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**NETTING ANALYSER LIBRARY**

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9 December 2013

Dear Sirs,

**FOA netting opinion issued in relation to the FOA Netting Agreements, FOA Clearing Module and ISDA/FOA Clearing Addendum**

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

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

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

**1. TERMS OF REFERENCE AND DEFINITIONS**

1.1 Subject as provided at paragraph 1.2, this opinion is given in respect of Parties which are:

- 1.1.1 companies incorporated with limited liability;
- 1.1.2 credit institutions<sup>1</sup>;
- 1.1.3 investment firms<sup>2</sup>;

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<sup>1</sup> Governed by the Law of 22 March 1993 on the status and supervision of credit institutions.

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- 1.1.4 partnerships;
- 1.1.5 insurance companies<sup>3</sup>; or
- 1.1.6 undertakings for collective investment<sup>4</sup>,

whether they are incorporated or formed under the laws of this jurisdiction or are incorporated or formed under the laws of another jurisdiction with a branch or branches located in this jurisdiction.

- 1.2 This opinion is also given in respect of Parties that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

- 1.2.1 individuals (Schedule 1);
- 1.2.2 sovereign and public sector entities (Schedule 2); and
- 1.2.3 pension funds (Schedule 3).

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

- 1.4 This opinion covers all types of Transaction.

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

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

**1.6 Definitions**

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

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<sup>2</sup> Governed by the Law of 6 April 1995 on the status and supervision of investment firms, intermediaries and investment advisers.

<sup>3</sup> Governed by the Law of 9 July 1975 on the supervision of insurance undertakings.

<sup>4</sup> Governed by the Law of 20 July 2004 on certain forms of collective management of investment portfolios. A "trust" is not a concept recognised by Belgian law and a "trust" does therefore not constitute an undertaking for collective undertakings for purposes of this opinion.

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

- 1.6.1 "Insolvency Proceedings" means the procedures listed in paragraph 3.1;
- 1.6.2 "Insolvency Representative" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction;
- 1.6.3 "FOA Member" means a member (excluding associate members) of the Futures and Options Association which subscribes to the Futures and Options Association's Netting Analyser service (and whose terms of subscription give access to this opinion); and
- 1.6.4 A reference to a "paragraph" is to a paragraph of this opinion letter.

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

**2. ASSUMPTIONS**

We assume:

- 2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.
- 2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws and the laws (other than Belgian law) of the places where the obligations thereunder have to be or have been performed, and that such laws allow post-insolvency netting.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.
- 2.4 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction.
- 2.5 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member"

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(as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates, and (b) will be a bank, investment firm or public authority.

- 2.6 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement and each Transaction is entered into prior to the commencement of any Insolvency Proceedings against either Party.
- 2.7 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.
- 2.8 The FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.9 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.
- 2.10 That the obligations assumed under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are "mutual" between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party.
- 2.11 In relation to the opinions set out at paragraphs 3.8 and 3.9 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.
- 2.12 That each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).
- 2.13 That all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of margin pursuant to the Title Transfer Provisions will have been effectively carried out.
- 2.14 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

### **3. OPINION**

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

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### 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:

- 3.1.1 bankruptcy (*faillite / faillissement*) under the law of 8 August 1997; this law also permits the temporary appointment of a provisional administrator (*administrateur provisoire / voorlopige bewindvoerder*) in the anticipation of a possible declaration of bankruptcy;
- 3.1.2 judicial reorganisation (*réorganisation judiciaire / gerechtelijke reorganisatie*) under the law of 31 January 2009<sup>5</sup>; this law also permits the temporary appointment of a judicial representative (*mandataire de justice / gerechtsmandataris*) if the continuity of the business is jeopardised; reorganisation proceedings, however, are not available to credit institutions, insurance companies and certain other categories of regulated financial institutions<sup>6</sup>;
- 3.1.3 voluntary or judicial liquidation (*liquidation / vereffening*) under the Company Code; it should be noted that a liquidation does not necessarily imply that the entity is insolvent properly speaking, but the proceeding triggers the applicability of many rules of insolvency law; and
- 3.1.4 rescue measures (*mesures de redressement / herstelmaatregelen*) taken by the government in respect of a financial institution of systemic importance under the law of 2 June 2010<sup>7</sup>.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, except for rescue measures referred to in paragraph 3.1.4 which cannot be a valid ground for termination.

### 3.2 Recognition of choice of law

- 3.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England.
- 3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the enforceability or effectiveness of the (i) FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off

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<sup>5</sup> Law of 31 January 2009 on the continuity of enterprises.

<sup>6</sup> *Ibid.*, Art. 4, par. 2.

<sup>7</sup> The government's powers to impose rescue measures relate only to insurance companies, credit institutions, and operators of clearing and settlement systems; law of 2 June 2010 on the completion of rescue measures applicable to enterprises in the banking and financial sector, Art. 3, 5 and 6.

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Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions.

**3.3 Enforceability of FOA Netting Provision**

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

- 3.3.1 the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and
- 3.3.2 the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because:

- (a) in the absence of Insolvency Proceedings, the laws of this jurisdiction give full effect to whatever contractual provisions parties may have agreed with regard to close-out, netting, set-off and similar arrangements between themselves<sup>8</sup>; and
- (b) following the occurrence of Insolvency Proceedings, the Law on Financial Collateral provides that Insolvency Proceedings do not affect the right of parties to close out and to determine a single net termination payment in the context of a netting arrangement<sup>9</sup>. In the context of reorganisation proceedings<sup>10</sup> or government rescue measures<sup>11</sup> of a Belgian Defaulting Party, however, the Law on Financial Collateral only protects Transactions (i) between public sector or financial entities, (ii) in respect of which a payment default occurred, (iii) traded under certain standardised master agreements, or (iv) subject to, or of a type eligible for trading under the rules of a regulated market, MTF, central counterparty, or clearing and settlement system ("Qualifying Transactions").

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Non-Defaulting Party (in respect of Qualifying Transactions only, in the context of reorganisation proceedings or government rescue measures of a Party).

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

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<sup>8</sup> Civil Code, Art. 1134.

<sup>9</sup> Law on Financial Collateral, Art. Art. 14, §1.

<sup>10</sup> See paragraph 3.1.2 above.

<sup>11</sup> See paragraph 3.1.4 above.



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**3.4 Enforceability of the Clearing Module Netting Provision**

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

We are of this opinion because:

- (a) in the absence of Insolvency Proceedings, the laws of this jurisdiction give full effect to whatever contractual provisions parties may have agreed with regard to close-out, netting, set-off and similar arrangements between themselves<sup>12</sup>; and
- (b) following the occurrence of Insolvency Proceedings, the Law on Financial Collateral provides that Insolvency Proceedings do not affect the right of parties to close out and to determine a single net termination payment in the context of a netting arrangement<sup>13</sup>. In the context of reorganisation proceedings or government rescue measures of a Party, however, the Law on Financial Collateral only protects Qualifying Transactions.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of rights under the Clearing Module Netting Provision (in respect of Qualifying Transactions only, in the context of reorganisation proceedings or government rescue measures of a Party).

No amendments to the Clearing Module Netting Provision are necessary in order for the opinions expressed in this paragraph 3.4 to apply.

**3.5 Enforceability of the Addendum Netting Provision**

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

We are of this opinion because:

- (a) in the absence of Insolvency Proceedings, the laws of this jurisdiction give full effect to whatever contractual provisions parties may have agreed with

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<sup>12</sup> Civil Code, Art. 1134.

<sup>13</sup> Law on Financial Collateral, Art. Art. 14, §1.

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regard to close-out, netting, set-off and similar arrangements between themselves<sup>14</sup>; and

- (b) following the occurrence of Insolvency Proceedings, the Law on Financial Collateral provides that Insolvency Proceedings do not affect the right of parties to close out and to determine a single net termination payment in the context of a netting arrangement<sup>15</sup>. In the context of reorganisation proceedings or government rescue measures of a Party, however, the Law on Financial Collateral only protects Qualifying Transactions.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of rights under the Addendum Netting Provisions (in respect of Qualifying Transactions only, in the context of reorganisation proceedings or government rescue measures of a Party).

