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Your Ref

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The Futures & Options Association
2nd Floor
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Dear Sirs

NETTING ANALYSER LIBRARY

FOA netting opinion issued in relation to the FOA Netting Agreements, FOA Clearing Module and ISDA/FOA Clearing Addendum – British Virgin Islands

You have asked us to give an opinion in respect of the laws of the British Virgin Islands ("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 an 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 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 letter.

Further, this opinion letter 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 companies¹ ("BVIBCs") incorporated, continued or re-registered² under the BVI Business Companies Act 2004 (the "BVIBC Act") (but not segregated portfolio

¹ Identified by any of the following in the last part of the name: "Limited", "Corporation" or "Incorporated", "Société Anonyme" or "Sociedad Anonima", "Ltd", "Corp", "Inc" or "S.A.", or in the case of an unlimited company "Unlimited" or

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companies which are dealt with separately in Schedule 1 (*Segregated portfolio companies*));

1.1.2 banks/financial institutions incorporated under the BVIBC Act and licensed under the Banks and Trust Companies Act 1990 (the “**BTCA**”); and

1.1.3 Parties incorporated or formed under the laws of another jurisdiction which are companies, banks or insurance companies³ and which have a branch or branches located in this jurisdiction.

1.2 This opinion is also given in respect of Parties 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 Segregated portfolio companies incorporated or registered as such under the BVIBC Act (Schedule 1 (*Segregated portfolio companies*));
- 1.2.2 Investment firms/broker dealers incorporated under the BVIBC Act or organised under the Partnership Act 1996 (the “**Partnership Act**”) and licensed to carry out investment business under the Securities and Investment Business Act 2010 (the “**SIBA**”) (Schedule 5 (*Investment firms/broker dealers*));
- 1.2.3 Partnerships organised under the Partnership Act (Schedule 2 (*Partnerships*));
- 1.2.4 Insurance companies/providers⁴ incorporated under the BVIBC Act and licensed under the Insurance Act 2008 (the “**Insurance Act**”) (Schedule 6 (*Insurance companies/providers*));
- 1.2.5 Individuals (Schedule 4 (*Individuals*));
- 1.2.6 Funds incorporated under the BVIBC Act or organised under the Partnership Act and where relevant licensed as mutual funds under the SIBA (Schedule 7 (*Funds*));
- 1.2.7 Parties organised as BVIBCs, partnerships or individuals acting as trustees of trusts settled in the British Virgin Islands and regulated by the Trustee Act (Cap 303) (the “**Trustee Act**”) and where relevant the Virgin Islands Special Trusts Act 2003 (the “**VISTA**”) (Schedule 3 (*Trusts*));
- 1.2.8 Charitable trusts/bodies organised as BVIBCs, partnerships or trusts (Schedule 8 (*Charitable trusts/bodies*)); and

² “Unltd”, or any other word or words , or abbreviations thereof, as may be specified in any regulations promulgated under the BVIBC Act.

³ Companies originally incorporated (i) under the International Business Companies Act (Cap 291) and re-registered under the BVI Business Companies Act either voluntarily before 30 November 2006 or automatically on 1 January 2007 or (ii) under the Companies Act (Cap 285) and re-registered under the BVI Business Companies Act either voluntarily before 1 January 2009 or automatically on 1 January 2009.

⁴ Note our qualification with respect to insurance companies at Schedule 7 (*Insurance companies*), which would also apply to branches of insurance companies formed under the laws of another jurisdiction.

⁴ Note the specific statutory limitations on the ability of an insurance company to enter into guarantees, provide security or invest or trade in derivatives described in Schedule 7 (*Insurance companies*).

- 1.2.9 Pension entities incorporated under the BVIBC Act or organised under the Partnership Act 1996 and where relevant licensed as mutual funds under the SIBA (Schedule 9 (*Pension entities*)).
- 1.3 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.
- 1.4 This opinion covers all Transactions, though we note the explicit statutory support for close-out provisions of Transactions which constitute “financial contracts” (as described in Annex 6 (*Netting and set-off*)).

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.

- 1.5 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 without risk of successful challenge. We do not opine on the availability of any judicial remedy.

1.6 **Definitions**

Terms used in this opinion letter 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 letter, this opinion letter may be read as if terms used herein were the terms as so changed.

- 1.6.1 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1.
- 1.6.2 "**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction;
- 1.6.3 "**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
- 1.6.4 A reference to a "**paragraph**" is to a paragraph of this Opinion.

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 letter 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 as to whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration of the Agreement.
- 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.
- 2.3 That each 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 the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the 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 is entered into prior to the formal commencement of any Insolvency Proceedings against either Party.
- 2.6 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.
- 2.7 That 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.
- 2.8 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.
- 2.9 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 regards obligations owing by it and solely entitled to the benefit of obligations owed to it by the other Party.

- 2.10 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction will not act as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum).
- 2.11 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.
- 2.12 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).
- 2.13 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.
- 2.14 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

3. OPINION

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

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 a Party would be subject in this jurisdiction are the following:

- (a) supervised creditors' arrangements under Part II (*Creditors' arrangements*) of the Insolvency Act;
- (b) receivership and administrative receivership⁵ under Part IV (*Receivership*) of the Insolvency Act⁶; and
- (c) liquidation under Part VI (*Liquidation*) of the Insolvency Act.

All the above constitute "**Insolvency Proceedings**" for the purposes of this opinion.

In addition to these proceedings, Part III (*Administration*) of the Insolvency Act provides for administration. However this part has not been brought into force and administration is not considered an "**Insolvency Proceeding**" for the purposes of this opinion.

⁵ An administrative receiver is a "receiver of the whole, or substantially the whole, of the business, undertaking and assets of a company".

⁶ Which also covers receivership under the Conveyancing and Law of Property Act (Cap 220).

There are a number of additional reorganisational processes under British Virgin Islands law in respect of BVIBCs which are not necessarily related to the insolvency of the BVIBC. These are:

- (a) solvent voluntary liquidation, insolvent voluntary liquidation (in which case it is subject to the provisions of Part VI of the Insolvency Act) or dissolution under Part XII (*Liquidation, Striking-Off and Dissolution*) of the BVIBC Act;
- (b) a reorganisation under Part IX (*Merger, Consolidation, Sale of Assets, Forced Redemptions, Arrangements and Dissenters*) of the BVIBC Act; and
- (c) continuation under foreign law under Part X (*Continuation*) of the BVIBC Act.

Solvent voluntary liquidation and insolvent voluntary liquidation constitute “**Insolvency Proceedings**” for the purposes of this opinion.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions⁷. While dissolution would not necessarily be caught by the Insolvency Events of Default Clause, it will constitute an Event of Default through breach of any representation as to good standing or power and capacity.

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 An Insolvency Representative or court in this jurisdiction would have regard to English law as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the enforceability or effectiveness of (i) the FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions.

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:

- 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.

⁷ See Schedules 1 to 9 for analysis of Insolvency Proceedings in respect of other entities.

