own usage (*Deckung des Eigenbedarfs*) but only serve trading purposes (*Handelsgeschäfte*);

(iv) repurchase transactions (§ 50 (1) BWG) and reverse repurchase transactions of the securities trading book; and

(v) securities borrowing and securities lending transactions of the securities trading book

that **have been rescinded** because of the institution of insolvency proceedings may be set off if the parties to a contract **have agreed** that these contracts are **automatically rescinded** or **may be rescinded at the option of a party** in case of the institution of insolvency proceedings against a counterparty and that **all** mutual claims are to be set off (an uncertified translation of § 20 (4) IO is attached as Annex 6 to this Opinion; an uncertified translation of Annex ./2 to § 22 BWG is attached as Annex 7 to this Opinion).

§ 20 (4) IO does not only deal with mere set-off[10], but also includes the termination and aggregation of all mutual claims upon the opening of bankruptcy proceedings (i.e. close-out netting). According to § 20 (4) IO the underlying contract has to be terminated as a consequence of a contractually stipulated right of the non-defaulting party or a contractually stipulated automatic termination upon the opening of insolvency proceedings.

We believe that from the **Transactions** mentioned in Sections (A)(i), (ii), (iii) and (iv) of Annex 2 to this Opinion (and

[10] Contrary to Article 6 (1) of the Regulation and § 223 IO (§ 81c BWG).

the equivalent back-to-back Transactions) the commonly traded ones should figure among the transactions set forth in **§ 20 (4) IO and / or Annex 2 to § 22 BWG** respectively (an uncertified translation of Annex 2 to § 22 BWG is attached hereto as Annex 6). For sake of completeness, we should mention that in respect of Transactions entered into on a "spot" basis[11], there is a risk that they will (absent elements of optionality or other derivative-like characteristics) **not** be included in Annex 2 to § 22 BWG and / or § 20 (4) IO either, irrespective of the underlying. As concerns the Transactions mentioned at Sections (A)(v), (B), (C), (D) and (E)[12] of Annex 2 to this Opinion, we cannot confirm (absent a more specific description of the Transactions) whether they would qualify for purposes of § 20 (4) IO.

In case § 20 (4) IO is not applicable, enforceability of close-out netting will essentially depended on whether one comes to the conclusion that the **claims to be netted** have **vested prior** to or **after** the **initiation** of insolvency proceedings. Prior vesting has been advocated in legal writing pre-1997 (when Austrian netting legislation was introduced), but has not been confirmed by case law. The lack of available case law on this point is likely due to the fact that, with effect of 1 January 1997, the netting privileges set out in § 20 (4) IO were introduced.

Effective as of 1 January 2014. Annex 2 to § 22 BWG will cease to exist. For solvency purposes, the Austrian legislator in its Expalantory Notes refers to Annex II of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institu-

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[11] Customarily, these are transactions where settlement occurs at the latest two banking days after the trade date; this also concurs with the definition of spot contract in Art 38 (2) of Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing MiFID.

[12] With respect to the Transaction referred to in (E) of Annex 2, we believe that certain transactions mentioned under paragraph (4) of Section C of Annex 1 to Directive 2004/39/EC would not be covered by § 20 (4) IO to the extent that they relate to "other derivatives instruments, financial indices or financial measures". Transaction relating to precious metals and gold will only be covered by § 20 (4) IO to the extent that such Transactions would be of the type as referred to in section 2 and 4 of Annex ./2 to § 22 BWG (see Annex 7).

tions and investment firms and amending Regulation (EU) No 648/2012 ("**CRR**").

As of the date of this Opinion, there is no draft bill by the Austrian legislator to also amend § 20 (4) IO accordingly to refer to Annex II of CRR instead of Annex 2 to § 22 BWG. This means that as of 1 January 2014 § 20 (4) IO will refer to a no longer existing part of the BWG.

We believe that there are good reasons to interpret the law in a way that as of 1 January 2014 § 20 (4) IO would to refer to Annex II of CRR instead of Annex 2 to § 22 BWG. This is because:

(i) There will be a gap (*Lücke*) as concerns the cross reference in § 20 (4) IO to Annex 2 to § 22 BWG. Such gap would appear to be unintentional (*planwidrig*) because the Austrian legislator has not shown any indication of an intention to abolish the close-out netting safe haven in § 20 (4) IO.

(ii) The Austrian legislator in its Explanatory Notes has shown that it considers the very contents of Annex 2 to § 22 BWG to be covered by Annex II to CRR as of 1 January 2014. This supports an argument that the Austrian legislator has no intention that the substance of Annex 2 to § 22 BWG is abolished from the Austrian legal system, thus confirming the existence of an unintentional gap (*planwidrige Lücke*).

(iii) A gap would usually be closed under Austrian law by way of assessing the (natural) intentions of the legislator in connection with relevant law provision that has the (unintentional) gap.

If these intentions cannot be determined, such gap would usually be closed by an analogy to other (Austrian) law provisions that relate to similar facts of a case (*Gesetzesanalogie*) or an analogy to general principles of Austrian law (*Rechtsanalogie*).

(iv) According to § 271 IO, any reference to another Austrian law (*Bundesgesetze*) in the IO shall be understood as reference to that law provision in the form as applicable from time to time. Whereas the CRR is not an Austrian law (*Bundesgesetz*), the CRR is directly appli-

cable in Austria and therefore forms part of the legal provisions that together are referred to as the Austrian legal system. This line of reasoning could be used to support an argument aimed at closing the gap by reference to Annex II of CRR.

(v) Whereas in the specific context no case law to support the above reasoning is available, the Austrian Constitutional Court (*Verfassungsgerichtshof – VfGH*) has held that "dynamic" cross references in Austrian law provisions to European law provisions are not in conflict with the Austrian Constitution (*Bundesverfassung*)[13].

Whether all Transactions would benefit from the netting safen haven of § 20 (4) IO, would, based on such reasoning, depend on whether such Transactions are listed in Annex II of CRR[14] or directly in § 20 (4) IO[15].

3.3.2.2 Special receivership proceedings in respect of Austrian Credit Institutions

Beyond the scope of the Provisions on Netting Agreements the BWG contains **no special provisions** on the effects of the institution of **special receivership proceedings** (*Geschäftsaufsichtsverfahren*) on contractual netting provisions.

Absent statutory provisions to the contrary, the principles set forth above with respect to bankruptcy proceedings (enforceability of netting provisions if contractually provided for) apply, in our opinion, *mutatis mutandis* in special receivership proceedings, subject to the following limitation: § 86 (1) BWG stipulates that "*upon commencement of special receivership, all prior claims against the bank are granted a moratorium*". The moratorium is granted until receivership is ended. Conse-

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13 VfGH 3.10.2003, G 49/03.

14 Annex 2 to § 22 BWG is not literally identical to Annex II of CRR.

15 For instance, it occurs that credit default swaps appear not to be covered by Annex II to CRR. Given that § 20 (4) item 1 IO states that derivative instruments for the transfer of credit risks are "included" in Annex 2 to § 22 BWG, it is uncertain whether, following 1 January 2014, credit default swaps would still be covered by § 20 (4) IO icw Annex II to CRR.

quently, although the counterparty of an insolvent Austrian Credit Institution could enforce the early termination and the FOA Netting Provisions, the Clearing Module Netting Provision and the Addendum Netting Provision, the resulting net termination claim, if owed by the Austrian Credit Institution, would be granted a **moratorium** until receivership is ended.

All funds (*Mittel*) accruing to an Austrian Credit Institution from transactions (*Geschäften*) entered into after the institution of special receivership proceedings (new claims (*neue Forderungen*)), will form a **separate fund** (*Sondermasse*) (see also at 4.2.3 below).

Special receivership according to §§ 83 et seq. BWG can last for one year or more. In general, the Austrian Credit Institution is entitled to continue its business under the supervision of the receiver. It is, however, not possible for the Austrian Credit Institution's business partners to set off claims originating prior to the institution of receivership with claims of the Austrian Credit Institution under supervision originating after the institution of such proceedings (see also at 4.2.3 below).

3.3.2.3 Regulatory measures in respect of Austrian Credit Institutions

Beyond the scope of the Provisions on Netting Agreements the BWG does **not contain special provisions** on the effects of regulatory measures pursuant to § 70 (2) BWG on contractual netting provisions. In our opinion, the principles set out with respect to special receivership proceedings, including the above mentioned exception, apply *mutatis mutandis* to regulatory measures pursuant to § 70 (2) BWG. This interpretation is supported by the fact that the legislator clarifies the applicability of the provisions in respect of special receivership proceedings to regulatory measures against Austrian Credit Institutions in § 70 (2a) and (2b) BWG.

3.3.2.4 Reorganisation proceedings in respect of Austrian Corporations and Austrian Partnerships

Pursuant to § 19 URG, a contractual stipulation providing for automatic termination or a contractual right to terminate an agreement in the event reorganisation proceedings are opened would be **unenforceable** (if this was the only reason for terminating the agreement). The URG does not contain a provision analogous to § 20 (4) IO. It follows from this that

the FOA Netting Agreement or the Clearing Agreement could **not** be terminated if the opening of reorganisation proceedings was the only reason for termination.

Because reorganisation proceedings under the URG are not Insolvency Proceedings, the Provisions on Netting Agreements do not apply.

No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 3.3 to apply.

3.4 Enforceability of the Clearing Module Netting Provision

In relation to a Clearing Agreement which includes the Clearing Module Netting Provision, the Clearing Module Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following (i) a Firm Trigger Event or (ii) a CCP Default, the Parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of the relevant individual Client Transactions that are terminated in accordance with the Clearing Agreement.

We are of this opinion because:

Outside of Insolvency Proceedings, we believe that such agreement should be enforceable against Austrian Counterparties.

In case of Insolvency Proceedings against an Austrian Counterparty (i.e. the Firm), within the scope of the Provisions on Netting Agreements (see at paragraph 3.2.2.2 above) the effectiveness of the Clearing Module Netting Provision depends on the laws **governing the FOA Clearing Module**, i.e. **English law**.

If the Firm Trigger relates to an Austrian Counterparty and the Provisions on Netting Agreements do not apply (or if the Clearing Agreement was subject to Austrian law), the enforceability of the Clearing Module Netting Provision is governed by Austrian substantive insolvency law and the reasoning as set out above at 3.3.2.1 to 3.3.2.7 would apply.

However, in a scenario outside the scope of the Provisions on Netting Agreements (see at paragraph 3.2.2.2 above), § 20 (4) IO sets out that claims arising of transactions that have been rescinded or may be rescinded at the option of one party **because** of the institution of insolvency proceedings may be subject to close-out netting.

Clause 5.2.1 of the FOA Clearing Module sets out that all provisions of the Agreement (i.e. the FOA Netting Agreement or the Clearing Agreement) that would entitle the Client to terminate Client Transactions early upon the occurrence of an Event of Default (e.g. the action seeking the opening of insolvency proceedings or

the appointment of an Insolvency Administrator) in respect of Firm will not apply in respect of Client Transactions.

Clause 5.2.2 of the FOA Clearing Module sets out that automatic termination of Client Transactions shall occur in case of a Firm Trigger Event. A Firm Trigger Event is defined in the FOA Clearing Module as "*an event that* [...] *the applicable Agreed CCP formally declares to Firm constitutes a default in respect of Firm*".

It follows that pursuant to the terms of the FOA Clearing Module, close-out netting under the FOA Clearing Module would not occur "*because of the institution of insolvency proceedings*". Although there is no case law dealing with § 20 (4) IO available at all, we are not convinced that the Clearing Module Netting Provision as such would benefit from the netting safe haven of § 20 (4) IO. Thus, there is risk that the Clearing Module Netting Provision would not be effective under Austrian law (i.e. if the Provisions on Netting Agreements would not apply).

Furthermore, even if one was to interpret § 20 (4) IO broadly to the effect that also a Firm Trigger Event would be considered as leading to a termination of the Client Transactions because of the institution of insolvency proceedings, the following amendments to the FOA Clearing Module would be necessary in order for the opinions expressed in this paragraph 3.4 to apply:

The following paragraph in the preamble of the FOA Clearing Module

Notwithstanding that the Clearing Agreement constitutes a single agreement, each Cleared Transaction Set will be treated separately for certain purposes, including, without limitation, termination of transactions in certain circumstances, as further described in this Module.

shall be deleted.

A new clause 9.6 shall be inserted into the FOA Clearing Module:

9.6 ***Single agreement:*** [Clause [•] (*Single agreement*) of the Agreement shall be supplemented (and where relevant also superseded) by the following[16]:

(i) in case of an Event of Default that would entitle the Firm to terminate the Clearing Agreement and/or transactions and to close-out transactions under the Clearing Agreement, the Clearing Agreement, the particular terms applicable to all Netting Transactions under the Clearing Agreement, all Netting

[16] Assuming this language is appropriate under the law governing the FOA Clearing Module and the Clearing Agreement.

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Transactions and all Client Transactions under this Module (including, without limitation, each Client Transaction that forms part of any of the Cleared Transaction Sets) and all amendments to any of them shall together constitute a single agreement between us; and

(ii) in case of a Firm Trigger Event, (a) the Agreement and the particular terms applicable to all Netting Transactions under the Agreement, all Netting Transactions under the Agreement and all amendments to any of them shall together constitute a single agreement between us and (b) this Module, the particular terms applicable to Client Transactions under the Module and the Client Transactions under a relevant Cleared Transaction Set shall each together constitute a single agreement between us.

In addition, if an Austrian Counterparty would be a defaulting Firm, the relevant Firm/CCP Transaction Value will need to be calculated under the relevant Rule Set by reference to the day of opening of insolvency proceedings against the Austrian defaulting Firm. Otherwise we see considerable risk that a Liquidation Amount consisting *inter alia* of the relevant Firm/CCP Transaction Value calculated only after the opening of Insolvency Proceedings could not be enforceable.

3.5 Enforceability of the Addendum Netting Provision

In relation to a Clearing Agreement which includes the Addendum Netting Provision, the Addendum Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following (i) a CM Trigger Event or (ii) a CCP Default, the Parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of the relevant individual Client Transactions that are terminated in accordance with the Clearing Agreement.

We are of this opinion because:

Outside of Insolvency Proceedings, we believe that such agreement should be enforceable against Austrian Counterparties.

In case of Insolvency Proceedings against an Austrian Counterparty, within the scope of the Provisions on Netting Agreements (see at paragraph 3.2.2.2 above) the effectiveness of the Addendum Netting Provision depends on the laws **governing the ISDA/FOA Addendum**, i.e. **English law**.

If the CM Trigger relates to an Austrian Counterparty and the Provisions on Netting Agreements do not apply (or if the Clearing Agreement was subject to Austrian law), the enforceability of the Clearing Module Netting Provision is governed by Austrian substantive insolvency law and the reasoning as set out above at 3.3.2.1 to 3.3.2.7 would apply.

However, in a scenario outside the scope of the Provisions on Netting Agreements (see at paragraph 3.2.2.2 above), § 20 (4) IO sets out that claims arising of transactions that have been rescinded or may be rescinded at the option of one party **because** of the institution of insolvency proceedings may be subject to close-out netting.

Paragraph (b) of Clause 8 of the ISDA/FOA Addendum sets out that all provisions of the Agreement (i.e. the FOA Netting Agreement or the Clearing Agreement) that would entitle the Client to terminate Client Transactions early upon the occurrence of an event of default (e.g. the action seeking the opening of insolvency proceedings or the appointment of an Insolvency Administrator) will not apply in respect of Client Transactions.

Paragraph (b) of Clause 8 of the ISDA/FOA Addendum sets out that automatic early termination of Client Transactions shall occur in case of a CM Trigger Event. A CM Trigger Event is defined in the ISDA/FOA Addendum as "*an event that* [...] *the applicable Agreed CCP formally declares to Firm constitutes a default in respect of Firm*".

It follows that pursuant to the terms of the ISDA/FOA Addendum, close-out netting under the ISDA/FOA Addendum would not occur "*because of the institution of insolvency proceedings*". Although there is no case law dealing with § 20 (4) IO available at all, we are not convinced that the Addendum Netting Provision as such would benefit from the netting safe haven of § 20 (4) IO. Thus, there is risk that the Addendum Netting Provision would not be effective under Austrian law (i.e. if the Provisions on Netting Agreements would not apply).

Furthermore, even if one was to interpret § 20 (4) IO broadly to the effect that also a CM Trigger Event would be considered as leading to a termination of the Client Transactions because of the institution of insolvency proceedings, the following amendments to the ISDA/FOA Addendum would be necessary in order for the opinions expressed in this paragraph 3.5 to apply:

The following paragraph in the preamble of the ISDA/FOA Addendum

Notwithstanding that the Clearing Agreement constitutes a single agreement, each Cleared Transaction Set will be treated separately for certain purposes, including, without limitation, termination of transactions in certain circumstances, as further described in this Addendum.

shall be deleted.

A new paragraph (f) shall be inserted into Clause 18 of the ISDA/FOA Addendum:

(f) ***Single agreement:*** [Clause [•] (*Single agreement*) of the Agreement shall be supplemented (and where relevant also superseded) by the following[17]:

(i) in case of an Event of Default that would entitle the Firm to terminate the Clearing Agreement and/or transactions and to close-out transactions under the Clearing Agreement, the Clearing Agreement, the particular terms applicable to all [Netting] Transactions under the Clearing Agreement, all [Netting] Transactions and all Client Transactions under this Addendum (including, without limitation, each Client Transaction that forms part of any of the Cleared Transaction Sets) and all amendments to any of them shall together constitute a single agreement between us; and

(ii) in case of a CM Trigger Event, (a) the Agreement and the particular terms applicable to all [Netting] Transactions under the Agreement, all [Netting] Transactions under the Agreement and all amendments to any of them shall together constitute a single agreement between us whereas (b) this Addendum, the particular terms applicable to Client Transactions and the Client Transactions under a relevant Cleared Transaction Set shall each together constitute a single agreement between us.

In addition, if an Austrian Counterparty would be a defaulting Firm, the relevant Firm/CCP Transaction Value will need to be calculated under the relevant Rule Set by reference to the day of opening of insolvency proceedings against the Austrian defaulting Firm. Otherwise we see considerable risk that a Liquidation Amount consisting *inter alia* of the relevant Firm/CCP Transaction Value calculated only after the opening of Insolvency Proceedings could not be enforceable.

3.6 Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision

In relation to a Clearing Agreement, the opinions expressed at paragraph 3.3 above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement, to the extent that the necessary amendments highlighted in 3.4 and 3.5 are made to the the FOA Clearing Module and the ISDA/FOA Addendum and subject to the assumption that these amendments are legal, valid, binding and enforceable under English law.

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[17] Assuming this language is appropriate under the law governing the ISDA/FOA Addendum and the Clearing Agreement.

Austrian law would recognize as part of a valid choice of English law an English law provision to the effect that in a case where a Party, who would (but for the use of the FOA Clearing Agreement or the ISDA/FOA Clearing Agreement) be the Defaulting Party for the purposes of the FOA Netting Agreement, acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the FOA Netting Provision will, to the extent inconsistent with the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, be superseded by the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.

3.7 Enforceability of the FOA Set-Off Provisions

3.7.1 In relation to an FOA Netting Agreement which includes the FOA Set-Off Provisions, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms so that following an Event of Default (where the Defaulting Party is the counterparty), the Non-Defaulting Party would be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

3.7.1.1 Where the FOA Set-Off Provisions include the General Set-Off Clause

3.7.1.1.1 subject to the following qualifications, the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party should be able to be set off against the Liquidation Amount (where such liquidation amount is owed by the Defaulting Party);

In a scenario outside of Insolvency Proceedings, we believe that such agreement should be enforceable against Austrian Counterparties.

In a scenario involving Insolvency Proceedings, this opinion applies only to the extent that the Non-Defaulting Party qualifies as Qualifying Entity (as defined in section 1.1 of Annex 8) and to the extent that the FOA Netting Agreements under its governing laws provides either for a title transfer financial collateral arrangement in respect of cash[18] or the general Lien

[18] Under certain optional clauses to the Agreement.

constitutes a security financial collateral arrangement under the FinSG (see also section 1.2 of Annex 8).

According to § 5 FinSG, upon occurrence of an enforcement event[19], the collateral taker is entitled to realise cash by setting off the amount against or applying it in discharge of the relevant financial obligations, i.e. the Liquidation Amount.

According to § 6 (1) FinSG, financial collateral may, if so agreed by the parties, be realised without any requirement to the effect that:

(i) prior notice of the intention to realise must have been given;

(ii) the terms of the realisation be approved by any court, public officer or other person;

(iii) the realisation be conducted by public auction or in any other prescribed manner; or

(iv) 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 law[20] that all

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[19] 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*".

