

FIA EUROPE - NETTING OPINIONS PROJECT

FIA Europe
2nd Floor
36-38 Botolph Lane
London EC3R 8DE

November 5, 2014

Dear Sirs,

FIA Europe netting opinion issued in relation to the FOA Netting Agreement

You have asked us to give an opinion in respect of the laws of Barbados ("this jurisdiction") in respect of the enforceability and validity of the FOA Netting Provision contained in a FOA Netting Agreement or a Clearing Agreement.

We understand that your fundamental requirement is for the enforceability of the FOA Netting Provision to be substantiated by a written and reasoned opinion. Our opinions on the enforceability of the FOA Netting Provision are 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 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 Companies which are incorporated, organised, established, licensed, regulated or formed under the laws of Barbados;

1.1.2 Companies incorporated or registered under the Companies Act, Cap. 308 of the laws of Barbados and licensed as International Business Companies under the International Business Companies Act, Cap. 310 of the laws of Barbados;

1.1.3 Societies with Restricted Liability and International Societies with Restricted Liability organised under the Societies with Restricted Liability Act, Cap. 318B of the laws of Barbados;

1.1.4 Investment firms/broker dealers incorporated under the Companies Act, Cap. 308 of the laws of Barbados;

1.1.5 Partnerships incorporated, continued or registered under the Companies Act, Cap. 308 of the laws of Barbados;

1.1.6 Individuals being persons resident in Barbados under the laws of Barbados;

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1.1.7 Mutual Funds existing in the form of registered unit trusts, companies, partnerships or societies and licensed to carry on mutual fund business in or from Barbados under the *Mutual Funds Act*, Cap. 320B of the laws of Barbados;

1.1.8 Charities registered under the *Charities Act*, Cap. 243 of the laws of Barbados; and

1.1.9 Companies incorporated or formed under the laws of another jurisdiction which are companies, including investment firms (that is, entities regulated under the *Securities Act*, Cap. 318A), banks or insurance companies 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 *Schedule to this opinion* applicable to that type of entity:

1.2.1 Banks and financial institutions incorporated under the *Companies Act*, Cap. 308 of the laws of Barbados and licensed under the *Financial Institutions Act*, Cap. 324A of the laws of Barbados or the *International Financial Institutions Act*, Cap. 325 of the laws of Barbados (Barbados Financial Institutions) (Schedule 1);

1.2.2 Insurance Companies incorporated under the *Companies Act*, Cap. 308 of the laws of Barbados and licensed as Exempt Insurance Companies under the *Exempt Insurance Act*, Cap. 308A of the laws of Barbados or licensed as Qualifying Insurance Companies under the *Insurance Act*, Cap. 310 of the laws of Barbados (Barbados Insurers) (Schedule 2); and

1.2.3 Parties acting as Trustees of Trusts (pursuant to the *Trustees Act*, Cap. 250 of the laws of Barbados, in respect of trusts (including pension entities which are commonly formed as trusts under the laws of Barbados), governed under the laws of Barbados (Barbados Trusts) (Schedule 3).

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 types of Transaction.

1.5 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*.

1.6 The opinions set out in paragraphs 3.7 and 3.8 are given only in relation to Margin which is located outside this jurisdiction.

1.7 A person incorporated or organised in this jurisdiction may be a Party to a Clearing Agreement only in the capacity of "Client" (as defined in the FOA Clearing Module or the ISDA/FOA Clearing Addendum). Our opinion does not apply in respect of a person incorporated or organised in this jurisdiction who is Party to a Clearing Agreement as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum).

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1.8 In this opinion, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.

1.9 A reference in this opinion to a Transaction is a reference, in relation to the FOA Netting Agreement to a Transaction (as defined therein) and, in relation to FOA Clearing Module and ISDA/FOA Clearing Addendum to a Client Transaction (as defined therein).

1.10 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 a FOA Netting Agreement or, as the case may be, a Clearing Agreement, a defined term has been changed but the changed term bears the same meaning as a term defined in a FOA Published Form Agreement or this opinion letter, this opinion letter may be read as if terms used herein were the terms as so changed.

1.10.1 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1;

1.10.2 "**Insolvency Representative**" means a liquidator, administrator, receiver or analogous or equivalent official in this jurisdiction; and

1.10.3 A reference to a "**paragraph**" is to a paragraph of this opinion letter.

1.10.4 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 unless the alteration has been set out by us in Section 5 of Annex 5. We express no view whether an alteration not contemplated in Part 2 (Non-material Amendments) of Annex 4 would or would not constitute a material alteration.

2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions or, as the case may be the Firm/CCP Transactions and CM/CCP Transactions are legal, valid, 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

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Deleted: <#>¶ "**Equivalent Agreement**" means an agreement¶ which is governed by the law of England and Wales;¶ which has broadly similar function to any of the Professional Client Agreement, Retail Client Agreement or Eligible Counterparty Agreement;¶ which contains the Core Provisions (with no amendments, or with Non-material Amendments);

Deleted: <#>which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);¶ References to the "**Agreement**" in this letter (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement;¶ "**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;¶ A "**Non-material Amendment**" means an amendment having the effect of one of the amendments set out at Annex 4; and¶

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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 commencement of any insolvency proceedings under the laws of any jurisdiction 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 each Party, when transferring Margin pursuant to the Title Transfer Provisions, has effectively transferred all right title and interest in the Margin according to the laws of the jurisdiction where the Margin is located.

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:

- i. Proposals in accordance with the Bankruptcy and Insolvency Act, Cap. 303 of the laws of Barbados;
- ii. Schemes of arrangement and winding up in accordance with the Companies Act, Cap. 308 of the laws of Barbados and the Companies Regulations, 1984 (Part X); and
- iii. Compositions and voluntary creditor arrangements in accordance with general law.