No amendments to the Addendum Netting Provision are necessary in order for the opinions expressed in this paragraph 3.5 to apply.

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

In relation to a Clearing Agreement, the opinions expressed at paragraph 3.3 above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement. In a case where a Party, who would (but for the use of the FOA Clearing Agreement or the ISDA/FOA Clearing Agreement) be the Defaulting Party for the purposes of the FOA Netting Agreement, acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the question as to whether the FOA Netting Provision will, to the extent inconsistent with the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, be superseded by the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision would be determined under the governing law of the Clearing Agreement.

**3.7 Enforceability of the FOA Set-Off Provisions**

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

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

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<sup>14</sup> Civil Code, Art. 1134.

<sup>15</sup> Law on Financial Collateral, Art. 14, §1.



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- (a) the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Defaulting Party); or
- (b) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or
- (ii) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because:

- (a) in the absence of Insolvency Proceedings, the laws of this jurisdiction give full effect to whatever contractual provisions parties may have agreed with regard to close-out, netting, set-off and similar arrangements between themselves<sup>16</sup>; and
- (b) following the occurrence of Insolvency Proceedings, the Law on Financial Collateral provides that Insolvency Proceedings do not affect the effectiveness of contractual netting or set-off arrangements<sup>17</sup>. In the context of reorganisation proceedings or government rescue measures of a Party, however, the Law on Financial Collateral only protects Qualifying Transactions.

No amendments to the General Set-Off Clause or the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 to apply.

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

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

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<sup>16</sup> Civil Code, Art. 1134.

<sup>17</sup> Law on Financial Collateral, Art. Art. 14, §1.

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

We are of this opinion because:

- (a) in the absence of Insolvency Proceedings, the laws of this jurisdiction give full effect to whatever contractual provisions parties may have agreed with regard to close-out, netting, set-off and similar arrangements between themselves<sup>18</sup>; and
- (b) following the occurrence of Insolvency Proceedings, the Law on Financial Collateral provides that Insolvency Proceedings do not affect the effectiveness of contractual netting or set-off arrangements<sup>19</sup>. In the context of reorganisation proceedings or government rescue measures of a Party, however, the Law on Financial Collateral only protects Qualifying Transactions.

No amendments to the General Set-Off Clause or the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.2 to apply.

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

3.8.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions is a Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:

- (a) if the Client is a Defaulting Party, so that the value of any cash balance owed by the Firm to the Client would be set-off against any Liquidation Amount owed by the Client to the Firm; and
- (b) if there has been a Firm Trigger Event or a CCP Default, so that the value of any cash balance owed by one Party to the other would, insofar as not already brought into account as part of the Relevant

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<sup>18</sup> Civil Code, Art. 1134.

<sup>19</sup> Law on Financial Collateral, Art. Art. 14, §1.

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Collateral Value, be set off against any Available Termination Amount owed by the Party entitled to receive the cash balance.

We are of this opinion because:

- (a) in the absence of Insolvency Proceedings, the laws of this jurisdiction give full effect to whatever contractual provisions parties may have agreed with regard to close-out, netting, set-off and similar arrangements between themselves<sup>20</sup>; and
- (b) following the occurrence of Insolvency Proceedings, the Law on Financial Collateral provides that Insolvency Proceedings do not affect the effectiveness of contractual netting or set-off arrangements<sup>21</sup>. In the context of reorganisation proceedings or government rescue measures of a Party, however, the Law on Financial Collateral only protects Qualifying Transactions.

No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.8.1 to apply.

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

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

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

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

would be immediately entitled to exercise its rights under the Addendum Set-Off Provision, and in particular so that, upon the exercise of such rights, in the case of a CM Trigger Event, any Available Termination Amount would be reduced by its set-off against any cash balance which constitutes a termination amount payable by (or to)

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<sup>20</sup> Civil Code, Art. 1134.

<sup>21</sup> Law on Financial Collateral, Art. Art. 14, §1.

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the Party which is owed (or owes) the Available Termination Amount, insofar as not already brought into account as part of the Relevant Collateral Value.

We are of this opinion because:

- (a) in the absence of Insolvency Proceedings, the laws of this jurisdiction give full effect to whatever contractual provisions parties may have agreed with regard to close-out, netting, set-off and similar arrangements between themselves<sup>22</sup>; and
- (b) following the occurrence of Insolvency Proceedings, the Law on Financial Collateral provides that Insolvency Proceedings do not affect the effectiveness of contractual netting or set-off arrangements<sup>21</sup>. In the context of reorganisation proceedings or government rescue measures of a Party, however, the Law on Financial Collateral only protects Qualifying Transactions.

No amendments to the Addendum Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.9 to apply.

#### **3.10 Enforceability of the Title Transfer Provisions**

- 3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.
- 3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value.
- 3.10.3 To the extent that under the governing law of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions the Transfers of Margin under the Title Transfer Provisions are characterised as effecting an unconditional transfer of ownership, such characterisation will be recognised by the courts of Belgium<sup>24</sup>. The courts of Belgium might add that such transfer of ownership constitutes a security arrangement (*sûreté / zekerheid*), but such an analysis would not render title to the Transferred Margin ineffective or prevent the use or investment by a Party of any margin transferred to it.

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<sup>22</sup> Civil Code, Art. 1134.

<sup>21</sup> Law on Financial Collateral, Art. Art. 14, §1.

<sup>24</sup> Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations, Art. 12.

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

We are of this opinion because the Title Transfer Provisions constitute a financial collateral arrangement for purposes of the Law on Financial Collateral, with the right for the transferee to use or invest the Transferred Margin, and to enforce the Title Transfer Provisions without prior notice or court approval, including in the insolvency Proceedings of the transferor<sup>25</sup>.

No amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.10 to apply.

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

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

- (i) a provision in the form of, or with equivalent effect to, Clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest provisions or the Title Transfer Provisions apply in respect of any given item of margin so that it is not possible for both the security interest provisions and the Title Transfer Provisions to apply simultaneously to the same item of margin; and
- (ii) the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

**3.12 Single Agreement**

Under the laws of this jurisdiction it is not necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision to be enforceable.

**3.13 Automatic Termination**

It is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision to ensure the effectiveness

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<sup>25</sup> Law on Financial Collateral, Art. 12.

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of netting under the FOA Netting Agreement or, as the case may be, the Clearing Agreement in the event of bankruptcy, liquidation, or other similar circumstances.

#### **3.14 Multibranch Parties**

We do not consider that the use of the FOA Netting Agreement or, as the case may be, the Clearing Agreement by a party with branches in a number of different jurisdictions, including some where netting may not be enforceable would jeopardise the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions in so far as the laws of this jurisdiction are concerned.

#### **3.15 Insolvency of Foreign Parties**

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

#### **3.16 Special legal provisions for market contracts**

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

### **4. QUALIFICATIONS**

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

#### **4.1 Territorial scope of Insolvency Proceedings**

The territorial scope of the Insolvency Proceedings is as follows:

##### **4.1.1 Bankruptcy proceedings may apply in the form of main proceedings to:**

- (a) parties that are credit institutions<sup>26</sup> or insurance undertakings<sup>27</sup> organised under Belgian law;
- (b) parties that are collective investment undertakings or investment undertakings which provide services involving the holding of funds or securities for third parties, and of which the principal establishment or the statutory seat is in Belgium<sup>28</sup>; and

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<sup>26</sup> Law of 22 March 1993, Art. 109/1 and 109/8.

<sup>27</sup> Law of 9 July 1975, Art. 45 and 48/2.

<sup>28</sup> European Regulation 1346/2000 of 29 May 2000 on insolvency proceedings ("EUIR"), Art. 1.2; Code IPL, Art. 118 §1 al. 2, 1°.



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- (c) parties that do not fall under any of the above categories of which the centre of main interests is in Belgium<sup>29 30</sup>;

and may apply in the form of secondary or territorial proceedings to parties, other than credit institutions and insurance undertakings, that do not meet the above eligibility conditions for main proceedings in Belgium and have an establishment in Belgium<sup>31</sup>.