We are of this opinion because:

- (a) *Termination.* The right to terminate a contract with notice or on the occurrence of a designated event by giving notice is well established in English common law, and there is little basis for an argument that the Parties do not have the right to dispense with that right. Such provisions contained in well-known standard form documentation is known to be accepted with strict application: consider *China National Foreign Trade Transportation Corporation v Eulogia Shipping Co SA of Panama - The Mihalis Xilas* [1979] 1 WLR 1018.
- (b) *Contractual accounting.* The failure to perform under an agreement gives rise to a claim for damages in accordance with general principles of contract law. Parties are free (with certain exceptions) to use a prearranged method of arriving at the amounts payable on termination of a contract. Calculation of a Liquidation Amount with reference to loss or mark-to-market as commercially acceptable and reasonable measures used to determine damages would be acceptable under British Virgin Islands law, and would simply be treated as accounting measures used to calculate amounts payable from one party to another. Prior to the commencement of Insolvency Proceedings therefore the FOA Netting Provisions would be upheld on a contractual basis.
- (c) *Insolvency set-off.* Statutory insolvency set-off under section 150 of the Insolvency Act (see Annex 6) would apply to any amounts arising from dealings prior to the commencement of liquidation and prior to the Non-Defaulting Party having knowledge of the insolvency of the Defaulting Party. The effect of statutory insolvency set-off would, subject to the other comments in this paragraph, be to aggregate and set off all Termination Amounts together with all other amounts due between the Parties so that only a single net sum is payable. Section 150(4) of the Insolvency Act provides that a party may before the commencement of liquidation waive the benefit of set-off and while this provides some reassurance that the effect of insolvency set-off will have a similar effect to the FOA Netting Provisions, the analysis is less convincing when applied to the Clearing Module Netting Provision and the Addendum Netting Provision (see paragraphs 3.4 and 3.5 below) because of, among other things, the potential for separate close-outs in respect of Cleared Transaction Sets and the fact that the Clearing Module and the Addendum may apply separately to distinct groups of Cleared Transactions. Statutory insolvency set-off is expressly made subject to Part XVII of the Insolvency Act (see Annex 6) so, while the analysis of statutory insolvency set-off will be important if Part XVII does not apply, the following analysis and the balance of this opinion is predicated on Part XVII applying. The applicability of Part XVII is discussed in paragraph (d) below.
- (d) *Netting agreements.* Part XVII provides that notwithstanding anything contained in the Insolvency Act, any rules promulgated under the Insolvency Act or in any rule of law relating to insolvency, the provisions relating to the netting of obligations under a netting agreement shall be enforceable against each party to that contract. Section 150 of the Insolvency Act, relating to insolvency set-off, is expressly made subject to Part XVII, and so if the insolvency set-off rules under British Virgin Islands law were to produce a different result from the FOA Netting Provision, the FOA Netting Provision would prevail. Part XVII applies to “netting agreements” in respect of transactions

which constitute “financial contracts”. The definition of “financial contracts” is included in Annex 6. Our view is that this definition clearly includes the examples of Transactions listed in Annex 2 and would for the avoidance of doubt include any 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. Furthermore the purpose of Part XVII is specifically to provide certainty as to close-out of contracts in the financial markets. Our view is therefore that Part XVII is highly likely to apply to any FOA Netting Agreement being used as intended.

Further, 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.

No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 3.3.1 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

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:

- (a) *Termination and netting.* Our comments in paragraph 3.3 above as to termination of contracts apply and there is no reason to believe British Virgin Islands courts would not uphold the provisions of (i) section 5.2.1 of the FOA Clearing Module disapplying certain optional and automatic termination provisions of an Agreement, (ii) section 5.2.2 of the FOA Clearing Module providing alternative termination and netting provisions in respect of a Firm Trigger Event and (iii) section 5.3 of the FOA Clearing Module introducing new termination and netting provisions in respect of a CCP Default.
- (b) *Insolvency set-off.* As discussed in paragraph 3.3 above, the effect of statutory insolvency set-off is to aggregate and set off all Cleared Set Termination Amounts together with all other amounts due between the Parties so that only a single net sum is payable, notwithstanding that the Clearing Module Netting Provision provides for each Cleared Set Termination Amount to be payable separately in respect of each Agreed CCP Service. The limited ability to waive statutory insolvency set-off in section 150(4) of the Insolvency Act would not in our view have the effect of upholding the calculation of separate Cleared Set Termination Amounts and the Clearing Module Netting Provision may therefore be overridden to the extent of inconsistency with statutory insolvency set-off. The analysis of the position under Part XVII is therefore important

in establishing clear British Virgin Islands statutory support for the Clearing Module Netting Provision.

- (c) *Part XVII.* The analysis in paragraph 3.3 above as to the applicability of Part XVII is valid for the Clearing Module Netting Provision, which will be enforceable subject to our comments below.
- (d) *Cleared Transaction Sets.* We have considered whether calculating Cleared Set Termination Amounts separately for each Agreed CCP Service is consistent with British Virgin Islands insolvency law bearing in mind that each Cleared Transaction Set may close-out at different times depending on the termination of the related Firm/CCP Transaction. Our view is that the principle of having separate close-outs for each Cleared Transaction Set is not inconsistent with British Virgin Islands law even if close-outs may occur at different times, and the relevant provisions would be enforceable under Part XVII. We note that the time for close-out of each Cleared Transaction Set under the FOA Clearing Module is determined automatically, but that there may be an element of optionality deriving from termination of the related Firm/CCP Transactions. We do not consider it necessary from a British Virgin Islands perspective that close-out is automatic.
- (e) *Third party close-out triggers.* There is no problem under British Virgin Islands law with the concept of a CCP Default automatically triggering close-out provisions between Client and Firm and such a trigger would not affect the mutuality between Client and Firm required for enforceability under Part XVII.
- (f) *Hierarchy of Events.* The provisions of section 5.4 of the FOA Clearing Module relating to the hierarchy of termination provisions are not inconsistent with British Virgin Islands law and would be enforceable under Part XVII.
- (g) *Use of both Clearing Module and Addendum.* We understand Clients may enter into both a FOA Clearing Module and an ISDA/FOA Clearing Addendum with a Firm and that different termination and netting provisions may apply to different Transactions. Provided it is clear which agreements cover which Transactions and no Transaction is expressed to be subject to termination and close-out provisions under both a FOA Clearing Module and an ISDA/FOA Clearing Addendum, the use of more than one agreement between two parties is not inconsistent with Part XVII and the conclusions of this paragraph 3.4 and paragraph 3.5 below would continue to apply separately in respect of each arrangement.
- (h) *Disapplication of obligation to return title transfer collateral.* We understand the provisions of section 5.2.2(h) of the FOA Clearing Module are merely a mechanism to ensure Title Transfer Collateral is not accounted for twice in any net close-out arrangements and are therefore not intended as a penalty. There is no problem under British Virgin Islands law with a party agreeing before the commencement of insolvency proceedings to waive a contractual right in certain circumstances and the provisions of section 5.2.2(h) of the FOA Clearing Module are therefore not inconsistent with British Virgin Islands law and would be enforceable under Part XVII.

- (i) *Porting.* We understand the provisions of section 5.2.2(i) of the FOA Clearing Module are merely a mechanism to ensure Client Transactions are not accounted for twice in any net close-out arrangements and therefore (i) are not intended as a penalty and (ii) would not be invalid under their governing law on the grounds of anti-deprivation or any analogous principle. There is no problem under British Virgin Islands law with a party agreeing before the commencement of insolvency proceedings to waive a contractual right in certain circumstances and the provisions of section 5.2.2(i) of the FOA Clearing Module are therefore not inconsistent with British Virgin Islands law and would be enforceable under Part XVII. The mechanism for the transfer of Firm/CCPs Transactions to another Firm is not set out under the FOA Clearing Module. Unless Firm/CCP Transactions are novated it is likely that the Client will remain able to satisfy its obligations under those transactions by delivery to the original Firm and any attempt to net amounts under Firm/CCP Transactions with the original Firm against amounts under new or novated Firm/CCP Transactions with the new Firm after the commencement of Insolvency Proceedings in respect of the Client will be unenforceable in the British Virgin Islands for lack of mutuality⁸.
- (j) *Payments adjustment/leapfrogging.* We have considered whether the payment adjustment mechanism in section 6 of the FOA Clearing Module could be challenged on the basis that it amounts to a tripartite netting arrangement and therefore lacks the necessary mutuality to be upheld under insolvency set-off principles or under Part XVII on the commencement of Insolvency Proceedings in respect of a Client. We understand the provisions of section 6 of the FOA Clearing Module are merely a mechanism to avoid unjust enrichment if an Agreed CCP were to return assets of a Client direct to the Client rather than through the relevant Firm and as such are not part of the netting arrangements. On that basis we do not believe a British Virgin Islands court would challenge the provisions of section 6 of the FOA Clearing Module.