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Deleted: <#>, will have 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).¶
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Deleted: That each party to the Agreement has been duly incorporated and that each party thereto is validly existing and in good standing under the laws of their respective jurisdictions of domicile, and that no proceedings have been commenced under the laws of their respective jurisdictions of domicile (or elsewhere), for the winding-up of their respective businesses.¶
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Deleted: That all applicable laws (other than the laws of Barbados), recognise a valid and enforceable (i) the termination and close-out netting provisions in the Agreement, and (ii) the complete transfer of title to the Margin Transferred in the Agreement, and that no security interest is created (by operation of law or otherwise, except as a result of the laws of Barbados), by reason of the purported complete transfer of ownership as contemplated in the Agreement. ¶
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We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions.

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 appropriate, as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the contractual validity of the (i) FOA Netting Provision and the FOA Set-Off Provisions or, as the case may be, of the Clearing Module Set-Off Provision, and (ii) the Title Transfer Provisions.

3.3 Enforceability of FOA Netting Provision

In relation to a FOA Netting Agreement and in relation to a Clearing Agreement where the Client is a Defaulting Party, 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;

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

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

We are of this opinion because:

The effectiveness of the FOA Netting Provision prior to the insolvency of a Party will be subject to normal contractual rules. A series of decided cases have confirmed the validity of the FOA Netting Provisions from different aspects, and it has been judicially confirmed that the net payment obligation is not unenforceable as a penalty.

The insolvency regime applicable in this jurisdiction in respect of the Parties is governed by the *Bankruptcy and Insolvency Act*. The FOA Netting Provision constitute "eligible financial contracts" within the meaning of section 35(8) of the *Bankruptcy and Insolvency Act*, and as such in the event of the insolvency of a party thereto, and notwithstanding the filing of a proposal for composition, extension of time or scheme of arrangement by or on behalf of such party or the filing of a notice of the intention to make a proposal by such party, pursuant to the *Bankruptcy and Insolvency Act* (which actions generally operate as a bar to the termination of contractual arrangements by reason only of insolvency), the termination and close-out of all outstanding transactions would be valid and enforceable under the laws of Barbados.

In the event of the commencement of Insolvency Proceedings in this jurisdiction on the insolvency of a Party, the netting of the obligations ("close-out netting"), between the parties in accordance with the provisions of the FOA Netting Provision would be valid

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and enforceable under the laws of this jurisdiction, and in the event that after the close-out netting, amounts remain owing by one party to another, the creditor party may prove as an unsecured creditor in bankruptcy in respect of such amounts.

Except as set out below, 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.

The *Bankruptcy and Insolvency Act* imposes stays in respect of proceedings (whether judicial or extra-judicial), by secured creditors in respect of the enforcement of security interests (and the limitation or exclusion of the rights, power and authority of an insolvent person over its assets). If a proposal or a notice of an intention to make a proposal (for composition, extension of time, or scheme of arrangement), has been filed, the Non-Defaulting Party (as the secured creditor) cannot enforce its security over the assets of the Defaulting Party except in cases where (a) Non-Defaulting Party had sought to enforce its security interest against the secured assets of the Defaulting Party prior to the filing of the notice of an intention to make a proposal with the Supervisor of Insolvency, (b) Non-Defaulting Party had given notice of its intention to realise the security interest at least 10 days prior to either (i) the filing of the notice of an intention to make a proposal with the Supervisor of Insolvency or (ii) the filing of the proposal with the Supervisor of Insolvency (where no notice had been filed), (c) Non-Defaulting Party had given notice of its intention to realise the security interest and Defaulting Party had consented to the enforcement action, or (d) the proposal filed with the Supervisor of Insolvency has not been made to Non-Defaulting Party or was not consented to by Non-Defaulting Party. The stay remains in force and effect until the trustee is discharged or the Defaulting Party adjudicated bankrupt in accordance with the *Bankruptcy and Insolvency Act*. Specifically as regards enforceability of netting, it has been recognised by judicial authority that netting is not a security interest that is stayed on Insolvency Proceedings.

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

3.4 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 Module 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.

3.5 Enforceability of the FOA Set-Off Provisions

3.5.1 In relation to a 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:

(a) where the FOA Set-Off Provisions include the General Set-Off Clause:

- (i) 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
- (ii) 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

(b) 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:

The effectiveness of the FOA Set-Off Provisions prior to the insolvency of a Defaulting Party will be subject to normal contractual rules. The right of set-off exists generally in respect of mutual debt obligations and will be effective to the extent that mutuality exists. It replaces two mutual payment obligations (actual or contingent), with the discharge of one debt obligation, and the creation of a new debt obligation for the net difference. In accordance with normal contractual rules, the law recognises the right of parties to provide for such set-off in cases where the elements of mutuality are lacking, or for an account to be taken where there is no extant obligation. This is recognised as the right of contractual-set off. The recognition of the rights accorded to contractual set-off apply up to insolvency.

Barbados law permits and mandates insolvency set-off in cases where there have been mutual debts, mutual credits and other mutual dealings between debtor and creditor. Hence in any bankruptcy action commenced in Barbados, a party will be liable to set off its debts to the other insolvent party. Notwithstanding the fact that the insolvency provisions of the laws of a foreign jurisdiction and the bankruptcy jurisdiction of the foreign court will be recognised in Barbados, the expressed basis for that opinion in prior judicial decisions is that the courts of Barbados will apply their own rules allowing set-off, even where the foreign tribunal prohibits or restricts the rights of contractual set-off. There is however persuasive academic opinion that on a correct analysis, the courts in Barbados ought to apply the law of the claim (*lex loci contractus*)

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in respect thereof, and to permit set-off in cases where the law of the contract permits the contractual set-off. The better view is the academic opinion but the more likely to be followed is the prior judicial decision.

No amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.5.1 to apply.