- 4.1.2 Judicial reorganisation proceedings are subject to the same territorial tests as set out in paragraph 4.1.1 in respect of bankruptcy proceedings, save that:

- (a) they cannot apply to credit institutions, insurance companies and certain other categories of regulated financial institutions<sup>32</sup>; and
- (b) they generally cannot apply in the form of secondary or territorial proceedings<sup>33</sup>.

- 4.1.3 Liquidation proceedings under the Company Code may apply to parties the principal establishment of which is located in Belgium<sup>34</sup>.

- 4.1.4 Rescue measures may apply to parties that are organised under Belgian law. They do not apply to Belgian branches of foreign credit institutions<sup>35</sup>, and it is unclear whether they may also apply to Belgian branches of foreign insurance undertakings and clearing and settlement systems<sup>36</sup>.

### 4.2 Governing law

- 4.2.1 The courts of this jurisdiction may not apply English law as the governing law of the Agreement if to do so would be contrary to certain mandatory rules (*lois de police / bepalingen van bijzonder dwingend recht*) or rules of international public policy (*ordre public international / internationale openbare orde*)<sup>37</sup>. The FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provisions and the Title Transfer Provisions do not conflict with any such mandatory rules or rules of international public policy. In addition, if all relevant elements

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<sup>29</sup> EUIR, Art. 3.1.

<sup>30</sup> As well as parties that do not fall under any of the above categories of which the centre of main interests is outside the European Union or in Denmark but the principal establishment or the statutory seat is in Belgium; this is an implausible factual situation. EUIR, Art. 1.2; Code IPL, Art. 118 §1 al. 2, 1<sup>o</sup>.

<sup>31</sup> EUIR, Art. 3.2; Code IPL, Art. 118 §1 al. 2, 2<sup>o</sup>.

<sup>32</sup> See footnote 6.

<sup>33</sup> EUIR, Art. 3.3 and 37.

<sup>34</sup> Code IPL, Art. 110, 111 §1, 3<sup>o</sup> and 112.

<sup>35</sup> Law of 22 March 1993, Art. 57bis and (*a contrario*) 84.

<sup>36</sup> Law of 9 July 1975, Art. 26bis; law of 2 August 2002 on the supervision of the financial sector and financial services, Art. 23bis.

<sup>37</sup> Rome I, Art. 3, 9 and 21; Code IPL, Art. 20 and 21.

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are located in a jurisdiction other than England then the mandatory provisions of the laws of that jurisdiction will remain applicable irrespective of the choice of governing law<sup>38</sup>.

4.2.2 The courts of Belgium may apply Belgian law despite the choice of law if it appears clearly impossible, in the course of legal proceedings, to determine the substantive rules of the chosen law.

4.2.3 The rules of conflicts of laws of this jurisdiction provide that the law of the jurisdiction of opening of Insolvency Proceedings governs the question whether current contracts may be closed out upon or by reason of the Insolvency Proceedings<sup>39</sup>, and that the question whether set-off may be invoked in Insolvency Proceedings is governed by various combinations of the law of the jurisdiction of opening of Insolvency Proceedings, the law that governs the claim of the insolvent debtor, and the law that governs the netting agreement between the parties<sup>40</sup>.

In the case that a Party has the centre of its main interests in this jurisdiction and is subject to main bankruptcy or judicial reorganisation proceedings or to liquidation proceedings in this jurisdiction (as to which please see paragraph 4.1), there may be a possibility that the courts of this jurisdiction would give effect to the insolvency laws of a foreign jurisdiction where such Party (unless it is a credit institution or an insurance undertaking<sup>41</sup>) has an establishment and is subject to secondary insolvency proceedings, to the extent that such foreign insolvency laws regulate the right to close out certain Transactions (for instance by allowing the liquidator in charge of these secondary proceedings to "cherry pick" which transactions to close out or to continue) and that these Transactions are deemed situated in that foreign jurisdiction. Although the determination of the situation of a contract is not free from doubt, there can be an argument that it is situated in the jurisdiction where the counterparty to the insolvent Party has the centre of its main interests<sup>42</sup>.

In the case that a Party only has an establishment in this jurisdiction and is subject to secondary or territorial Insolvency Proceedings in this jurisdiction (as to which please see paragraph 4.1), the enforceability of close-out netting under the Agreement may be affected in particular by the laws of the jurisdiction of opening of the main proceedings.

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<sup>38</sup> Rome I, Art. 3.3.

<sup>39</sup> EUIR, Art. 4.2(e); Code IPL, Art. 119 §1; WUD, Art. 10.2(d); European directive 2001/17 of 19 March 2001 on the reorganisation and winding-up of insurance undertakings ("WUD(I)"), Art. 9.2(d).

<sup>40</sup> EUIR, Art. 4.2(d), 6 and 9; Code IPL, Art. 119 §2, 2°; WUD, Art. 10.2(c), 23 and 25; WUD(I), Art. 9.2(c) and 22.

<sup>41</sup> WUD, Art. 10.2(d); WUD(I), Art. 9.2(d).

<sup>42</sup> EUIR, Art. 2(g). See Virgos-Schmit Report on the Convention of Insolvency Proceedings, No. 89.

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### 4.3 Enforceability before insolvency

In the absence of Insolvency Proceedings, the laws of this jurisdiction in principle give full effect to whatever contractual provisions parties may have agreed with regard to close-out, netting, set-off and similar arrangements between themselves<sup>43</sup>. Limitations to this principle can arise in the following respects:

- 4.3.1 *Mobilisation of financial receivables.* A recent law of August 3 August 2012 provides that a credit institution or a financial institution owing a receivable which is connected with its banking activities<sup>44</sup> (a "financial receivable") can no longer invoke any legal or conventional set-off rights in respect of the financial receivable after the transfer or pledge of that financial receivable to a third party<sup>45</sup>. An exception applies if both (i) the transferor or pledgor is a public sector or financial entity<sup>46</sup> and (ii) the credit institution or financial institution owing the transferred or pledged financial receivable can invoke the benefit of a netting arrangement<sup>47</sup> that forms part of a financial collateral arrangement or that contains a security interest<sup>48</sup>.

The FOA Netting Agreement (with Title Transfer Provisions) and the Clearing Agreement which includes the Title Transfer Provisions both satisfy the second test but only certain Parties (the "Exempt Parties")<sup>49</sup> satisfy the first test and certain other Parties (the "Non-Exempt Parties")<sup>50</sup> do not. In other words, if a credit institution or a financial institution has various Transactions outstanding with a Non-Exempt Party under an Agreement, and if the Non-Exempt Party transfers or pledges one or more receivable(s) that arose from such Transactions to a third party, netting will no longer be possible between on the one hand the receivables that were transferred or pledged to the third party and on the other hand the receivables that

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<sup>43</sup> Civil Code, Art. 1134.

<sup>44</sup> Law of 22 March 1993 on the status and supervision of credit institutions and, Art. 3, §2. These activities include transactions that are commonly subject to netting arrangements, such as currency, derivatives and securities transactions.

<sup>45</sup> Law of 3 August 2012 on measures to facilitate the mobilisation of receivables in the financial sector, Art. 6, §1.

<sup>46</sup> Law of 15 December 2004 on financial collateral, Art. 3, 11° and 12°. "Public sector or financial entity" for these purposes means a credit institution, an investment firm, an insurance company, an undertaking for collective investment, a central counterparty, a clearing and settlement system, a public sector entity, a central bank, a holding company or an entity whose principal activity consists in banking activities other than deposit taking.

<sup>47</sup> Law of 15 December 2004 on financial collateral, Art. 3, 4°. "Netting arrangement" for these purposes means any agreement providing for the novation or bilateral or multilateral set-off of claims.

<sup>48</sup> Law of 3 August 2012 on measures to facilitate the mobilisation of receivables in the financial sector, Art. 6, §4, 1°.

<sup>49</sup> The Parties referred to in paragraphs 1.1.2 (*credit institutions*), 1.2.1 (*investment firms*), 1.2.3 (*insurance companies*), 1.2.5 (*undertakings for collective investment*) and 1.2.6 (*sovereign and public sector entities*) qualify as "public sector or financial entities".