Further, 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 rights under the Clearing Module Netting Provision.

No amendments to the Clearing Module Netting Provision are necessary in order for the opinions expressed in this paragraph 3.4 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

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:

⁸ Though we note that the issue of whether the original Firm and new Firm are a single party for the purposes of insolvency set-off and Part XVII will also be affected by their treatment under the laws of their jurisdictions of organisation.

- (a) *Termination and netting.* Our comments in paragraph 3.3 above as to termination of contracts apply and there is no reason to believe British Virgin Islands courts would not uphold the provisions of (i) section 8(b)(1) of the ISDA/FOA Clearing Addendum disapplying certain optional and automatic termination provisions of an Agreement, (ii) section 8(b)(ii) of the ISDA/FOA Clearing Addendum providing alternative termination and netting provisions in respect of a CM Trigger Event and (iii) section 8(c) of the ISDA/FOA Clearing Addendum introducing new termination and netting provisions in respect of a CCP Default.
- (b) *Insolvency set-off.* As discussed in paragraph 3.3 above, the effect of statutory insolvency set-off is to aggregate and set off all Cleared Set Termination Amounts together with all other amounts due between the Parties so that only a single net sum is payable, notwithstanding that the Addendum Netting Provision provides for each Cleared Set Termination Amount to be payable separately in respect of each Agreed CCP Service. The limited ability to waive statutory insolvency set-off in section 150(4) of the Insolvency Act would not in our view have the effect of upholding the calculation of separate Cleared Set Termination Amounts and the Addendum Netting Provision may therefore be overridden to the extent of inconsistency with statutory insolvency set-off. The analysis of the position under Part XVII is therefore important in establishing clear British Virgin Islands statutory support for the Addendum Netting Provision.
- (c) *Part XVII.* The analysis in paragraph 3.3 above as to the applicability of Part XVII is valid for the Addendum Netting Provision, which will be enforceable subject to our comments below.
- (d) *Cleared Transaction Sets.* We have considered whether calculating Cleared Set Termination Amounts separately for each Agreed CCP Service is consistent with British Virgin Islands insolvency law bearing in mind that each Cleared Transaction Set may close-out at different times depending on the termination of the related CM/CCP Transaction. Our view is that the principle of having separate close-outs for each Cleared Transaction Set is not inconsistent with British Virgin Islands law even if close-outs may occur at different times, and the relevant provisions would be enforceable under Part XVII. We note that the time for close-out of each Cleared Transaction Set under the ISDA/FOA Clearing Addendum is determined automatically, but that there may be an element of optionality deriving from termination of the related CM/CCP Transactions. We do not consider it necessary from a British Virgin Islands perspective that close-out is automatic.
- (e) *Third party close-out triggers.* There is no problem under British Virgin Islands law with the concept of a CCP Default automatically triggering close-out provisions between Client and Clearing Member and such a trigger would not affect the mutuality between Client and Clearing Member required for enforceability under Part XVII.
- (f) *Hierarchy of Events.* The provisions of section 8(d) of the ISDA/FOA Clearing Addendum relating to the hierarchy of termination provisions are not inconsistent with British Virgin Islands law and would be enforceable under Part XVII.
- (g) *Use of both Clearing Module and Addendum.* We understand Clients may enter into both a FOA Clearing Module and an ISDA/FOA Clearing with a Clearing Member and

that different termination and netting provisions may apply to different Transactions. Provided it is clear which agreements cover which Transactions and no Transaction is expressed to be subject to termination and close-out provisions under both a FOA Clearing Module and an ISDA/FOA Clearing Addendum, the use of more than one agreement between two parties is not inconsistent with Part XVII and the conclusions of paragraph 3.4 above and this paragraph 3.5 would continue to apply separately in respect of each arrangement.

Further, 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 rights under the Addendum Netting Provisions.

No amendments to the Addendum Netting Provision are necessary in order for the opinions expressed in this paragraph 3.5 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

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. 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 question as to whether 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 would be determined under the governing law of the Clearing Agreement.

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, 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:

- (i) where the FOA Set-Off Provisions include the General Set-Off Clause:
 - (a) the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Defaulting Party); or
 - (b) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or

- (ii) 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 would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because:

- (a) *Set-off prior to insolvency.* The principle of setting off payments due from one Party to another rather than making separate payments does not contravene British Virgin Islands law. Prior to the commencement of Insolvency Proceedings in respect of the Client, the British Virgin Islands courts would uphold valid contractual expectations of the Parties and the FOA Set-Off Provisions would be enforceable in the British Virgin Islands on a contractual basis.
- (b) *Insolvency set-off.* Statutory insolvency set-off under section 150 of the Insolvency Act would apply to any amounts arising from dealings prior to the commencement of liquidation and prior to the Non-Defaulting Party having knowledge of the insolvency of the Defaulting Party. The effect of statutory insolvency set-off would, subject to the other comments in this paragraph, be to aggregate and set off all Termination Amounts together with all other amounts due between the Parties so that only a single net sum is payable. Section 150(4) of the Insolvency Act provides that a Party may before the commencement of liquidation waive the benefit of set-off. However while the overall effect of insolvency set-off may well give the same result as the contractual set-off provisions, the optionality in applying the FOA Set-Off Provisions may be lost. Insolvency set-off is expressly made subject to Part XVII so, while the analysis of insolvency set-off will be important if Part XVII does not apply, our comments in paragraph 3.3 above as to the desirability of being able to uphold contractual provisions under Part XVII are equally applicable to set-off.
- (c) *Netting agreements.* Part XVII explicitly extends enforceability to “*the set off of money provided by way of security*”. We take this as including cash in bank accounts and any financial obligation that may be reduced to money, in each case where they are subject to collateral arrangements, and so would include the set-off of cash balances and cash margin against a Liquidation Amount. Our comments in paragraph 3.3 above as to the applicability of Part XVII to the FOA Netting Agreement are equally applicable in the context of the FOA Set-Off Provisions.

No amendments to the General set-Off Clause or the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

Furthermore, in addition to the highlighted words, it is necessary that the Security Interest Clauses of each FOA Netting Agreement be treated as a Core Provision in order for the opinions expressed in this paragraph 3.7.1 to apply.

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:

- (i) where the FOA Set-Off Provisions include the General Set-Off Clause:
 - (a) the value of any cash balance owed by the Firm or, as the case may be, the Clearing Member to the Client would be set off against the Liquidation Amount (where such liquidation amount is owed by the Client); or
 - (b) the value of any cash balance owed by the Client to the Firm or, as the case may be, the Clearing Member would 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
- (ii) 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 would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because the analysis in paragraph 3.7.1 above is equally valid where the Clearing Agreement includes the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision.

No amendments to the General Set-Off Clause or the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.2 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

Furthermore, in addition to the highlighted words, it is necessary that the Security Interest Clauses of each FOA Netting Agreement be treated as a Core Provision in order for the opinions expressed in this paragraph 3.7.2 to apply.