3.5.2 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 (and in which the FOA Set-Off Provisions are not Disapplied 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 in respect of the Client, the Firm or, as the case may be, the Clearing Member would (to the extent that set-off is not already covered by the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision) 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:

(a) where the FOA Set-Off Provisions includes the General Set-Off Clause:

- (i) 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
- (ii) 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

(b) 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:

Barbados law permits and mandates insolvency set-off in cases where there have been mutual debts, mutual credits and other mutual dealings between debtor and creditor. Hence in any bankruptcy action commenced in Barbados, a party will be liable to set off its debts to the other insolvent party. Notwithstanding the fact that the insolvency provisions of the laws of a foreign jurisdiction and the bankruptcy jurisdiction of the foreign court will be recognised in Barbados, the expressed basis for that opinion in prior judicial decisions is that the courts of Barbados will apply their own rules allowing set-off, even where the foreign tribunal prohibits or restricts the rights of contractual set-off. There is however persuasive academic opinion that on a correct analysis,

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the courts in Barbados ought to apply the law of the claim (*lex loci contractus*) in respect thereof, and to permit set-off in cases where the law of the contract permits the contractual set-off. The better view is the academic opinion but the more likely to be followed is the prior judicial decision.

No amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.5.2 to apply.

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

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, if there has been an Event of Default in respect of the Client or a CCP Default, so that the value of any cash balance owed by one Party to the other would be set off against any Available Termination Amount owed by the Party entitled to receive the cash balance, insofar as not already brought into account as part of the Relevant Collateral Value.

We are of this opinion because:

Barbados law permits and mandates insolvency set-off in cases where there have been mutual debts, mutual credits and other mutual dealings between debtor and creditor. Hence in any bankruptcy action commenced in Barbados, a party will be liable to set off its debts to the other insolvent party. Notwithstanding the fact that the insolvency provisions of the laws of a foreign jurisdiction and the bankruptcy jurisdiction of the foreign court will be recognised in Barbados, the expressed basis for that opinion in prior judicial decisions is that the courts of Barbados will apply their own rules allowing set-off, even where the foreign tribunal prohibits or restricts the rights of contractual set-off. There is however persuasive academic opinion that on a correct analysis, the courts in Barbados ought to apply the law of the claim (*lex loci contractus*) in respect thereof, and to permit set-off in cases where the law of the contract permits the contractual set-off, as appropriate, as the governing law of the Agreement, in determining the enforceability or effectiveness of the FOA Netting Provision. The better view is the academic opinion but the more likely to be followed is the prior judicial decision.

No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.6 to apply.

3.7 Enforceability of the Title Transfer Provisions

3.7.1 In relation to a 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

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exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) would be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.

3.7.2 The questions in relation to the FOA Netting Agreement (with Title Transfer Provisions) or a Clearing Agreement which includes the Title Transfer Provisions, (x) whether Transfers of Margin would be characterised as outright transfers of title or creating a security or other interest, and (y) whether Margin Transferred may be used without restriction, would, under the conflicts of laws rules of this jurisdiction, be determined by reference to the governing law of the FOA Netting Agreement (with Title Transfer Provisions) and a Clearing Agreement which includes the Title Transfer Provisions, and/or by reference to the governing law of the place where the Margin is located.

We are of this opinion because:

Under the laws of Barbados, the law of England (being the choice of law of the FOA Netting Agreement), is the relevant law in the determination of the validity of the transfer and the determination of whether each transfer of assets is an unconditional transfer of title and ownership in the assets transferred.²

Assuming that in judicial proceedings in Barbados, the courts of Barbados were to apply the laws of Barbados being the *lex fori* (either because English law was not pleaded and proven in such proceedings or for some other reason), subject to the provisions of laws relating to insolvency, bankruptcy, liquidation, re-organisation, administration and examination, and the fraudulent preference of creditors, the conveyance of the interest in property and assets ("Transferred Property") will constitute a complete and valid transfer of that Transferred Property, and create a separate ownership in the transferee, where the Transferee may use the Transferred Property permanently as his own.³ and the transferor retains no proprietary rights in the Transferred Property, such as would give rise to a right in equity to redeem or reacquire the Transferred Property (the "equity of redemption"). In their determination that the transfer under the transaction document constitutes a valid and legal assignment of the full legal and beneficial interest in the Transferred Property, the courts in Barbados will need to be satisfied that the legal form of the transaction document, the rights of the parties under the transaction document, and the preponderance of surrounding facts and circumstances indicate that there is an absolute assignment and not the creation in favour of the transferee a security interest in the Transferred Property. In determining whether any given transaction is in the nature of a grant of a security interest as distinct from an absolute transfer and sale, the courts of Barbados will look at the substance of the transaction and not merely the form.⁴

² This confirmation is given notwithstanding the fact that there is no case-law in Barbados, but having reference to the decisions in the case-law of other jurisdictions the courts of Barbados should apply such decisions either (a) as being directly binding, or (b) as being highly persuasive.

³ Joachimson v Swiss Bank Company [1921] 3KB 110 at pp. 126-127; Royal Trust Co. Molson's Bank [1912] 27 OLR 441.

⁴ Re Watson, *ex p. Official Receiver in Bankruptcy* (1890) 25 Q.B.D. 27; Re Lovegrove [1935] Ch.464.

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where the Firm is the Non-Defaulting Party,

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That the terms of the transaction document consistently and unqualifiedly characterise the transfer thereunder as an absolute transfer, such that the rights of the parties as stated therein are consistent with an absolute sale is only *prima facie* determinative.

No amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.7 to apply.

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

In relation:

3.8.1 to a FOA Netting Agreement (with Title Transfer Provisions) and to a Clearing Agreement which includes the Title Transfer Provisions and the Non-Cash Security Interest Provisions (used with or without the Rehypothecation Clause) and/or the Client Money Additional Security Clause - whether the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) would be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision; and

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3.8.2 to the Clearing Agreement which includes the Title Transfer Provisions - whether the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value,

would be determined by reference to the governing law of the FOA Netting Agreement (with Title Transfer Provisions) and a Clearing Agreement which includes the Title Transfer Provisions, or by reference to the governing law of the place where the collateral is located. Further, our opinion at paragraph 3.7 remains true in relation to such a FOA Netting Agreement or Clearing Agreement.

