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Dear Sirs

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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 Bermuda ("**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

- 1.1.1 generally, in respect of Parties which are companies incorporated under the Companies Act 1981;**
- 1.1.2 banks regulated under the Banks Act 1969; and**
- 1.1.3 generally, in respect of Parties incorporated or formed under the laws of another jurisdiction which are companies, banks or insurance companies and which have a branch or branches located in this jurisdiction.**

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

- 1.2.1 Partnerships (schedule 1)
- 1.2.2 Trusts (schedule 2)
- 1.2.3 Segregated accounts companies (schedule 3)
- 1.2.4 Insurance companies/providers (schedule 4);
- 1.2.5 Individuals (schedule 5)
- 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.
- 1.5 This opinion is given in respect of only such of those Transactions which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.
- 1.6 This opinion is given in respect to Margin which consists of cash or securities only.
- 1.7 We express no opinion as to matters of fact.
- 1.8 In this opinion, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.
- 1.9 **Definitions**

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

 - 1.9.1 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1;
 - 1.9.2 "**Insolvency Representative**" means a liquidator, receiver or analogous or equivalent official in this jurisdiction;
 - 1.9.3 "**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

1.9.4 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.

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

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

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

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

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

each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

- 2.8 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.
- 2.9 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.
- 2.10 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).
- 2.11 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.
- 2.12 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction will not act as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum).

3. OPINION

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

3.1 Insolvency Proceedings

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

- bankruptcy under The Bankruptcy Act 1989 and the rules thereunder (collectively, the "**1989 Act**");
- liquidation under Part XIII of The Companies Act 1981 and the winding up rules thereunder (collectively, the "**1981 Act**");
- the appointment of a receiver under The Supreme Court Act 1905;
- scheme of arrangement under the 1981 Act;

- the appointment of a receiver under the Segregated Accounts Companies Act 2000 (the "2000 Act"), but solely as regards a Segregated Accounts Company registered under that Act.

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

3.2 **Recognition of choice of law**

- 3.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England.
- 3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law, as appropriate, as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the 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 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 absent Insolvency Proceedings parties' contractual rights of netting or set-off would be effective to the extent that they are under the governing law of that contract. Furthermore, even where Insolvency Proceedings are pending, but subject to the qualifications outlined later in this opinion, while insolvency set-off will prevail over contractual set-off or netting provisions, we consider that the contractual provisions referred to above are generally consistent with insolvency set-off under the law of Bermuda ("Insolvency Set-off"), as summarised below.

The laws of this jurisdiction will give effect to the obligations of the Parties created by the Agreement, including (without limitation) netting of positions and notwithstanding the existence of Insolvency Proceedings,

provided that in the case of bankruptcy or insolvent liquidation such obligations are in the nature of "mutual debts" (defined below) within the meaning of Section 37 of the 1989 Act. Section 37 of the 1989 Act applies in a bankruptcy under the 1989 or in an insolvent liquidation under the 1981 Act override any contractual provisions to the contrary and provides as follows:

"Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall have been made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person is not entitled under this Section to claim the benefit of any set off against the property or debtor in any case where he had, at the time of giving credit to the debtor, notice of any act of bankruptcy committed by the debtor and available against him."

The meaning of "act of bankruptcy" is explained later in this section.

Section 37 and the other "bankruptcy rules" applicable under the 1989 Act apply with equal force to natural persons domiciled in Bermuda and the range of other Parties in respect of which this opinion is given. The 1989 Act provisions encompass any corporation which becomes an Insolvent Party, by virtue of Section 235 of the 1981 Act, which provides specifically that such bankruptcy rules (Section 37 included) include "companies" within the meaning of that expression given in the 1981 Act. Under the 1981 Act, "company" means a company to which the 1981 Act applies by virtue of section 4(1) thereof. The 1981 Act applies specifically to all categories of corporations incorporated under the laws of this jurisdiction, and to "overseas companies", that is, corporations incorporated under the laws of a jurisdiction other than this jurisdiction but which (as referred to in paragraph 1.1.2 on page 2 of this opinion) maintain a registered office in this jurisdiction pursuant to Part XI of the 1981 Act. The 1989 Act provisions encompass any partnership (within the categories referred to in paragraph 1.2.1 on page 3 of this opinion) which commits an "act of bankruptcy" within the meaning given such expression in the 1989 Act. The 1989 Act provisions also encompass any natural person domiciled in Bermuda who commits an "act of bankruptcy" within the meaning given such expression in the 1989 Act.