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 are Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will 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:

- (a) if the Client is a Defaulting Party, so that the value of any cash balance owed by the Firm to the Client would be set-off against any Liquidation Amount owed by the Client to the Firm; and
- (b) 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 would, 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.

We are of this opinion because:

- (a) *Set-off prior to insolvency.* The analysis of paragraph 3.7.1 above is applicable and prior to the commencement of Insolvency Proceedings in respect of the Client, the British Virgin Islands courts would uphold valid contractual expectations of the parties and the Clearing Module Set-Off Provision would be enforceable in the British Virgin Islands on a contractual basis.
- (b) *Insolvency set-off.* Insolvency set-off would apply to any amounts arising from dealings prior to the commencement of liquidation and prior to the Non-Defaulting Party having knowledge of the insolvency of the Defaulting Party. Section 150(4) of the Insolvency Act provides that a party may before the commencement of liquidation waive the benefit of set-off. However while the overall effect of insolvency set-off may well give the same result as the contractual set-off provisions, the optionality in applying the Clearing Module Set-Off Provision may be lost. Insolvency set-off is expressly made subject to Part XVII so, while the analysis of insolvency set-off will be important if Part XVII does not apply, our comments in paragraph 3.3 above as to the desirability of being able to uphold contractual provisions under Part XVII is equally applicable to set-off.
- (c) *Netting agreements.* Our comments in paragraph 3.3 and paragraph 3.7.1 above as to the applicability of Part XVII to the FOA Netting Agreement are equally applicable in the context of the Clearing Module Set-Off Provision.

No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.8.1 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

Furthermore, in addition to the highlighted words, it is necessary that the Security Interest Clauses of each FOA Netting Agreement be treated as a Core Provision in order for the opinions expressed in this paragraph 3.8.1 to apply.

3.8.2 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision for which the FOA Set-Off Provision (insofar as constituting part of the FOA Netting Agreement) is not a Disapplied Set-Off Provision, the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 3.8.1 above; and the FOA Set-Off Provision 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 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):

- (a) in the case of a CM Trigger Event, the Client (as defined in the ISDA/FOA Clearing Addendum); or
- (b) in the case of a CCP Default, either Party (the "**Electing Party**"),

would 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:

- (a) *Set-off prior to insolvency.* The analysis of paragraph 3.7.1 above is applicable and prior to the commencement of Insolvency Proceedings in respect of the Client, the British Virgin Islands courts would uphold valid contractual expectations of the parties and the Addendum Set-Off Provision would be enforceable in the British Virgin Islands on a contractual basis.
- (b) *Insolvency set-off.* Insolvency set-off would apply to any amounts arising from dealings prior to the commencement of liquidation and prior to the Non-Defaulting Party having knowledge of the insolvency of the Defaulting Party. Section 150(4) of the Insolvency Act provides that a party may before the commencement of liquidation waive the benefit of set-off. However while the overall effect of insolvency set-off may well give the same result as the contractual set-off provisions, the optionality in applying the Addendum Set-Off Provision may be lost. Insolvency set-off is expressly made subject to Part XVII so, while the analysis of insolvency set-off will be important if Part XVII does not apply, our comments in paragraph 3.3 above as to the desirability of being able to uphold contractual provisions under Part XVII is equally applicable to set-off.
- (c) *Netting agreements.* Our comments in paragraph 3.3 and paragraph 3.7.1 above as to the applicability of Part XVII to the FOA Netting Agreement are equally applicable in the context of the Addendum Set-Off Provision.

No amendments to the Addendum Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.9 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

Furthermore, in addition to the highlighted words, it is necessary that the Security Interest Clauses of each FOA Netting Agreement be treated as a Core Provision in order for the opinions expressed in this paragraph 3.9 to apply.

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) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.
- 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 taken into account as part of the Relevant Collateral Value.
- 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.
- 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.

We are of this opinion because:

- (a) The laws relating to recharacterisation of title transfer transactions under British Virgin Islands law may be summarised as follows:
 - (i) generally speaking, British Virgin Islands law will give effect to the expressed intentions of the parties: accordingly, if the parties intend a transaction to take effect as an outright transfer of title, unless there were very good reasons for recharacterising the transaction, a British Virgin Islands court would not do so;
 - (ii) the courts of the British Virgin Islands would be extremely slow to recharacterise a transaction governed by foreign law if it would not be recharacterised under that foreign law; and

- (iii) the courts of the British Virgin Islands would only recharacterise a transfer of title transaction if satisfied that the transferor retained an equity of redemption in the property transferred.
- (b) In our view therefore, a court in the British Virgin Islands would not recharacterise title transfer arrangements as a security interest where the governing law did not imply such recharacterisation, and where assets are not located in the British Virgin Islands we have no reason to believe a court in this jurisdiction would choose to consider the question.

No amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.10 to apply. The Schedules contain additional qualifications in relation to SPCs, Partnerships and Trusts.

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:

- (i) 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 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
- (ii) 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 not 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 or the Addendum Netting Provisions to be enforceable.

3.13 Automatic Termination

It is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provisions to ensure the effectiveness of netting under the FOA Netting Agreement or, as the case may be, the Clearing Agreement in the event of insolvency, liquidation, or other similar circumstances.

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 a party with branches in a number of different jurisdictions, including some where netting may not be enforceable would jeopardise the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, 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.

3.15 Insolvency of Foreign Parties

The British Virgin Islands courts may appoint a liquidator of a company incorporated outside the British Virgin Islands if the court is satisfied that the company has a connection⁹ with the British Virgin Islands. 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 therefore be subject to Insolvency Proceedings in this jurisdiction. However the British Virgin Islands courts would generally defer to proceedings in the Foreign Defaulting Party's home jurisdiction. Notwithstanding proceedings in a Foreign Defaulting Party's home jurisdiction, it is possible for a receiver to be appointed separately in the British Virgin Islands although this would ordinarily only be relevant to assets located in the British Virgin Islands.

Part XIX (*Orders in aid of foreign proceedings*) of the Insolvency Act regulates the making of orders by the British Virgin Islands courts in aid of foreign insolvency proceedings¹⁰. However Part XVIII (*Cross-border insolvency*) of the Insolvency Act which provides a mechanism for dealing with cross-border insolvency based in large part on the UNCITRAL model has not been brought into force.

⁹ A company incorporated outside the British Virgin Islands has a connection with the British Virgin Islands only if (i) it has or appears to have assets in the British Virgin Islands, (ii) it is carrying on, or has carried on, business in the British Virgin Islands or (iii) there is a reasonable prospect that the appointment of a liquidator in the British Virgin Islands will benefit the creditors of the company. Even if such a connection is established, the British Virgin Islands court retains a discretion whether or not to appoint a liquidator. An application for the appointment of a liquidator of a company incorporated outside the British Virgin Islands may be made (i) notwithstanding that the company has been dissolved or has otherwise ceased to exist under or by virtue of the laws of any other country and (ii) whether or not the company is or has been registered as a foreign company under Part XI of the BVI Business Companies Act. The provisions for voluntary liquidation are not applicable to companies incorporated outside the British Virgin Islands, so the only mechanism in the British Virgin Islands for liquidation is by a court appointed liquidator.

¹⁰ These orders may include (i) restraining the commencement or continuation of proceedings or execution of legal process in the British Virgin Islands against a debtor or its property, (ii) restraining the creation, exercise or enforcement of rights over the debtor's property, (iii) requiring any person to deliver up property of the debtor, (iv) making such orders or granting such relief as may be appropriate to facilitate or implement arrangements to co-ordinate British Virgin Islands insolvency proceedings with foreign insolvency proceedings, (v) appointing an interim receiver of any property of the debtor, (vi) authorising the examination of any person who could be examined in a British Virgin Islands insolvency in respect of the debtor, (vii) staying or terminating or making any order in relation to British Virgin Islands insolvency proceedings as the court considers appropriate and (viii) making such orders or granting such other relief as the court considers appropriate.