3.9 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 to be enforceable.

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Deleted: However, we note where all Transactions entered into pursuant to the Agreement are part of a single agreement⁵, this satisfies the requirement for mutuality which is essential in the application of Set-Off under equitable principles or under the *Bankruptcy and Insolvency Act*.

3.10 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 to ensure the effectiveness of netting under the FOA Netting Agreement in the event of bankruptcy, liquidation, or other similar circumstances.

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3.11 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 FOA Set-Off Provisions, the Clearing

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Module Set-Off Provision or the Title Transfer Provisions insofar as the laws of this jurisdiction are concerned. In particular, there is no danger that an Insolvency Representative of a Defaulting Party could treat the obligations in respect of Transactions entered into in this jurisdiction separately from other obligations arising under the FOA Netting Agreement or, as the case may be, the Clearing Agreement or other Transactions.

3.12 Insolvency of Foreign Parties

Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default occurs in respect of such Party (a "Foreign Defaulting Party") the Foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction. Notwithstanding the fact that the insolvency provisions of the laws of a foreign jurisdiction and the bankruptcy jurisdiction of the foreign court will be recognised in Barbados, the expressed basis for that opinion in prior judicial decisions is that the courts of Barbados will apply their own rules allowing set-off, even where the foreign tribunal prohibits or restricts the rights of contractual set-off. There is however persuasive academic opinion that on a correct analysis, the courts in Barbados ought to apply the law of the claim (*lex loci contractus*) in respect thereof, and to permit set-off in cases where the law of the contract permits the contractual set-off. The better view is the academic opinion but the more likely to be followed is the prior judicial decision.

3.13 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 Taxes

4.1.1 Except for the stamp duty in the amount adjudicated in accordance with the Stamp Duty Act, payable in respect of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, no further stamp duties or other taxes are payable under the laws of Barbados in connection with the execution and delivery of the FOA Netting Agreement or the Clearing Agreement, or to ensure the legality, validity, enforceability or admissibility in evidence of any thereof, or to preserve or protect the security afforded and to be afforded by the FOA Netting Agreement or the Clearing Agreement.⁶

4.1.2 Stamp duty is a documentary tax charged upon instruments; it is not a tax upon transactions or upon persons. For the purposes of the *Stamp Duty Act*, an instrument is

⁶ In the case of licensees under the *Financial Institutions Act* or the *International Financial Institutions Act*, the rate of stamp duty is currently BDS\$10.00 (approx. US\$5.00) per document. In all other cases, there is an *ad valorem* rate as specified in the Schedule to the *Stamp Duty Act*.

defined to include every written document; thus any transaction which is effected orally or arises solely from the conduct of the parties is not subject to stamp duty.

4.1.3 The territorial limits of the stamp duty is defined incidentally; the *Stamp Duty Act* section 34(4) prescribes that stamp duty is chargeable in respect of (a) an instrument executed in Barbados, and (b) an instrument, wheresoever executed to any property situate in or to any matter or thing done or to be done in Barbados. In most cases, it is anticipated that with a Barbados Financial Institution, the FOA Netting Agreement or the Clearing Agreement will be executed in Barbados. The performance of the Agreement is interpreted as being required to be performed in Barbados (there being some element of performance of that obligation in Barbados). As a consequence, even if the FOA Netting Agreement or the Clearing Agreement is not executed in Barbados, and the Collateral is situate outside of Barbados, the FOA Netting Agreement or the Clearing Agreement is *prima facie* subject to stamp duty.

4.1.4 An instrument which is not properly stamped is nonetheless effective; but remains (except in criminal proceedings) inadmissible in evidence, or available for any purpose whatsoever. The failure to stamp is inherently remediable and does not affect the validity of the document. It is understood that current practice is to admit an unstamped document subject to counsel's undertaking to have the instrument stamped. In a security instrument such as the FOA Netting Agreement or the Clearing Agreement, the onus of payment of the stamp duty is on chargee or mortgagee, and is usually completed in the normal course of registration.

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4.2 Exchange Control Restrictions

4.2.1 There are exchange control (foreign currency control) restrictions in Barbados. Specific classes of companies are exempt from the restrictions against (a) ownership of foreign property, and (b) dealing in foreign cash and securities. Counterparties licensed as international business companies or international societies with restricted liability are exempt from these restrictions.

4.2.2 The standard market practice is for the Party to provide independently evidence of its exemption from the Exchange Control Act by tendering a copy of the licence issued under the relevant statute.

4.3 An Insolvency Representative or court in this jurisdiction would recognise the jurisdiction of the courts of England over a Party to the Agreement in cases where the Party is "properly subject" to the jurisdiction of the court in that foreign jurisdiction (as such is determined in accordance with Barbados conflicts of laws rules). An adjudication of bankruptcy is equivalent to a judgment, and the established rules with regard to the competence of the adjudicating foreign tribunal in the recognition of foreign judgments (specifically domicile and submission) apply. This is statutorily recognised in section 224(1) of the *Bankruptcy and Insolvency Act*. In addition, it appears accepted that the foreign tribunal will be competent to adjudicate the bankruptcy in cases where the Party is resident or carrying on business within the jurisdiction, but the mere presence of assets within the jurisdiction of the foreign tribunal may not be sufficient grounds for recognising the claims of jurisdiction by the adjudicating foreign tribunal.