[20] The definitions of insolvency and liquidation proceeding (*Konkurs- und Liquidationsverfahren*) as well as reorganisation proceedings or reorganisation measures (*Sanierungsverfahren oder Sanierungsmaßnahmen*) as

Proceedings mentioned under 3.1 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).

Should the FinSG not apply, for instance because the Firm would not be a Qualified Entity (as defined in section 1.1 of Annex 8), the opinion statement in this paragraph 3.7.1.1.1 would be subject to the same limitations and qualifications as set out in further detail below at paragraph 3.7.1.1.2 which would apply to the scenario described in paragraph 3.7.1.1.1 *mutatis mutandis.*

3.7.1.1.2 subject to the following qualifications, the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party should be able to be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or

In a scenario outside of Insolvency Proceedings, we believe that such agreement should be enforceable against Austrian Counterparties.

In a scenario involving Insolvency Proceedings, please note the following:

The above mentioned set-off privilege available to financial collateral arrangements under the FinSG will not apply if the Defaulting Party is obliged to pay to the Non-defaulting Party, e.g. to deliver cash margin, because the payment obligations in regards to the (negative) cash balance owed to the Non-Defaulting Party and (positive) Liquidation Amount owed by the Non-Defaulting Party are independent of the realisation of a financial collateral arrangement.

Rather we understand that in such scenario, under the terms of the FOA Netting Agreement (leaving aside the FOA Set-Off

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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.

Provisions), the Non-Defaulting Party would (i) be obliged to pay the Liquidation Amount to the Insolvency Representative and (ii) have an (unsecured) claim for delivery of further cash margin against the Insolvency Representative.

Neither the Provisions on Netting Agreements (see at paragraph 3.2.2.2 above) nor the special provisions of Austrian insolvency law regarding contracts involving special off-balance sheet financial transactions (see at paragraph 3.3.2.1 above) will apply to such an additional set-off. This is because such set-off would be effected after close-out netting already occurred (and consequently a Liquidation Amount has been determined). However, said provisions of § 233 IO and § 20 (4) IO will only benefit a genuine close-out netting mechanism. The FOA Set-Off Provisions will thus be subject to the **limitations** of set-off provided by **Austrian insolvency law**.

According to § 221 (2) no 4 IO the conditions under which set-offs may be invoked following the opening of Insolvency Proceedings are generally subject to the law of the *forum concursus*, i.e. Austria in case of Insolvency Proceedings regarding an Austrian Counterparty.

As a matter of Austrian law, set-off will be enforceable if the Liquidation Amount under the FOA Netting Agreement or the Clearing Agreement and the claim against which set-off shall be effected were in the position to be set-off (i.e. reciprocal, even if conditional) at the time of opening of Insolvency Proceedings.

The Insolvency Events of Default Clauses provide for either termination rights for the Non-Defaulting Party[21] or optional automatic early termination. In our understanding of the Insolvency Events of Default Clauses, the Liquidation Date would occur either upon termination notice by the Non-Defaulting Party to the Defaulting Party or automatically at a point in time when Insolvency Proceedings have not yet been opened but rather **pre-insolvency** at a point in time when a filing (*Antrag*) for the opening of Insolvency Proceedings is made. This is because the Insolvency Events of Default

[21] In case of election of the one way clauses: the Firm.

Clause in no (b) and (c) refers to the Defaulting Party or a debtor of the Defaulting Party (as the case may be) "seeking" reliefs under insolvency or similar laws. In the given context, "seeking" (although to be interpreted under the governing law of the FOA Netting Agreement and the Clearing Agreement) should likely be understood to refer to filing (*Antrag*) for the opening of Insolvency Proceedings. Insolvency Proceedings will, however, only become effective as of 0:00 hours of the day following the publication of the receiving order in the official insolvency data base (www.edikte.justiz.gv.at).

Accordingly, (i) to the extent that the Non-Defaulting Party exercises its termination right under the Insolvency Events of Default Clause **prior** to the actual **opening** of Insolvency Proceedings or (ii) if **automatic early termination** was selected, the Liquidation Amount under the FOA Netting Agreement or the Clearing Agreement would exist prior to the opening of Insolvency Proceedings.

It follows that in case also the Non-Defaulting Party acquired the claim to receive a cash payment from the Defaulting Party (i.e. the claim with which the Liquidation Amount shall be set-off) **prior** to the opening of Insolvency Proceedings, both claims (that are in this scenario subject to set-off) were already prior to the opening of Insolvency Proceedings in a position to be set-off.

For set-off to become effective, set-off will, however, have to be declared (executed) by either party. If set off was executed **prior to** the opening of Insolvency Proceedings against the Austrian Counterparty, such set-off would initially be valid between the Austrian Counterparty and the Firm but could, in certain circumstances, subsequently be subject to an action for avoidance (*Anfechtung*) by the insolvency administrator of the Austrian Client (see at paragraph 4.2.2 and Annex 9). In a post-insolvency scenario, set-off should generally not be affected by the opening of Insolvency Proceedings if both claims were already prior to the opening of Insolvency Proceedings in a position to be set-off (§ 19 (1) IO).

Therefore, if set-off was executed **after** the opening of Insolvency Proceedings against the Austrian Client **set-off** should – subject to the following paragraph and only to the extent that also the claim of the Non-Defaulting Party to receive the (negative) cash balance from the Defaulting Party already ex-

isted prior to the opening of Insolvency Proceedings – be **enforceable** in accordance with § 19 IO.

Generally, pursuant to § 20 (1) third alternative and (2) IO set-off, *inter alia*, will **not** be **enforceable** if (i) the Non-Defaulting Party acquired its counterclaim to be-set off against the Liquidation Amount payable to the Defaulting Party within six months prior to the opening of Insolvency Proceedings concerning the Defaulting Party and (ii) at that time the Non-Defaulting Party was aware or should have been aware of the Defaulting Party's illiquidity (*Zahlungsunfähigkeit*). While legal writing indicates that this should not apply (and set-off should thus be enforceable) if claim and counterclaim arise contemporaneously before the opening of Insolvency Proceedings, no case law is available to support that view. If courts did not follow legal writing on this very point, enforceability will essentially depend on whether, on the date of acquiring its counterclaim, a Firm was aware or should have been aware of the Austrian Counterparty's illiquidity (*Zahlungsunfähigkeit*).

If set-off was held to be unenforceable in accordance with the above, a Firm might, however, still be able to resort to § 223 IO (and, consequently, English law) to preserve the enforceability of set-off: Pursuant to § 223 IO the opening of Insolvency Proceedings shall not affect the rights of creditors (the Firm) or Art 6 of the Regulation to demand the set-off of their claims against the claims of the debtor (the Austrian Counterparty), where such set-off is enforceable under the law applicable to the insolvent debtor's (the Austrian Counterparty's) claim, i.e. English law as the law governing the FOA Netting Agreement and the Clearing Agreement.

Even if set-off was enforceable in accordance with §§ 19 and 20 IO, it is important to note that set-off (as well as early termination) could still be subject to an **action for avoidance** (*Anfechtung*) under Austrian insolvency law. Also § 223 IO does not preclude actions for voidance, voidability or unenforceability under the law of the *forum concursus*. Therefore claims for avoidance (see Annex 9 as to voidance (*Anfechtung*) under Austrian insolvency law) remain possible under Austrian law, even if § 223 IO and thus English law was resorted to in an attempt to preserve the FOA Set-Off Provisions.

In the present context, in particular avoidance due to knowledge of insolvency (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*) pursuant to § 31 IO and, in case of termination rather than automatic early termination, also avoidance due to preferential treatment (*Anfechtung wegen Begünstigung*) pursuant to § 30 IO could be used as a means to challenge the termination and / or the set-off (see also Annex 9 for an overview).

In this respect, please note that under Austrian law also the creation of the set-off situation (*Herstellung der Aufrechnungslage*) as such, i.e. early termination under an Agreement, can be subject to voidance proceedings if the other conditions (as summarised in Annex 9) are met. In case the Liquidation Date would be designated based on solvency considerations affecting the Austrian Counterparty (which do not yet amount to Insolvency Proceedings)[22], we believe that – although this is ultimately a question of fact / evidence – in such scenario there is a risk that the Firm would be held to have been aware of the Austrian Counterparty's illiquidity (*Zahlungsunfähigkeit*) at the time it terminated the FOA Netting Agreement or the Clearing Agreement and thus created the set-off situation as a result of close-out netting. As set out above, if the Firm would be held to have been aware of the Austrian Counterparty's illiquidity (*Zahlungsunfähigkeit*) at the time of termination, this could adversely affect set-off of the Liquidation Amount if the the Firm terminated the FOA Netting Agreement or the Clearing Agreement within six months prior to the opening of Insolvency Proceedings.

In that case, a Firm might attempt to refer to § 229 (1) IO or Art 13 of the Regulation: Pursuant to this provision, a Firm could defend a claim for the avoidance of contract if it can provide proof that the challenged act (termination and / or set-off) is subject to the laws of another state (here: English law) and that English law do not allow any means of challenging the legal act in the relevant case.

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[22] For instance, failure to make payments when due under the Agreement, the Austrian Counterparty becoming unable to pay its debts, etc.

3.7.1.2 subject to the qualifications made above at 3.7.1.1.1, where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm to the Client should be able to be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

3.7.2 In relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default in respect of the Client, the Firm or, as the case may be, the Clearing Member would be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

3.7.2.1 where the FOA Set-Off Provisions includes the General Set-Off Clause:

3.7.2.1.1 subject to the qualifications made above at 3.7.1.1.1, the value of any cash balance owed by the Firm or, as the case may be, the Clearing Member to the Client should be able to be set off against the Liquidation Amount (where such liquidation amount is owed by the Client); or

3.7.2.1.2 subject to the qualifications made above at 3.7.1.1.2, the value of any cash balance owed by the Client to the Firm or, as the case may be, the Clearing Member should be able to be set off against the Liquidation Amount (where such liquidation amount is owed by the Firm or, as the case may be, the Clearing Member); or

3.7.2.2 subject to the qualifications made above at 3.7.1.1.1, where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm or, as the case may be, the Clearing Member to the Client should be able to be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

3.8 Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision

3.8.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions is a Disapplied Set-off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision should be immediately

(and without fulfilment of any further conditions) enforceable in accordance with its terms so that the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:

3.8.1.1 subject to the qualifications made above at 3.7.1.1.1, if the Client is a Defaulting Party, so that the value of any cash balance owed by the Firm to the Client should be able to be set-off against any Liquidation Amount owed by the Client to the Firm; and

3.8.1.2 subject to the following qualifications, if there has been a Firm Trigger Event or a CCP Default, so that the value of any cash balance owed by one Party to the other should be able to, insofar as not already brought into account as part of the Relevant Collateral Value, be set off against any Available Termination Amount owed by the Party entitled to receive the cash balance.

In a scenario outside of insolvency proceedings against an Austrian Counterparty under the IO (i.e. in case of a CCP Default and in case of a Firm Trigger Event (a) in respect of a Firm not subject to Insolvency Proceedings or (b) that does not involve Insolvency Proceedings), we believe that such agreement should be enforceable against Austrian Counterparties.

In a scenario involving insolvency proceedings against an Austrian Counterparty under the IO (i.e. in case of a Firm Trigger Event (a) in respect of a Firm being subject to insolvency proceddings under the IO and (b) which involves Insolvency Proceedings), please refer to the reasoning and the qualifications made at 3.7.1.1.2 above which apply *mutatis mutandis* also to this paragraph 3.8.1.2.

Kindly note though that as regards the Liquidation Amount we are not convinced that our reasoning employed at 3.7.1.1.2 will be robust in the scenario addressed in this paragraph 3.8.1.2. This is because a Firm Trigger Event will only have occurred if the relevant CCP has, following an Event of Default, declared a default over such Firm under the relevant Rule Set. Without knowing those Rule Sets and their implementation in practice, we believe it is likely that the Firm Trigger Event will only have occurred after the opening of Insolvency Proceedings. If that is the case, the Liquidation Amount will likely only come into existence after the opening

of insolvency proceedings. Thus, the Liquidation Amount and the amount against which the Liquidation Amount shall be set-off will not both have been in a position to be set-off prior to insolvency proceedings. This means that set-off under the Clearing Module Set-Off Provision would only appear to be feasible to the extent that the Party declaring such set-off would be in a position to successfully resort to § 223 IO or Art 6 of the Regulation (see at paragraph 3.7.1.1.2 above). Such set-off could further be subject to avoidance proceedings, unless such Party could successfully refer to § 229 IO (see at paragraph 3.7.1.1.2 above).

3.8.2 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision for which the FOA Set-Off Provisions (insofar as constituting part of the FOA Netting Agreement) is not a Disapplied Set-off Provision, the Clearing Module Set-Off Provision should be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out, and subject to the limitations contained, in paragraph 3.8.1 above; and the FOA Set-Off Provisions will, to the extent that set-off is not already covered by the Clearing Module Set-Off Provision, be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out, and subject to the limitations contained, in paragraph 3.7.1 above.

3.9 Set-Off under a Clearing Agreement with an Addendum Set-Off Provision

In relation to a Clearing Agreement which includes the Addendum Set-Off Provision, the Addendum Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that following (i) a CM Trigger Event (as defined in the ISDA/FOA Clearing Addendum) or (iii) a CCP Default (as defined in the ISDA/FOA Clearing Addendum):

3.9.1 in the case of a CM Trigger Event, the Client (as defined in the ISDA/FOA Clearing Addendum); or

3.9.2 in the case of a CCP Default, either Party (the "**Electing Party**"),

would, subject to the following qualifications, be immediately entitled to exercise its rights under the Addendum Set-Off Provision, and in particular so that, upon the exercise of such rights, in the case of a CM Trigger Event, any Available Termination Amount would be reduced by its set-off against any cash balance which constitutes a termination amount payable by (or to) the Party which is owed (or owes) the Available Termination Amount, insofar as not already brought into account as part of the Relevant Collateral Value.

We are of this opinion because:

In a scenario outside of Insolvency Proceedings (i.e. in case of a CCP Default and in case of a CM Trigger Event (a) in respect of a CM not subject to Insolvency Proceedings or (b) that does not involve Insolvency Proceedings), we believe that such agreement should be enforceable against Austrian Counterparties.

In a scenario involving Insolvency Proceedings (i.e. in case of a CM Trigger Event (a) in respect of a Firm being subject to Insolvency Proceedings and (b) which involves Insolvency Proceedings), please refer to the reasoning and the qualifications made at 3.7.1.1.2 above which apply *mutatis mutandis* also to this paragraph 3.9.

Kindly note though that as regards the Liquidation Amount we are not convinced that our reasoning employed at 3.7.1.1.2 will be robust in the scenario addressed in this paragraph 3.8.1.2. This is because a CM Trigger Event will only have occurred if the relevant CCP has, following an Event of Default, declared a default over such Firm under the relevant Rule Set. Without knowing those Rule Sets and their implementation in practice, we believe it is likely that the CM Trigger Event will only have occurred after the opening of Insolvency Proceedings. Consequently, the Liquidation Amount will likely only come into existence after the opening of insolvency proceedings. Thus, the Liquidation Amount and the amount against which the Liquidation Amount shall be set-off will not both have been in a position to be set-off prior to insolvency proceedings. This means that set-off under the Addenum Set-off Provision would only appear to be feasible to the extent that the Party declaring such set-off would be in a position to successfully resort to § 223 IO or Art 6 of the Regulation (see at paragraph 3.7.1.1.2 above). Such set-off could further be subject to avoidance proceedings, unless such Party could successfully refer to § 229 IO (see at paragraph 3.7.1.1.2 above).

3.10 Enforceability of the Title Transfer Provisions

3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) would be able to be taken into account by the relevant Party for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.

In a scenario outside of Proceedings (i.e. in case of a CCP Default and in case of a CM Trigger Event or Firm Trigger Event (a) in respect of a CM / Firm not subject to Proceedings or (b) that does not involve Proceedings),

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we believe that such agreement should be enforceable against Austrian Counterparties.

In a scenario involving Proceedings or Insolvency Proceedings (i.e. in case of a CM Trigger Event or Firm Trigger Event (a) in respect of a CM / Firm being subject to Proceedings/Insolvency Proceedings and (b) which involves Proceedings/Insolvency Proceedings), we are of this opinion because (i) pursuant to § 5 FinSG, upon occurrence of an enforcement event[23], the collateral taker is entitled to realise (i) 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 cash by setting off the amount against or applying it in discharge of the relevant financial obligations and (ii) pursuant to § 9 FinSG, a close-out netting provision (involving financial collateral) shall be enforceable in case of opening of Proceedings/Insolvency Proceedings against either the collateral taker or collateral provider. The Default Margin Amount forms part of the amounts to be taken into account when calculating the Liquidation Amount.

3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the Transferred Margin would be able to be taken into account by the relevant Party as part of the Relevant Collateral Value.

Please refer to the reasoning set out at paragraph 3.10.1 above which applies *mutatis mutandis*.

3.10.3 The courts of this jurisdiction would not recharacterise Transfers of Margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions, as creating a security interest in the form of a mere pledge.

We are of this opinion because in respect of financial collateral the FinSG recognises title transfer financial collateral agreements.

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[23] 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*".

3.10.4 A Party shall be entitled to use or invest for its own benefit, as outright owner and without restriction, any Margin Transferred to it pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

3.11 Use of security interest margin not detrimental to Title Transfer Provisions

In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions, the opinions expressed above in paragraph 3.10 (*Enforceability of the Title Transfer Provisions*) in relation to the Title Transfer Provisions are not affected by the use also in the same agreement of the Non-Cash Security Interest Provisions (used with or without the Rehypothecation Clause) and/or the Client Money Additional Security Clause, provided always that:

3.11.1 the agreement unambiguously specifies the circumstances in which the security interest provisions or the Title Transfer Provisions apply in respect of any given item of margin so that it is not possible for both the security interest provisions and the Title Transfer Provisions to apply simultaneously to the same item of margin; and

3.11.2 the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

3.12 Single Agreement

Under the laws of this jurisdiction it is necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision to be enforceable under Austrian substantive insolvency law (i.e. outside of the Provisions on Netting Agreement; see at paragraphs 3.2.2.2 and 3.3.2.1).

We believe that an agreement of the parties that the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions form one single agreement should be recognized.

We believe that an agreement of the parties that subject to the suggested wording in paragraph 3.4 being inserted in the Clearing Agreement, the Clearing Agreement and each of the Transactions of relevant Cleared Transaction Set would be part of a single agreement should be recognized.

3.13 Automatic Termination

Under Austrian substantive insolvency law it is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the Netting Provisions in the event of bankruptcy, liquidation, or other similar circumstances. As stated at paragraph 3.3.2.1 above § 20 (4) IO refer to contracts involving special off-balance sheet financial transactions as set forth in Annex 2 to § 22 BWG according to which the parties have agreed that these contracts are automatically rescinded or may be rescinded at the option of a party in case of the institution of bankruptcy or composition proceedings against a counterparty. In case not all Transactions would benefit from § 20 (4) IO (which we cannot confirm for the reasons set out at paragraph 3.3.2.1 above) an agreement on automatic early termination taking effect prior to the commencement of Insolvency Proceedings may mitigate the uncertainty that would otherwise exist in case Austrian substantive insolvency laws apply (see at paragraph 3.3.2.1 above). Furthermore, selection of automatic early termination of the FOA Netting Agreementor the Clearing Agreement could serve as argument in order to mitigate the risk of avoidance under Austrian insolvency law (see also at paragraphs 3.3.4.2. above and 4.2.2 below).

3.14 Multibranch Parties

We do not consider that the use of the FOA Netting Agreement or, as the case may be, the Clearing Agreement by an Austrian Counterparty with branches in a number of different jurisdictions, including some where netting may not be enforceable would jeopardise the enforceability (as explained and subject the qualifications and limitations set out elsewhere in this Opinion) of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions in so far as the laws of this jurisdiction are concerned.

We are of this opinion because:

3.14.1 Foreign branches of Austrian Corporations, Austrian Partnerships

According to established principles of Austrian corporate law, the head office and all branches of a corporation (in this case including investment service providers) form one single legal entity. Consequently, Transactions carried out through branches of these entities create rights and obligations of these entities which could be enforced in the insolvency proceeding of the Austrian Corporation, Austrian Partnership or Austrian Investment Firm.

3.14.2 Foreign branches of an Austrian Credit Institution

Also with respect to foreign branches of Austrian Credit Institutions the head office and all branches of the Austrian Credit Institution form one single legal entity. Consequently, Transactions carried out through branch offices of an Austrian Credit Institution create rights and obligations of the Austrian Credit Institution which have to be enforced in the insolvency proceeding of the Austrian Credit Institution.