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. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications.

- 4.1 See Annex 6 (*Netting and set-off*) for a summary of statutory provisions relating to netting and set-off in the British Virgin Islands.
- 4.2 See Annex 7 (*Voidable transactions*) for a summary of avoidance rules in the British Virgin Islands. Assuming no element of complicit fraud for the purposes of section 2 (*Intent to defraud*) of Annex 7, we would not expect these to be relevant given the assumptions in section 2 above.
- 4.3 If a Party has actual notice of the insolvency of a party organised in the British Virgin Islands at the time at which a Transaction is entered into, that Party may not be entitled to claim the benefit of statutory insolvency set-off¹¹.
- 4.4 Margin loans are not included within the examples of financial contracts for the purposes of Part XVII (which has not been amended to reflect the revised form of the ISDA model netting act as published in October 2007). Netting of amounts arising from margin loans alone would not therefore be upheld on the basis of Part XVII. However we do not believe that an FOA Netting Agreement which would otherwise be a netting agreement would fail to be so for the sole reason that it allowed for margin lending.
- 4.5 Our view is that Part XVII is intended to uphold netting provisions on their terms notwithstanding any moratorium provisions arising under any insolvency provisions. However, it remains to be seen how a court would treat (i) an application for a moratorium order as part of a creditor's arrangement under section 51 of the Insolvency Act or (ii) if administration is brought into force, an automatic moratorium under section 83 of the Insolvency Act. Where Part XVII does not apply Transactions would be subject to avoidance as a preference or as a transaction at an undervalue (see section 1 of Annex 7): however on the basis of the assumption at paragraph 2.7, this would not be applicable.
- 4.6 While the Liquidation Amount may be denominated in any currency, any residual claim in the liquidation of a BVIBC based on a liability incurred or payable in a currency other than US dollars would have to be converted into US dollars at the rate of exchange prevailing at the relevant time. However, since the British Virgin Islands courts have power to grant a monetary judgment expressed otherwise than in US dollars, any monetary judgment in a court of the British Virgin Islands in respect of a claim is likely to be expressed in the currency in which such claim is made.

¹¹ Insolvency Act s150(2).

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

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.

Yours faithfully
HARNEY WESTWOOD & RIEGELS

A handwritten signature in blue ink, appearing to read "Harry Westwood & Riegels".

SCHEDULE 1

Segregated portfolio companies

For the purposes of this Schedule 1 (*Segregated portfolio companies*), "SPC" means a BVIBC incorporated or registered with the approval of the British Virgin Islands Financial Services Commission as a segregated portfolio company. A SPC is a specific type of BVIBC which is formed with one or more portfolios, each of which is required to be designated with the words "Segregated Portfolio". The assets and liabilities which are attributable to a particular portfolio are compartmentalised and are treated separately from assets and liabilities attributable to each other portfolio, and from assets and liabilities which are the general assets and liabilities of the SPC (ie assets of the company which are not attributable to a particular portfolio). Only insurance companies¹² or funds regulated as Mutual Funds¹³ under SIBA may be organised as SPCs.

Subject to the modifications and additions set out in this Schedule 1 (*Segregated portfolio companies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are segregated portfolio companies.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (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 1.9.1 is deemed deleted and replaced with the following:

"The laws and procedures referred to in paragraph 3.1 as extended by section 2.1 of Schedule 1 (*Segregated portfolio companies*) are together called "**Insolvency Proceedings**"

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: Segregated portfolio companies**

The BVIBC Act contains certain additional provisions relating to the insolvency of SPCs. Notwithstanding any other provision of British Virgin Islands law, a liquidator of a segregated portfolio company is bound to maintain the segregation of the portfolios and, in discharging the claims of creditors, may only apply the company's assets to those entitled to recourse to them under the segregated portfolio provisions of the BVIBC Act. The principles of segregation of portfolios are therefore maintained through insolvency. The BVIBC Act also contains provisions under which certain parties may apply to the court for a portfolio liquidation order in respect of a specific segregated portfolio and where relevant in the opinion the expression "**Insolvency Proceedings**" includes portfolio liquidation orders. The BVIBC Act further contains provision for administration orders in respect of individual segregated portfolios, effectively applying the provisions of Part III (*Administration*) of the Insolvency Act to segregated portfolios (once the relevant provisions have been brought into force).

¹² See Schedule 7 (*Insurance companies*).

¹³ See Schedule 8 (*Funds*).

The conclusions of paragraph 3.1 in relation to the Insolvency Events of Default Clause remain valid, but it is important to establish in the Agreement whether the Insolvency Events of Default Clause should extend to the SPC or the relevant segregated portfolio or indeed to all segregated portfolios of the SPC.

3. ADDITIONAL QUALIFICATIONS

3.1 Applicability of Part XVII to Segregated portfolio companies

The provisions of Part XVII require that a netting agreement be an agreement between two “persons”. There has not yet been any judicial consideration of how far “person” should extend. Nevertheless we believe that a portfolio of an SPC should be treated as a person for these purposes. Although the portfolio itself does not have separate legal personality, it only engages in transactions through the segregated portfolio company itself (which clearly does have separate legal personality). Although the strictures relating to the treatment of portfolio assets and portfolio liabilities would prevent recognition or enforcement of any netting of assets and liabilities outside of portfolio assets and portfolio liabilities under British Virgin Islands law, we believe that Part XVII should be effective to ensure primacy be given to the Netting Provisions in the Agreement in the event of any Insolvency Proceedings and the conclusions of Paragraph 3.3 therefore apply.

SCHEDULE 2 Partnerships

For the purposes of this Schedule 2 (*Partnerships*), "**Partnership**" means a partnership or limited partnership formed or regulated under the Partnership Act. Partnerships are not separate legal entities under British Virgin Islands law.

Subject to the modifications and additions set out in this Schedule 2 (*Partnerships*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Partnerships.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (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 1.9.1 is deemed deleted and replaced with the following:

"The laws and procedures referred to in paragraph 3.1 as extended by section 2.1 of Schedule 2 (*Partnerships*) are together called "**Insolvency Proceedings**"."

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: Partnerships

Section 499 of the Insolvency Act provides that the Insolvency Rules (the "**Rules**") (promulgated under the Act) will determine which provisions of the Insolvency Act apply to insolvent partnerships. To date only one set of Rules has been promulgated, the Insolvency Rules 2005. However, these do not address the position in relation to insolvent partnerships. Because a partnership is not a separate legal entity, it cannot be liquidated in the same manner as a company, but it is possible to pursue claims in respect of the partnership against each person who was a member of the partnership at the relevant time. In the event that any partner is unable to satisfy the claims made against them the partner would be subject to insolvency proceedings under British Virgin Islands law in the usual way.

The courts of the British Virgin Islands do have jurisdiction to wind-up and dissolve partnerships on various grounds, including:

- (a) when the business of the partnership can only be carried on at a loss; and
- (b) whenever circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

However the court will only hear an application on these grounds from a partner, not a third party. Further there is nothing in British Virgin Islands law at present that would enable the

court to wind up a partnership itself (as distinct from any partners) on the basis that the partnership was insolvent on the basis of the cash flow test or the balance sheet test.