<sup>50</sup> The Parties referred to in paragraphs 1.1.1 (*companies incorporated with limited liability*) (unless they are a holding company or an entity that principally carries out banking activities other than deposit taking), 1.2.2 (*partnerships*), 1.2.4 (*individuals*) and 1.2.7 (*pension funds*) do not qualify as "public sector or financial entities".

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otherwise arose from the transactions and were not transferred or pledged by the Non-Exempt Party.

Transactions between a credit institution or a financial institution and an Exempt Party fall outside the scope of the rule and are therefore not subject to the prohibition on set-off after transfer or pledge.

- 4.3.2 *Abuse of right.* The courts have developed a body of case law to the effect that rights may not be exercised in an abusive manner, and a party may be denied the right to invoke a contractual right if so doing would be abusive<sup>51</sup>. It is unlikely in fact that the exercise of a right of set-off could ever be considered abusive, but the exercise of a right to terminate or close out a Transaction might be susceptible of abuse. As to conflicts of laws, however, we believe that these issues must be regarded as being contractual matters, that a Belgian court should apply the law that governs the Agreement, and that Belgian law should thus not be relevant to an allegation of abusive termination pursuant to the Agreement.
- 4.3.3 *Liquidated damages and penalties.* Belgian law allows contractual arrangements providing for liquidated damages (*clause pénale / strafbeding*), but gives the courts the power to reduce the agreed amount of liquidated damages if such amount manifestly exceeds a genuine pre-estimate by the parties of the loss to be suffered in the event of a breach<sup>52</sup>. The determination of a Liquidation Amount upon close-out of the Transactions may fall under these rules. As to conflicts of laws, however, we believe that these issues must be regarded as being contractual matters, that a Belgian court should apply the law that governs the Agreement, and that Belgian law should thus not be relevant to an allegation that a Liquidation Amount determined in accordance with the Agreement is excessive.
- 4.3.4 *Grace periods.* The courts have the power to grant periods of grace for the performance of its obligations to a debtor who has acted in good faith<sup>53</sup>. It is uncertain whether this power is a matter of substantive law and can only be exercised if an agreement is governed by Belgian law, or is a procedural matter and can always be exercised by the Belgian courts irrespective of the governing law of an agreement.
- 4.3.5 *Mandatory rules and rules of public policy.* Certain rules of law of this jurisdiction are mandatory (*impératives / van dwingend recht*) rules or relate to public policy (*ordre public / openbare orde*), and overrule any contractual provision with which they would be inconsistent. The FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provisions and the Title Transfer

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<sup>51</sup> For example, Cass., 8 February 2001, *Pas.*, 2001, p. 244; 6 January 2011, with concl. Adv. Gen. Henkes, *juridat*, C.09.0624.F.

<sup>52</sup> Civil Code, Art. 1231.

<sup>53</sup> Civil Code, Art. 1244; Judicial Code, Art. 1333 *et seq.*

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Provisions do not conflict with any such mandatory rules or rules of public policy.

### 4.4 Enforceability upon insolvency

Belgian law provides that current contracts with a party that is subject to reorganisation proceedings<sup>54</sup> or government rescue measures<sup>55</sup> may not be terminated by reason of these Insolvency Proceedings<sup>56</sup>.

However, to the extent they aim at achieving a netting arrangement, the Law on Financial Collateral protects the efficacy of termination clauses:

- 4.4.1 in the context of reorganisation proceedings or government rescue measures, if:
- (a) both parties are public sector or financial entities<sup>57</sup>;
  - (b) the non-insolvent party can invoke a payment default; or
  - (c) the close-out netting relates to derivatives or other financial transactions that are:
    - (i) traded under certain standardised master agreements<sup>58</sup>; or
    - (ii) subject to, or of a type eligible for trading under, the rules of a regulated market, MTF, central counterparty, or clearing and settlement system.

As a result, Transactions that satisfy any of the conditions of paragraphs (a), (b) or (c) above ("Qualifying Transactions") are protected and can be closed out whilst a party is subject to reorganisation proceedings or government rescue measures. Transactions that do not satisfy any of these

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<sup>54</sup> See paragraph 3.1.2 above.

<sup>55</sup> See paragraph 3.1.4 above.

<sup>56</sup> Law of 31 January 2009 on the continuity of enterprises, Art. 35 §1, par. 1, Law of 22 March 1993 on the status and supervision of credit institutions, Art. 57bis, §4, Law of 9 July 1975 on the supervision of insurance undertakings, Art. 26bis, §4.

<sup>57</sup> Law on Financial Collateral, Art. 3, 11° and 12°. "Public sector or financial entity" for these purposes means a credit institution, an investment firm, an insurance company, an undertaking for collective investment, a central counterparty, a clearing and settlement system, a public sector entity, a central bank, a holding company or an entity whose principal activity consists in banking activities other than deposit taking. See footnotes 49 and 50.

<sup>58</sup> The standardised master agreements listed in Art. 2 of the Royal Decree of 7 November 2011 on transactions eligible for close-out netting during reorganisation and rescue measures are the ISDA Master Agreement developed by the International Swaps and Derivatives Association, the Rahmenvertrag für Finanztermingeschäfte developed by the Bundesverband deutscher Banken, the European Master Agreement for Financial Transactions developed by the European Banking Federation, the Global Master Securities Agreement developed by the International Securities Lending Association, the Global Master Repurchase Agreement developed by the International Capital Market Association and any similar or comparable master agreement used by credit institutions in the Belgian market. Whether the Agreement constitutes a "similar or comparable master agreement used by credit institutions in the Belgian market" is a question of fact which we cannot assess.



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conditions ("Non-Qualifying Transactions"), however, cannot be closed out in these Insolvency Proceedings. The rules only affect the right to close out individual Non-Qualifying Transactions, so that close-out netting remains effective in respect of Qualifying Transactions that form part of a mixed pool comprising both Qualifying Transactions and Non-Qualifying Transactions.

4.4.2 in the context of other types of Insolvency Proceedings, without further conditions,

so that, subject to the pre-insolvency limitations described in paragraph 4.1 above and the reservations mentioned in the following paragraphs, the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provisions and the Title Transfer Provisions would remain enforceable under the laws of this jurisdiction (i) in respect of Qualifying Transactions if a Party is subject to reorganisation proceedings or government rescue measures and (ii) in respect of all Transactions if a Party is subject to other types of Insolvency Proceedings.

### 4.5 Termination not aiming at netting arrangement

The Law on Financial Collateral protects the efficacy of termination clauses to the extent that they aim at achieving a netting arrangement<sup>59</sup>.

The termination and netting components of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision are linked to each other. These provisions thus qualify in principle for the protection offered by the Law on Financial Collateral. In certain specific factual circumstances, however, there may be an argument that a termination in accordance with the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision does not in fact aim at achieving a netting arrangement<sup>60</sup>, for instance because there is only one outstanding Transaction at the time, or because all outstanding Transactions give rise to an early termination payment owing in the same direction between the relevant counterparty and the other parties. In those circumstances only, the following two risks may arise:

4.5.1 *Reorganisation proceedings and government rescue measures.* In the case of reorganisation proceedings<sup>61</sup> or government rescue measures<sup>62</sup>, the Transactions cannot be terminated by reason of a party applying for or

<sup>59</sup> Law on Financial Collateral, Art. 14: "*les clauses et conditions résolutoires ou de déchéance du terme stipulées pour permettre la novation ou la compensation / de ontbindende bedingen en voorwaarden of de bedingen en voorwaarden met betrekking tot de vroegtijdige beëindiging die zijn vastgelegd om de schuldvernieuwing of -vergelijking mogelijk te maken*".

<sup>60</sup> The legislative history of the law of 31 January 2009 on the continuity of enterprises confirms that an effective netting is required in order for Art. 14 of the law of 15 December 2004 on financial collateral to be applicable; see Government's amendment, *doc. parl.*, Ch., 52-160/02, p. 62. See also R. Houben, *Schuldvergelijking*, No. 912. *Contra*: M. E. Storme, "Schuldvergelijking en netting, in en buiten de Wet Financiële Zekerheden", in coll., *CBR Jaarboek 2010-2011*, p. 207, No. 26.

<sup>61</sup> See paragraph 3.1.2 above.

<sup>62</sup> See paragraph 3.1.4 above.