In addition it is to be noted that solely Austrian law applies to bankruptcy proceedings, special receivership proceedings and regulatory measures against an Austrian Credit Institution that also qualifies as credit insitution under Directive 2006/48/EC[24] throughout the European Economic Area

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[24] Austrian law generally uses the term "credit institution" as a reference to entities regulated and licensed under § 1 (1) of the Austrian Banking Act (*Bankwesengesetz – BWG*). This domestic definition is considerably wider when compared to the definition of credit institution under Directive 2006/48/EC. Pursuant to Art 4 (1) of Directive 2006/48/EC an entity only constitutes a credit institution if such entity is licensed to receive deposits or other repayable funds from the public and to grant credits for its own account or qualifies as an electronic money institution within the meaning of Directive 2000/46/EC. Entities that are licensed for one or more activities listed in points 2 to 12 of Annex I of Directive 2006/48/EC are defined as "financial institutions" in said Directive.

Annex I of Directive 2006/48/EC, however, contains various activities that are subject to licensing in Austria under § 1 (1) BWG. It follows from this that a "credit institution" under the BWG might carry a license to perform activities that in contrast to domestic Austrian law would cause the same entity to constitute a "financial institution" under Directive 2006/48/EC.

The impact of what at first glance might appear to be pure semantics under Austrian law, Directive 2001/24/EC and the Regulation can be summarised as follows:

(i) Directive 2001/24/EC applies to credit institutions as defined in Directive 2006/48/EC only. It does not apply to financial institutions as defined in Directive 2006/48/EC.

(ii) The Regulation does not apply to *inter alia* credit institutions as defined in Directive 2006/48/EC. In contrast, the Regulation applies to financial institutions as defined in Directive 2006/48/EC. It follows from this e.g. that secondary proceedings may be opened pursuant to Art 3 (2) of the Regulation in other Member States, where an Austrian Credit Institution that qualifies only as financial institution under Directive 2006/48/EC possesses an establishment (as defined in the Regulation). For the avoidance of doubt, this in turn also means that secondary proceedings might be opened in Austria against foreign financial institutions to the extent that all pre-requisites under the Regulation (and the IO) are met.

(iii) Special receivership proceedings (see at paragragh 3.1.2.3 above) may be opened and regulatory measures (see at paragraph 3.1.2.4) may be imposed by the FMA in relation to credit institutions as defined in the BWG. As noted above, the domestic notion of credit institution includes also Austrian Credit Institutions that, for lack of deposit taking and lending or e-money business, constitute financial institutions under Directive 2006/48/EC.

However, such proceedings or measures against an Austrian Credit Instutition that "only" constitutes a financial institution under Directive 2006/48/ EC would – in contrast to what is stated in §§ 81 (2) and

(EEA). The effects of bankruptcy proceedings opened in this jurisdiction will also cover all of the Austrian Credit Institution's assets situated abroad. The effects of special receivership proceedings and regulatory measures against Austrian Credit Institutions that also qualifies as credit insitution under Directive 2006/48/EC will cover all of the Austrian Credit Institution's assets situated within the EEA.

In case of Austrian Credit Institutions that would qualify as financial institutions under Direcitve 2006/48/EC, the effects of special receivership proceedings and regulatory measures would not necessarily cover also all assets situated within the EEA. Whereas our Opinion only relates to Austrian law and thus the conclusions of our Opinion should not be adversely affected by the fact that an Austrian Credit Institution that would qualify as financial institution under Direcitve 2006/48/EC is acting as multi-branch party, we cannot assess what implications the laws other states might have on close-out netting under the FOA Netting Agreement or the Clearing Agreement.

3.15 Insolvency of Foreign Parties

Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default or a Firm Trigger Event, or as the case may be, a CM Trigger Event occurs in respect of such Party (a "**Foreign Defaulting Party**") the Foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction under the following circumstances:

3.15.1 Foreign corporations

Pursuant to Article 3 (1) of the Regulation, the courts of the Regulation State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open so-called **main insolvency proceedings**. With respect to **Austrian branches** of **foreign corporations** having the centre of their main interests in another Regulation State Austrian courts may only institute (territorial or secondary) insolvency proceedings against the Austrian branch if the Austrian branch

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70 (2b) of the BWG – not constitute reorganisation measures under Directive 2001/24/EC. It follows that such proceedings and measures would not necessarily have to be recognized by other Member States.

qualifies as establishment[25] according to the Regulation (Article 3 (2) and Art 27 (1) of the Regulation). If insolvency proceedings are opened in Austria against such an Austrian establishment, the territorial / secondary insolvency proceedings will only cover Austrian assets (including the rights of the foreign corporation and foreign investment service provider under the FOA Netting Agreement or the Clearing Agreement against an **Austrian Counterparty**). In secondary insolvency proceedings also the Provisions on Netting Agreements apply.

3.15.2 Foreign credit institutions

3.15.2.1 Credit institution authorized in another EEA State

Austrian courts do not have jurisdiction for the institution of bankruptcy proceedings, special receivership proceedings or regulatory measures against the Austrian branch of a **credit institution as defined in Directive 2006/48/EC authorized in another EEA State**. The **home Member State** shall alone be empowered to decide on the implementation of reorganization measures over such **credit institution or its branch in Austria**.

If the FMA deems it necessary to implement reorganization measures in respect of an Austrian branch of a credit institution authorized in another EEA State, it shall **inform** the competent authorities of the home Member State accordingly.

3.15.2.2 Foreign Banks

In respect of **Foreign Banks**, Austrian courts have jurisdiction for the institution of bankruptcy proceedings, special receivership proceedings or regulatory measures over the assets of the **Austrian branch** of the Foreign Bank. The institution of bankruptcy proceedings is reserved to the FMA and the institution of special receivership proceedings as well as the institution of regulatory measures is reserved to the FMA and to the Foreign Bank.

Insolvency proceedings with respect to Austrian branches of Foreign Banks will, however, be limited to Austrian assets (in-

[25] Which is any place of operations where the debtor carries out a non-transitory economic activity with human means and goods (Article 2 (h) of the Regulation).

cluding the rights of the Foreign Bank arising under the FOA Netting Agreement or the Clearing Agreement against an **Austrian counterparty**), if (i) the Foreign Bank's centre of main interest is in another state, (ii) insolvency proceedings were opened in that other state and (iii) these insolvency proceedings also include the assets situated abroad (§ 237 IO). The Provisions on Netting Agreements apply would in such proceedings.

3.15.3 Foreign insurance undertakings

3.15.3.1 Foreign insurance undertakings authorized in another EEA State

With respect to foreign insurance undertakings authorized in another EEA State we refer to our statements regarding the rules for credit institutions authorized in another EEA State set out above at paragraph 3.15.2.1 that apply *mutatis mutandis*.

3.15.3.2 Foreign insurance undertakings domiciled outside the EEA

With respect to foreign insurance undertakings domiciled outside the EEA we refer to our statements regarding the rules for credit institutions authorized outside the EEA set out above at paragraph 3.15.2.2 that apply *mutatis mutandis*.

3.16 Special legal provisions for market contracts

There are no special provisions of law which would affect the opinions given in this paragraph 3 which would apply to a Transaction between two Parties as a result of the fact that such Transaction was entered into on, or is back to back with a Transaction entered into on an exchange (in this or another jurisdiction), or is cleared at, or is "back to back" with a Transaction to be cleared by a central counterparty.

4 Limitations and 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 and to satisfy the opinion requirements set forth by the Basel Committee on Banking Supervision of the Bank for International Settlements as set forth in the Basel Capital Accord of July 1998 and subsequent amendments and as set forth in the

Basel II Revised Framework of November 2005 as well as subsequent amendments and European and national legislation implementing the same concerning the recognition of close-out netting for capital purposes. Except for the purposes set out in the preceeding sentence, 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 found 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 FOA Netting Agreement and the Clearing 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 FOA Netting Agreement, the Clearing 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 FOA Netting Agreement or the Clearing Agreement (including the FOA Clearing Module and the ISDA/FOA Addendum) may have on the opinions expressed herein.

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

4.2.1 The enforceability of the FOA Netting Agreement or, as the case may be, the Clearing Agreement (including the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision) may be affected by:

(i) avoidance laws (as summarized in Annex 8 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 Speculation for differences (*Differenzeinwand*)

Pursuant to § 1270 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*), amounts due as a result of games and bets (speculative transactions) are **unenforceable**[26].

§ 1 (5) BWG stipulates that, with respect to the resolution of disputes resulting from **banking transactions** (as defined in § 1 (1) BWG), the defense that a claim is based on a speculation for differences (*Differenzeinwand*) qualifying as game or bet may not be relied upon if at least one party to the contract is **authorized** (i.e. licensed or "passported") to carry on such activity on a commercial basis.

For Transactions which do not qualify as banking transactions, § 1 (5) BWG does not apply. In connection with the implementation of Directive 2004/39/EC on markets in financial instruments ("**MiFID**"), the number of Transactions that constitute banking transactions and, thus,

[26] Unfortunately, it cannot be clearly established which Transaction types could potentially be unenforceable pursuant to § 1270 of the Austrian Civil Code. § 1270 of the Austrian Civil Code was first introduced in the year 1811 and does not *per se* relate to derivative transactions. However, Austrian Supreme Court case law has applied § 1270 of the Austrian Civil Code to derivative contracts and contracts for differences. It would appear that § 1270 ABGB applies to all types of Transactions that have an element that would qualify such Transaction as "game" or "bet" for both parties or one party. This needs to be assessed on a case by case basis and is very facts driven. The Austrian Banking Act, the Austrian Securities Supervision Act and the Austrian Stock Exchange contain – as is explained in this paragraph 4.2.2 – certain exemptions if certain criteria are met.

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benefit from § 1 (5) BWG if at least one of the parties to the Transaction holds the requisite license / passport has increased significantly (in particular in the area of commodity derivatives). However, market participants should still carefully analyse whether a particular Transaction constitutes a banking transaction and whether either of the parties holds the requisite license / passport so as to determine whether an exposure in respect of gaming laws for speculative transactions exists.

In addition, the Austrian Stock Exchange Act (*Börsegesetz – BörseG*) stipulates that (i) in decisions concerning legal disputes arising from exchange transactions, the objection or defence of gambling or wager shall be inadmissible (§ 28 (1) BörseG[27]) or (ii) if options and financial futures contracts are traded on recognized exchanges, in Austria or outside the country, and prices are published for these, the objection of gambling and wager in legal disputes arising from these transactions shall not be admissible, irrespective of who presents the claim (§ 28 (2) BörseG).

In respect of **non-banking transactions** that do not qualify for purposes of § 28 BörseG, the prevailing view in Austria, which has also been confirmed by the Supreme Court, is that contracts for differences (*Differenzgeschäfte*) which serve the needs of **sound business** (hedging transactions, for example) do **not** qualify as **gambling contracts**. The **enforceability** of these Transactions, therefore, depends on whether such Transactions are entered into for **speculative** or **gambling reasons** or **for hedging purposes**, whereby only the latter will be enforceable. The Supreme Court has also held that because of the close link between hedging and speculative transactions, transactions by traders, i.e. those market participants who take on risk from parties seeking to hedge an exposure for a premium and, thus, enable the hedging party to separate the risk from the underlying transaction and pass it on to other market participants, are also economically justified and, therefore, not subject to the defense of speculation for differences (*Differenzeinwand*).

4.2.3 Limitations with respect to single agreement

Even if the amendments to the single agreement clauses of the FOA Netting Agreement and the Clearing Agreement proposed under paragraph 3.4 and 3.4 above should be effective under English law as the law governing the FOA Netting Agreement and the Clearing Agreement so that

[27] A similar provision is contained in § 67 (8) of the Austrian Securities Supervision Act (*Wertpapieraufsichtsgesetz 2007 – WAG 2007*) with relation to transactions concluded via an MTF.

the relevant single agreements would be created under English law, we cannot rule out that, in case of insolvency proceedings under Austrian law, in a scenario outside the scope of the Provisions on Netting Agreements, an Insolvency Administrator would not recognize such agreement by the parties and challenge it.

4.2.4 Limitations with respect to Austrian Credit Institutions

Irrespective of the law governing the FOA Netting Agreement or the Clearing Agreement, the enforceability of pre- or post-insolvency close-out netting will be limited whenever Austrian substantive law provides for certain funds of an Austrian legal entity to constitute a separate fund (*Sondermasse*) or being exempt from execution.

This is relevant also outside the covered bonds context, because upon institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*) with respect to Austrian Credit Institutions (please see at paragraphs 3.1.2.3 and 3.3.2.2 above) all funds (*Mittel*) accruing to the Austrian Credit Institution from transactions (*Geschäften*) entered into after the institution of such special receivership proceedings (new claims (*neue Forderungen*)), will form a **separate fund** (*Sondermasse*). Such separate fund would be used to preferentially satisfy new claims of creditors of an Austrian Credit Institution which arose after the institution of special receivership proceedings.

Under Austrian (insolvency) law, **separate funds** (e.g. the funds of an Austrian Credit Institution which arose after the institution of special receivership proceedings) are **ring-fenced** (as long as the separate fund is not dissolved by court; see last paragraph of this paragraph 4.2.3).

It follows from this that claims resulting out of Transactions entered into prior to the institution of special receivership proceedings **cannot be netted** with / against claims resulting out of Transactions entered into after the institution of special receivership proceedings.

Any counterparty of an Austrian Credit Institution should therefore consider carefully terminating the FOA Netting Agreement or the Clearing Agreement upon institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*). An Austrian Credit Institution may apply to the competent court in order to have such separate fund (*Sondermasse*) dissolved only if (i) the special receivership proceedings ended without the Austrian Credit Institution becoming subsequently subject to formal insolvency proceedings (*Nachfolgeinsolvenz*) and (ii) two years have lapsed since the special receivership proceedings ended. If not dissolved by court order, such separate funds would also sustain (and thus adversely affect

close-out netting of claims under "old" and "new" Transactions) in case of subsequent formal insolvency proceedings (*Nachfolgeinsolvenz*).

4.2.5 Avoidance of Transactions

Under §§ 27 et seq. IO certain actions taken by persons / companies that are held to be **detrimental to their creditors** may be **set aside** by the courts if a voidance action is filed in insolvency proceedings by the receiver. Please refer to Annex 9 concerning a brief summary of Austrian avoidance rules.

Avoidance may relate to both the conclusion of the FOA Netting Agreement or the Clearing Agreement, each Transaction and / or each posting of cash margin / each transfer of non-cash margin under the Title Transfer Provisions. For the purposes of this Opinion, we consider in particular voidance due "**preferential treatment**" (§ 30 (1) no 1 IO) and all cases of voidance 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 9).

Also early termination of the FOA Netting Agreement or the Clearing Agreement can be qualified as challengeable transaction if the other conditions (as summarised in Annex 9) are met. Selection of automatic early termination of the FOA Netting Agreement or the Clearing Agreement could serve as argument in order to mitigate the risk of avoidance under Austrian insolvency law.

It has to be noted that **Article 13 of the Regulation** and **§ 229 IO** (where applicable) impose a restriction on the ability of an Austrian insolvency administrator to set aside set-off. Article 13 of the Regulation and § 229 IO limit the national rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors, if (i) the respective act is subject to the law of another (Member) State (*lex causae*) and (ii) the *lex causae* does not allow any means of challenging the act in the relevant case.

4.2.6 Limitations concerning the calculation of the Liquidation Amount

No case law exists on whether the insolvency administrator or debtor can **challenge or otherwise dispute** the **methods of calculating** the mutual claims arising from Transactions. However, in connection with the

dissolution of **other agreements** as a result of insolvency proceedings, the Austrian Supreme Court held that any agreement on a penalty made prior to the initiation of insolvency proceedings to the detriment of the estate is ineffective to the extent the compensation paid by the estate exceeds the damage actually incurred by the solvent party[28]. Should the insolvency administrator not have the necessary evidence to calculate the actual claims, the opponent may be forced to disclose the information and business matters required to determine the amount of the claims.

It should further be noted that § 58 IO generally **excludes the assertion of interest** as of the commencement of insolvency proceedings and costs incurred by the creditors from participating in the agreement. These claims are not part of the proceedings. The assertion of interest accruing after the initiation of insolvency proceedings by a right to preferential satisfaction (*Absonderungsrecht*) is, however, generally permitted, but for a period of 6 months after opening of insolvency proceedings the claim for interest is limited to contractual interest (*Vertragszinsen*) rather than default interest (*Verzugszinsen*) (in case no contractual interest was agreed the statutory interest (*gesetzliche Zinsen*) will apply). Furthermore, while the assertion of interest accruing after the initiation of Insolvency Proceedings by set-off should generally be permissible, the law is silent whether the above restrictions will also apply for set-off rights[29].

In addition, Austrian law provides for certain mandatory principles as regards damages and the calculation of damages respectively which may not be derogated from and which, although not directly geared at derivatives business, might be relevant in regards to the close-out amount calculations and related payments foreseen in the FOA Netting Agreement or the Clearing Agreement. For instance, such mandatory principle would be that any exclusion of liability is only permissible within *bones mores* (*gute Sitten*). Even in case of contracts between entrepreneurs (*Unternehmerverträge*), pursuant to Austrian law, clauses excluding liability (*Haftungsausschlüsse*) in cases of (i) blatant gross negligence (*krass grobe Fahrlässigkeit*)[30] and (ii) intent (*Vorsatz*) would not be enforceable, for example (irrespective of the law governing the agreement). In cases of gross negligence (*grobe Fahrlässigkeit*) it is disputed among scholars

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[28] OGH 17.5.1983 SZ 56/78.

[29] This remains to be clarified by the Austrian courts.

[30] OGH 7 Ob 666/84; 6 Ob 836/83; 3 Ob 527/89.

and courts whether or not exclusion of liability would be valid[31]. Moreover, 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.

In the event that the calculations of the Liquidation Amount and relevant payment obligations foreseen in the FOA Netting Agreement or the Clearing Agreement (including the FOA Clearing Module and the ISDA/FOA Addendum) would yield results that would be incompatible with the foregoing, these would be superseded by Austrian law. Whereas it is difficult to quantify this risk from the language of the FOA Netting Agreement and the Clearing Agreement without reference to the facts of specific Transactions we understand that generally the relevant clauses have been drafted aiming at commercially balanced results, so that this risk should probably be small.

4.2.7 Limitations with respect to the choice of law

4.2.7.1 Notwithstanding the recognition of English law as the law governing the FOA Netting Agreement or the Clearing 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 FOA Netting Agreement or the Clearing Agreement unlawful;

(ii) the courts of the Republic of Austria will apply Austrian law insofar as it is mandatory irrespective of English law governing the FOA Netting Agreement or the Clearing Agreement;

(iii) the application of English law may be refused to the extent it is incompatible with public policy (*ordre public*) of the Republic of Austria;

[31] From OGH 7 Ob 666/84 it might be derived that exclusion of liability in case of gross negligence is permissible (see for the same result: SZ 31/57). However, in case OGH 6 Ob 541/92 the OGH decided that the exclusion of liability in case of gross negligence was invalid.

(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 Title Transfer Provisions as well as the opinions expressed in paragraph 3.10 and 3.11 above will not be determined by the law chosen but by the laws applicable pursuant to Austrian private international law (see at section 1 and section 2 of Annex 10).

4.2.7.2 Where all other elements relevant to the situation at the time of entry into the FOA Netting Agreement or the Clearing 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.

4.2.8 Limitations concerning the Title Transfer Provisions

4.2.8.1 (Re-)Characterisation of title transfer collateral arrangements

Under Austrian law the transfer of ownership title requires both, the obligation to transfer ownership title (i.e. the agreement between the parties on the transfer of ownership) (*titulus*) and the transfer of ownership title (*modus*). Abstract transfers of rights (without *titulus*) are not recognized under Austrian law.

The question therefore arises whether there is a risk that the Title Transfer Provisions that purport an "clean" / full transfer of title to the collateral assets could be re-characterised as creating a security interest only.

4.2.8.1.1 Within the scope of the FinSG

The Act On Financial Collateral Arrangements (*Finanzsicherheitengesetz – FinSG*) (see Annex 8) expressly recognises full title transfer collateral arrangements. Within the ambit of the FinSG, a collateral arrangement should, thus, not be re-characterised as a security interest (being a limited *in rem* right only).