Where a limited partnership is being wound-up and dissolved and it appears to either the general partner or the liquidator that the limited partnership is unable to meet its creditor's claims in full, then they are required to immediately give notice to the Registrar of Limited Partnerships and the winding up then proceeds as if the limited partnership was a company. Although the legislation does not specify, the presumption must be that the winding up would proceed as if the limited partnership was an unlimited liability company and the general partners only were members.¹⁴

If any individual partner has either been declared bankrupt (for an individual) or has gone into insolvent liquidation (for a company), then the partnership will be dissolved. If upon the dissolution of the partnership it is unable to pay the partnership debts as they fall due, then in the case of a limited partnership the winding up and dissolution of the partnership proceeds as if the partnership was an insolvent company. There is no present guidance under British Virgin Islands law as to how the winding-up and dissolution of an insolvent general partnership could be conducted. In comparable common law jurisdictions courts have sometimes resorted to the fiction of treating the insolvent partnership as a "quasi person" in order to maintain an orderly distribution amongst creditors, but there is no statutory basis upon which such a procedure might be based.

Winding-up and dissolution of a Partnership would constitute "**Insolvency Proceedings**" for the purposes of this Schedule 2 (*Partnerships*).

The conclusions of paragraph 3.1 in relation to the Insolvency Events of Default Clause remain valid. However it is important to consider and make clear in the Agreement whether the Insolvency Events of Default Clause should be limited to the partnership itself or extend to the general partners or indeed to all partners, in which case the conclusions of this opinion applicable to the organisational form of the relevant partners (if relevant) will be valid.

3. ADDITIONAL QUALIFICATIONS

3.1 Applicability of Part XVII to Partnerships

3.1.1 General issues with set off and partnerships

Both insolvency set off and Part XVII require mutuality to be effective. While we are not aware of any case law directly relating to unincorporated partnerships, we take the view that analogous conclusions to those in respect of trusts (see section 2.2.1 of Schedule 3 (*Trusts*)) may be drawn in respect of the relationship between general partner and partnership and that mutuality may exist between a partnership and another party.

¹⁴ The Partnership Act actually provides that "the provisions of the Companies Act relating to winding-up and dissolution ... shall apply *mutatis mutandis* to the winding-up of the limited partnership." Unfortunately the provisions of the Companies Act relating to winding-up and dissolution were repealed by the Insolvency Act, and the Partnership Act was not amended, but under normal provisions of statutory interpretation it must be assumed that the references would be construed as references to the Insolvency Act.

Part XVII refers to “an agreement between two parties only”. We take the view that a partnership may constitute a party for these purposes¹⁵.

While we do not in principle believe that our arguments above preclude mutuality with a limited partnership which has more than one general partner, given the lack of British Virgin Islands statutory provision for the appointment of a single liquidator of an insolvent partnership we have concerns as to how the courts would handle set-off claims involving a number of general partners holding assets for a single partnership, especially were the interests of the general partners to diverge.

3.1.2 **Mutuality on a change of partners**

Limited partners are not liable for partnership debts and their rights to assets of the partnership are rights between themselves rather than against third parties. Therefore although their entitlement to participate in the benefit of claims of the partnership against third parties obviously ceases when they leave the partnership, our view is that a change of limited partner (provided they have not held themselves out as a general partner¹⁶) would not be sufficient to destroy the necessary mutuality for set-off or contractual netting as protected by Part XVII.

General partners are only liable for the partnership debts which are accrued during the time when they are a general partner. Given that a change in the composition of the partnership would alter both the entitlement to partnership assets and the liabilities of the partners in respect of future obligations, we have concerns that a change in the partnership may destroy the mutuality necessary to allow obligations to be netted or for set-off to apply on close-out.

3.2 **Applicability of insolvency set-off to Partnerships**

Section 150, relating to insolvency set-off, is not applicable to Partnerships. However given the inapplicability of liquidation proceedings to Partnerships, we believe a similar result may be obtained either through the application of contractual accounting or through Part XVII.

¹⁵ It is hoped that subsidiary legislation will be enacted clarifying the scope of Part XVII, but in the meantime and in the absence of statutory or judicial guidance there is no obvious reason not to apply Part XVII to partnerships.

¹⁶ A limited partner that participates in the control of the partnership business may be liable to persons who transact business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner.

SCHEDULE 3 **Trusts**

For the purposes of this Schedule 3 (*Trusts*), "Trustee" means a BVIBC, partnership or individual acting as trustees of a trust settled in the British Virgin Islands and regulated by the Trustee Act and where relevant the VISTA.

Subject to the modifications and additions set out in this Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Trustees.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (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 1.9.1 is deemed deleted and replaced with the following:

"The laws and procedures referred to in paragraph 3.1 as extended by section 2.1 of Schedule 3 (*Trusts*) are together called "**Insolvency Proceedings**"

2. ADDITIONAL ASSUMPTIONS

- 2.1 That the trustees are entitled to recourse against trust assets in respect of any liability arising under transactions entered into as trustee.
- 2.2 If any trustees are providing trust services in or from the British Virgin Islands that they are duly licensed under the BTCA or are exempt from the requirement to obtain a trust license by virtue of the Financial Services (Exemptions) Regulations 2007.
- 2.3 That the trust instrument confers sufficiently wide power on the trustees to enter into Transactions¹⁷.
- 2.4 Where the proper law of the trust is British Virgin Islands law, that the trust instrument has been stamped with applicable British Virgin Islands trust duty (failing which it may be inadmissible in a British Virgin Islands court).

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: Trusts

¹⁷ Section 3 of the Trustee Act permits a trustee to invest trust funds "in any kind of investments" wherever situate, as long as "he exercises the diligence and prudence that a reasonable person would be expected to exercise in making an investment as if it were his own money". There are no decided authorities in the British Virgin Islands but it is doubtful the extent to which the usual prudent man of business rule would be construed to permit British Virgin Islands trustees to enter into derivative transactions.

Trusts may be terminated under the terms of the trust, by unanimous agreement of the beneficiaries or on the order of a court. There is some question as to whether termination of a trust itself would be covered by the Insolvency Events of Default Clause. It is therefore important to consider and make clear in the Agreement whether the Insolvency Events of Default Clause should be limited to the trust itself or extend to the Trustees, in which case the conclusions of this opinion applicable to the organisational form of the Trustees (if relevant) will be valid.

4. ADDITIONAL QUALIFICATIONS

4.1 Applicability of Part XVII to Trusts

4.1.1 General issues with set off and trusts

Both insolvency set off and Part XVII require mutuality to be effective. The requirement of mutuality is that debts and credits must be mutual. There are a number of English common law cases on mutuality as it relates to trust assets which establish that in determining mutuality the court will look at the beneficial ownership of claim and cross-claim rather than legal title. In particular, while a trustee cannot set off debts of the trustee against credits of the trust, there does not appear to be any question but that mutuality can exist between the trust itself and another party.

Part XVII refers to “an agreement between two parties only”. We take the view that a trust may constitute a party for these purposes.

While we do not in principle believe that our arguments above preclude mutuality with a trust which has more than one trustee, given the lack of British Virgin Islands statutory provision for the appointment of a single liquidator of an insolvent trust we have concerns as to how the courts would handle set-off claims involving a number of trustees holding assets for a single trust, especially were the interests of the trustees to diverge.

4.1.2 Mutuality on a change of trustees

Trustees are only liable for the trust debts which are accrued during the time when they are a trustee. Given that a change of trustee would alter both the entitlement to trust assets and the liabilities of the trustee in respect of future obligations, we have concerns that a change in trustee may destroy the mutuality necessary to allow obligations to be netted or for set-off to apply on close-out.