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4.2.3 . The standard market practice is for the Counterparty (a) to give representations and warranties to the effect that (a) no authorisation or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution and delivery by the Counterparty of the Agreement, and (ii) that the execution, delivery and performance by the Counterparty of the Agreement does not violate or conflict with any provision of the corporate instruments, by-laws, the licence or business plan of the Barbados entity, or any law, rule or regulation in Barbados, applicable to the Counterparty; and (b)

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4.4 The term “enforceable” as used herein means that the obligations assumed by a party under a specified document are of a type which the Barbados courts enforce. It does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms. In particular:

- (a) a Barbados court will not necessarily grant any remedy the availability of which is subject to equitable considerations or which is otherwise in the discretion of the court. In particular, orders for specific performance and injunctions are, in general, discretionary remedies under Barbados law and specific performance is not available where damages are considered by the court to be an adequate alternative remedy;
- (b) claims may become barred by prescription, limitation or lapse of time, or may be or become subject to defences of set-off or counterclaim;
- (c) where obligations are to be performed in a jurisdiction outside Barbados, these may not be enforceable in Barbados to the extent that performance would be illegal under the laws of that jurisdiction;
- (d) enforcement may be restricted by the principles relating to the frustration of contracts by events happening after their execution; and
- (e) enforcement may be limited to the extent that performance would be illegal or contrary to public policy under the laws of Barbados or any other applicable jurisdiction and a Barbados court may take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance. There are no reasons, of which we are aware, for avoiding enforcement of the [FOA Netting Agreement, or as the case may be, the Clearing Agreement](#) under the laws of Barbados, on the grounds that that performance would be contrary to public policy.

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4.5 General qualifications

4.5.1 [Where an obligation has been entered into \(including under a Transaction or a transfer of Margin under the Title Transfer Provisions\) after the commencement of Insolvency Proceedings in relation to a Party, any amount which is due in respect of such an obligation may not be capable of inclusion in the netting under the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, or a set-off under the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision, but this would not impair the effectiveness of the netting under the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, or a set-off under the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision in respect of amounts due in respect of Transactions entered into before the commencement of such Insolvency Proceedings.](#)

4.5.2 [If the obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement are not "mutual" between the Parties they may not be eligible for inclusion in a netting or set-off pursuant to the FOA Netting Provision, the FOA Set-Off Provisions or the Clearing Module Set-Off](#)

Provision. For these purposes, under the laws of this jurisdiction, obligations would not be regarded as "mutual" if there are mutual credits, mutual debts or other mutual dealings between the Parties. However, the inclusion of amounts in respect of non-mutual obligations would not impair the effectiveness of the netting under the FOA Netting Provision or a set-off under the FOA Set-Off Provisions or the Clearing Module Set-Off Provision in respect of amounts due in respect of Transactions which are mutual.

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 FIA Europe and members of FIA Europe (other than associate members) and their affiliates which have subscribed to FIA Europe's opinions library and whose terms of subscription give them access to this opinion (as evidenced by the records maintained by FIA Europe and each a "subscribing member").

This opinion may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

- a) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings;
- c) the officers, employees, auditors and professional advisers of any addressee or any subscribing member; and
- d) any competent authority supervising a subscribing member in connection with their compliance with their obligations under prudential regulation

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made and in preparing this opinion we have not had regard to the interests of any such person.

We accept responsibility to FIA Europe and the subscribing members in relation to the matters opined on in this opinion. However, the provision of this opinion is not to be taken as implying that we assume any other duty or liability to the subscribing members. The provision of this opinion does not create or give rise to any client relationship between this firm and the subscribing members.

Yours faithfully,

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SCHEDULE 1
BARBADOS FINANCIAL INSTITUTIONS

Subject to the modifications and additions set out in this Schedule 1 (*Barbados Financial Institutions*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Barbados Financial Institutions. For the purposes of this Schedule 1 (*Barbados Financial Institutions*), "**Barbados Financial Institution**" means banks and financial institutions incorporated under the *Companies Act*, Cap. 308 of the laws of

Barbados and licensed under the *Financial Institutions Act*, Cap. 324A of the laws of Barbados ("Barbados Domestic Financial Institutions") or licensed under the *International Financial Services Act*, Cap. 325 of the laws of Barbados ("Barbados International Financial Institutions").

Barbados Financial Institutions are legal entities, which may be organised as a corporation, partnership or in some other form, that conduct commercial banking activities, that is, whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) making loans to private individual and/or corporate borrowers. This type of entity is sometimes referred to as a "commercial bank" or, if its business also includes investment banking and trading activities, a "universal bank". (If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm/Broker Dealer" discussed in the opinion letter above.)

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

"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 1.

2. ADDITIONAL ASSUMPTIONS:

NONE

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 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:

Winding up proceedings for Barbados Domestic Financial Institutions in accordance with the *Financial Institutions Act*, Cap. 324A of the laws of Barbados (Part V); and

Winding up proceedings for Barbados International Financial Institutions in accordance with the *International Financial Services Act*, Cap. 325 of the laws of Barbados (Part III).

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions.

The express exclusion of Barbados Financial Institutions from the scope of the *Bankruptcy and Insolvency Act*, does result in a certain degree of legal uncertainty as to (a) the substantive rules to be applied by the court in the making of the order for compulsory winding-up of a Party that is a Barbados Financial Institution, and (b) the power and jurisdiction of the court to make ancillary orders affecting the wind-up and the distribution of assets of a Barbados Financial Institution.

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Deleted: category below.) This type of entity is referred to as a "credit institution" in European Community (EC) legislation. This category may include specialised types of bank, such as a mortgage savings bank (provided that the relevant entity accepts deposits and makes loans), or such an entity may be considered in the local jurisdiction to constitute a separate category of legal entity (as in the case of a building society in the United Kingdom (UK)).