While in Austrian legal writing the awareness that title transfer collateral arrangements under the FinSG might not only include fiduciary transfers of ownership (see paragraph 4.2.7.2.1.2 below) is not (yet) fully developed we believe that also the title transfer arrangements under a collateral arrangement are subject to the FinSG (if concluded by a Qualifying Entity with an Austrian Counterparty). Various concepts set out in the FinSG could not be reconciled with Austrian concepts concerning secured transactions, if the FinSG was limited to fiduciary transfer of ownership title (to which the general rules for security interests apply), e.g. close-out netting (as a method of enforcement). Further it would not be consistent to expressly provide for the possibility of an agreement to freely use the collateral for security financial collateral arrangements (in accordance with the Financial Collateral Directive), if title transfer collateral arrangements were to include fiduciary transfers of ownership only (where, absent an express permission in the FinSG, such right of use would be limited). Even if an Austrian court would come to the conclusion to characterise the Title Transfer Provisions (to the extent that they provide for an outright transfer of title) as creating a fiduciary transfer of ownership (as opposed to an outright transfer of ownership), this should not materially adversely affect most of the conclusions reached in the Opinion if and when the FinSG applies: Under the FinSG as far as book entry securities collateral is concerned, ownership title and other rights *in rem* may be transferred by means of an entry in the register or an entry in the custody account. Outside the scope of application of the FinSG, not the entry in a register or account but the – normally antecedent – instruction (*Besitzanweisung*) to the custodian is decisive for transferring title. Also, the FinSG expressly recognizes (irrespective of the characterization of the FOA Netting Agreement or Clearing Agreement) close-out netting as a method of enforcing title transfer financial collateral arrangements. Pursuant to § 9 FinSG the agreed close-out netting provisions are effective:

(i) notwithstanding the commencement or continuation of insolvency proceedings or reorganisation measures in respect of the collateral provider and / or the collateral taker; and

(ii) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

4.2.8.1.2 Beyond the scope of the FinSG

In those instances, where either because of the parties involved (see at 1.1 of Annex 8) or because of the nature of the collateral (see at 1.2 of Annex 8), the FinSG does not apply, it is to be examined which right(s) *in rem* available under Austrian law come(s) closest to the transactions contemplated by a title transfer collateral arrangement.

Under Austrian law contracts have to be interpreted primarily following the parties' intentions. After having determined the parties' intentions the contract needs to be characterised in accordance with the possibilities available under Austrian law. No court precedent is available whether Austrian courts would uphold an outright title transfer under a collateral arrangement, stipulating that the transfer of collateral is not intended to create a security interest. There is a certain risk that the transfer of collateral could be (re-)characterized by Austrian courts as creating either an irregular pledge (*pignus irregulare*) in, or a fiduciary transfer of ownership (*Sicherungsübereignung*) of, collateral. Bearing in mind that Austrian law does not recognise abstract transfers of ownership, the crucial question to be answered is whether there is sufficient cause (*causa*) / consideration in order for a collateral arrangement to constitute valid *titulus*. If Austrian courts would not follow this route, they could, notwithstanding the FOA Netting Agreement or the Clearing Agreement in question, come to the conclusion that the parties' intention was to create a security interest.

In the latter case, the **irregular pledge** (*pignus irregulare*) in our opinion comes closest to what a title transfer collateral arrangement is typically aiming at; however, it is also possible that a title transfer collateral arrangement would be construed as **fiduciary transfer of ownership** (*Sicherungsübereignung*) of the cash or securities.

4.2.8.1.2.1 Irregular pledge (*pignus irregulare*)

Contrary to the, admittedly misleading, terminology, an irregular pledge implies the **outright transfer of ownership** in the collateral from the collateral provider to the collateral taker, the latter being entitled to **freely use** and **dispose** of the collateral. The collateral taker would only be obliged to return an equivalent amount of equivalent assets while the collateral provider retains no proprietary interest in the collat-

eral. The collateral provider only has a claim to demand re-transfer of an equivalent amount of equivalent assets. The collateral taker may realise its "security" interest in the collateral by **setting off** its claims against the collateral provider's claim for retransfer of the collateral posted. This concept is known in Austria with respect to fungible assets such as notes and coins (*Barkaution*).

If fungible assets other than notes and coins are the object of an irregular pledge the collateral taker may not set off its claim against the collateral provider's re-transfer claim, because under Austrian law, any set-off requires that the claims are congeneric (*gleichartig*), e.g. claims for payment of money can be set off against counterclaims for payment of money but not against claims for delivery of securities. However, also in case of an irregular pledge, the collateral taker may realize its interest by purchasing the collateral assets at market value and then setting off the purchase price claim against its secured claim. Upon insolvency of the collateral provider, the collateral taker will not be treated like the outright owner of the collateral but as a secured party (instead of a right of segregation (*Aussonderung*), it will "only" have a right of separate satisfaction (*Absonderung*)).

4.1.8.1.2.2 Fiduciary transfer of ownership for security purposes

Contrary to other jurisdictions (e.g. Germany) a fiduciary transfer of ownership for security purposes is treated akin to genuine security interests (a pledge (*Pfandrecht*), for example). This holds true in particular as concerns the perfection steps to be taken and also with respect to the procedures and limitations to be observed upon realisation.

As outlined above, the instrument which comes closest to the parties' intention of transferring outright ownership would in our opinion be an **irregular pledge**. According to Austrian case law, the irregular pledge is available for fungible assets and has been recognised in Austria mainly with respect to coins and notes. For example with respect to savings account books (*Sparbücher*) the Austrian Supreme Court has held that the security interest created in this respect would not constitute such irregular pledge and that the proceeds of a savings account may not be realised by way of set off because the collateral provider's claim for re-delivery of the savings account book (*Sparbuch*) and the secured (monetary) claim of the collateral taker would not be congeneric (*gleichartig*).

In the absence of case law, it cannot be excluded that Austrian courts could re-characterize a title transfer collateral arrangement as intended to create a **fiduciary transfer of ownership**.

4.2.8.2 Realisation of collateral assets

In case the FinSG would not apply, for instance because the relevant Firm is not a Qualified Entity (see section 1.2 of Annex 8), the Title Transfer Provisions will not be enforceable. In case the Title Transfer Provisions were re-characterized as creating a security interest only, realization of the collateral assets, i.e. securities, could, depending on the laws applicable to the relevant collateral assets, be subject to the Austrian substantive law rules.

Thus, collateral assets could only be realised upon occurrence of the due date of the secured obligations and non-payment of the due amounts on such date.

In order to reduce the risk of the collateral taker being liable for damages, we recommend that in this case a notice requesting payment of the amount payable upon early termination of the FOA Netting Agreement or the Clearing Agreement and announcing that the collateral will be realised unless this amount is paid within a period of time to be determined in this notice is sent to the collateral provider; the statutory periods of one month (consumers) or 7 days (entrepreneurs) may be shortened by agreement of the parties. Arguably, the parties could even contract out of this requirement to send a prior notice; however, a risk that such arrangement would be considered as not in accordance with *bona fide* commercial intercourse remains.

Absent any parties' agreement to the contrary, the rules contained in §§ 461 – 466 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*) would apply. According to these provisions, a pledge (*Pfandrecht*) may be realised either by (i) judicial alienation (*gerichtliche Feilbietung*) or (ii) out of court enforcement (*außergerichtliche Pfandverwertung*).

Out of court enforcement would usually take place by way of a public auction in accordance with § 466b ABGB. In case securities (*Wertpapiere*) have a market or (stock) exchange price, out of court enforcement will only be permissible by

way of free sale (*Freihandverkauf*) to the market or (stock) exchange price (§ 466 (4) ABGB).

4.2.9 Limitations concerning the substitution of Margin

4.2.9.1 Substitution by the collateral taker

4.2.9.1.1 Within the scope of the FinSG

According to § 7 of the FinSG, if and to the extent that the terms of a collateral arrangement so provide, the collateral taker is entitled to exercise a right of use in relation to collateral provided under the collateral arrangement (other than credit claims).

Where a collateral taker exercises a right of use, he thereby incurs an obligation to transfer equivalent collateral to replace the original financial collateral at the latest on the due date for the performance of the relevant financial obligations covered by the security financial collateral arrangement. The collateral taker shall, on the due date for the performance of the relevant financial obligations, either transfer equivalent collateral, or, if and to the extent that the terms of a security financial collateral arrangement so provide, set off the value of the equivalent collateral against or apply it in discharge of the relevant financial obligations.

The equivalent collateral transferred in discharge of an obligation to provide substitute collateral shall be subject to the same security financial collateral agreement to which the original financial collateral was subject and shall be treated as having been provided under the collateral arrangement at the same time as the original collateral was first provided.

If an enforcement event occurs while an obligation to provide substitute collateral remains outstanding, the obligation may be the subject of a close-out netting provision.

4.2.9.1.2 Beyond the scope of the FinSG

Where the FinSG is not applicable, according to Austrian substantive law, a collateral taker is generally not allowed to use the collateral, unless the collateral provider agrees.

Even if the Austrian Counterparty agrees to its counterparty using the collateral, when Austrian substantive law is applicable, *inter alia*, according to § 1372 ABGB certain limitations to

such right would apply. According to this provision, an agreement granting the collateral taker the right to any distributions from the pledged assets (i.e. a right of *usufructus* (*Fruchtnießung*)) would be unenforceable in Austria. Furthermore, if the collateral taker is granted the right to use the pledged assets, such use has to be exercised with diligent care. It is furthermore held that § 1372 ABGB will apply in analogy also with respect to security assignments and a fiduciary transfer of ownership for security purposes.

Further, according to § 454 ABGB, a collateral taker may, provided he is so allowed under the pledge agreement, itself pledge pledged assets to a sub-pledgee. In order for such sub-pledge (*Afterpfand*) to become valid, the pledged assets will however, need to be handed over to the sub-pledgee.

In case fungible (*vertretbare*) pledged assets, i.e. fungible securities or cash, were to be commingled (*vermischt*) with fungible assets of the same kind of the collateral taker, this would result in the collateral taker acquiring full ownership of such fungible (*vertretbare*) pledged assets. Should this materialize, an irregular pledge would likely be created and the pledgor would only have a claim to demand re-transfer of fungible (*vertretbare*) assets of the same kind.

4.2.9.2 Substitution by the collateral provider

Under Austrian Law the substitution of collateral with concurrent preservation of identity and priority of the interest that a collateral taker has in the collateral under the FOA Netting Agreement or the Clearing Agreement will **not** be possible. In case of a substitution of the collateral, such interest (be it a fiduciary transfer of ownership, an irregular pledge or a title transfer collateral arrangement) will have to be **newly created** in respect of the collateral upon each exchange.

The notice of the collateral provider offering the exchange of collateral to the collateral taker, the consequent acceptance notice of the collateral taker if followed by an effective transfer of the collateral resulting in the perfection of the security interest or the transfer of ownership would from an Austrian law perspective suffice for creating the security interest of the collateral taker in the collateral.

Normally, the consent of the collateral taker to re-transfer the collateral that served as collateral is prerequisite for validly

transferring title to the collateral provider. However, in the event the Title Transfer Provisions of the FOA Netting Agreement or the Clearing Agreement would be re-characterized as a fiduciary transfer of ownership (see at paragraph 4.2.7.2.1.2 above) or in case of collateral assets (e.g. cash) pledged, for instance by way of the (general) Lien, title to the collateral will be surrendered by the collateral taker upon losing possession to the collateral (e.g. by transferring it to an account of the collateral provider), irrespective if the collateral taker intends to / consents to surrender title.

4.2.9.3 Avoidance of a substitution of Margin

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.

4.2.10 In case claims (for instances such claims remaining unpaid following the application of the close-out netting mechanism and other set-off rights) 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 proceedings[32].

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[32] 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 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/Ger*harter, 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

4.2.11 Any amounts resulting from an enforcement of the cash or non-cash margin which remain after set-off or similar rights have been applied and which exceed the amount of the secured obligations will have to be surrendered to the Austrian Counterparty.

There are no other material issues (other than those issues flagged in the Schedules and Annexes) relevant to the issues addressed in this Opinion which we wish to 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

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 Investment Firms

Subject to the modifications and additions set out in this Schedule 1 (*Austrian Investment Firms*), the opinions, assumptions and qualifications set out in this Opinion will also apply in respect of Parties which are Austrian Investment Firms. For the purposes of this Opinion, "**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, the receipt and transmission of orders in relation to one or more financial instruments and the operation of a multilateral trading facility (§ 3 (2) nos 1 to 4 of the WAG 2007).

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 MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.11.1 is deemed deleted and replaced with the following:

"**Proceedings**" means the procedures listed in section 2.1.1.3 and 2.1.1.4 of Schedule 1 (*Austrian Investment Firms*).

Paragraph 1.11.2 is deemed deleted and replaced with the following:

"**Insolvency Proceedings**" means the procedures listed in section 2.1.1.2 of Schedule 1 (*Austrian Investment Firms*).

2 MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

2.1 Insolvency Proceedings and Proceedings: Austrian Investment Firms

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an Austrian Investment Firm could be subject under the laws of this jurisdiction, and which are relevant for the purposes

of this Opinion, are described in section 2.1.1 of this Schedule 1 (*Austrian Investment Firms*) below.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings and Proceedings, if supplemented or amended as follows:

"[(•)] the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) or during effective special receivership proceedings (*Geschäftsaufsichtsverfahren*) the receiver (*Aufsichtsperson*) applies to the competent insolvency court seeking the opening of bankrupcty proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

"[(•)] [you]/[a party] or the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) applies to the competent court seeking the opening of special receivership proceedings (*Geschäftsaufsichtsverfahren*) under the Austrian Securities Supervision Act (*Wertpapieraufsichtsgesetz – WAG 2007*) against [you]/[such party];"

"[(•)] regulatory measures (*aufsichtsbehördliche Maßnahmen*) under the Austrian Securities Supervision Act (*Wertpapieraufsichtsgesetz – WAG 2007*) are implemented by the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) against [you]/[a party];"

2.1.1 Types of Proceedings under Austrian law with respect of Investment Firms

2.1.1.1 General

The insolvency related provisions in §§ 80 to 89 WAG 2007 in relevant parts correspond to the rules governing insolvency of Austrian Credit Institutions set forth in §§ 81 to 91 BWG (see at paragraph 3.1.2.1 above).

2.1.1.2 Bankrupcty proceedings

As it is the case with respect to Austrian Credit Institutions **only bankruptcy proceedings** (*Konkursverfahren*), but not restructuring proceedings (*Sanierungsverfahren*) may be instituted against Investment Firms. Also Investment Firms cannot be subject to reorganisation proceedings.

2.1.1.3 Special receivership proceedings

In addition to bankruptcy proceedings the WAG 2007 provides for **special receivership proceedings** (*Geschäftsaufsichtsverfahren*).

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2.1.1.4 Regulatory measures

In addition to bankruptcy proceedings and special receivership proceedings the WAG 2007 provides **regulatory measures** such as the appointment of a government commissioner (*Regierungskommissär*). Also, the provisions concerning regulatory measures set out in § 92 (1) et seq. WAG (almost) literally correspond to § 70 (2) BWG (see at paragraph 3.1.2.4 above)

The statements made in paragraphs 3.1.2.1 to 3.1.2.4 above with respect to Austrian Credit Institutions apply *mutatis mutandis* to procedures dexcribed in this section 2.1.1.1 of Schedule 1 (*Austrian Investment Firms*).

2.2 Modifications of our opinion statement in paragraphs 3.3:

New paragraphs 3.3.2.5 and 3.3.2.6 shall be inserted as follows:

3.3.2.5 Special receivership proceedings in respect of Investment Firms

The WAG 2007 contains **no special provisions** on the effects of the institution of **special receivership proceedings** (*Geschäftsaufsichtsverfahren*) on contractual netting provisions, subject to the following exception: § 84 (1) of the Austrian Securities Supervision Act 2007 (*Wertpapieraufsichtsgesetz 2007 – WAG 2007*) stipulates that "*upon commencement of special receivership, all prior claims against the investment firm are granted a moratorium*". The moratorium is granted until receivership is ended. Consequently, although the non-defaulting counterparty could enforce the early termination and the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision, the resulting net termination claim, if owed by the Investment Firm, would be granted a **moratorium** until receivership is ended.

All funds (*Mittel*) accruing to an Investment Firm from transactions (*Geschäften*) entered into after the institution of such special receivership proceedings (new claims (*neue Forderungen*)), will form a **separate fund** (*Sondermasse*) (see also at section 3.1 of Schedule 1 below).

Special receivership according to §§ 81 et seq. WAG 2007 can last for one year or more. In general, the Investment Firm is entitled to continue its business under the supervision of the receiver. It is, however, not possible for the Investment Firm's business partners to set off claims originating prior to the institution of receivership with claims of the Investment Firm under supervision originating after the institution of such proceedings (see also at section 3.1 of Schedule 1 below).

Furthermore, distinct from the BWG, the WAG 2007 does not provide for special provisions in relation to netting agreements that would apply to special receivership proceedings.

3.3.2.6 Regulatory measures in respect of Investment Firms

The WAG 2007 contains **no special provisions** on the effects of regulatory measures pursuant to § 92 WAG 2007 on contractual netting provisions. We believe that the principles as set out with respect to special receivership proceedings, including the above mentioned limitations, apply *mutatis mutandis* to regulatory measures pursuant to § 92 WAG 2007.

Further to what is mentioned in paragraph 3.3 and this section 2.2 (and by way of reference in the relevant limitations and qualifications), there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Non-Defaulting Party.

3 ADDITIONAL QUALIFICATIONS

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

3.1 Irrespective of the law governing the FOA Netting Agreement or the Clearing Agreement, the enforceability of pre- or post-insolvency close-out netting will be limited whenever Austrian substantive law provides for certain funds of an Austrian legal entity to constitute a separate fund (*Sondermasse*) or being exempt from execution.

This is relevant because upon institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*) with respect to Austrian Investment Firms (please see at paragraphs 3.1.4 and 3.3.2.7 above) all funds (*Mittel*) accruing to the Investment Firm from transactions (*Geschäften*) entered into after the institution of such special receivership proceedings (new claims (*neue Forderungen*)), will form a **separate fund** (*Sondermasse*). Such separate fund would be used to preferentially satisfy new claims of creditors of an Investment Firm which arose after the institution of special receivership proceedings.

Under Austrian (insolvency) law, **separate funds** (e.g. the funds of an Investment Firm which arose after the institution of special receivership proceedings) are **ring-fenced** (as long as the separate fund is not dissolved by court; see last paragraph of this section 1.1).

It follows from this that claims resulting out of Transactions entered into prior to the institution of special receivership proceedings **cannot be netted** with / against claims resulting out of Transactions entered into after the institution of special receivership proceedings.

Any counterparty of an Investment Firm should therefore consider carefully terminating the FOA Netting Agreement or the Clearing Agreement upon institution of special receivership proceedings (*Geschäftsaufsichtsverfahren*). An Investment Firm may apply to the competent court in order to have such separate fund (*Sondermasse*) dissolved only if (i) the special receivership proceedings ended without the Investment Firm becoming subsequently subject to formal insolvency proceedings (*Nachfolgeinsolvenz*) and (ii) two years have lapsed since the special receivership proceedings ended. If not dissolved by court order, such separate funds would also sustain (and thus adversely affect close-out netting of claims under "old" and "new" Transactions) in in case of subsequent formal insolvency proceedings (*Nachfolgeinsolvenz*).

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 (*Versicherungs-unternehmen*), 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*)[33].

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 MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.11.1 is deemed deleted and replaced with the following:

"**Proceedings**" means the procedures listed in section 3.1.1.3 of Schedule 2 (*Austrian Insurance Undertakings*).

Paragraph 1.11.2 is deemed deleted and replaced with the following:

"**Insolvency Proceedings**" means the procedures listed in section 3.1.1.2 of Schedule 2 (*Austrian Insurance Undertakings*).

2 ADDITIONAL ASSUMPTIONS

We assume:

2.1 The Austrian Insurance Undertaking when entering into Transactions with respect to Allocated Assets (as defined below in section 4.1) will comply with all relevant provisions of the VAG and / or the FMA Regulation on Capital Investment (*Kapitalanlageverordnung – KAVO*) as regards the use of derivative instruments for a reserve fund or a division thereof.

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[33] § 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.

3 MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this Opinion as modified, or added to, by this Schedule), we are of the following opinion.

3.1 Insolvency Proceedings and Proceedings: Austrian Insurance Undertakings

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an Austrian Insurance Undertaking could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this Opinion, are described in section 3.1.1 of this Schedule 2 (*Austrian Insurance Undertakings*) below.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings and Proceedings, if supplemented or amended as follows:

"[(•)] the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) applies to the competent insolvency court seeking the opening of bankrupcty proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) [you]/[a party];"

"[(•)] regulatory measures (*aufsichtsbehördliche Maßnahmen*) under the Austrian Insurance Supervision Act (*Versicherungsaufsichtsgesetz – VAG*) are implemented by the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) against [you]/[a party];"

3.1.1. Types of proceedings under Austrian law with respect of Austrian Insurance Undertakings

3.1.1.1 General

The rules governing insolvency of **Austrian Insurance Undertakings** are set forth in §§ 87 to 98 VAG. Pursuant to § 95 (1) of the Austrian Insurance Supervisory Act (*Versicherungsaufsichtsgesetz – VAG*), **only bankruptcy proceedings** (*Konkursverfahren*), but not restructuring proceedings (*Sanierungsverfahren*) may be instituted against an Austrian Insurance Undertaking. Also Austrian Insurance Undertakings cannot be subject to reorganisation proceedings.