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becoming subject to these Insolvency Proceedings<sup>63</sup> (but termination for other causes would remain possible); in addition, in the case of reorganisation proceedings only, the Transactions cannot be terminated by reason of a breach that occurred before the commencement of these Insolvency Proceedings if that breach is subsequently remedied within fifteen days of demand<sup>64</sup>. In other words, close-out may not be possible in reorganisation proceedings or upon the adoption of government rescue measures (but to the extent that close-out would be allowed, there is no doubt that netting will then also be allowed) until the end of such reorganisation proceedings or government rescue measures.

- 4.5.2 *Bankruptcy and optional termination.* In the case of a bankruptcy, there is an argument that the termination clause must be automatic in order to be enforceable<sup>65</sup>, ie that a clause allowing the non-defaulting party to terminate or not at its option would be unenforceable and that the liquidator would in such case be the only party entitled to decide whether to terminate or not.

The argument under 4.5.2 only reflects a minority view in legal doctrine and is weak in our view. The argument under 4.5.1 is not unreasonable and we cannot reliably assess, in the absence of relevant case law or legal doctrine, its chances of success.

If a Party is subject to Insolvency Proceedings both in this jurisdiction and abroad, please see above under paragraph 4.2.3, as to the relevant rules of conflicts of law and the possible impact of the relevant foreign insolvency laws.

### 4.6 Portfolio split upon rescue measures

The near collapse in 2008 of some Belgian financial institutions led to the adoption of the law of 2 June 2010 on the completion of rescue measures applicable to enterprises in the banking and financial sector. This law allows the government, in crisis situations, to take rescue measures in respect of credit institutions and insurance companies of systemic importance. This includes the power to order a forced transfer to the State or to a third party of certain assets of the institution<sup>66</sup>.

Rescue measures of this type may only be taken in severe crisis situations. The regulator (the National Bank of Belgium or NBB) must provide its input to the government prior to the decision. The government's decision must determine the compensation payable in consideration for the forced disposal. The decision is subject to validation by the courts and only becomes effective when the validation judgment has been rendered and published. The amount of compensation may subsequently be reviewed by the courts.

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<sup>63</sup> Law of 31 January 2009 on the continuity of enterprises, Art. 35 §1, par. 1, Law of 22 March 1993 on the status and supervision of credit institutions, Art. 57bis, §4, Law of 9 July 1975 on the supervision of insurance undertakings, Art. 26bis, §4.

<sup>64</sup> Law of 31 January 2009 on the continuity of enterprises, Art. 35 §1, par. 2.

<sup>65</sup> This argument is based on (an extensive reading of) the wording of Art. 46 §1 of the law of 8 August 1997 on bankruptcy.

<sup>66</sup> The same powers apply in respect of operators of clearing and settlement systems. The government may also impose a forced transfer of the shares in the institution concerned.

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The adoption of rescue measures may not cause the termination of current contracts to which the financial institution concerned was a party: termination clauses triggered by the adoption of these measures are unenforceable. For the rest, the legal regime of these rescue measures is not set out in any detail by the law; the law just empowers the government to set the rules if and when applicable<sup>67</sup>. There has been no case of application so far.

In addition, rescue measures may lead to a forced "portfolio split": the government might adopt measures whereby part only of the Transactions made with the relevant financial institution counterparty are transferred to a third party (the "Transferee"), or whereby different parts are transferred to different third parties. A Party would thus be in a situation where some of the Transactions that it had made with the original counterparty are now Transactions with the Transferee, whilst others remain Transactions with the original counterparty. If, after the split, an event of default arises in respect of the original counterparty and justifies a termination of those Transactions that remained with the original counterparty, it is uncertain whether this event of default can also be invoked against the Transferee and trigger the termination of those Transactions that have been transferred to it (or conversely)<sup>68</sup> and whether, after a termination, netting remains possible between settlement amounts relating on the one hand to the original counterparty and on the other hand to the Transferee. We believe that the government has the power, when adopting rescue measures, to impose either solution.

### 4.7 Liquidated damages upon reorganisation

The law of 31 January 2009 on the continuity of enterprises has created some uncertainty as to the effectiveness, in proceedings of judicial reorganisation, of clauses providing for a method of calculation of the amount due upon termination of a transaction, such as the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision in respect of the calculation of Liquidation Amounts. Article 35 §3 of that law invalidates liquidated damages clauses during a judicial reorganisation. We believe that this provision is disapplied by the Law on Financial Collateral when the relevant liquidated damages clause is part of a close-out netting arrangement, but in the absence of clear indication in the legislative history or of other authority on the point, there remains a degree of uncertainty<sup>69</sup>.

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<sup>67</sup> For example, in respect of credit institutions: Law of 22 March 1993, newly inserted Art. 57bis, §4, 2<sup>nd</sup> and 4<sup>th</sup> par.

<sup>68</sup> The law of 2 June 2010 expressly provides that rescue measures "may not have the effect of modifying the terms of any agreement made between the [credit institution / insurance company] and one or more third parties" (in respect of credit institutions: Law of 22 March 1993, newly inserted Art. 57bis, §4, 2<sup>nd</sup> par.). This may suggest that the contractual termination rights remain applicable in full, and that the counterparty remains entitled to terminate the entire portfolio of Transactions despite the split of the portfolio and the transfer of some Transactions to a Transferee. However, legislative history seems to show that the purpose of this article in the law was just to prevent the parties from inserting in their contracts provisions that would change the terms of a contract if and when rescue measures are adopted (law of 2 June 2010, *doc. parl.*, Ch., *Statement of reasons*, 52/2406/01, p. 17); for instance, parties could not validly provide for a margin call or a pricing step-up triggered by the adoption of rescue measures.

<sup>69</sup> Our view is based on the facts that the Law on Financial Collateral takes priority over the law on the continuity of enterprises (see law of 31 January 2009 on the continuity of enterprises, Art. 7; Government's

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### **4.8 Termination by the liquidator and walk-away in case of reorganisation**

It should also be noted that, in the case of a bankruptcy, the liquidator of the bankrupt Party will be entitled to terminate any Transaction notwithstanding any contractual disapplication of termination rights, and irrespective of whether the counterparty exercises its own termination right<sup>70</sup>. In the case of reorganisation proceedings, the Defaulting Party may be entitled to suspend performance of its obligations under any Transaction, subject to damages<sup>71</sup>. It is uncertain whether the Non-Defaulting Party may, assuming that it is contractually entitled to do so, invoke this suspension as a breach of contract and terminate the relevant Transaction<sup>72</sup>.

### **4.9 Porting of positions and leapfrogging of net payments**

The netting provisions of the FOA Netting Agreement and the Clearing Agreement provide :

- (a) the possibility for a Client, prior to a Clearing Member being formally in default under the relevant CCP Rules, to port its Transactions away from the affected Clearing Member to a replacement Clearing Member; and
- (b) the possibility for a CCP to leapfrog net payments to Clients if a Clearing Member defaults.

The main legal risk in an insolvency of the Clearing Member is that the porting or leapfrogging arrangements would be seen as a technique that takes away from the bankruptcy estate an asset that belonged to it, and that this breaches the insolvency law principles according to which the bankruptcy assets must be sold by the liquidator and the proceeds distributed among the creditors. The porting and leapfrogging arrangements should not give rise to any such deprivation issues, however, to the extent that they do not have any financial impact on the bankruptcy estate. Both arrangements are financially neutral because (i) porting involves the transfer of both the Transactions between the Client and the Clearing Member and the related back-to-back Transactions between the Clearing Member and the CCP and (ii) leapfrogging involves net payments, to which the Clearing Member has no own entitlement

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amendment, *doc. parl.*, Ch., 52-160/02, p. 62), that a liquidated damage clause is an inherent component of any close-out netting arrangement, and that the Law on Financial Collateral precisely aims at keeping these close-out netting arrangements effective in an insolvency (Art. 14). The circumstance that Art. 14 of the Law on Financial Collateral expressly deals with the "termination" and "set-off" aspects only of these arrangements, and not with the "damage calculation" aspects, can be explained by the lack of any provision in the earlier law of 17 July 1997 on judicial composition that would have purported to invalidate liquidated damage clauses. See also V. Biernaux and S. Reniers, "Wet betreffende de continuïteit van de ondernemingen: close-out netting en vereenvoudigde pandverzilvering", *TRV*, 2009, p. 509, No. 15 *et seq.*

<sup>70</sup> Law of 8 August 1997 on bankruptcy, Art. 46 §1.