4.2 Applicability of insolvency set-off to Trusts

Section 150, relating to insolvency set-off, is not applicable to Trusts. However given the inapplicability of liquidation proceedings to Trusts, we believe a similar result may be obtained either through the application of contractual accounting or through Part XVII.

SCHEDULE 4 Individuals

For the purposes of this Schedule 4 (*Individuals*), "**Individual**" means an individual (a) ordinarily resident in the British Virgin Islands, (b) personally present in the British Virgin Islands, (c) carrying on a business in the British Virgin Islands either personally or by way of an agent or manager, (d) who is a member of a partnership carrying on a business in the British Virgin Islands by means of a partner or partners or of an agent or manager, (e) with a place of residence in the British Virgin Islands, (f) having or appearing to have assets in the British Virgin Islands or (g) in respect of whom there is a reasonable prospect that the making of a bankruptcy order will benefit their creditors.

Subject to the modifications and additions set out in this Schedule 4 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Individuals.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (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 1.9.1 is deemed deleted and replaced with the following:

“Insolvency Proceedings” means the procedures listed in section 2.1 of Schedule 4 (*Individuals*)."

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: Individuals

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party would be subject in this jurisdiction are the following:

- (d) supervised creditors' arrangements under Part II (*Creditors' arrangements*) of the Insolvency Act; and
- (e) bankruptcy under Part XII (*Bankruptcy*) of the Insolvency Act.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings referred to above.

3. ADDITIONAL QUALIFICATIONS

The opinions in this opinion letter are subject to the following additional qualifications.

3.1 Part XVII refers to “an agreement between two parties only”. We take the view that an individual may constitute a party for these purposes. Section 150, relating to insolvency set-off, is explicitly applicable to individuals. Therefore in our view the analysis at paragraphs 3.2 to 3.7, 3.10 and Annex 6 (*Netting and set-off*) will apply equally to individuals.

SCHEDULE 5

Investment firms/broker dealers

For the purposes of this Schedule 5 (*Investment firms/broker dealers*), "**Investment firm/broker dealer**" means an entity organised as a BVIBC, partnership or trust and licensed to carry on investment business under the SIBA.

Subject to any modifications and additions set out in, where appropriate Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment firms/broker dealers.

SCHEDULE 6 **Insurance companies/providers**

For the purposes of this Schedule 6 (*Insurance companies/providers*), "**Insurance company**" means an insurance company organised as a BVIBC (including as a segregated portfolio company) and licensed under the Insurance Act.

Subject to the modifications and additions set out in this Schedule 6 (*Insurance companies/providers*) and where appropriate Schedule 1 (*Segregated portfolio companies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance companies.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (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 1.9.1 is deemed deleted and replaced with the following:

"The laws and procedures referred to in paragraph 3.1 as amended by section 2.1 of Schedule 6 (*Insurance companies/providers*) are together called "**Insolvency Proceedings**"."

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: Insurance companies

The liquidation of Insurance companies is regulated separately in Part VII (*Liquidation of Insurance Companies*) of the Insolvency Act and the Insurance Act. These provide for a solvency margin in determining solvency. They also provide the Financial Services Commission with power to apply to court for the appointment of a liquidator, and require the liquidator of an insurance company carrying on long-term business to set aside assets of segregated funds to meet long term liabilities rather than to distribute in accordance with the general scheme of the Insolvency Act.

3. ADDITIONAL QUALIFICATIONS

The opinions in this opinion letter are subject to the following additional qualifications.

3.1 The Insurance Act 2008 provides that a British Virgin Islands insurance company "shall not invest or trade in a derivative without the prior written approval of the [Financial Services] Commission". The Regulatory Code 2009 provides that as part of the application for an insurance license, the business plan should include among other things "any plans that the applicant has to purchase or sell derivatives" (a "derivative" being defined in the Regulatory Code as "an option, a future or a contract for differences"). Properly therefore such approval would have been obtained at the time of licensing. If an insurance company were to invest or trade in a derivative without consent, any agreement to that effect would be unenforceable against the counterparty under the Financial Services Commission Act, 2001. Note however that the agreement would still be enforceable against the insurance company by the counterparty, which would also be entitled to recover from the insurance company any money

or other property paid or transferred by it under the agreement, as well as compensation for any loss.

SCHEDULE 7 Funds

For the purposes of this Schedule 7 (*Funds*), “**Fund**” means an entity organised as a BVIBC (including as a segregated portfolio company), partnership or trust for investment purposes and “**Mutual Fund**” means a Fund regulated as a mutual fund¹⁸ under the SIBA.

Subject to any modifications and additions set out in, where appropriate Schedule 1 (*Segregated portfolio companies*), Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Funds whether licensed as Mutual Funds or not.

¹⁸ A mutual fund is an entity which (a) collects and pools investor funds for the purpose of collective investment and (b) issues shares that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the entity. Investment funds which are not mutual funds are not subject to additional licensing requirements.

SCHEDULE 8

Charitable trusts/bodies

For the purposes of this Schedule 8 (*Charitable trusts/bodies*), “**Charitable body**” means an entity organised as a BVIBC, partnership or trust for charitable purposes and regulated under the Non-profit Organisations Act, 2012 (the “**NPOA**”). It excludes any organisation licensed under the BTCA and any charitable or non-charitable purpose trust where the trustee is licensed under the BTCA¹⁹.

Subject to any modifications and additions set out in this Schedule 8 (*Charitable trusts/bodies*) and where appropriate Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Charitable bodies.

¹⁹ In other words, this schedule applies only to true charities, not financial structures that use charitable purposes to achieve orphan status.

SCHEDULE 9

Pension entities

For the purposes of this Schedule 9 (*Pension entities*), “**Pension entity**” means an entity organised as a BVIBC (including as a segregated portfolio company), partnership or trust for collective investment of pension contributions, which may be regulated as a Mutual Fund²⁰ under the SIBA.

Subject to any modifications and additions set out in, where appropriate Schedule 1 (*Segregated portfolio companies*), Schedule 2 (*Partnerships*) or Schedule 3 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Pension Entities whether licensed as Mutual Funds or not.

²⁰ See Schedule 7.

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 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; or
- (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.

"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.

"Core Provision" means those parts of the clauses or provisions specified below in relation to a paragraph of this opinion letter (and any equivalent paragraph in any Schedule to this opinion letter), 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 Provision;
- (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 letter.

"FOA Netting Agreement" means an agreement:

- (a) on the terms of the forms specified in Annex 1 to this opinion letter 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 Provision, 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
- (g) 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**);
 - (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 letter.

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

"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-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.

"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).

"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
- (d) 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).

"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 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."

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:

"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."

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

"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 extent 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 Transactions 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.]

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/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.

"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 effect²¹.
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.

²¹ A netting agreement is defined for the purposes of Part XVII as being in relation to "present or future financial contracts". As a matter of construction there is an open question as to whether an outstanding transaction constitutes a "present financial contract" and therefore whether Part XVII protects Transactions entered into before the date of the relevant netting agreement.

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 Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time 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.
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.

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

None.

2. Desirable amendments

See Schedules for comments in respect of SPCs, Partnerships and Trusts.

3. Additional wording to be treated as part of the Core Provisions

None.