However, in the event of a liquidation of a Party under the laws of this jurisdiction, there may be a mandatory Insolvency Set-Off of amounts due between the Parties. The effect of Insolvency Set-Off would, subject to the other comments in this paragraph and below, be to aggregate and set off all Cleared Set Termination Amounts together with all other amounts due between the Parties so that only a single net sum is payable, notwithstanding that the Clearing Module Netting Provision provides for each Cleared Set Termination Amount to be payable separately in respect of each Agreed CCP Service. Under the laws of this jurisdiction it is not possible to contract out of Insolvency Set-Off, so that the Clearing Module Netting Provision may be overridden to the extent of inconsistency with

Insolvency Set-Off. Accordingly there is a risk that the net amount determined pursuant to Insolvency Set-Off could be different from the net amount that would be determined under the contractual netting provisions, which might be commercially disadvantageous to one or more of the Parties.

It should, however, be noted that Insolvency Set-Off is subject to certain limitations:

- (a) If an amount due between the Parties does not constitute a provable debt, Insolvency Set-Off does not apply. A debt which is secured is not provable. However, in our opinion this is an entirely theoretical point because insolvency or contractual set-off would first have to be applied in order to determine the net sum owing and thus subject to the security interest. If that net amount owing is secured, then clearly it is not also proveable but no commercial disadvantage flows from that fact.
- (b) If an amount due between the Parties is not "mutual" with any other amount due between them, Insolvency Set-Off does not apply. In particular, a Cleared Set Termination Amount may not be mutual with any other debt, including another Cleared Set Termination Amount, if it is held on trust or subject to a security interest.

Notwithstanding the observations made above, if Insolvency Set-Off does apply, the Party which is not in liquidation or administration (the "**Solvent Party**") would be unlikely to be left in a worse position than in the absence of Insolvency Set-Off. This is because (under the laws of this jurisdiction) the solvent Party would be able to reconstitute separate mutual amounts which, when aggregated and set off, equal the net amount receivable or payable under Insolvency Set-Off.

In relation to the above provisions, obligations of either Party arising or claims of the Non-Defaulting Party acquired in the circumstances set out below may not be included in the termination and liquidation of sums under Insolvency Set-off:

- 1.1.1. In relation to all Parties, in the case that the Non-Defaulting Party had actual notice of an act of bankruptcy.
- 1.1.2. In relation to companies and Segregated Accounts Companies referred to in paragraphs 1.1.3 above of this opinion under the heading "Terms of Reference and Definitions", in the case that either:
 - i. the Non-Defaulting Party had notice that a meeting of creditors had been summoned under section 181 of the 1981

Act (when a winding-up order has been made by the Court¹);
or

- ii. the Non-Defaulting Party had notice that a meeting of creditors had been summoned under section 211 of the 1981 Act (to consider a resolution for a creditors' voluntary winding up of a Defaulting Party) or
- iii. after notice of the commencement of the winding up of the Defaulting Party.

For purposes of this opinion, a reference to the "commencement" of a winding up means:

- i. in the case of a voluntary winding up, the time of the passing of the resolution for voluntary winding up; and
- ii. in the case of a winding up by the court, the time of the presentation of the petition for the winding up by the court, or if earlier, the time of the passing of a resolution for winding up.

The law is not clear as to whether actual knowledge is required to constitute such "notice" or whether constructive notice is sufficient.

Under Bermuda law "debt" means sum of money which is due and payable by a certain and express agreement, in the sense that it is presently payable, or will become payable at a future time by reason of a pertinent obligation: the expression "mutual debts" is to be construed accordingly.

Pursuant to the 1989 Act, an "act of bankruptcy" is an act committed by a debtor under the laws of Bermuda if, when in this jurisdiction or elsewhere, in any of the following cases, such debtor:

- (a) makes a conveyance or assignment of his (or its) property to a trustee or trustees for the benefit of his (or its) creditors;
- (b) makes a fraudulent conveyance, gift, delivery, or transfer of his (or its) property, or of any part thereof;
- (c) makes any conveyance or transfer of his (or its) property or part thereof, or creates any charge thereon, which would under this or any other Act of Bermuda be void as a fraudulent preference;

¹ As defined in the 1981 Act.