<sup>71</sup> Law of 31 January 2009 on the continuity of enterprises, Art. 35 §2.

<sup>72</sup> In favour of the right of termination: E. Dirix and R. Jansen, "De positie van de schuldeisers en het lot van de lopende overeenkomsten", in coll., *Gerechtelijke reorganisatie getest, gewikt en gewogen*, p. 157, No. 52. *Contra*: J. Windey, "Les effets de la loi du 31 janvier 2009 relative à la continuité des entreprises sur les créanciers et leurs garanties", in coll., *La loi relative à la continuité des entreprises*, p. 95, No. 30; A.-S. Gigot, "L'opposabilité de la clause de réserve de propriété en cas de procédures collectives d'insolvabilité", *RDCB*, 2011, p. 511, No. 51.

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anyway, being made directly by the CCP to the relevant Clients instead of the payments passing through the Clearing Member.

#### **4.10 Post insolvency interest**

The inclusion in the Liquidation Amount of interest accrued after the commencement of the Insolvency Proceedings might not be enforceable<sup>71</sup>.

#### **4.11 Acts detrimental to all creditors**

In addition, the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provisions and the Title Transfer Provisions may be vulnerable to the application of the following rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors:

4.11.1 *Post insolvency transactions.* The calculation of a single Liquidation Amount may not include Transactions entered into after the commencement of the Insolvency Proceedings<sup>71</sup>.

4.11.2 *Abnormal transactions.* Abnormal transactions entered into in the knowledge that the transaction would prejudice the creditors of a party are voidable in the subsequent bankruptcy of that party<sup>75</sup>. None of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provisions and the Title Transfer Provisions in itself appears to us as "abnormal" for the purposes of this rule of bankruptcy law, but the assessment of the abnormal character of a contractual arrangement may be affected by the factual circumstances of a particular case.

4.11.3 *Transactions at an undervalue.* Transactions entered into by a party during the suspect period prior to the declaration of bankruptcy of that party are voidable if they entail a significant undervalue (the law reads "if the value of what was given by the bankrupt party notably exceeds the value of the consideration received by it")<sup>76</sup>. The so-called "suspect period" may have a duration of up to six months before the declaration of bankruptcy, or more if the bankrupt entity was already in liquidation or subject to judicial reorganisation before its bankruptcy. None of FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the

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<sup>71</sup> In respect of bankruptcies: law of 8 August 1997 on bankruptcy, Art. 23. In respect of liquidations: cass., 7 April 1986, *Pas.*, 1986, I, 951; 24 March 1977, *Pas.*, 1977, I, 796. In respect of judicial reorganisations, there is no express legal provision, but an argument can be made from the fact that the rule of the earlier law on composition proceedings that required the debtor to continue to pay interest accruing during the proceedings (law of 17 July 1997, Art. 21 §2) was not repeated in the new law on the continuity of enterprises.

<sup>74</sup> Law on Financial Collateral, Art. 14.

<sup>75</sup> Law of 8 August 1997 on bankruptcy, Art. 20; Law on Financial Collateral, Art. 16 §3; cass., 15 March 1985, *Pas.*, 1985, I, 875; 27 February 1998, *Pas.*, 1998, p. 109.

<sup>76</sup> Law of 8 August 1997 on bankruptcy, Art. 17, 1°.



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FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provisions and the Title Transfer Provisions in itself appears to us as entailing a significant undervalue for the purposes of this rule of bankruptcy law, but the assessment of this question may be affected by the factual circumstances of a particular case and in particular by the arm's length character of the Transactions.

Other rules of bankruptcy law, providing for the voidness of payments of unmatured debts made during the suspect period, and of transactions made or payments received during the suspect period by a party in the knowledge that the other party was already in a situation of cessation of payments, have been made inapplicable to close-out and netting agreements and to payments made pursuant thereto<sup>77</sup>, and are thus not relevant to the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provisions.

#### **4.12 Suspension of performance**

If a Non-Defaulting Party exercises its right to suspend performance or withhold payments pursuant to the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provisions:

- (a) if the Defaulting Party is bankrupt, its liquidator will be entitled anyway to terminate any Transaction and thereby, in effect, to defeat the continuation of such suspension or withholding<sup>78</sup>; and
- (b) in any event, the courts may not allow such suspension or withholding to continue beyond a reasonable period of time<sup>79</sup>.

#### **4.13 Contingent or unascertained obligations**

If a Party is subject to Insolvency Proceedings in this jurisdiction, the courts may not give effect to the provisions of the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provisions to the extent that these provisions seek to allow set-off of an obligation owed to that Party against obligations of that Party that are merely contingent or unascertained.

#### **4.14 Excessive delay**

The courts of this jurisdiction may not allow the operation of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provisions to delay the Liquidation Date or the payment of a Liquidation Amount beyond a reasonable period of time<sup>80</sup>.

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<sup>77</sup> Law of 8 August 1997 on bankruptcy, Art. 17, 2° and 18; Law on Financial Collateral, Art. 16 §3.

<sup>78</sup> See paragraph 4.8 above.

<sup>79</sup> See the discussion of the concept of "abuse of right" in paragraph 4.3.2.

<sup>80</sup> See the discussion of the concept of "abuse of right" in paragraph 4.3.2.

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

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library and whose terms of subscription give them access to this opinion (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 affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, auditors and professional advisers of such affiliate;
- b) 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; and
- d) any competent authority supervising a subscribing member or its affiliates 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 only had regard to the interests of our client.

We accept responsibility to the Futures and Options Association and 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 Futures and Options Association's members or their affiliates. The provision of this opinion does not create or give rise to any client relationship between this firm and the Futures and Options Association's members or their affiliates.

Yours faithfully,





SCHEDULE 1  
Individuals

Subject to the modifications and additions set out in this Schedule 1 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are individuals. For the purposes of this Schedule 1 (*Individuals*), an "individual" means a natural person acting for his own account and in his own name.

1. ADDITIONAL QUALIFICATIONS

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

1.1 Protective legislation

Individuals have the benefit of various laws and regulations generally aiming at "consumer protection", or at the protection of their spouse or family. These laws can have wide ranging consequences, for instance because contractual provisions may be unenforceable if they fail to satisfy certain fairness tests. This opinion does not discuss these laws and regulations and must therefore be read subject to this qualification.

1.2 Set-off and enforcement of financial collateral after insolvency

The Constitutional Court declared in its judgment 167/2008 of 27 November 2008<sup>81</sup> that the law on financial collateral is unconstitutional to the extent that its Articles 14 and 15 §1 applied to "natural persons who do not qualify as tradesmen" (*commerçants / kooplieden*). As a result, the law on financial collateral cannot be applied to set-off or to enforce financial collateral against natural persons who fall within the scope of the judgment, and the law on financial collateral has been amended accordingly<sup>82</sup>. Post-insolvency set-off will not be allowed unless the mutual debts are closely connected with each other. The concept of "close connection" is highly factual; case law does not provide consistent guidelines for the application of this concept and it is often difficult to assess whether a particular set of facts will be recognised as showing a close connection or not<sup>83</sup>. There will certainly be arguments to support the idea that all Transactions covered by the FOA Netting Agreement or the Clearing Agreement and entered into with a particular individual counterparty are closely connected with each other, so that the netting provisions of the FOA Netting Agreement or the Clearing Agreement should remain effective in an insolvency of the counterparty, but the outcome of any litigation on this subject will never be entirely predictable.

<sup>81</sup> *Monit.*, 4 February 2009, p. 7947.

<sup>82</sup> Law of 26 September 2011 implementing European directive 2009/44 of 6 May 2009 amending European Directive 98/26 on settlement finality and securities settlement systems and European directive 2002/47 on financial collateral arrangements as regards linked systems and credit claims, Art. 20 and 21.