In addition to bankruptcy proceedings the VAG provides for certain **regulatory measures** (*aufsichtsbehördliche Maßnahmen*).

The (special) rules governing insolvency of Austrian Insurance Undertakings as set forth in the VAG do not apply to Austrian Insurance Undertakings exclusively licensed to carry out reinsurance business (§ 2 (2) no 1 VAG) (with one minor exception for reinsurance undertakings established as mutual insurance companies (*Versicherungsverein auf Gegenseitigkeit*) as regards the treatment of additional contributions in cases of insolvency). As regards such reinsurance undertakings the rules of the IO apply. Also the rules governing regulatory measures on Austrian Insurance Undertakings only partly apply to Austrian Insurance Undertakings exclusively licensed to carry out the reinsurance business.

3.1.1.2 Bankruptcy proceedings

Unless the VAG provides otherwise, the provisions of the IO also apply to bankruptcy proceedings of Austrian Insurance Undertakings. Pursuant to § 89 (2) VAG **only** the **FMA** (being also the insurance supervisory authority) may file for the institution of bankruptcy proceedings against an Austrian Insurance Undertaking.

3.1.1.3 Regulatory measures

In case an Austrian Insurance Undertaking is illiquid or overindebted, but if the opening of bankruptcy proceedings would not be in the interest of the insurants (*Versicherte*), the FMA is obliged (should this be required in the interests of the insurants arising out of insurance contracts):

(i) to **prohibit payments**, in particular in respect of insurance benefits (as well as repurchases and advance payments under life insurances) to the extent necessary to overcome the financial difficulties; or

(ii) to **reduce obligations** of the Austrian Insurance Undertaking under the life insurance business according to the existing assets

as regards the business carried out under the license granted pursuant to § 4 (1) VAG (§ 98 (1) no 1 and no 2 VAG).

Such prohibitions and reductions may, according to the letter of the law, only relate to the business carried out under the license granted pursuant to § 4 (1) VAG (i.e. the insurance contract business (*Versicherungsvertragsgeschäft*)). It is, however, uncertain whether only those payments, which are

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connected with insurance contracts or whether all payments an Austrian Insurance Undertaking may have to make may be prohibited. We believe that the FMA may, in principle, prohibit **all kinds of payments** to be effected by an Austrian Insurance Undertaking and not only those connected to insurance contracts. This view is also taken in Austrian legal writing (as regards a previous version of § 98 (1) VAG, which did not yet contain the wording "*as regards the business carried out under the license granted pursuant to § 4 (1) VAG*", which according to the explanatory statements to the government bill (*Erläuternde Bemerkungen zur Regierungsvorlage*) should, however, only clarify the territorial application of this provision but not its substantial scope of application).

The regulatory measures described under (i) above are to be revoked as soon as the financial situation of the Austrian Insurance Undertaking allows such revocation (§ 98 (2) VAG). The regulatory measures described under (ii) above will, once they have been adopted, continue for an indefinite period.

The FMA can **comprehensively interfere** with the business activities of an Austrian Insurance Undertaking:

Pursuant to § 104 (1) VAG, the FMA is obliged to **issue all kinds of orders** that are necessary and appropriate to keep the business operations of an Austrian Insurance Undertaking (including Austrian Insurance Undertakings exclusively licensed to carry out the reinsurance business) in line with the provisions applicable to the business of contract insurance and the established principles for proper business operations of Austrian Insurance Undertakings, if the interests of the insured require such orders. Further, § 104a (3) VAG provides that the FMA is obliged to **restrict** or to **prohibit** the **free disposal** of the **assets** of an Austrian Insurance Undertaking with a view to securing, at any time, the fulfilment of an Austrian Insurance Undertaking's obligations under insurance contracts, if:

(i) actuarial reserves are not set aside in sufficient extent or the provisions on investments for the coverage of such reserves are not complied with;

(ii) the Austrian Insurance Undertaking's own funds do not reach the amounts set forth in the VAG and, due to extraordinary circumstances, it is to be expected that the financial situation of the Austrian Insurance Undertaking will further deteriorate; or

(iii) the Austrian Insurance Undertaking's own funds do not reach the extent of the guarantee fund.

These restrictions and prohibitions are published in the official gazette (*Amtsblatt zur Wiener Zeitung*). Disposals violating such restrictions and prohibitions to dispose of assets are **null and void**.

If the interests of the insurants (*Versicherte*) are endangered, in particular if the fulfillment of obligations under insurance contracts is at risk, the FMA may order measures limited in time (which are to be or are deemed repealed no later than 18 months after being ordered) to avoid such risk (§ 106 (1) VAG). For this purpose, the FMA may appoint a **government commissioner** (*Regierungskommissär*) with expert experience, who may prohibit the Austrian Insurance Undertaking from entering into transactions or from taking actions which might increase this risk. The FMA may take even more far reaching measures and prohibit the Austrian Insurance Undertaking from conducting its business in whole or in part, for example

3.2 Modifications of our opinion statement in paragraphs 3.3:

A new paragraph 3.3.2.5 shall be inserted as follows:

3.3.2.5 Regulatory measures in respect of Austrian Insurance Undertakings

The VAG does not contain special provisions as regards the effects of the adoption of regulatory measures in relation to Austrian Insurance Undertakings on contractual netting provisions where Austrian courts do have jurisdiction.

(A) On that basis, we note the following:In the circumstances described at section 3.1.1.3 above relating to § 98 VAG the FMA may be obliged to prohibit payments by an Austrian Insurance Undertaking by adopting regulatory measures (*aufsichtsbehördliche Maßnahmen*). Such prohibition in our opinion may extend to **all** kinds of payments. Therefore, the FMA may grant all kinds of payments to be made by Austrian Insurance Undertakings a **moratorium** until the financial situation of the Austrian Insurance Undertaking permits the revocation of the prohibition.

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(B) We believe that § 104 VAG[34] authorizes the FMA to (i) **prohibit** (the entering into / the execution of) such transactions (the taking of such measures) which either are in violation of the provisions applicable to the insurance contract business or would not be entered into / effected (taken) by Austrian Insurance Undertakings conducting proper business operations and (ii) order to enter into such transactions (take such measures) which are required for the insurance contract business or which would be entered into (taken by) by Austrian Insurance Undertakings conducting proper business operations.

(C) Pursuant to § 104a VAG[35], the FMA may be obliged to grant claims against Austrian Insurance Undertakings a moratorium.

(D) In the circumstances described at section 3.1.1.3 above relating to § 106 VAG the FMA may order measures limited in time which are not exhaustively specified in § 106 VAG. In case a **government commissioner** (*Regierungskommissär*) is appointed, such person may veto actions so that the Austrian Insurance Undertaking may be, temporarily, restricted from effecting payments. The FMA may also take more far reaching measures and **prohibit** the Austrian Insurance Undertaking from **conducting** its business. Pursuant to Austrian legal writing such prohibitions are designed to restrict the creation of new debts and shall not extend to debts originated prior to the prohibition to conduct the business. However, it is to be noted that the measures the FMA may take pursuant to § 106 (2) VAG are not exhaustively specified by law. Therefore, it is uncertain what other measures might be taken and how far reaching such measures could be. Pursuant to Austrian legal writing the measures according to § 106 (2) VAG may only be measures which influence the organization of Austrian Insurance Undertakings or constitute restrictions on the further conduct of business.

Consequently (in the absence of statutory provisions to the contrary), we believe that the enforceability of the FOA Netting Provision of the FOA Netting Agreement or the Clearing Agreement (as the case may be) should (subject to the specific limitations set out at section 4.1 and in particular 4.2 of this Schedule 2 below) not be affected by the adoption of regulatory measures as regards Austrian Insurance Undertakings. However, it is to be noted that an Austrian Insurance Undertaking might, tempo-

[34] See at paragraph 3.1.3.3 above.

[35] See at paragraph 3.1.3.3 above.

rarily, be restricted from effecting payments relating to termination claims resulting from close-out netting, if owed by it.

3.3 Modifications of our opinion statement in paragraphs 3.3:

A new paragraph 3.14.3 shall be inserted as follows:

3.14.3Foreign branches of Austrian Insurance Undertakings

Also with respect to foreign branches of Austrian Insurance Undertaktings the head office and all branches of the Austrian Insurance Undertaktings form one single legal entity. Consequently, Transactions carried out through branch offices of an Austrian Insurance Undertaktings create rights and obligations of the Austrian Insurance Undertaktings which have to be enforced in the insolvency proceeding of the Austrian Insurance Undertaktings.

In addition it is to be noted that solely Austrian law applies to bankruptcy proceedings and regulatory measures against an Austrian Insurance Undertaktings throughout the European Economic Area (EEA). The effects of bankruptcy proceedings opened in this jurisdiction will also cover all of the Austrian Insurance Undertaktings' assets situated abroad. The effects of regulatory measures against Austrian Insurance Undertaktings will cover all of the Austrian Credit Institution's assets situated within the EEA.

3.4 Modifications of our opinion statements in paragraphs 3.3, 3.4 and 3.5:

The FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision will in case that the FOA Netting Agreement or the Clearing Agreement and Transactions thereunder serve as cover for the actuarial reserve funds (*zur Bedeckung der versicherungstechnischen Rückstellungen*) only be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms and subject to what is stated above at paragraphs 3.3, 3.4 and 3.5, to the extent that the FOA Netting Agreement or the Clearing Agreement and the Transactions thereunder relate to a single specific reserve fund (*Deckungsstock*) or division thereof.

3.5 Modifications of our opinion statements in paragraphs 3.7, 3.8 and 3.9

To the extent a FOA Netting Agreement or a Clearing Agreement was concluded with an Austrian Insurance Undertaking for Allocated Assets (as defined below at section 5.1), our opinion statements made under paragraphs 3.7, 3.8 and 3.9 in relation to the FOA Set-Off Provisions, the Clearing Module Set-Off Provisions and the Addendum Set-Off Provisions will only apply to the extent that that the FOA Netting Agreement or the Clearing Agreement, the Transactions thereunder and the claims to be set-off against the Liquidation Amount relate to the same single specific reserve fund (*Deckungsstock*) or division thereof.

4 ADDITIONAL QUALIFICATIONS

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

4.1 Reserve funds (*Deckungsstöcke*) of Austrian Insurance Undertakings

With respect to Transactions relating to **Unallocated Assets** (as defined below at section 5.1) we refer to the general conclusions reached in this Opinion.

With respect to Transactions relating to **Allocated Assets** (as defined below at section 5.1), the respective **reserve funds** (*Deckungsstöcke*), and, where applicable, the **divisions** of a reserve fund (*Abteilung eines Deckungsstocks*) will have to be treated on a **segregated basis** as separate funds:

Pursuant to § 87 (1) VAG execution can be levied against assets registered in the reserve fund register (*Deckungsstockverzeichnis*) only for the benefit (*zugunsten*) of an **insurance claim** (*Versicherungsforderung*) (as defined in the VAG; not including claims under derivative transactions) for which a reserve fund requirement (*Deckungserfordernis*) exists. Subject to certain exemptions, assets that are not subject to execution are also **excluded from set-off** (§ 293 (3) of the EO).

In relation to claims that are in principle excluded from execution (and, consequently, set-off), § 293 (3) EO sets out that set-off against such claims is permissible *inter alia* for **collecting a legally connective counterclaim** (*zur Einbringung einer im rechtlichen Zusammenhang stehenden Gegenforderung*). Pursuant to Austrian case law and legal writing, the requirement that counterclaims be legally connective has to be construed narrowly. However, pursuant to legal writing, a set-off should e.g. be permissible if the claim and the counterclaim to be set off derive from a unitary agreement (*einheitlicher Vertrag*) (*Oberhammer* in *Angst*, EO § 293 Rz 7).

We believe that an Austrian court should recognize the parties' agreement in the FOA Netting Agreement or the Clearing Agreement that the FOA Netting Agreement or the Clearing Agreement and all Transactions entered into thereunder, as such single agreement clause is amended by the proposed amendments made at paragraphs 3.4 and 3.5 above, shall form a single agreement.

It follows from this that good arguments can be made that the inclusion of a Transaction (the Austrian Insurance Undertaking's rights thereunder respectively) in a reserve fund (*Deckungsstock*) or division thereof and its registration with the reserve fund register (*Deckungsstockregister*), which is decisive in allocating an asset to a reserve fund, would not *per se* adversely affect the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision or the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision.

In our opinion it will, however, not be possible to net payment and delivery obligations that relate to a particular reserve fund and are registered in the respective reserve fund (or division thereof) register with / against obligations that do not relate to a reserve fund (i.e. Unallocated Assets) or that relate to another reserve fund (even of the same Austrian Insurance Undertaking), i.e. **(close-out) netting or set-off across reserve funds** will **not** be **enforceable**.

In case of insolvency proceedings **Allocated Assets** relating to a reserve fund or to a division[36] of a reserve fund (*Abteilung eines Deckungsstocks*) constitute a **separate fund** (*Sondermasse*) according to § 48 IO. Claims arising out of insurance contracts, including **insurance claims** (*Ansprüche auf Versicherungsleistung*) will be satisfied preferentially out of the assets allocated to this separate fund. These claims will, thus, have **priority** over a Firm's claim to receive an Liquidation Amount or to receive the amount payable in respect of an Liquidation Date.

4.2 No set off clauses

Whereas we do not express any opinion on whether or not any party to the FOA Netting Agreement or Clearing Agreement is allowed under applicable laws, its constitutional documents and / or its licence(s) to enter into one or several Transactions, we would like to note that Austrian Insurance Undertakings are (under certain conditions) allowed to use rights under derivative financial instruments for Allocated Assets when complying with the requirements set out by applicable law.

Based on § 1 (5) of the FMA Regulation on Capital Investment (*Kapitalanlageverordnung – KAVO*)[37] some practitioners take the view that derivative instruments may only be used by an Austrian Insurance Undertaking for Allocated Assets if the counterparty waives any right of set-off (including presumably also arising out of close-out netting provisions). While we do not believe that the relevant arguments are overly convincing, we also have informal knowledge that the Austrian Financial Market Authority (FMA) shares such more restrictive view as regards the use of derivative transactions in respect of Allocated Assets. We therefore recommend that any Firm envisaging to enter into Transactions with an Austria Insurance Undertaking carefully scrutinizes this issue and discusses with its counterparty and / or the FMA.

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[36] *Braumüller*, Versicherungsaufsichtsrecht, 257; *Baran*, VAG, §§ 87 footnote 3 concurrs in relation to assets which are subject to execution and belong to a division of a reserve fund.

[37] § 1 (5) KAVO stipulates that claims (*Forderungen*) may only be used as Allocated Assets if the counterparty of the Austrian Insurance Undertaking has waived any set-off or retention rights.

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4.3 According to § 94 (2) VAG **insurance claims** (*Ansprüche auf Versicherungsleistung*; as defined in the VAG and in any case not including claims under derivative transactions) have **priority** over all other claims arising out of insurance contracts.

According to § 94 (1) VAG **claims** arising **out of insurance contracts** (*Forderungen aus Versicherungsverträgen*, other than insurance claims) have **priority** over other claims against the estate.

Claims arising out of an Agreement relating to **Unallocated Assets** should in our opinion rank *pari passu* with other claims of the Austrian Insurance Undertaking's creditors relating to such Unallocated Assets (other than insurance claims or other claims arising out of insurance contracts); however, such claims would be subordinated to insurance claims and other claims arising out of insurance contracts.

In case of Insolvency Proceedings **Allocated Assets** relating to a reserve fund or to a division[38] of a reserve fund (*Abteilung eines Deckungsstocks*) constitute a **separate fund** (*Sondermasse*) according to § 48 IO. Claims arising out of insurance contracts, including **insurance claims** (*Ansprüche auf Versicherungsleistung*) will be satisfied preferentially out of the assets allocated to this separate fund. These claims will thus have **priority** over a Firm's claim to receive the Liquidation Amount.

4.4 To safeguard / protect the interest of the Austrian Insurance Undertaking's customers, the **power of disposal** (*Verfügungsberechtigung*) as regards such Allocated Assets (as defined in section 5.1 below) is severely **limited**[39]. 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**[40]. In this respect it has to be noted that such trustee approval must specifically relate to a single transaction (disposal or

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[38] *Braumüller*, Versicherungsaufsichtsrecht, 257; *Baran*, VAG, §§ 87 footnote 3 concurrs in relation to assets which are subject to execution and belong to a division of a reserve fund.

[39] Including the ability of the Austrian Insurance Undertaking to use such Allocated Assets as cash or non-cash margin for purposes of the Title Transfer Provisions under the Agreement.

[40] It remains yet to be decided by courts whether such written approval is also required to pay obligations resulting from Transactions which were allocated to a reserve fund or division thereof out of the Allocated Assets.

encumbrance) or a limited number of single transactions (if specified clearly). An anticipatory[41] 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. cash or non-cash margin taken from the cover pool) would not be valid and thus not enforceable.

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

5.1 General obligation to maintain reserve funds (*Deckungsstöcke*)

By way of background information to what is said at section 4.1 to 4.4 above, we note that under the VAG an Austrian Insurance Undertaking must keep specific assets or a pool of assets (which under certain conditions may also include derivatives transactions) as cover for the actuarial reserve funds (*zur Bedeckung der versicherungstechnischen Rückstellungen*) according to § 77 VAG ("**Allocated Assets**") with respect to certain classes of insurance (*Versicherungszweige*). 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*).

Allocated Assets need to be registered with the reserve fund register (*Deckungsstockverzeichnis*) to be maintained by the Austrian Insurance Undertaking (§ 79b (1) VAG), otherwise such assets will not be Allocated Assets of the intended reserve fund (*Deckungsstock*).

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 ("**Unallocated Assets**").

5.2 Documentation

Whereas not set out by law, it should be **clear** from the documentation used **to which class of assets** (i.e. Unallocated Assets and Allocated Assets or to which respective reserve fund or division thereof respectively) the relevant Agreement and the Transactions thereunder are allocated. This is because the Allocated Assets relating to a particular reserve fund (*Deckungsstock*) or division thereof are **ring-fenced**, i.e. the counterparty of an Austrian Austrian Insurance Undertaking

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[41] *Braumüller*, Versicherungsaufsichtsrecht, 265.

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will have no access to the assets of **other reserve funds** (*Deckungsstöcke*) or divisions thereof maintained by the respective counterparty (see also section 4.1 above).

6 Recent developments regarding Austrian Insurance Undertakings

6.1 Credit default swaps

Although this Opinion does not address questions as to the capacity of Austrian counterparties to enter into derivative transactions, we would like to draw your attention to a recent circular (*Rundschreiben*) issued by the Austrian Financial Market Authority (*Finanzmarktaufsicht – FMA*) dated 17 October 2012[42].

In this circular the FMA expresses the view that Austrian Insurance Undertakings are not allowed to issue (*begeben*) or sell (*verkaufen*) respectively credit default swaps (CDS) because issuing / selling CDS does not constitute an activity that an Austrian Insurance Undertaking is entitled to undertake pursuant to the Austrian Insurance Supervision Act.

Circulars (*Rundschreiben*) of the FMA are interpretations of Austrian law by the FMA and, while a circular does not constitute a law (*Gesetz*) or binding regulation (*Verordnung*), the FMA's practice will usually follow the interpretation expressed in a circular.

6.2 Securities lending transactions

§ 1 (9) of the FMA Regulation on Capital Investment (*Kapitalanlageverordnung – KAVO*) has been amended as of 31 October 2012 to include more detailed regulatory requirements for Austrian Insurance Undertakings when entering into securities lending transactions. For instance, collateral (as specified in the KAVO) has to be posted by the borrower to the Austrian Insurance Undertaking to sufficiently cover the market value of the lent securities at all times (with a corresponding obligation to post further collateral in case that the market value of the collateral drops below the market value of the lent securities). Moreover, the amended KAVO stipulates that an Austrian Insurance Undertaking must at any time during the term of a securities lending transaction be entitled to request from the borrower that lent securities be returned within a maximum period of 90 days following such request.

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[42] Circular of the FMA addressed to insurance undertakings concerning credit default swaps (*Rundschreiben der FMA an Versicherungsunternehmen betreffend Credit Default Swaps*).

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 the Regulation, 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 MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.11.1 and any reference to the term "Proceedings" in this Opinion are deemed deleted.

Paragraph 1.11.2 is deemed deleted and replaced with the following:

"**Insolvency Proceedings**" means the procedures listed in section 3.1.1 of Schedule 3 (*Austrian Individuals*).

2 ADDITIONAL ASSUMPTIONS

We assume:

2.1 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*).