- (d) if with intent to defeat or delay his creditors, the debtor departs out of Bermuda, or being out of Bermuda remains out of Bermuda, or otherwise absents himself or begins to keep house;
- (e) if execution against the debtor has been levied by seizure of his (or its) goods in an action or any civil proceeding in the Bermuda Court, and the goods have been sold or held by the Provost Marshal General of Bermuda or other officer for 21 days (the time elapsing between the date of the summons and the date at which the proceedings on the summons are disposed shall be discounted in calculating such period of 21 days where an interpleader summons has been taken out in regard to the goods seized);
- (f) if the debtor files in the Court a declaration of his (or its) inability to pay his (or its) debts or presents a bankruptcy petition against himself (or itself);
- (g) if a creditor has obtained a final judgement or final order against the debtor for any amount, and, execution thereon not having been stayed, has served on him in Bermuda, or, by leave of the Court, elsewhere, a bankruptcy notice under the 1989 Act, and the debtor does not, within 14 days after service of the notice (where the service is effected in Bermuda) or within the time limited by the order giving leave the requirements of the notice or satisfy the Court that he (or it) has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgement debt, or sum ordered to be paid, and which the debtor could not set up in the action in which the judgement was obtained, or the proceedings in which the order was obtained [any person who is, for the time being, entitled to enforce a final judgement or final order, is deemed to be a creditor who has obtained final judgement or final order];
- (h) if the debtor gives notice to any of his (or its) creditors that he (or it) has suspended, or that he (or it) is about to suspend payment on his (or its) debts.

The 1989 Act provisions encompass any corporation which becomes an Insolvent Party, by virtue of Section 235 of the 1981 Act, which provides specifically that such bankruptcy rules (Section 37 included) include "companies" within the meaning of that expression given in the 1981 Act. Under the 1981 Act, "company" means a company to which the 1981 Act applies by virtue of section 4(1) thereof. The 1981 Act applies specifically to all categories of corporations incorporated under the laws of this jurisdiction, and to "overseas companies", that is, corporations incorporated under the laws of a jurisdiction other than this jurisdiction but which (as referred to in paragraph 1.1.2 on page 2 of this opinion) maintain a registered office in this jurisdiction pursuant to Part XI of the 1981 Act. The 1989 Act provisions encompass any partnership (within the categories referred to in paragraph 1.2.1 on page 3 of this opinion) which commits an "act of bankruptcy" within the meaning given such expression in the 1989 Act. The 1989 Act provisions also encompass any natural person domiciled in Bermuda who commits an "act of bankruptcy" within the meaning given such expression in the 1989 Act.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Non-Defaulting Party.

No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 3.3.1 to apply.

As stated above, whilst Insolvency Set-Off may prevail over contractual set-off or netting provisions, we believe that the contractual provisions referred to above are generally consistent with Insolvency Set-Off.

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 the reasoning outlined above at section 3.3 also applies *mutatis mutandis* to this section of the opinion.

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 the reasoning outlined above at section 3.3 also applies *mutatis mutandis* to this section of the opinion.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of rights under the Addendum Netting Provisions.

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

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

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

3.7 Enforceability of the FOA Set-Off Provisions

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

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

We are of this opinion because absent Insolvency Proceedings parties' contractual rights of netting or set-off would be effective to the extent that they are under the governing law of that contract.

No amendments to the General set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 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
 - (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 absent Insolvency Proceedings parties' contractual rights of netting or set-off would be effective to the extent that they are under the governing law of that contract.

No amendments to the General set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.2 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 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 absent Insolvency Proceedings parties' contractual rights of netting or set-off would be effective to the extent that they are under the governing law of that contract.

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

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

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

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

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

We are of this opinion because absent Insolvency Proceedings parties' contractual rights of netting or set-off would be effective to the extent that they are under the governing law of that contract.

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

Furthermore, in addition to the highlighted words, it is necessary that the words shown as underlined in Part 1 of Annex 4 be treated as Core Provisions 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.