<sup>83</sup> Civil Code, Art. 1298; law of 31 January 2009 on the continuity of enterprises, Art. 34; cass., 4 February 2011, C.10.0443.N, *juridat*; 24 June 2010, with concl. Adv. Gen. D. Thijs, C.09.0365.N, *juridat*; 1 June 2006, *Pas.*, 2006, p. 1255; 7 April 2006, *Pas.*, 2006, p. 812, with concl. Adv. Gen. Werquin; 12 January 1996, *Pas.*, 1996, I, 27; 25 May 1989, *Pas.*, 1989, I, 1015; 11 April 1986, *Pas.*, 1986, I, 987; 28 February 1985, *Pas.*, 1985, I, 795; 2 September 1982, *Pas.*, 1983, I, 3.

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The judgment of the Constitutional Court (and the financial collateral law) refer to individuals "who do not qualify as tradesmen". This makes it clear that the judgment applies to consumers, *ie* individuals who do not carry out any commercial or self-employed professional activity. The Court, however, did not provide a conclusive statement about the exact scope of its judgment. It used the words "who do not qualify as tradesmen" because the case brought before it arose in the context of a particular type of insolvency proceedings, the so-called collective debt settlement (*règlement collectif de dette / collectieve schuldenregeling*), and these are the words that are used by the law to define the scope of collective debt settlement proceedings<sup>84</sup>. The court did not say anything about the application of the law on financial collateral to individuals in other circumstances. This leaves a doubt as to whether the law may be applied to the following situations:

- 1.2.1 *tradesmen acting for private purposes, ie* the situation where the counterparty is an individual tradesman who enters into a transaction for private purposes rather than in connection with his trade; and
- 1.2.2 *liberal professions and other self-employed activities*: certain individual counterparties will not technically qualify as tradesmen because their activities are traditionally seen as being of a "civil" rather than "commercial" nature (for instance, farmers or liberal professions), even though their transactions may have been entered into in connection with their business or profession.

Some legal doctrine takes the view that the scope of the Constitutional Court's judgment must be extended to all categories of individuals<sup>85</sup>.

#### **1.3 Title transfer collateral arrangements**

Under the laws of this jurisdiction, title transfer collateral arrangements cannot validly be made between or with individuals<sup>86</sup>. To the extent that the courts of Belgium would characterise the Title Transfer Provisions as a collateral arrangement, the Title Transfer Provisions would not be enforceable against individuals.

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<sup>84</sup> Judicial Code, Art. 1675/2.

<sup>85</sup> C. Boddaert, *loc. cit.*

<sup>86</sup> Financial Collateral Law, Art. 12 §3.

**SCHEDULE 2  
Sovereign and public sector entities**

Subject to the modifications and additions set out in this Schedule 2 (*Sovereign and public sector entities*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are sovereign and public sector entities organised in this jurisdiction. For the purposes of this Schedule 2 (*Sovereign and public sector entities*), "sovereign and public sector entities" means sovereign states, local authorities and state controlled entities undertaking public service activities.

**2. MODIFICATIONS TO OPINIONS**

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

**2.1 Insolvency Proceedings: sovereign and public sector entities**

Under the laws of this jurisdiction, central and local authorities generally benefit from immunities against Insolvency Proceedings. These immunities will not affect the effectiveness of the close-out netting provisions of the Agreement in accordance with the analysis made in this opinion, because the core of the analysis is based on the Law on Financial Collateral which applies equally to central and local authorities<sup>87</sup>.

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<sup>87</sup> With regard to the broad *ratione personae* scope of the Law on Financial Collateral, see R. Houben, *Schuldvergelijking*, No. 917 *et seq.* and the references. The European directive 2002/47 of 6 June 2002 on financial collateral arrangements (the "Financial Collateral Directive", Art. 1.2(a)) made it mandatory to include public authorities within the scope of the Law on Financial Collateral in any event.

**SCHEDULE 3**  
**Pension funds**

Subject to the modifications and additions set out in this Schedule 3 (*Pension funds*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are pension funds organised in this jurisdiction. For the purposes of this Schedule 3 (*Pension funds*), "pension funds" means institutions for occupational retirement provision<sup>88</sup>.

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

**3. MODIFICATIONS TO OPINIONS**

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

**3.1 Insolvency Proceedings: pension funds**

The opinion at paragraph 3.1.3 is deemed modified as follows:

3.1.3 voluntary or judicial liquidation (*liquidation / vereffening*), imposition of a stabilisation or recovery plan, or appointment of provisional managers under the law of 27 October 2006<sup>89</sup>; it should be noted that a liquidation does not necessarily imply that the entity is insolvent properly speaking, but the proceeding triggers the applicability of many rules of insolvency law; and

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<sup>88</sup> Law of 27 October 2006 on the supervision of institutions for occupational retirement provision.

<sup>89</sup> Law of 27 October 2006 on the supervision of institutions for occupational retirement provision, Art. 35 *et seq.*

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**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")

Where an FOA Published Form Agreement expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement), provided that any election made does not constitute an Adverse Amendment.

Each of the Agreements listed at items 13 to 30 of this Annex I may be deemed to include FOA Netting Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement, in which case references to the Insolvency Events of Default and FOA Netting Provision in respect of such FOA Netting Agreements shall mean the Insolvency Events of Default and FOA Netting Provision in relation to the Two Way Clauses.

**ANNEX 2**  
**List of Transactions**

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

- (A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
- (i) a contract made on an exchange or pursuant to the rules of an exchange;
  - (ii) a contract subject to the rules of an exchange; or
  - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,
- in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
- (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
  - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex I 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 Inconsistency Provision"** means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum) Clause 1(b) (i) of the ISDA/FOA Clearing Addendum.

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

- (a) Clause 8(b) (*Clearing Member Events*), 8(c) (CCP Default) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum; or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

- (a) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement; or
- (b) any modified version of such clause provided that it includes at least those parts of paragraph 8 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

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

- (a) on the terms of the FOA Netting Agreement when used (i) in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or (ii) in conjunction with a Clearing Module Netting Provision and/or an Addendum Netting Provision and with or without a Clearing Module Set-Off Provision and/or an Addendum Set-Off Provision;
- (b) which is governed by the law of England and Wales; and
- (c) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.

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

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

- (a) Clause 5.2 (*Firm Events*), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module; or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

- (a) Clause 5.5 (*Set-Off*) of the FOA Clearing Module; or
- (b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

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

- (a) for the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*) and 3.6 (*Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;
- (b) for the purposes of paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value";
- (c) for the purposes of paragraph 3.5 (*Enforceability of the Addendum Netting Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value";
- (d) for the purposes of paragraph 3.7.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;
- (e) for the purposes of paragraph 3.7.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;

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- (f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;
- (g) for the purposes of paragraph 3.8.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provision;
- (h) for the purposes of paragraph 3.9 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;
- (i) for the purposes of paragraph 3.10.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and
- (j) for the purposes of paragraphs 3.10.3 and 3.10.4, the Title Transfer Provisions;

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

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

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

"**Eligible Counterparty Agreements**" means each of the Eligible Counterparty (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).

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

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



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"FOA Netting Agreement" means an agreement:

- (a) on the terms of the forms specified in Annex 1 to this opinion letter or which has broadly similar function to any of them, when not used in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum and/or a Clearing Module Netting Provision and/or an Addendum Netting Provision;
- (b) which is governed by the law of England and Wales; and
- (c) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provision, and with or without the Title Transfer Provisions, with no Adverse Amendments.

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

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

- (a) in relation to the terms of the Long Form One-Way Clauses 2007 and the Long Form Two-Way Clauses, Clause 2.2 (*Liquidation Date*), Clause 2.4 (*Calculation of Liquidation Amount*) and Clause 2.5 (*Payer*);
- (b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (*Liquidation Date*), Clause 2.3 (*Calculation of Liquidation Amount*) and Clause 2.4 (*Payer*);
- (c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;
- (d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (*Liquidation Date*), Clause 10.3 (*Calculation of Liquidation Amount*) and Clause 10.4 (*Payer*);
- (e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*);
- (f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*); or
- (d) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

"FOA Set-off Provisions" means:

- (a) the "General Set-off Clause", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (*Set-off*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (*Set-off*);
  - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (*Set-off*);
  - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (*Set-off*);
  - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (*Set-off*);
  - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (*Set-off*);
  - (vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (*Set-Off*);
  - (viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (*Set-Off*); or
  - (ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or
- (b) the "Margin Cash Set-off Clause", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (*Set-off on default*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (*Set-off upon default or termination*);
  - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (*Set-off on default*),

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

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

- (a) where the FOA Member's counterparty is not a natural person:
  - (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
  - (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);
  - (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
  - (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);
  - (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or
  - (vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and
- (b) where the FOA Member's counterparty is a natural person:
  - (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
  - (ii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);
  - (iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or

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

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

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

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

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

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

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

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

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

**"Professional Client Agreements"** means each of the Professional Client (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).