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2.1.1 . There is no restriction under either of the *International Financial Services Act* or the *Financial Institutions Act*, which restricts or limits the statutory and corporate authority and capacity of the Barbados Financial Institution to enter into the Agreement in respect of any of the Transactions, by restricting or proscribing classes of investments available to companies licensed under the *International Financial Services Act* or the *Financial Institutions Act*.¶

2.1.2 . There are however certain statutory provisions which are relevant for consideration and which may impact or may limit the capacity of a Barbados Financial Institution from entering into the Transactions as contemplated by the Agreement and specifically completing the transfer of assets under the Agreement, including *inter alia* (a) the restrictions on banking business prescribed under the *International Financial Services Act* and the *Financial Institutions Act*, which limits financial exposures (b) the financial capital requirements which are mandated under the *International Financial Services Act* and the *Financial Institutions Act*, or otherwise applicable by virtue of administrative fiat dealing specifically with credit and risk exposures in accordance with prudential banking standards adopted pursuant to the Basel II Accord on banking and financial regulation, and (c) the ability of the Central Bank of Barbados to suspend the licence of a Barbados Financial Institution, to restrict the banking business of a Barbados Financial Institution, to seize control of the operations by commencing judicial proceedings for the appointment of a custodian of a Barbados Financial Institution, to commence proceedings for the winding up of a Barbados Financial Institution in circumstances where the Central Bank of Barbados is of the view that the Barbados Financial Institution is c... [37]

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Even assuming the non-application of the *Bankruptcy and Insolvency Act* in the event of the insolvency of the Barbados Financial Institution (as the case may be), there is no specific legislative enactment operating as a bar to the termination of contractual arrangements by reason only of insolvency of a party thereto, and the termination and close-out of all outstanding Transactions would be valid and enforceable under the laws of Barbados.

4. MODIFICATIONS TO QUALIFICATIONS

NONE

5. ADDITIONAL QUALIFICATIONS

NONE

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Taxes and Duties¶

5.2.1. In the case of licensees under the *International Financial Institutions Act*, the rate of stamp duty is currently BD\$10.00 (approx. US\$5.00) per document. In all other cases, there is an *ad valorem* rate as specified in the Schedule to the *Stamp Duty Act*. ¶

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SCHEDULE 2 BARBADOS INSURERS

Subject to the modifications and additions set out in this Schedule 2, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Barbados Insurers. For the purposes of this Schedule 2, "*Barbados Insurer*" means insurance companies or providers incorporated under the *Companies Act*, Cap. 308 of the laws of Barbados and licensed as exempt insurance companies under the *Exempt Insurance Act*, Cap. 38A of the laws of Barbados (*"Exempt Insurance Companies"*) or licensed as an insurance company under the *Insurance Act* Cap. 310 of the laws of Barbados (*"Domestic Insurance Companies"*).

Barbados Insurers are legal entities, which may be organised as a corporation, partnership or in some other legal form, that are licensed to carry on insurance business, and are typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.

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

"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 2.

2. ADDITIONAL ASSUMPTIONS

NONE

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 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:

Winding up proceedings for Exempt Insurance Companies in accordance with the *Exempt Insurance Act*, Cap308A of the laws of Barbados (Part IV); and

Winding up proceedings for Domestic Insurance Companies in accordance with the *Insurance Act*, Cap. 310 of the laws of Barbados (Sections 56-70).

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions.

The express exclusion of Barbados Insurers from the scope of the *Bankruptcy and Insolvency Act*, does result in a certain degree of legal uncertainty as to (a) the

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1. Modifications to Terms of Reference and Definitions¶
1.1. These

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Deleted: 2. Additional Assumptions¶

We assume the following:¶
2.1.1. That on the execution and delivery thereof, each party to the Agreement is solvent and has not committed any "act of bankruptcy" (within the meaning of the *Bankruptcy and Insolvency Act*);¶
2.1.2. That immediately prior to the execution and delivery of the Agreement no party thereto is insolvent and that (a) there has not been any assignment filed with the with the Supervisor of Insolvency pursuant to the *Bankruptcy and Insolvency Act*, by or in respect of any such party (b) there has not been any proposal for a composition, for an extension of time or for a scheme of arrangement under the *Bankruptcy and Insolvency Act*, by or in respect of any such party, (c) there has not been any notice of intention to file a proposal lodged with the Supervisor of Insolvency pursuant to the *Bankruptcy and Insolvency Act*, by or in respect of any such party, (d) there has not been any petition presented for a receiving order under the *Bankruptcy and Insolvency Act*, by or in respect of any such party, and (e) no winding up proceedings under any of the *Insurance Act*, or the *Exempt Insurance Act*, have been commenced by or in respect of any such party.¶
2.2.1. There is no restriction under either of the *Exempt Insurance Act* or the *Insurance Act*, which restricts or limits the statutory and corporate authority and capacity of the Barbados Insurer to enter into the Agreement in respect of any of the Transactions, by restricting or proscribing classes of investments available to companies licensed under the *Exempt Insurance Act*, or the *Insurance Act*.¶

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Deleted: 3.1.1. In the event that transfers of Margin Transferred under the Agreement are outside of the ordinary course of business of the Barbados Insurer, the prior approval of the applicable regulatory authority is required as a condition of the respective licences issued to the Barbados Insurer.¶
3.1.2. There are statutory conditions of the issue of a licence under the *Exempt Insurance Act*, to the effect that a licensee may not without prior consent of the Minister of Finance (acting through the Financial Services Commission), transfer the whole or any part of its assets or liabilities, except in circumstances where that transfer is in the ordinary course of business of the Barbados Insurer. These statutory conditions have been applied *mutatis mutandis* (pursuant to the general regulatory authority of the Financial Services Commission), to qualifying insurance companies licensed under the *Insurance Act*.¶
3.1.3. In the event that the licence and business plan of the Barbados Insurer include the authority to transact general insurance business in the form of financial insurance and reinsurance (including specifically the assumption and ceding of risk by alternative forms of risk-transfer, through the securitisation of insurance policies or portfolios, or classes or category of risks, by way of financial derivative instruments), the Agreement is *prima facie* entered into as part of the ordinary course of business of the Barbados Insurer, and as such no prior permission is required. Where the Transaction is entered into as an investment transaction, which is incidental to the insurance business of the Barbados Insurer, the prior permission of the Financial Services Commission must be obtained.¶
3.1.4. To obtain the necessary regulatory permission the Barbados Insurer will usually submit a letter to the applicable regulatory authority, together with copies of the relevant Transaction documents. Permission is usually granted within two (2) weeks of the submission of the request.¶
4. additional qualifications¶

... [39]

substantive rules to be applied by the court in the making of the order for compulsory winding-up of a Party that is a Barbados Insurer, and (b) the power and jurisdiction of the court to make ancillary orders affecting the wind-up and the distribution of assets of a Barbados Insurers.