3 MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

3.1 **Insolvency Proceedings: Austrian Indivuals**

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an Austrian Individuals could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this Opinion, are described in section 3.1.1 of this Schedule 3 (*Austrian Individuals*) below.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented or amended as follows:

"[(•)] [you]/[a party] or a creditor of [you]/[a party] applies to the competent insolvency court seeking the opening of insolvency proceedings, financial reorganisation (*Schuldenregulierungsverfahren*) or absorption procedure (*Abschöpfungsverfahren*) under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

3.1.1 Insolvency of Austrian Individuals

Austrian Individuals are subject to the same insolvency laws and proceedings as described with respect to Austrian Corporations (see paragraph 3.1.1 above).

In addition, the IO contains special provisions with respect to the insolvency of Austrian Individuals in order to facilitate their financial reorganisation (*Schuldenregulierungsverfahren*). There is usually no need for an insolvency administrator (*Insolvenzverwalter*) in this proceeding, meaning that the insolvent Austrian Individual is still entitled to carry out transactions on his own. The insolvent Austrian Individual has the possibility to file for a payment plan to **discharge his residual debt** (*Zahlungsplan*), which is a special type of the restructuring plan (*Sanierungsplan*) (see paragraph 3.1.1.1 above). The insolvent Austrian Individual has to offer the creditors a payment *quota* that reflects his estimated income (less statutory minimum wage) for the next five years; such *quota* can even be less than 20% of his total residual debt. The insolvent Austrian Individual has to repay this *quota* within seven years. The creditors can decide whether they want to accept the payment plan or not. If the creditors accept the payment plan and the insolvent Austrian Individual pays the *quota* in time, he is discharged of residual debts.

If the insolvent Austrian Individual does not comply with one of these requirements, he / she can still become discharged of his / her debts by an absorption procedure (*Abschöpfungsverfahren*). The insolvent has to prove that he will be able to either pay (i) a *quota* of 10% of his debts within the next seven years or (ii) a *quota* of 50% within the next three years. If the insolvent Austrian Individual is able to prove such ability, the insolvency court decides the implementation of such absorption procedure. Should the insolvent Austrian Individual nevertheless be able to pay the *quota*, he will be **discharged** of **residual debts**.

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 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 fund[43]. 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 MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.11.1 and any reference to the term "Proceedings" in this Opinion are deemed deleted.

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[43] See Article 58 et seq of the UCITS Directive.

Paragraph 1.11.2 is deemed deleted and replaced with the following:

"**Insolvency Proceedings**" means the liquidation of such Austrian Investment Fund pursuant to the terms of the Austrian Investment Fund Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*).

2 ADDITIONAL ASSUMPTIONS

We assume:

2.1 The Investment Fund Management Company when entering into Transactions for Austrian Investment Funds on account of the Unitholders 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.

3 MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this Opinion as modified, or added to, by this Schedule), we are of the following opinion.

3.1 Insolvency Proceedings: Austrian Investment Funds

Based on the reasoning described in section 3.1.1 of this Schedule 4 (*Austrian Investment Funds*), we believe that an Austrian Investment Fund cannot become become overindebted in terms of Austrian insolvency law (*insolvenzrechtlich überschuldet*) or illiquid (*zahlungsunfähig*) within the meaning of the Austrian Insolvency Code (*Insolvenzordnung*) but can only be liquidated pursuant to the terms of the Austrian Investment Fund Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*).

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to such liquidation, if supplemented or amended as follows:

"[(•)] the [fund][44] managed by [you]/[a party] is liquidated in accordance with the procedures laid out in the Austrian Investment Fund Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*);"

3.1.1 Liquidation of Austrian Investment Funds

Under certain conditions and subject to certain restrictions (the details of which are beyond the scope of this Opinion), Investment Fund Manage-

[44] Insert the name of the Austrian Investment Fund on behalf of which the Investment Fund Management Company entered into the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

ment Companies may use (*einsetzen*) derivatives transactions for Austrian Investment Funds.

For the avoidance of any doubt, we should, however, note that, whereas **Investment Fund Management Companies** qualify as **Austrian Credit Institutions**, **Austrian Investment Funds**, i.e. Investment Fund Management Companies entering into transactions "for" Austrian Investment Funds – that is in their own name but for the account of the holders of units in an Austrian Investment Fund (*Anteilinhaber*) (the "**Unitholders**" – have to be treated differently.

Austrian statutory law is silent on the question whether an Austrian Investment Fund (which does not have legal personality (*Rechtspersönlichkeit*)) might be subject to insolvency proceedings (*Insolvenzverfahren*) or reorganisation proceedings (*Reorganisationsverfahren*). Also, no court rulings confirming either position are available.

It occurs that, mainly because of the applicable limitations on asset allocation (spreading of risk) and also because the InvFG 2011 contains specific provisions on the redemption of the Austrian Investment Fund's units (and certain limitations / precautions in case redemption should lead to a liquidity problem), the Austrian Investment Fund Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*) is based on the assumption that an Austrian Investment Fund may not become overindebted in terms of Austrian insolvency law (*insolvenzrechtlich überschuldet*) or illiquid (*zahlungsunfähig*). Accordingly, save for provisions that relate to an Austrian Investment Fund's liquidation (*Abwicklung*) (e.g. in case the Austrian Investment Fund's assets decrease below EUR 1,150,000 and the Investment Fund Management Company opts to no longer manage that Austrian Investment Fund and no substitute Investment Fund Management Company is appointed in accordance with the InvFG 2011), applicable law is silent in this regard. In our opinion this (historic) view somewhat neglects to take into account the risks that may be incurred by the Investment Fund Management Company, e.g. in relation to derivatives transactions that are entered into by the Investment Fund Management Company in its name and for the account of Unitholders in respect of a specific Austrian Investment Fund.

Based on general insolvency law considerations, we believe, however, that **neither insolvency proceedings** (*Insolvenzverfahren*) **nor reorganisation proceedings** (*Reorganisationsverfahren*) may be opened in respect of an Austrian Investment Fund.

For the sake of completeness we should like to note that pursuant to § 65 (1) InvFG 2011 an Investment Fund Management Company may under certain circumstances demerge (*abspalten*) illiquid parts of an Austrian

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Investment Fund's assets into a new Austrian Investment Fund established for the purpose of liquidation of these illiquid assets in accordance with § 63 InvFG 2011[45]. This may limit the assets available to satisfy the creditors of illiquid parts of an Austrian Investment Fund's assets. Furthermore, as regards Feeder and Master Investment Funds, pursuant to § 101 InvFG 2011, in case of liquidation of a Master Investment Fund in general also a Feeder Investment Fund invested in the Master Investment Fund has to be liquidated[46].

3.2 Modifications of our opinion statements in paragraphs 3.3, 3.4 and 3.5

The FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision will in case that the FOA Netting Agreement or the Clearing Agreement and Transactions thereunder shall be entered into by an Investment Fund Management Company for the account of the Unitholders of an Austrian Investment Fund only be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms and subject to what is stated above at 3.3, 3.4 and 3.5, to the extent that the FOA Netting Agreement or the Clearing Agreement and the Transactions thereunder relate to a single specific Austrian Investment Fund.

3.3 Modifications of our opinion statements in paragraphs 3.7, 3.8 and 3.9

Our opinion statements made under paragraphs 3.7, 3.8 and 3.9 in relation to the FOA Set-Off Provisions, the Clearing Module Set-Off Provisions and the Addendum Set-Off Provisions will only apply to the extent that that the FOA Netting Agreement or the Clearing Agreement, the Transactions and the claims to be set-off against the Liquidation Amount thereunder relate to a single specific Austrian Investment Fund.

3.4 **Modifications of the opinion statement in paragraph 3.7.1.1.1**

The following paragraph shall be inserted as penultimate paragraph to paragraph 3.7.1.1.1:

As regards Austrian Investment Funds, which are among the entities referred to in § 2 (1) FinSG and thus qualify for the purposes of the FinSG, we believe that the term "liquidation proceedings" can in this context only be understood as to refer to

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[45] Such Austrian Investment Fund would not qualify as UCITS (*OGAW*) under Article 1 (2) of the UCITS Directive (§ 65 (3) InvFG 2011).

[46] Save for the FMA approving (i) that at least 85% of the Feeder Investment Fund's assets are to be invested in another Investment Fund or (ii) the amendment of the Feeder Investment Fund's terms and conditions to allow for the transformation of the Feeder Investment into a "regular" Investment Fund.

the liquidation of an Austrian Investment Fund under the InvFG 2011. Thus, the enforcement procedures under the FinSG as described in this paragraph 3.7.1.1.1 should apply also with respect to Austrian Investment Funds.

4 ADDITIONAL QUALIFICATIONS

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

4.1 As outlined under paragraph 3.1.5 above, likely neither insolvency proceedings (*Insolvenzverfahren*) nor reorganisation proceedings (*Reorganisationsverfahren*) may be opened in respect of an Austrian Investment Fund. On the other hand the InvFG 2011– except for § 91 (2) InvFG 2011 (please see at section 3.2 below) – does not contain any express restrictions with regard to set-off, netting or close-out netting in case of an Austrian Investment Fund's liquidation (*Abwicklung*). Therefore, we believe that, other than as set out at section 3.2 below, no investment fund-specific limitations to close-out netting should apply.

However, it must be **clear** from the documentation **to which Austrian Investment Fund** the relevant Agreement and the Transaction(s) that are entered into by the Investment Fund Management Company on behalf and for the benefit of the Austrian Investment Fund are allocated (see also at paragraph 3.1.7 above). This is because pursuant to § 54 (2) of the InvFG 2011 the assets allocated to an Austrian Investment Fund are **ring-fenced**, i.e. an Austrian Investment Fund's counterparty will have no access to the assets of other Austrian Investment Funds managed by the same Investment Fund Management Company to satisfy its claims against the first-mentioned Austrian Investment Fund.

Further, the Austrian legislator opted to permit Austrian Investment Funds consisting of several investment compartments pursuant to Article 1 (2) of the UCITS Directive (*Teilsfonds*) (the "**Investment Compartments**"). The InvFG 2011 in this respect uses the term umbrella structure (*Umbrella-Konstruktion*). Each Investment Compartment constitutes a separate estate (*Sondervermögen*) under the InvFG 2011. Enforcement against an Investment Compartment is thus limited to the assets of that very Investment Compartment, i.e. the assets allocated to an Investment Compartment are **ring-fenced**, too.

This ring-fencing also prevents that receivables allocated to a particular Austrian Investment Fund / Investment Compartment are netted / sett-off with / against payables allocated to another Austrian Investment Fund / Investment Compartment (i.e. no netting across different Austrian Investment Funds / Feeder Investment Funds / Master Investment Funds / Investment Compartments will be possible, even if managed by the same Investment Fund Management Company). We also note that Transactions between an Austrian Investment Fund's counterparty and an Austrian Investment Fund must satisfy the provisions as set out by the InvFG 2011 relating to derivates. Furthermore, the Regulation on Notification and

Risk Calculation relating to Derivatives[47] issued by the FMA, which also refers to netting agreements, must be considered.

As is the case with other types of counterparties, parties should carefully consider amending the Insolvency Events of Defaults Clause to adapt them to the specifics of transacting with Austrian Investment Funds.

4.2 Austrian law implementation of Article 43 (2) of Directive 2010/43/EU

The InvFG 2011 entered into force on 1 September 2011. The InvFG 2011 implements, *inter alia*, Commission Directive 2010/43/EU implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company ("**Directive 2010/43/EU**") into Austrian law.

§ 91 (2) InvFG 2011 reads[48]:

"*Management companies may net the derivative positions of a UCITS with the same counterparty, provided that they are able to legally enforce netting agreements with the counterparty on behalf of the UCITS.* ***Netting shall only be permissible with respect to OTC derivative instruments with the same counterparty and not in relation to any other exposures the UCITS may have with that same counterparty***".

On its face, the second sentence of § 91 (2) InvFG 2011 suggests that netting would only be "permissible" with respect to OTC derivatives (as described in § 73 InvFG 2011). Consequently, netting agreements might thus only be enforceable in case the claims to be netted would arise out of such OTC derivatives.

However, based on the arguments set out below, one could also try to interpret this provision in a manner to only set out a regulatory approach with respect to matters of counterparty risk but without genuinely restricting enforceability of a netting agreement with an Austrian Investment Fund. The arguments that could be brought forward in favour of the latter understanding are the following:

(i) Systematically, § 91 (2) InvFG 2011 forms part of a section of the InvFG 2011 that deals with risk management and calculation of certain types of risks (e.g. liquity risk, market risk and counterparty risk) and an Austrian In-

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[47] *Verordnung der Finanzmarktaufsichtsbehörde (FMA) über die Risikoberechnung und Meldung von Derivaten (4. Derivate-Risikoberechnungs- und Meldeverordnung*, BGBl II 266/2011).

[48] This corresponds to Article 43 (2) of Directive 2010/43/EU.

vestment Fund's exposure towards its counterparties. On the other hand, § 91 (2) InvFG 2011 has no apparent nexus to § 54 InvFG 2011 (dealing with ring-fencing of an Austrian Investment Fund's assets; please see for further details at section 4.1 above) or § 63 InvFG (dealing with an Austrian Investment Fund's liquidation (*Abwicklung*); please see for further details at paragraph 3.1.5 above).

(ii) The Explanatory Notes of the Austrian legislator (*Erläuternde Bemerkungen*) in relation to § 91 (2) InvFG 2011 appear to suggest that § 91 InvFG 2011 shall merely serve for purposes of determining criteria to calculate an Austrian Investment Fund's counterparty risk (the Explanatory Notes also refer to Recital 26 of Directive 2010/43/EU in this respect).

(iii) On its face, the first sentence of § 91 (2) InvFG 2011 appears to only be addressed at Investment Fund Management Companies ("*Management companies may* [...]"), thereby suggesting that § 91 (2) InvFG 2011 could only be understood as regulatory provision within the broad context of an Investment Fund Management Company's compliance with the relevant Austrian Investment Fund's investment restrictions pursuant to the InvFG 2011 and the UCITS Directive[49].

Also, the German law implementation of Article 43 (2) of Directive 2010/43/EU in § 22 of the Regulation on Risk Management and Risk Measuring When Dealing With Derivatives in Separate Assets under the German Investment Act (*Derivateverordnung – DerivateV*) suggests that the German legislator read (and implemented) Article 43 (2) of Directive 2010/43/EU in the sense that it would not impact / adversely affect the enforceability of netting.

However, based on the terminology used by the Austrian legislator in the second sentence of § 91 (2) InvFG 2011, there is considerable uncertainty whether an Austrian authority would follow such approach or whether ultimately netting under the FOA Netting Agreement and the Clearing Agreement with an Austrian Investment Fund might only be enforceable in case the claims to be netted would arise out of Transactions that qualify as OTC derivatives pursuant to § 73 InvFG 2011[50].

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[49] An Investment Fund Management Company may only use derivatives for an Austrian Investment Fund provided that the counterparty risk of that Austrian Investment Fund does not exceed certain thresholds.

[50] 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;

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4.3 Limitations to granting security interests

According to § 81 InvFG 2011, an Investment Fund Management Company may not use assets of an Austrian Investment Fund for purposes of pledging or otherwise encumbering of such assets (including by way of title transfer under the Title Transfer Provisions), 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 2011. Therefore, Firms should carefully scrutinize whether Transactions qualify for purposes of § 73 InvFG 2011 (see also footnote 41 in this respect).

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). However, as the Austrian Investment Fund's assets are ring-fenced (see at section 3.1 above), we do not believe that in respect of such assets the close-out netting mechanism under the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision would work.

(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).

5 Recent developments regarding Austrian Investment Funds

5.1 Securities lending

On 1 May 2013, the FMA Regulation on Securities Lending and Repurchase Transactions (*Wertpapierleih- und Pensionsgeschäfteverordnung – WPV*) entered into force. This regulation contains specific limitations for Investment Fund Management Companies when entering into securities lending or repurchase transactions for the account of Investment Funds. According to the explanatory notes of the FMA, the WPV also takes into account the ESMA Guidelines on ETFs and other UCITS dated 25 July 2012.

While most of the changes do not relate to the matters dealt with in the Opinion, we should like to point out that according to the WPV securities lending and repurchase transactions are limited to a maximum tenor of twelve months. Investment Fund Management Companies must have the unconditional right to terminate the securities lending transaction at any time and to request from the borrower that lent securities be returned within a maximum period of three business days following such request. Also, lending by the Investment Fund Management Company of securities belonging to an Investment Fund is only permissible if sufficient collateral is posted by the counterparty to the Investment Fund Management Company. Such collateral must satisfy the conditions stipulated in the WPV.

In case of repurchase transactions, the Investment Fund Management Company must be entitled to request the repayment of any and all amounts paid under such repurchase transaction at any time.

Kindly note that we do not express any opinion as to the legal effects a violation of the WPV would have on the opinions expressed in this Opinion.

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*)[51], 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 MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.11.1 and any reference to the term "Proceedings" in this Opinion are deemed deleted.

Paragraph 1.11.2 is deemed deleted and replaced with the following:

"**Insolvency Proceedings**" means the procedures listed in paragraph 3.1.1.1 of this Opinion.

2 MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

2.1 Insolvency of Austrian Sovereign Entities

Based on our reasoning set out in section 2.1.1 and 2.1.2 of this Schedule 5 (*Austrian Sovereign Entities*), we believe that in principle Insolvency Proceedings may be opened against Austrian Sovereign Entities if the Austrian Sovereign Entities are illiquid (*zahlungsunfähig*) or over-indebted in terms of insolvency law (*insolvenzrechtlich überschuldet*).

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented or amended as follows:

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[51] More commonly referred to as the "Republic of Austria".

"[(•)] [you]/[a party] or a creditor of [you]/[a party] applies to the competent insolvency court seeking the opening of insolvency proceedingsunder the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

2.1.1 Capability of Austrian Sovereign Entities to be subject of Insolvency Proceedings

Austrian law does not contain any specific provision regarding the question whether Insolvency Proceedings can be opened against sovereign entities such as the Austrian Federal State (*Bund*)[52], Austrian States (*Bundesländer*) or Austrian municipalities (*Gemeinden*) and, if so, the potential effects of such insolvency proceedings against Austrian Sovereign Entities on the enforceability of netting provisions of the FOA Netting Agreement or the Clearing Agreement.

The question whether a legal entity has the capacity to be subject to insolvency proceedings (*Konkursfähigkeit*) is not regulated in the Austrian Insolvency Code. According to the prevailing view, a legal entity has the capacity to be subject to insolvency proceedings if it has the capacity to be party to civil proceedings (*Parteifähigkeit*) and to hold and assume legal rights and duties (*Rechtsfähigkeit*). There is no doubt that Austrian Sovereign Entities as public law entities may be a party to civil proceedings and hold and assume legal rights and duties. In this respect, we note that the Austrian Supreme Court has ruled that insolvency proceedings may be opened with respect to Austrian municipalities (*Gemeinden*)[53]. Taking into account the above, it follows that, absent statutory provisions to the contrary, Austrian Sovereign Entities may in principle be subject to Insolvency Proceedings.

2.1.2 Grounds for the opening of Insolvency Proceedings

It is disputed in legal writing whether a Federal State such as the Republic of Austria can become illiquid (*zahlungsunfähig*) or over-indebted in terms of insolvency law (*insolvenzrechtlich überschuldet*) at all. Due to the Federal State's competence to collect taxes, it may be argued that the Federal State will always be able to make available the necessary funds in order to uphold its ability to pay.

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[52] More commonly referred to as the "Republic of Austria".

[53] OGH 21.11.1933, 4 Ob 435; the Austrian Supreme Court held that insolvency proceedings may only be opened with respect to Austrian municipalities (*Gemeinden*) in relation to those assets which do not serve public interest (*Erfüllung öffentlicher Interessen*) in accordance with § 15 EO (please also section 1.1 of Schedule 6).

Furthermore, legal writing holds that – where a tax or due (*Abgabe*) is not subject to the competence of the Federal State (*Bund*) in accordance with Austrian constitutional law – the Austrian States (*Länder*) may have competence to "invent" (and consequently collect) their own taxes (*Steuererfindungsrecht*)[54]. Based on this competence to "invent" taxes, it could be argued that the Austrian States could always be able to make available the necessary funds in order to uphold their ability to pay. It could further be argued that Austrian States or Austrian municipalities may also not become over-indebted in terms of insolvency law since parts of their assets could become subject to the limitations of debt enforcement under § 15 EO (see at section3.1 of this Schedule 6 below).

We do not find this argumentation convincing. Taking into account the financial collapse of several South-American states in economic history and their decision to cease further payments to their creditors as well as recent developments in peripheral European Countries, it is obvious that illiquidity may also occur to states. As to the cited argumentation on over-indebtedness it is to be noted that the potential applicability of § 15 EO probably restricts the assets that are subject to insolvency proceedings, but is not relevant with regards to over-indebtedness in terms of insolvency law.