**"Rehypothecation Clause"** means:

- (e) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (*Rehypothecation*);
- (f) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (*Rehypothecation*);
- (g) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (*Rehypothecation*); or
- (h) any modified version of such clauses provided that it includes at least those parts of paragraph 4 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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"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).

"Non-Cash Security Interest Provisions" means:

- (a) the "Non-Cash Security Interest Clause", being:
  - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (*Security interest*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (*Security interest*);
  - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (*Security interest*);
  - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (*Security interest*);
  - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (*Security interest*);
  - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (*Security interest*);
  - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (*Security interest*);
  - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (*Security interest*);
  - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (*Security interest*); or
  - (x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow; and
- (b) the "Power of Sale Clause", being:
  - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (*Power of sale*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (*Power of sale*);
  - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (*Power of sale*);



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- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (*Power of sale*);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (*Power of sale*);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (*Power of sale*);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (*Power of sale*);
- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (*Power of sale*);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (*Power of sale*); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"Client Money Additional Security Clause" means:

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);

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- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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

- (a) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version); or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

ANNEX 4

PART 1  
CORE PROVISIONS

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

1. FOA Netting Provision:

- a) **"Liquidation date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, then the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") for the termination and liquidation of Netting Transactions in accordance with this clause.
- b) **Calculation of Liquidation Amount:** Upon the occurrence of a Liquidation Date:
  - i. neither party shall be obliged to make any further payments or deliveries under any Netting Transactions which would, but for this clause, have fallen due for performance on or after the Liquidation Date and such obligations shall be satisfied by settlement (whether by payment, set-off or otherwise) of the Liquidation Amount;
  - ii. the Non-Defaulting Party shall as soon as reasonably practicable determine (discounting if appropriate), in respect of each Netting Transaction referred to in paragraph (a), the total cost, loss or, as the case may be, gain, in each case expressed in the Base Currency specified by the Non-Defaulting Party as such in the Individually Agreed Terms Schedule as a result of the termination, pursuant to this Agreement, of each payment or delivery which would otherwise have been required to be made under such Netting Transaction; and
  - iii. the Non-Defaulting Party shall treat each such cost or loss to it as a positive amount and each such gain by it as a negative amount and aggregate all such amounts to produce a single, net positive or negative amount, denominated in the Non-Defaulting Party's Base Currency (the "Liquidation Amount").
- c) **Payer:** If the Liquidation Amount is a positive amount, the Defaulting Party shall pay it to the Non-Defaulting Party and if it is a negative amount, the Non-Defaulting Party shall pay it to the Defaulting Party. The Non-Defaulting Party

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shall notify the Defaulting Party of the Liquidation Amount, and by which Party it is payable, immediately after the calculation of such amount."

### 2. General Set-Off Clause:

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

### 3. Margin Cash Set-Off Clause:

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

### 4. Insolvency Events of Default Clause:

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

"The following shall constitute Events of Default:

- i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];
- ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief with respect to itself or to its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a trustee, receiver, liquidator, conservator, administrator, custodian, examiner or other similar official (each a "Custodian") of it or any substantial part of its assets, or takes any corporate action to authorise any of the foregoing;
- iii. an involuntary case or other procedure is commenced against a party seeking or proposing liquidation, reorganisation, or moratorium, or other similar relief with respect to it or its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a Custodian of it or any substantial part of its assets."



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

"The following shall constitute Events of Default:

- i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];
- ii. you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)."

### 5. Title Transfer Provisions:

- a) **"Default:** If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date *will* be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "Default Margin Amount" means the amount, calculated in the Base Currency of the aggregate value as at the relevant Liquidation Date (as determined by us) of the Transferred Margin.
- b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

### 6. Clearing Module Netting Provision / Addendum Netting Provision:

- a) [Firm Trigger Event/CM Trigger Event]

Upon the occurrence of a [Firm Trigger Event/CM Trigger Event], the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise stated in the [Core Provisions of the] relevant Rule Set, be dealt with as set out below:



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- (a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];
- (b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;
- (c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (C) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[ or any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributed] [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included [Clauses 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for

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payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

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

b) CCP Default

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

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[ as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];
2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;
3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the date on which the CCP Default occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the day on which the relevant Client Transactions had all been terminated and, in either case, will be an amount equal to the sum, but without duplication, of (1) the Aggregate Transaction Value, (2) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to

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[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

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otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement].

### 7. Clearing Module Set-Off Provision

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

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

### 8. Addendum Set-Off Provision

- (i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("CM Other Amounts"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its set-off against any other termination amount payable by or to X (where "X" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing Agreement at such time ("EP Other Amounts" and together with CM Other Amounts, "Other Amounts"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).
- (ii) For the purposes of this Section 8(ii):
  - (A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;
  - (B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and



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- (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.

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**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.

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9. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).
10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.
11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.
13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.
14. Any change to the FOA Set-Off Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the scope of the provision where a Party acts as agent, (iv) the use of currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.
15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.
16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.
17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).
18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:

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- more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
- more than one FOA Clearing Module or Clearing Module Netting Provision
- one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision

provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with equivalent effect to, clauses 4.3 and/or 4.4. of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.
20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in an FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).
21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).
22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.
23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.

**PART 3**  
**SECURITY INTEREST PROVISIONS**

**1. Security Interest Clause:**

"As a continuing security for the performance of the Secured Obligations under or pursuant to this Agreement, you grant to us, with full title guarantee, a first fixed security interest in all non-cash margin now or in the future provided by you to us or to our order or under our direction or control or that of a Market or otherwise standing to the credit of your account under this Agreement or otherwise held by us or our Associates or our nominees on your behalf."

**2. Power of Sale Clause:**

"If an Event of Default occurs, we may exercise the power to sell all or any part of the margin. The restrictions contained in Sections 93 and 103 of the Law of Property Act 1925 shall not apply to this Agreement or to any exercise by us of our rights to consolidate mortgages or our power of sale. We shall be entitled to apply the proceeds of sale or other disposal in paying the costs of such sale or other disposal and in or towards satisfaction of the Secured Obligations."

**3. Client Money Additional Security Clause**

"As a continuing security for the payment and discharge of the Secured Obligations you grant to us, with full title guarantee, a first fixed security interest in all your money that we may cease to treat as client money in accordance with the Client Money Rules. You agree that we shall be entitled to apply that money in or towards satisfaction of all or any part of the Secured Obligations which are due and payable to us but unpaid."

**4. Rehypothecation Clause**

"You agree and authorise us to borrow, lend, appropriate, dispose of or otherwise use for our own purposes, from time to time, all non-cash margin accepted by us from you and, to the extent that we do, we both acknowledge that the relevant non-cash margin will be transferred to a proprietary account belonging to us (or to any other account selected by us from time to time) by way of absolute transfer and such margin will become the absolute property of ours (or that of our transferee) free from any security interest under this Agreement and from any equity, right, title or interest of yours. Upon any such rehypothecation by us you will have a right against us for the delivery of property, cash, or securities of an identical type, nominal value, description and amount to the rehypothecated non-cash margin, which, upon being delivered back to you, will become subject to the provisions of this Agreement. We agree to credit to you, as soon as reasonably practicable following receipt by us, and as applicable, a sum of money or property equivalent to (and in the same currency as) the type and amount of income (including interest, dividends or other distributions whatsoever with respect to the non-cash margin) that would be received by you in respect of such non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid."

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**ANNEX 5**  
**NECESSARY OR DESIRABLE AMENDMENTS**

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