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Even assuming the non-application of the *Bankruptcy and Insolvency Act* in the event of the insolvency of the Barbados Insurers (as the case may be), there is no specific legislative enactment operating as a bar to the termination of contractual arrangements by reason only of insolvency of a party thereto, and the termination and close-out of all outstanding Transactions would be valid and enforceable under the laws of Barbados.

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4. MODIFICATIONS TO QUALIFICATIONS

NONE

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5. ADDITIONAL QUALIFICATIONS

NONE

Deleted: 5.1.3. In the event of the commencement of proceedings in this jurisdiction on the insolvency of the Barbados Insurers (as the case may be), the netting of the obligations ("close-out netting"), between the parties in accordance with the Netting Provisions to satisfy the net payment obligations owing by the Barbados Insurers (as the case may be), would be valid and enforceable under the laws of Barbados, and in the event that after the close-out netting, any amounts remain owing by one party to another, the creditor party may prove as an unsecured creditor in bankruptcy in respect of such amounts.¶

Taxes and Duties¶

5.2.1. In the case of licensees under the *Exempt Insurance Act* and the *Insurance Act* (qualifying insurance companies) the rate of stamp duty is currently BD\$10.00 (approx. US\$5.00) per document. In the case of all other Barbados Insurers, there is an *ad valorem* rate as specified in the Schedule to the *Stamp Duty Act*.¶

SCHEDULE 3 BARBADOS TRUSTS

Subject to the modifications and additions set out in this Schedule 3 (Barbados Trusts), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are persons acting as Trustees of *Barbados Trusts*. For the purposes of this Schedule 3 (Barbados Trusts), "Barbados Trusts" means Parties acting as trustees of Trusts (pursuant to the *Trustees Act*, Cap. 250 of the laws of Barbados), in respect of trusts governed under the laws of Barbados.

Barbados Trusts include:

- i) Trusts governed by the *International Trusts Act*, Cap 245.
- ii) All other Trusts governed by the laws of Barbados.

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

NONE.

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1 (a) that the Party is not specifically restricted by the trust deed from entering into the Transactions governed by the FOA Netting Agreement, or as the case may be, the Clearing Agreement, or (b) where the trust deed or the terms and conditions of any regulatory licence or certificate of registration of the Barbados Trust specifically restrict the powers of the Party, that the Transactions do not constitute the exercising of powers by the Party outside of the permitted scope of the provisions of the Trust Deed, and (c) that the Party will have the necessary power to enter into and to execute the Agreement and the Transactions governed therein.

2.2 that the Transactions are executed by the Trustees in accordance with its duties under Part II of the *Trustees Act*, Cap. 250 of the laws of Barbados, whereby (a) the Trustee shall have regard to the need for diversification of investments of the trust in so far as appropriate to the circumstances of the trust and (b) the Trustee is not authorised to invest in bearer securities unless those securities are purchased through a bank and until sold retained at all times by the bank for safe custody and collection of income.

2. MODIFICATIONS TO OPINIONS

NONE

4. MODIFICATIONS TO QUALIFICATIONS

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NONE

5. ADDITIONAL QUALIFICATIONS

NONE

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ADDITIONAL QUALIFICATIONS¶

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

4.1 . An Insolvency Representative or court in this jurisdiction would recognise the jurisdiction of the courts of England or the courts of the State of New York over a Barbados Party to the Agreement in cases where the Party is "properly subject" to the jurisdiction of the court in that foreign jurisdiction (as such is determined in accordance with Barbados conflicts of laws rules). An adjudication of bankruptcy is equivalent to a judgment, and the established rules with regard to the competence of the adjudicating foreign tribunal in the recognition of foreign judgments (specifically domicile and submission) apply. This is statutorily recognised in section 224(1) of the *Bankruptcy and Insolvency Act*. In addition, it appears accepted that the foreign tribunal will be competent to adjudicate the bankruptcy in cases where the Party is resident or carrying on business within the jurisdiction, but the mere presence of assets within the jurisdiction of the foreign tribunal may not be sufficient grounds for recognising the claims of jurisdiction by the adjudicating foreign tribunal.¶

MODIFICATIONS TO QUALIFICATIONS¶

Furthermore, the qualifications at paragraph 4 are deemed modified as follows.¶

Taxes and Duties¶

5.1.1 . In the case of International Trusts governed by the *International Trusts Act*, the rate of stamp duty is currently BD\$10.00 (approx. US\$5.00) per document. In all other cases, there is an *ad valorem* rate as specified in the Schedule to the *Stamp Duty Act*. ¶

SCHEDULE 10

BARBADOS CHARITIES¶

Subject to the modifications and additions set out in this Schedule 10 (*Barbados Charities*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are *Barbados Charities*. For the purposes of this Schedule 10 (*Barbados Charities*), "*Barbados Charities*" means any institution, corporate or not, which is established for charitable objects or purposes, is intended to and does operate for the public benefit, and is subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.¶

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.¶

MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS¶

1.1 . Barbados Charities means any institution, including any society, trust or undertaking which is established for charitable objects or purposes, is intended to and does operate for the public benefit, and is subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.¶

ADDITIONAL ASSUMPTIONS¶

We assume the following.¶

2.1 . (a) that the Counterparty is not specifically restricted by its corporate instruments from entering into the transactions governed by the Agreement, or (b) where the corporate instruments or the terms and conditions of any regulatory licence of the Counterparty specifically restrict the business of the Counterparty, that the Transactions do not constitute the carrying on of a business by the Counterparty outside of the permitted scope of business of the Counterparty and c) that the Counterparty will have the necessary corporate power to enter into and to execute the Agreement and the Transactions governed therein.¶

MODIFICATIONS TO OPINIONS¶

[... [53]

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")

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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**")

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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")

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Where a 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.