3 ADDITIONAL QUALIFICATIONS

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

3.1 Restrictions on enforcement

3.1.1 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*). It remains yet to be clarified if this would also include title transfer financial collateral arrangements.

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[54] See *Matzinger/Pröll* in *Steger (Hrsg)*, Öffentliche Haushalte in Österreich, 71 et seq.

3.1.2 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 States[55], we cannot rule out that an Austrian Court would come to the conclusion that an enforcement (and thus set-off) 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 Interessen*) even if these assets were not transferred to a non profit institution under public law.

The applicability of § 15 EO may affect pre-insolvency close-out netting 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 close-out netting are excluded from execution / enforcement pursuant to § 15 EO. § 15 EO may also affect post-insolvency close-out netting since it limits the scope of the assets that are subject to insolvency proceedings. According to § 1 of the Austrian Insolvency Code (*Insolvenzordnung – IO*) the bankrupt's estate comprises of all assets that are subject to execution / enforcement according to the Enforcement Act.

3.2 Legislative power of the Republic of Austria

The Republic of Austria and its legislative bodies do have legislative power as to the national law on close-out netting. Such legislative power may be used to restrict the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision and the Title Transfer Provisions under the FOA Netting Agreement or the Clearing Agreement in a pre-insolvency and a post-insolvency scenario. The legislative bodies of the Republic of Austria may e.g. decide that insolvency proceedings may not be opened against the Republic of Austria and / or Austrian States or Austrian municipalities or that the specific close-out netting legislation such as § 233 IO (see at paragraph 3.2.2.2 above) and § 20 (4) IO (see at paragraph 3.3.2.1 above) shall not be applicable. In this case, the provisions of the FOA Netting Agreement or the

[55] 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.

Clearing Agreement on close-out netting would not be enforceable against Austrian Sovereign Entities.

3.3 Capacity of Austrian Sovereign Entities to enter into Transactions

When dealing with Austrian Sovereign Entities, Firms should carefully scrutinize whether restrictions as to the relevant Sovereign Entity's capacity to enter into Transactions or the Title Transfer Provisions or to post margin exist. In case that a Sovereign Entity would not be permitted to enter into specific Transactions under the FOA Netting Agreement, the FOA Clearing Module or the Title Transfer Provisions, enforceability of the whole FOA Netting Agreement, the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision, the Title Transfer Provisions and / or Transactions contemplated thereunder may be affected.

ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

1. Master Netting Agreement - One-Way (1997 version) (the "**One-Way Master Netting Agreement 1997**")

2. Master Netting Agreement - Two-Way (1997 version) (the "**Two-Way Master Netting Agreement 1997**")

3. Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Long-Form One-Way Clauses 2007**")

4. Short Form Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Short-Form One-Way Clauses 2007**")

5. Short Form Default, Netting and Termination Module (One-Way Netting) (2009 version) (the "**Short-Form One-Way Clauses 2009**")

6. Short Form Default, Netting and Termination Module (One-Way Netting) (2011 version) (the "**Short-Form One-Way Clauses 2011**")

7. Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Long-Form Two-Way Clauses 2007**")

8. Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Long-Form Two-Way Clauses 2009**")

9. Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Long-Form Two-Way Clauses 2011**")

10. Short Form Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Short-Form Two-Way Clauses 2007**")

11. Short Form Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Short-Form Two-Way Clauses 2009**")

12. Short Form Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Short-Form Two-Way Clauses 2011**")

13. Professional Client Agreement (2007 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2007**")

14. Professional Client Agreement (2009 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2009**")

15. Professional Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2011**")

16. Professional Client Agreement (2007 Version), excluding Module G (Margin and Collateral) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2007**")

17. Professional Client Agreement (2009 Version), excluding Module G (Margin and Collateral) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2009**")

18. Professional Client Agreement (2011 Version), excluding Module G (Margin and Collateral) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2011**")

19. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2007**")

20. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2009**")

21. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2011**")

22. Retail Client Agreement (2007 Version), excluding Module G (Margin and Collateral) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2007**")

23. Retail Client Agreement (2009 Version), excluding Module G (Margin and Collateral) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2009**")

24. Retail Client Agreement (2011 Version), excluding Module G (Margin and Collateral) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2011**")

25. Eligible Counterparty Agreement (2007 Version) including Module G (Margin) (the "**Eligible Counterparty (with Security Provisions) Agreement 2007**")

26. Eligible Counterparty Agreement (2009 Version) including Module G (Margin) (the "**Eligible Counterparty (with Security Provisions) Agreement 2009**")

27. Eligible Counterparty Agreement (2011 Version) including Module G (Margin) (the "**Eligible Counterparty (with Security Provisions) Agreement 2011**")

28. Eligible Counterparty Agreement (2007 Version) excluding Module G (Margin) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2007**")

29. Eligible Counterparty Agreement (2009 Version) excluding Module G (Margin) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2009**")

30. Eligible Counterparty Agreement (2011 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2011**")

Where an 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), provided that any election made does not constitute an Adverse Amendment.

Each of the Agreements listed at items 13 to 30 of this Annex 1 may be deemed to include FOA Netting 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, in which case references to the Insolvency Events of Default and FOA Netting Provision in respect of such FOA Netting Agreements shall mean the Insolvency Events of Default and FOA Netting Provision in relation to the Two Way Clauses.

ANNEX 2
LIST OF TRANSACTIONS

The following groups of Transactions may be entered into under the FOA Netting Agreements or Clearing Agreements:

(A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements :

(i) a contract made on an exchange or pursuant to the rules of an exchange;

(ii) a contract subject to the rules of an exchange; or

(iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,

in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or

(iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or

(v) any other Transaction which the parties agree to be a Transaction;

(B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;

(C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;

(D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.

(E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC, including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

"**Addendum Inconsistency Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum) Clause 1(b) (i) of the ISDA/FOA Clearing Addendum.

"**Addendum Netting Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum):

(a) Clause 8(b) (*Clearing Member Events*), 8(c) (CCP Default) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clauses.

"**Addendum Set-Off Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum):

(a) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 8 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clause.

"**Adverse Amendments**" means (a) any amendment to a Core Provision and/or (b) any other provision in an agreement that may invalidate, adversely affect, modify, amend, supersede, conflict or be inconsistent with, provide an alternative to, override, compromise or fetter the operation, implementation, enforceability or effectiveness of a Core Provision (in each case in (a) and (b) above, excepting any Non-material Amendment).

"**Clearing Agreement**" means an agreement:

(a) on the terms of the FOA Netting Agreement when used (i) in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or (ii) in conjunction with a Clearing Module Netting Provision and/or an Addendum Netting Provision and with or without a Clearing Module Set-Off Provision and/or an Addendum Set-Off Provision;

(b) which is governed by the law of England and Wales; and

(c) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.

"**Clearing Module Inconsistency Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module) Clause 1.2.1 of the FOA Clearing Module.

"**Clearing Module Netting Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module):

(a) Clause 5.2 (*Firm Events*), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clauses.

"**Clearing Module Set-Off Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module):

(a) Clause 5.5 (*Set-Off*) of the FOA Clearing Module; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

together with the defined terms required properly to construe such Clause.

"**Client**" means, in relation to an FOA Netting Agreement or a Clearing Agreement, the Firm's or, as the case may be, Clearing Member's counterparty under the relevant FOA Netting Agreement or Clearing Agreement.

"**Core Provision**" means those parts of the clauses or provisions specified below in relation to a paragraph of this Opinion (and any equivalent paragraph in any Schedule to this Opinion), which are highlighted in Annex 4:

(a) for the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*) and 3.6 (*Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;

(b) for the purposes of paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value";

(c) for the purposes of paragraph 3.5 (*Enforceability of the Addendum Netting Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value";

(d) for the purposes of paragraph 3.7.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;

(e) for the purposes of paragraph 3.7.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin

Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;

(f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;

(g) for the purposes of paragraph 3.8.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provisions;

(h) for the purposes of paragraph 3.9 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;

(i) for the purposes of paragraph 3.10.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and

(j) for the purposes of paragraphs 3.10.3 and 3.10.4, the Title Transfer Provisions;

in each case, incorporated into an FOA Netting Agreement or a Clearing Agreement together with any defined terms required properly to construe such provisions, in such a way as to preserve the essential sense and effect of the highlighted parts.

References to "**Core Provisions**" include Core Provisions that have been modified by Non-material Amendments.

"**Defaulting Party**" includes, in relation to the One-Way Versions, the Party in respect of which an Event of Default entitles the Non-Defaulting Party to exercise rights under the FOA Netting Provision.

"**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement (with Security Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Security Provisions) Agreement 2009, the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2009, the Eligible Counterparty Agreement (with Security Provisions) Agreement 2011 or the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"**Firm**" means, in relation to an FOA Netting Agreement or a Clearing Agreement which includes an FOA Clearing Module, the Party providing the services under the relevant FOA Netting Agreement or Clearing Agreement which includes an FOA Clearing Module.

"**FOA Clearing Module**" means the FOA Client Cleared Derivatives Module as first published on 9 October 2013 or any subsequent published version up to the date of this Opinion.

"**FOA Netting Agreement**" means an agreement:

(a) on the terms of the forms specified in Annex 1 to this Opinion or which has broadly similar function to any of them, when not used in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum and/or a Clearing Module Netting Provision and/or an Addendum Netting Provision;

(b) which is governed by the law of England and Wales; and

(c) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provisions, and with or without the Title Transfer Provisions, with no Adverse Amendments.

"**FOA Netting Agreements (with Title Transfer Provisions)**" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2011, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009 and the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1) or an FOA Netting Agreement which has broadly similar function to any of the foregoing.

"**FOA Netting Provision**" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

(a) in relation to the terms of the Long Form One-Way Clauses 2007 and the Long Form Two-Way Clauses, Clause 2.2 (***Liquidation Date***), Clause 2.4 (***Calculation of Liquidation Amount***) and Clause 2.5 (***Payer***);

(b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (***Liquidation Date***), Clause 2.3 (***Calculation of Liquidation Amount***) and Clause 2.4 (***Payer***);

(c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;

(d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (***Liquidation Date***), Clause 10.3 (***Calculation of Liquidation Amount***) and Clause 10.4 (***Payer***);

(e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***);

(f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***); or

(d) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"**FOA Published Form Agreement**" means a document listed at Annex 1 in the form published by the Futures and Options Association on its website as at the date of this opinion.

"**FOA Set-Off Provisions**" means:

(a) the "**General Set-off Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (***Set-off***);

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (***Set-off***);

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (***Set-off***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (***Set-off***);

(vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);

(viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***); or

(ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or

(b) the "**Margin Cash Set-off Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (***Set-off on default***);

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(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (***Set-off upon default or termination***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (***Set-off on default***),

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (***Set-off upon default or termination***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (***Set-off on default***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (***Set-off upon default or termination***); or

(vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"**Insolvency Events of Default Clause**" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

(a) where the FOA Member's counterparty is not a natural person:

(i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);

(ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);

(iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);

(iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);

(v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or

(vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and

(b) where the FOA Member's counterparty is a natural person:

(i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);

(ii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);

(iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or

(iv) any modified version of such clauses provided that it includes at least those parts of paragraph 4(b) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"**ISDA/FOA Clearing Addendum**" means the ISDA/FOA Client Cleared OTC Derivatives Addendum as first published on 11 June 2013, or any subsequent published versions up to the date of this Opinion.

"**Limited Recourse Provision**" means Clause 8.1 of the FOA Clearing Module or Clause 15(a) of the ISDA/FOA Clearing Module.

"**Long Form Two-Way Clauses**" means each of the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"**Master Netting Agreements**" means each of the One-Way Master Netting Agreement 1997 and the Two-Way Master Netting Agreement 1997 (each as listed and defined at Annex 1).

"**Non-Defaulting Party**" includes, in relation to the One-Way Versions, the Party entitled to exercise rights under the FOA Netting Provision.

"**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 4.

"**One-Way Versions**" means the Long Form One-Way Clauses 2007, the Short Form One-Way Clauses, the One-Way Master Netting Agreement 1997, and the FOA Netting Provision as published in the Retail Client Agreements and the Professional Client Agreements in each case in the form of an FOA Published Form Agreement.

"**Party**" means a party to an FOA Netting Agreement or a Clearing Agreement.

"**Professional Client Agreements**" means each of the Professional Client Agreement (with Security Provisions) Agreement 2007, the Professional Client Agreement (with Title Transfer Provisions) Agreement 2007, the Professional Client Agreement (with Security Provisions) Agreement 2009, the Professional Client Agreement (with Title Transfer Provisions) Agreement 2009, the Professional Client Agreement (with Security Provisions) Agreement 2011 or the Professional Client Agreement (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

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"**Rehypothecation Clause**" means:

(a) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);

(b) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);

(c) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); or

(h) any modified version of such clauses provided that it includes at least those parts of paragraph 4 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"**Retail Client Agreements**" means each of the Retail Client Agreement (with Security Provisions) Agreement 2007, the Retail Client Agreement (with Title Transfer Provisions) Agreement 2007, the Retail Client Agreement (with Security Provisions) Agreement 2009, the Retail Client Agreement (with Title Transfer Provisions) Agreement 2009, the Retail Client Agreement (with Security Provisions) Agreement 2011 or the Retail Client Agreement (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"**Non-Cash Security Interest Provisions**" means:

(a) the "**Non-Cash 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***); or

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow; and

(b) 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***); or

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"**Client Money Additional Security Clause**" means:

(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); or

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"**Short Form One Way-Clauses**" means each of the Short-Form One-Way Clauses 2007, the Short-Form One-Way Clauses 2009 and the Short-Form One-Way Clauses 2011 (each as listed and defined at Annex 1).

"**Short Form Two Way-Clauses**" means each of the Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009 and the Short-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"**Title Transfer Provisions**" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

(a) clauses 2, 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version); or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"**Two Way Clauses**" means each of the Long-Form Two Way Clauses and the Short-Form Two Way Clauses.

ANNEX 4

PART 1
CORE PROVISIONS

For the purposes of the definition of Core Provisions in Annex 3, the wording highlighted in yellow below shall constitute the relevant Core Provision:

1 FOA Netting Provision:

a) **"Liquidation date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, then the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") for the termination and liquidation of Netting Transactions in accordance with this clause.

b) **Calculation of Liquidation Amount:** Upon the occurrence of a Liquidation Date:

i. neither party shall be obliged to make any further payments or deliveries under any Netting Transactions which would, but for this clause, have fallen due for performance on or after the Liquidation Date and such obligations shall be satisfied by settlement (whether by payment, set-off or otherwise) of the Liquidation Amount;

ii. the Non-Defaulting Party shall as soon as reasonably practicable determine (discounting if appropriate), in respect of each Netting Transaction referred to in paragraph (a), the total cost, loss or, as the case may be, gain, in each case expressed in the Base Currency specified by the Non-Defaulting Party as such in the Individually Agreed Terms Schedule as a result of the termination, pursuant to this Agreement, of each payment or delivery which would otherwise have been required to be made under such Netting Transaction; and

iii. the Non-Defaulting Party shall treat each such cost or loss to it as a positive amount and each such gain by it as a negative amount and aggregate all such amounts to produce a single, net positive or negative amount, denominated in the Non-Defaulting Party's Base Currency (the "**Liquidation Amount**").

c) **Payer:** If the Liquidation Amount is a positive amount, the Defaulting Party shall pay it to the Non-Defaulting Party and if it is a negative amount, the Non-Defaulting Party shall pay it to the Defaulting Party. The Non-Defaulting Party shall notify the Defaulting Party of the Liquidation Amount, and by which Party it is payable, immediately after the calculation of such amount."

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2 General Set-Off Clause:

"**Set-off:** Without prejudice to any other rights to which we may be entitled, we may at any time and without notice to you set off any amount (whether actual or contingent, present or future) owed by you to us against any amount (whether actual or contingent, present or future) owed by us to you. For these purposes, we may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained."

3 Margin Cash Set-Off Clause:

"**Set-off upon default or termination:** If there is an Event of Default or this Agreement terminates, we may set off the balance of cash margin owed by us to you against your Obligations (as reasonably valued by us) as they become due and payable to us and we shall be obliged to pay to you (or entitled to claim from you, as appropriate) only the net balance after all Obligations have been taken into account. [The net amount, if any, payable between us following such set-off, shall take into account the Liquidation Amount payable under the Netting Module of this Agreement.]"

4 Insolvency Events of Default Clause:

a) In the case of a Counterparty that is not a natural person:

1.1. "The following shall constitute Events of Default:

i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];

ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief with respect to itself or to its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a trustee, receiver, liquidator, conservator, administrator, custodian, examiner or other similar official (each a "**Custodian**") of it or any substantial part of its assets, or takes any corporate action to authorise any of the foregoing;

iii. an involuntary case or other procedure is commenced against a party seeking or proposing liquidation, reorganisation, or moratorium, or other similar relief with respect to it or its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a Custodian of it or any substantial part of its assets."

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b) In the case of a Counterparty that is a natural person:

1.2. "The following shall constitute Events of Default:

i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];

ii. you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)."

5 Title Transfer Provisions:

a) "**Default:** If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date *will* be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "**Default Margin Amount**" means the amount, calculated in the Base Currency of the aggregate value as at the relevant Liquidation Date (as determined by us) of the Transferred Margin.

b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

6 Clearing Module Netting Provision / Addendum Netting Provision:

a) [Firm Trigger Event/CM Trigger Event]

Upon the occurrence of a [Firm Trigger Event/CM Trigger Event], the Client Transactions in the relevant Cleared Transaction Set will, except to the ex-

tent otherwise stated in the [Core Provisions of the] relevant Rule Set, be dealt with as set out below:

(a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];

(b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;

(c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (C) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (D) any other amount attributable to the relevant Client Trans-

actions under the Clearing Agreement[or any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributed] [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included [Clauses 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

(d) if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable in accordance with this [Module/Addendum].

b) CCP Default

Upon the occurrence of a CCP Default, the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise stated in the [Cor Provisions of the relevant] Rule Set, be dealt with as set out below:

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];

2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;

3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the date on which the CCP Default occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the

day on which the relevant Client Transactions had all been terminated and, in either case, will be an amount equal to the sum, but without duplication, of (1) the Aggregate Transaction Value, (2) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (3) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (4) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[and any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in [Clauses 5.3.3(1) to 5.3.3(3)] [Sections 8(c)(iii)(1) to 8(c)(iii)(3)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing member]);

4. if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable, in accordance with this [Module/Addendum].

c) Hierarchy of Events

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

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[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the clause pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

d) Definitions

"**Aggregate Transaction Value**" means, in respect of the termination of Client Transactions of a Cleared Transaction Set, an amount (which may be positive or negative or zero) equal to the aggregate of the [Firm/CM]/CCP Transaction Values for all Client Transactions in the relevant Cleared Transaction Set or, if there is just one [Firm/CM]/CCP Transaction Value in respect of all such Client Transactions, an amount (which may be positive or negative or zero) equal to such [Firm/CM]/CCP Transaction Value.

"**[Firm/CM]/CCP Transaction Value**" means, in respect of a terminated Client Transaction or a group of terminated Client Transactions, an amount equal to the value that is determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction or group of related [Firm/CM]/CCP Transactions in accordance with the relevant Rule Set following a [Firm/CM] Trigger Event or CCP Default (to the extent such Rule Set contemplates such a value in the relevant circumstance). If the value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set reflects a positive value for [Firm/Clearing Member] vis-à-vis the Agreed CCP, the value determined in respect of such terminated Client Transaction(s) will reflect a positive value for Client vis-à-vis [Firm/Clearing Member] (and will constitute a positive amount for any determination under this [Module/Addendum]) and, if the value determined in respect of the related terminated [Firm/CCP]/CCP Transaction(s), under the relevant Rule Set reflects a positive value for the relevant Agreed CCP vis-à-vis [Firm/Clearing Member], the value determined in respect of [or otherwise ascribed to] such terminated Client Transaction(s) will reflect a positive value for [Firm/Clearing Member] vis-à-vis Client (and will constitute a negative amount for any determination under this [Module/Addendum]). The value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set may be equal to zero.

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"**Relevant Collateral Value**" means, in respect of the termination of Client Transactions in a Cleared Transaction Set, the value (without applying any "haircut" but otherwise as determined in accordance with the [Agreement/Collateral Agreement]) of all collateral that:

(a) is attributable to such Client Transactions;

(b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and

(c) is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

The Relevant Collateral Value will constitute a positive amount if the relevant collateral has been transferred by Client to [Firm/Clearing Member] and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement] and a negative amount if the relevant collateral has been transferred by [Firm/Clearing Member] to Client and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement].

7 Clearing Module Set-Off Provision

Firm may at any time and without notice to Client, set-off any Available Termination Amount against any amount (whether actual or contingent, present or future) owed by Firm to Client under the Clearing Agreement or otherwise. For these purposes, Firm may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained.