ANNEX 6

NETTING AND SET-OFF

- 1.1 Insolvency set-off is regulated under Part V (*Provisions applicable to the liquidation of companies and the bankruptcy of individuals*) of the Insolvency Act and is applicable to BVIBCs, foreign companies and individuals. Specifically Section 150 provides for set-off of mutual credits and debts incurred prior to the commencement of liquidation.
- 1.2 Part XVII (*Netting and Financial Contracts*) of the Insolvency Act (“**Part XVII**”), based on the ISDA model netting act²², provides that notwithstanding anything contained in the Insolvency Act, the insolvency rules promulgated under the Insolvency Act or in any rule of law relating to insolvency, provisions relating to netting and set off under a netting agreement are enforceable against each party to that contract.
- 1.3 Section 150 of the Insolvency Act is expressly made subject to Part XVII, and so if the insolvency set-off rules were to produce a different result from the netting provisions of a “netting agreement”, the netting provisions would prevail.
- 1.4 A “netting agreement” is defined in Part XVII as an agreement between two parties only, in relation to present or future financial contracts between them the provisions of which include the termination of those contracts for the time being in existence, the determination of the termination values of those contracts and the set-off of the termination values so determined so as to arrive at a net amount due.
- 1.5 For the purposes of Part XVII of the Insolvency Act, a financial contract is a contract, including any terms and conditions incorporated into any such contract, pursuant to which payment or delivery obligations that have a market or an exchange price are due to be performed at a certain time or within a certain period of time.
- 1.6 Without limiting paragraph 1.5, the following are financial contracts:
 - (a) a currency, cross-currency or interest rate swap agreement;
 - (b) a basis swap agreement;
 - (c) a spot, future, forward or other foreign exchange agreement;
 - (d) a cap, collar or floor transaction;
 - (e) a commodity swap;
 - (f) a forward rate agreement;
 - (g) a currency or interest rate future;

²² The ISDA model netting act was amended in 2007 specifically to provide for margin lending. Part XVII has not been amended to reflect those changes.

- (h) a currency or interest rate option;
- (i) equity derivatives, such as equity or equity index swaps, equity options and equity index options;
- (j) credit derivatives, such as credit default swaps, credit default basket swaps, total return swaps and credit default options;
- (k) energy derivatives, such as electricity derivatives, oil derivatives, coal derivatives and gas derivatives;
- (l) weather derivatives, such as weather swaps or weather options;
- (m) bandwidth derivatives;
- (n) freight derivatives;
- (o) carbon emissions derivatives;
- (p) a spot, future, forward or other commodity contract;
- (q) a repurchase or reverse repurchase agreement;
- (r) an agreement to buy, sell, borrow or lend securities, such as a securities lending transaction;
- (s) a title transfer collateral arrangement;
- (t) an agreement to clear or settle securities transactions or to act as a depository for securities;
- (u) any other agreement similar to any agreement or contract referred to in paragraphs (a) to (t) with respect to reference items or indices relating to (without limitation) interest rates, currencies, commodities, energy products, electricity, equities, weather, bonds and other debt instruments and precious metals;
- (v) any derivative or option in respect of, or combination of, one or more agreements or contracts referred to in paragraphs (a) to (u); and
- (w) any agreement or contract designated as such by the [British Virgin Islands Financial Services] Commission.

ANNEX 7

VOIDABLE TRANSACTIONS

1 Voidable transactions

1.1 Under British Virgin Islands law, certain transactions may be set aside or otherwise varied or amended by orders of the British Virgin Islands court when an insolvent party goes into liquidation or into administration²³. These are where the transaction is (i) an unfair preference, (ii) an undervalue transaction, (iii) a voidable floating charge or (iv) an extortionate credit transaction.

Unfair preferences, undervalue transactions, voidable floating charges and extortionate credit transactions are all regulated by the Insolvency Act, 2003 (the “**Insolvency Act**”) and in each the transaction must have been entered into within the relevant vulnerability period, being the period prior to the onset of insolvency²⁴ or making of the administration order and (except in the case of extortionate credit transactions) the transaction must either (x) have been entered into at a time that the insolvent party was insolvent or (y) have caused the insolvent party to become insolvent.

An unfair preference is a transaction that has the effect of putting a creditor into a position which, in the event of the insolvent party going into insolvent liquidation, would be better than the position in which that creditor would have been vis-à-vis other creditors of the insolvent party if the transaction had not been entered into. A transaction is not an unfair preference if it took place in the ordinary course of the insolvent party’s business. The relevant vulnerability period is six months, except if the creditor is a “connected person”²⁵ in which case it is two years.

An undervalue transaction is a transaction where the insolvent party makes a gift or otherwise receives no consideration for the transaction, or the value of the consideration that it receives in money or money’s worth is considerably less than the consideration provided to the insolvent party. A transaction is not an undervalue transaction if the insolvent party enters into the transaction in good faith and for the purposes of its business and if at the time it entered into the transaction there were reasonable grounds for believing that the transaction would benefit the insolvent party. The relevant vulnerability period is six months, except if the creditor is a connected person, in which case it is two years.

²³ Administration is provided for in the Insolvency Act but not yet in force in the British Virgin Islands.

²⁴ For which purposes “insolvency” means (a) it fails to comply with the requirements of a statutory demand that has not been set aside, (b) execution or other process issued on a judgment, decree or order of a British Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied or (c) the company is unable to pay its debts as they fall due. For most other purposes “insolvency” also includes the value of the company’s liabilities exceeding its assets.

²⁵ In relation to a company, “connected person” means any one or more of: (a) a promoter of the company; (b) a director or member of the company or of a related company; (c) a beneficiary under a trust of which the company is or has been a trustee; (d) a related company; (e) another company one of whose directors is also a director of the company; (f) a nominee, relative, spouse or relative of a spouse of a person referred to in (a) to (c); (g) a person in partnership with a person referred to in (a) to (c); and (h) a trustee of a trust having as a beneficiary a person who is, apart from this paragraph, a connected person. A company is related to another company if (a) it is a subsidiary or holding company of that other company; (b) the same person has control of both companies; and (c) the company and that other company are both subsidiaries of the same holding company.

A floating charge may be set aside if there was no consideration at the same time or subsequent to the creation of the charge. The relevant vulnerability period is six months, except if the creditor is a connected person, in which case it is two years.

An extortionate credit transaction is a transaction for or involving the provision of credit and, having regard to the risk accepted by the person giving credit, (a) the terms of such credit extension are such as to require grossly exorbitant payments to be made (either unconditionally or in certain contingencies) or (b) the transaction otherwise grossly contravenes ordinary principles of fair trading. The relevant vulnerability period is five years.

2 Intent to defraud

2.1 Any conveyance made by any person with intent to defraud creditors is voidable at the instance of the person thereby prejudiced under British Virgin Islands law. It is not a requirement that the relevant transaction was entered into at time when one party was insolvent or became insolvent as a result of the transaction. It is not a requirement that the transferring party subsequently went into liquidation or administration. No conveyance entered into for valuable consideration and in good faith to a person who did not have notice of the intention to defraud may be impugned.

3 Directors' conflicts of interests

3.1 Where a director fails to disclose a conflict of interest in a transaction to the other directors, the transaction may in certain circumstances be voidable by the company.

4 Prejudiced shareholders

4.1 A shareholder of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is unfairly prejudicial to him in that capacity, may apply to the Court for an order, among other things setting aside any decision made or action taken by the company or its directors in breach of the BVI Business Companies Act (the “**BVIBC Act**”) or the memorandum or articles of the company.

5 Transactions entered into with a counterparty subject to insolvency proceedings

5.1 Claims arising after the commencement of the liquidation of a company may not be admissible in the liquidation.

6 Disclaimer of onerous property

6.1 A liquidator may subject to certain conditions disclaim an unprofitable contract or an asset comprised in the insolvent company’s estate which is unsaleable or not readily saleable, or which may give rise to a liability to pay money or perform an onerous act.

7 Transactions entered into with knowledge of insolvency of the counterparty

7.1 Certain transactions entered into with a British Virgin Islands company in the knowledge that the company is insolvent may not subsequently be enforceable against a liquidator.