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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.

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ANNEX 2
LIST OF TRANSACTIONS

The following groups of Transactions may be entered into under the [FOA Netting](#) Agreements, or [Clearing Agreements](#):

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

- (i) a contract made on an exchange or pursuant to the rules of an exchange;
- (ii) a contract subject to the rules of an exchange; or
- (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,
in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
- (iv) a transaction which is back-to-back with any transaction [within paragraph \(i\), \(ii\) or \(iii\) of this definition, or](#)
- (v) any other Transaction which the parties agree to be a Transaction;

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

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

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

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

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ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

"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 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.

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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 a 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:

- (a) 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);
- (b) 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);
- (c) 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);
- (d) 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);
- (e) 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);
- (f) 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);
- (g) 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);
- (h) 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); or
- (i) 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

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(j) 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/or 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 3.4 (*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 3.5 (*Enforceability of the FOA Set-Off Provisions*), 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;

(c) for the purposes of paragraph 3.6 (*Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Available Termination Amount", "Disapplied Set-Off Provisions", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provisions; and

(d) for the purposes of paragraph 3.7.1, (i) in relation to a 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;

in each case, incorporated into a 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 and necessary amendments set out in Section 1 of Annex 5.

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

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"Firm" means, in relation to a FOA Netting Agreement or a Clearing Agreement which includes a FOA Clearing Module, the Party providing the services under the relevant FOA Netting Agreement or Clearing Agreement which includes a 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 Provisions, and with or without the Title Transfer Provisions, with no Adverse Amendments.

"FOA Netting Agreements (with Title Transfer Provisions)" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2011, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009 and the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1) or a 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**);

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Moved down [23]: "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).

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"Core Provisions" means:¶

- (a) . with respect to all Equivalent Agreements: the Insolvency Events of Default Clause and the Netting Provisions;¶
- (b) . with respect to Equivalent Agreements that are Agreements (with Title Transfer Provisions), the Title Transfer Provisions;¶
- (c) . with respect to Equivalent Agreements that are Agreements (with Title Transfer Provisions) (other than Equivalent Agreements without Core Set-off Provisions), the General Set-off Clause; and¶
- (d) . with respect to Equivalent Agreements that are Agreements (with Security Provisions) (other than Equivalent Agreements without Core Set-off Provisions), the Set-off Provisions;¶

together with any defined terms required properly to construe such provisions.¶

"Counterparty" means such Party as may be referred to as "you" in an Agreement.¶

"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).¶

"Equivalent Agreement without Core Set-off Provisions" means an Equivalent Agreement that does not include the Set-off Provisions.¶

"Firm" means the Party referred to as "we" or "us" in an Agreement.¶

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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);¶

in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1 (b) and (c);¶

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

in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (b) and (c);¶

in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(b) to (d) (inclusive) and Clause 10.1 (h) and (i); and ¶ [68]

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(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 FIA Europe on its website as at the date of this opinion.

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

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

- (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (**Set-off**);
- (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (**Set-off**);
- (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (**Set-off**);
- (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (**Set-off**);
- (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (**Set-off**);
- (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (**Set-off**);
- (vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (**Set-Off**);
- (viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (**Set-Off**); or
- (ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or

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

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

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"**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).¶

"**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).¶

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- (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (***Set-off upon default or termination***);
- (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (***Set-off on default***);
- (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (***Set-off upon default or termination***);
- (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (***Set-off on default***);
- (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (***Set-off upon default or termination***); or
- (vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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"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):

- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) and (c) (inclusive);
- (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (b) and (c) (inclusive);
- (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (ii) and (iii) (inclusive);
- (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (b) and (c) (inclusive);
- (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(b) and (c) (inclusive); or
- (vi) any modified version of such clauses provided that it includes at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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"Short Form One Way-Clauses" means each of the Short-Form One

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"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.

"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).

"Margin" means any cash collateral provided to a Party and any cash or non-cash collateral comprising Acceptable Margin provided to a Party pursuant to the Title Transfer Provisions which (in either case) has been credited to an account provided by the Party which is the transferee.

"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);

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- (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 and, in relation to the FOA Set-Off Provisions, the Party entitled to exercise rights under the FOA Set-Off Provisions.

"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 a FOA Published Form Agreement.

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

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

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"Rehypothecation Clause" means:

- (a) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (*Rehypothecation*);
- (b) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (*Rehypothecation*);
- (c) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (*Rehypothecation*); or

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 (with Security Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Security Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Security Provisions) Agreement 2011 or the Retail Client (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.

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

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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:

"The following shall constitute Events of Default:

- i. 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.
- ii. 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."

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)(i)].
- (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 [Core 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 (I)

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

8. Addendum Set-Off Provision

(i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("CM Other Amounts"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its set-off against any other termination amount payable by or to X (where "X" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing Agreement at such time ("EP Other Amounts" and together with CM Other Amounts, "Other Amounts"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

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

- (A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;
- (B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and
- (C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that has previously been reduced in part by set-off pursuant to this Section 8(e).

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

PART 2 NON-MATERIAL AMENDMENTS

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

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10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.
11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.
13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.
14. Any change to the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time 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 use of currency conversion in case of cross-currency set-off, (iv) the application or disapplication of any grace period to set-off; 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

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Any change to the Close-out Netting Provision or a 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 the Netting Provision, Set-Off Provision, Title Transfer provision or other provision.¶

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- 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 the agreement 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 a 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

Moved (insertion) [15]

2. Desirable amendments

None

Moved (insertion) [16]

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

None

Moved (insertion) [18]

4. Additional events for the purposes of paragraph 3.1:

None

Moved (insertion) [19]

5. Alterations which constitute material alterations:

None

Moved (insertion) [20]

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