This Clause shall apply to the exclusion of all Disapplied Set-off Provisions in so far as they relate to Client Transactions; provided that, nothing in this Clause shall prejudice or affect such Disapplied Set-off Provisions in so far as they relate to transactions other than Client Transactions under the Agreement.

8 Addendum Set-Off Provision

(i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("**CM Other Amounts**"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its set-off against any other termination amount payable by or to X (where "**X**" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing

Agreement at such time ("**EP Other Amounts**" and together with CM Other Amounts, "**Other Amounts**"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

(ii) For the purposes of this Section 8(ii):

(A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;

(B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and

(C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that has previously been reduced in part by set-off pursuant to this Section 8(e).

(iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.

PART 2
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" using synonyms, changing the order of the words) 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 for the purposes of correct cross-referencing or 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. A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes effect.

4. Any change to the scope of the agreement clarifying that certain transactions (e.g., OTC derivatives governed by an ISDA Master Agreement) shall not be transactions or contracts for purposes of the agreement.

5. 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), where such addition 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, and such addition may be expressed to apply to one only of the Parties.

6. 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.

7. 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.

8. 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.

9. 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).

10. In the case of any agreement incorporating the Two Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.

11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.

13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.

14. Any change to the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time[56] set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the scope of the provision where a Party acts as agent, (iv) the use of currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.

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[56] See opinion statements in paragraphs 3.7, 3.8 and 3.9 above in respect of the impact timing of a termination may have on set-off under the FOA Set-Off Provisions, the Clearing Module Set-Off Provisions and the Addendum Set-Off Provisions.

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15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.

16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.

17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).

18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:

    - more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
    - more than one FOA Clearing Module or Clearing Module Netting Provision
    - one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision

    provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction and provided that the necessary amendments to the single agreement clauses (cf Annex 5 and paragraphs 3.4, 3.5 and 3.12 above) be respected thereby.

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with equivalent effect to, clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.

20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in an FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).

21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).

22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.

23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and its

related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.

PART 3
SECURITY INTEREST PROVISIONS

1. Security Interest Clause:

"As a continuing security for the performance of the Secured Obligations under or pursuant to this Agreement, you grant to us, with full title guarantee, a first fixed security interest in all non-cash margin now or in the future provided by you to us or to our order or under our direction or control or that of a Market or otherwise standing to the credit of your account under this Agreement or otherwise held by us or our Associates or our nominees on your behalf."

2. Power of Sale Clause:

"If an Event of Default occurs, we may exercise the power to sell all or any part of the margin. The restrictions contained in Sections 93 and 103 of the Law of Property Act 1925 shall not apply to this Agreement or to any exercise by us of our rights to consolidate mortgages or our power of sale. We shall be entitled to apply the proceeds of sale or other disposal in paying the costs of such sale or other disposal and in or towards satisfaction of the Secured Obligations."

3. Client Money Additional Security Clause

"As a continuing security for the payment and discharge of the Secured Obligations you grant to us, with full title guarantee, a first fixed security interest in all your money that we may cease to treat as client money in accordance with the Client Money Rules. You agree that we shall be entitled to apply that money in or towards satisfaction of all or any part of the Secured Obligations which are due and payable to us but unpaid."

4. Rehypothecation Clause

"You agree and authorise us to borrow, lend, appropriate, dispose of or otherwise use for our own purposes, from time to time, all non-cash margin accepted by us from you and, to the extent that we do, we both acknowledge that the relevant non-cash margin will be transferred to a proprietary account belonging to us (or to any other account selected by us from time to time) by way of absolute transfer and such margin will become the absolute property of ours (or that of our transferee) free from any security interest under this Agreement and from any equity, right, title or interest of yours. Upon any such rehypothecation by us you will have a right against us for the delivery of property, cash, or securities of an identical type, nominal value, description and amount to the rehypothecated non-cash margin, which, upon being delivered back to you, will become subject to the provisions of this Agreement. We agree to credit to you, as soon as reasonably practicable following receipt by us, and as applicable, a sum of money or property equivalent to (and in the same currency as) the type and amount of income (including interest, dividends or other distributions whatsoever with respect to the non-cash margin) that would be received by you in respect of such non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid."

ANNEX 5

NECESSARY OR DESIRABLE AMENDMENTS

1. Necessary amendments

(a) For the purposes of paragraph 3.1:

The Insolvency Events of Default Clause is supplemented or amended as follows:

"[(•)] [you]/[a party] or a creditor of [you]/[a party] applies to the competent insolvency court seeking the opening of insolvency proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[such party];"

"[(•)] [you]/[a party] appl[y]/[ies] to the competent court seeking opening of reorganisation proceedings (*Reorganisationsverfahren*) under the Austrian Business Reorganisation Act (*Unternehmensreorganisationsgesetz – URG*) against [you]/[such party];"

"[(•)] the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) or during effective special receivership proceedings (*Geschäftsaufsichtsverfahren*) the receiver (*Aufsichtsperson*) applies to the competent insolvency court seeking the opening of bankrupcty proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

"[(•)] [you]/[a party] or the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) applies to the competent court seeking the opening of special receivership proceedings (*Geschäftsaufsichtsverfahren*) under the Austrian Banking Act (*Bankwesengesetz - BWG*) against [you]/[a party];"

"[(•)] regulatory measures (*aufsichtsbehördliche Maßnahmen*) under the Austrian Banking Act (*Bankwesengesetz – BWG*) are implemented by the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) against [you]/[a party];"

(b) For the purposes of paragraph 3.4:

The following amendments to the FOA Clearing Module are necessary in order for the opinions expressed in this paragraph 3.4 to apply:

The following paragraph in the preamble of the FOA Clearing Module

Notwithstanding that the Clearing Agreement constitutes a single agreement, each Cleared Transaction Set will be treated separately for certain purposes, including, without limitation, termination of transactions in certain circumstances, as further described in this Module.

shall be deleted.

A new paragraph 9.6 shall be inserted into the FOA Clearing Module:

9.6 ***Single agreement:*** [Clause [•] (*Single agreement*) of the Agreement shall be supplemented (and where relevant also superseded) by the following:

(i) in case of an Event of Default that would entitle the Firm to terminate the Clearing Agreement and/or transactions and to close-out transactions under the Clearing Agreement, than the Clearing Agreement, the particular terms applicable to all Netting Transactions under the Clearing Agreement, all Netting Transactions and all Client Transactions under this Module (including, without limitation, each Client Transaction that forms part of any of the Cleared Transaction Sets) and all amendments to any of them shall together constitute a single agreement between us; and

(ii) in case of a Firm Trigger Event, than (a) the Agreement and the particular terms applicable to all Netting Transactions under the Agreement, all Netting Transactions under the Agreement and all amendments to any of them shall together constitute a single agreement between us and (b) this Module, the particular terms applicable to Client Transactions of this Module and the Client Transactions under a relevant Cleared Transaction Set shall each together constitute a single agreement between us.

(c) For the purposes of paragraph 3.5:

The following paragraph in the preamble of the ISDA/FOA Addendum

Notwithstanding that the Clearing Agreement constitutes a single agreement, each Cleared Transaction Set will be treated separately for certain purposes, including, without limitation, termination of transactions in certain circumstances, as further described in this Addendum.

shall be deleted.

A new paragraph (f) shall be inserted into Clause 18 of the ISDA/FOA Addendum:

18. (f) ***Single agreement:*** [Clause [•] (*Single agreement*) of the Agreement shall be supplemented (and where relevant also superseded) by the following:

(i) in case of an Event of Default that would entitle the Firm to terminate the Clearing Agreement and/or transactions and close-out transactions under the Clearing Agreement, than the Clearing Agreement, the particular terms applicable to all [Netting] Transactions under the Clearing Agreement, all [Netting] Transactions and all Client Transactions under this Addendum (including, without limitation, each Client Transaction that forms part of any of the Cleared Transaction Sets) and all amendments to any of them shall together constitute a single agreement between us; and

(ii) in case of a CM Trigger Event, than (a) the Agreement and the particular terms applicable to all [Netting] Transactions under the Agreement, all [Netting] Transactions under the Agreement and all amendments to any of them shall together constitute a single agreement between us whereas (b) this Addendum, the particular terms applicable to Client Transactions of this Addendum and the Client Transactions under a relevant Cleared Transaction Set shall each together constitute a single agreement between us.

(d) For the purposes of paragraph 3.12:

The single agreement clauses of the FOA Netting Agreement or the Clearing Agreement shall be amended as follows (additions highlighted in yellow:

Single agreement: This Agreement, the particular terms applicable to each Netting Transaction, all Netting Transactions and all amendments to any of them shall together constitute a single agreement between us. We both acknowledge that all Netting Transactions entered into on or after the date this Agreement takes effect are entered into in reliance upon the fact that the Agreement, all Netting Agreements and all such terms constitute a single agreement between us.

(e) For the purposes of Schedule 1 (*Austrian Investment Firms*):

The Insolvency Events of Default Clause is supplemented or amended as follows:

"[(•)] the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) or during effective special receivership proceedings (*Geschäftsaufsichtsverfahren*) the receiver (*Aufsichtsperson*) applies to the competent insolvency court seeking the

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opening of bankrupcty proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

"[(•)] [you]/[a party] or the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) applies to the competent court seeking the opening of special receivership proceedings (*Geschäftsaufsichtsverfahren*) under the Austrian Securities Supervision Act (*Wertpapieraufsichtsgesetz – WAG 2007*) against [you]/[such party];"

"[(•)] regulatory measures (*aufsichtsbehördliche Maßnahmen*) under the Austrian Securities Supervision Act (*Wertpapieraufsichtsgesetz – WAG 2007*) are implemented by the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) against [you]/[a party];"

(f) For the purposes of Schedule 2 (*Austrian Insurance Undertakings*):

The Insolvency Events of Default Clause is supplemented or amended as follows:

"[(•)] the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) applies to the competent insolvency court seeking the opening of bankrupcty proceedings under the Austrian Insolvency Code (*Insolvenzordnung – IO*) [you]/[a party];"

"[(•)] regulatory measures (*aufsichtsbehördliche Maßnahmen*) under the Austrian Insurance Supervision Act (*Versicherungsaufsichtsgesetz – VAG*) are implemented by the Austrian Financial Market Authority (*Finanzmarktaufsichtsbehörde – FMA*) against [you]/[a party];"

(g) For the purposes of Schedule 3 (*Austrian Individuals*):

The Insolvency Events of Default Clause is supplemented or amended as follows:

"[(•)] [you]/[a party] or a creditor of [you]/[a party] applies to the competent insolvency court seeking the opening of insolvency proceedings, financial reorganisation (*Schuldenregulierungsverfahren*) or absorption procedure (*Abschöpfungsverfahren*) under the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

(h) For the purposes of Schedule 4 (*Austrian Investment Funds*):

The Insolvency Events of Default Clause is supplemented or amended as follows:

"[(•)] the [fund][57] managed by [you]/[a party] is liquidated in accordance with the procedures laid out in the Austrian Investment Fund Act 2011 (*Investmentfondsgesetz 2011 – InvFG 2011*);"

(i) For the purposes of Schedule 5 (*Austrian Sovereign Entities*):

The Insolvency Events of Default Clause is supplemented or amended as follows:

"[(•)] [you]/[a party] or a creditor of [you]/[a party] applies to the competent insolvency court seeking the opening of insolvency proceedingsunder the Austrian Insolvency Code (*Insolvenzordnung – IO*) against [you]/[a party];"

2. Additional wording to be treated as part of the Core Provisions

(a) For the purposes of paragraph 5 (*Title Transfer Provisions*) of Annex 4 (*Core Provisions*):

c) **Transfer**: Upon a demand made by us on or promptly following a Valuation Date, if the amount of the Margining Requirement exceeds the Value of the Transferred Margin, then you will Transfer to us such Acceptable Margin having a Value as of the date of Transfer at least equal to the applicable Margin Delivery Amount (rounded up to the nearest integral multiple of the Minimum Transfer Quota).

d) **Return**: Upon a demand made by you on or promptly following a Valuation Date, if the Value of the Transferred Margin exceeds the amount of the Margining Requirement, then we will Transfer to you such Equivalent Margin having a Value as of the date of Transfer as close as practicable to the applicable Margin Return Amount (rounded down to the nearest integral multiple of the Minimum Transfer Quota).

e) **Redelivery Obligation**: On the earlier of the date of termination of this Agreement, or when no obligations are outstanding from you to

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[57] Insert the name of the Austrian Investment Fund on behalf of which the Investment Fund Management Company entered into the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

us, we will also Transfer to you Equivalent Margin having a Value as of the date of Transfer equal to the Margin Return Amount calculated as if the Margining Requirement were then zero.

ANNEX 6

§ 20 (4) IO

§ 20 (4) IO reads (in unofficial English translation) as follows:

"(4) [C]laims under agreements which have been terminated by virtue of the initiation of a bankruptcy proceeding concerning

1. the special off-balance sheet financial transactions referred to in Annex ./2 to § 22 BWG including derivative instruments for the transfer of credit risks,

2. interest rate, currency, precious metal, raw material, stock and other securities options sold and options on indices and trades relating to listed goods and commodities pursuant § 1 (4) of the Austrian Stock Exchange Act, BGBl. 555/1989, as long as such commercial transaction does not serve for own usage (Deckung des Eigenbedarfs) but only serves trading purposes[58]*,*

2a. trades relating to listed goods and commodities pursuant to § 1 (4) of the Austrian Stock Exchange Act, BGBl. 555/1989, as long as such commercial transaction does not serve for own usage (Deckung des Eigenbedarfs) but only serves trading purposes,

3. repurchase transactions (§ 50 (1) BWG) and reverse repurchase transactions of the securities trading book (§ 2 No 46 BWG) and

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[58] On a general note, we would like to mention that the legislator has as of 1 July 2010 extended the scope of application of § 20 (4) IO. In the process of the amendment of § 20 (4) IO, the legislator initially introduced the following amendment to § 20 (4) no 2 IO:

"*2. interest rate, currency, precious metal, raw material, stock and other securities options sold and options on indices and trades relating to listed goods and commodities pursuant § 1 (4) of the Austrian Stock Exchange Act, BGBl. 555/1989, as long as such commercial transaction does not serve for own usage but only serves trading purposes*".

Whereas the Explanatory Notes (*Erläuternde Bemerkungen*) by the legislator to the draft legislation clearly stated that § 20 (4) IO shall be extended to only cover trades in respect to listed goods and commodities, the proposed wording could arguably be read to also include "*options on* [...] *trades relating to listed goods and commodities*". In the session of the Austrian parliament on 21 April 2010 – in the course of which the amendment of § 20 (4) IO was finally passed – the initial draft (as set out above) was amended in order to create a new separate sub-no to § 20 (4) IO in relation to the newly included trades (see § 20 (4) no 2a IO). However, due to – what we believe to be – a drafting error, although the relevant part of the draft of § 20 (4) no 2 IO was moved into the newly created § 20 (4) no 2a IO, the same text now appears also in § 20 (4) no 2 IO (see § 20 (4) no 2 IO).

However, we believe that under consideration of the genesis of § 20 (4) no 2a IO and the Explanatory Notes, § 20 (4) IO should not be understood in a way that would also include *options* on trades in respect of listed goods and commodities.

4. securities borrowing and securities lending transactions of the securities trading book (§ 2 Nos 45 and 47 BWG)
may be offset, provided it has been agreed that these agreements are terminated or may be terminated by the other party upon initiation of a insolvency proceeding against the assets of one contract party and that all mutual claims resulting from such agreements shall be offset."

ANNEX 7
ANNEX ./2 TO § 22 BWG

Derivatives

1. *Interest rate derivatives*
   a) *interest rate swaps (in one single currency);*
   b) *floating / floating interest rate swaps (basis swaps);*
   c) *forward rate agreements, including purchases of forward forward deposits;*
   d) *interest rate futures and interest related index contracts;*
   e) *options purchased on interest based instruments;*
   f) *other contracts of a similar nature.*
2. *Foreign exchange rate derivatives and contracts concerning gold*
   a) *cross currency interest rate swaps;*
   b) *forward foreign exchange contracts;*
   c) *currency futures and currency related index contracts;*
   d) *currency options purchased;*
   e) *contracts concerning gold and other contracts similar to those referred to in nos a) through d).*
3. *Contracts concerning equities and other securities related contracts (unless already included in no 1.)*
   a) *forward transactions in equities and other securities price related forward transactions;*
   b) *index contracts in equities and other securities price related index futures;*
   c) *options purchased in equities and other securities index options;*
   d) *other contracts of a similar nature concerning equities and other securities.*
4. *Precious metal contracts not including contracts concerning gold referred to in no 2 e)*
   a) *precious metal forward transactions;*
   b) *precious metal futures;*
   c) *precious metal options purchased;*
   d) *other precious metal contracts of a similar nature.*
5. *Commodities contracts not including contracts concerning precious metals*
   a) *commodities forward transactions;*
   b) *commodities futures;*
   c) *commodities options purchased;*

d) other commodities related contracts of a similar nature.

6. *Other forward transactions, futures, options purchased and similar transactions not attributable to those referred to in Nos. 1 through 5; these include instruments pursuant to Annex 1 Section C No 10 of Directive 2004/39/EC (OJ L 145/1 of 21 April 2004).*

ANNEX 8
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 the Financial Collateral Directive applies to collateral takers and collateral providers mentioned in § 2 (1) of the FinSG[59]. Collateral takers and collateral providers mentioned in § 2 (2) FinSG[60] (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[61].

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[59] Corresponding to Article 1(2) (a) to (d) of the Financial Collateral Directive.

[60] Corresponding to Art 1 (2) point (e) of the Financial Collateral Directive.

[61] The collateral taker and the collateral provider must each belong to one of the following categories:

(a) a public authority (excluding publicly guaranteed undertakings unless they fall under points (b) to (e)) including:

(i) public sector bodies of Member States charged with or intervening in the management of public debt, and

(ii) public sector bodies of Member States authorised to hold accounts for customers

(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as referred to in Annex VI, Part 1, Section 4 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (1), the International Monetary Fund and the European Investment Bank;

(c) a financial institution subject to prudential supervision including:

(i) a credit institution as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that 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

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(ii) an investment firm as defined in Article 4(1)(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (1);

(iii) a financial institution as defined in Article 4(5) of Directive 2006/48/EC;

(iv) an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance (third non-life insurance Directive) (2) and an assurance undertaking as defined in Article 1(1)(a) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (3);

(v) an undertaking for collective investment in transferable securities (UCITS) as defined in Article 1(2) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (4);

(vi) a management company as defined in Article 1a(2) of Directive 85/611/EEC; and

(d) a central counterparty, settlement agent or clearing house, as defined respectively in Article 2(c), (d) and (e) of Directive 98/26/EC, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by that Directive, and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or any institution as defined in points (a) to (d).

forms of debt instruments[62] 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 FinSG[63].

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 Effektengiro 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).

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[62] 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).

[63] 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 9
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 indirect[64] 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*).

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[64] See the requirement of objective predictability of such indirect discrimination in case of § 31 IO.

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.

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 insolvency[65] 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 "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.

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[65] Regarding the definition of insolvency see 1.4.

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 by 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.

ANNEX 10

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 (section 1 below) and (ii) which perfection steps would be required if Austrian law was to apply (section 2 below), please refer to the following high level overview:

1 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 English law is, subject to the limitations on choice of law set out at paragraph 4.2.6 of this Opinion, valid as concerns the parties' obligations under the FOA Netting Agreement or the Clearing Agreement (i.e. questions in regard to determining the parties' obligations, interpretation and remedies for breach of the FOA Netting Agreement or the Clearing Agreement), the creation of rights *in rem* in the Collateral will be determined in accordance with Austrian conflicts of laws rules.

1.1 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.

1.2 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 of the Austrian Act on Private International Law (*Internationales Privatrechts-Gesetz - IPRG*), the legal nature (*Rechtsnatur*) and contents (*Inhalt*) of book entry securities collateral (*im Effektengiro übertragbare Wertpapiere*) (as defined at § 3 (1) no 7

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FinSG[66]) 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** (*maßgebliches Konto*) (as defined at § 3 (1) no 8 FinSG[67]) is **maintained**.

This law is also relevant for determining (i) whether ownership title or other rights *in rem* to book entry securities collateral 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 collateral following the occurrence of an enforcement event (*Verwertungs- oder Beendigungsfall*) (as defined at § 3 (1) no 12 FinSG[68]).

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 enforcement[69].

1.3 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 fall within the scope of § 31 IPRG[70]. § 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*).

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[66] 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.

[67] 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.

[68] 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.

[69] See *Verschraegen* in *Rummel*[3], IPRG § 33a Rz 8.

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