The courts of this jurisdiction are unlikely to recharacterise Transfers of Margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest. In our opinion, the courts are likely to refer to the governing law of the contract, and/or the

law of the place or places where the property subject to Title Transfer Provisions is located, to determine the proper character of Transfers of Margin. Therefore the law of Bermuda should not have a bearing in typical cases. In any event, we are unaware of any particular commercial disadvantage that would arise under the law of Bermuda even if the courts of this jurisdiction did recharacterise the Title Transfer Agreements in this manner, except that in that event Part V ("Part V") of the 1981 Act (pertaining to registration of charges) may be implicated. Charges over the assets of Bermuda companies (other than real property in Bermuda or a ship or aircraft registered in Bermuda) wherever situated, and charges on assets situated in Bermuda (other than real property in Bermuda or a ship or aircraft registered in Bermuda) which are granted by or to companies incorporated outside Bermuda, are capable of being registered in Bermuda in the office of the Registrar of Companies pursuant to the provisions of Part V. Registration under Part V is the only method of registration of charges over the assets of Bermuda companies in Bermuda except charges over real property in Bermuda or ships or aircraft registered in Bermuda. Registration under Part V is not compulsory and does not affect the validity or enforceability of a charge and there is no time limit within which registration of a charge must be effected. However, in the event that questions of priority fall to be determined by reference to Bermuda law, any charge registered pursuant to the Act will take priority over any other charge which is registered subsequently in regard to the same assets, and over all other charges created over such assets after 1 July, 1983, which are not registered.

3.10.3 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 statements above concerning the Title Transfer Provisions are true under the governing law of the Title Transfer Provisions. The courts of Bermuda are not likely to construe these provisions in a manner that conflicts with their construction under their governing law.

The following amendments to the Title Transfer Provisions are recommended in order for the opinions expressed in this paragraph 3.10 to apply:

It is not necessary for any particular formalities to be followed by a secured party in exercising its right of sale provided that in a case that involves a security interest over real property in Bermuda the agreement excludes the application of Section 31 of the Conveyancing Act. We recommend that in such a case Title Transfer Provisions include the words "section 31 of the Conveyancing Act 1983 shall not apply." Otherwise notice requirements under section 31 would apply before any powers of sale could be enforced.

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

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

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

3.12 Single Agreement

Under the laws of this jurisdiction it is 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. In any event, in our view, the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and Transactions are part of a single agreement.

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 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.

We have indicated above that section 37 of the Bankruptcy Act overrides any contractual provisions that are inconsistent with section 37. In this jurisdiction there are no special rules that would enable a different treatment of Insolvency Set-off for transactions settled through clearing facilities and we are unfamiliar with any underlying novation or other arrangements which may be in place in this case and have a bearing on this. If the application of a contractual provision (such as section 5 of the FOA Clearing Module) produces a result that is inconsistent with section 37 of the Bankruptcy Act, section 37 will prevail. However, subject to the discussion below, this qualification as far as it relates to the inclusion of provisions pertaining to Disapplied Set-off Provisions may be largely academic if, (a) as we have assumed is the case, any Party in Bermuda acts only as Client, which is to say no Party in Bermuda in any of the transactions to which this opinion may apply is either a CCP or a Firm and (b) our understanding of the FOA Clearing Module and the ISDA/FOA Clearing Addendum is that Disapplied Set-off Provisions will become an issue only when either a CCP or a Firm becomes insolvent. Bermuda insolvency law is unlikely to be implicated as a direct consequence of the inclusion of provisions pertaining to Disapplied Set-off Provisions if the only Bermuda Party FOA Clearing Module or the ISDA/FOA Clearing Addendum is a Client.

Equally, we are not asked to and do not express any opinion directly in relation to "porting" of client positions or to "leapfrogging", all as referred to in your instructions. However, to the extent that these may produce a result that is inconsistent with section 37 of the Bankruptcy Act, section 37 will prevail. Again this point (subject to the discussion below) may be largely academic for the reasons similar to those mentioned in the preceding

paragraph, since we understand that "porting" and leapfrogging" will not apply in the case where the Client is insolvent.

Where section 37 applies possible additional restrictions and qualifications apply including that debts against an insolvent company (including for the purpose of foreign exchange) must be calculated as at the date of the winding up order, contingent debts due to the insolvent company may not fall into insolvency set off, and only claims in debt fall into the set off calculation.¹ Furthermore, the liquidator in an insolvent liquidation in Bermuda is required to estimate contingent claims. For these reasons, the net amount payable between the Parties as a consequence of the application of Insolvency Set-off may be different than the amount payable between the Parties under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision.

Section 37 of the 1989 Act does not expressly contemplate obligations arising in respect of the types of transactions envisaged by the Transactions and its application to Transactions has not been the subject of judicial consideration in this jurisdiction.

Insolvency Set-Off only applies whether the amounts being set-off are "mutual" between the parties. In this context, "mutual" means 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. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, where a Party is acting as a trustee, where a Party has a joint interest (other than where a Party is a partnership organised under the laws of this jurisdiction and then only in relation to the position between the partnership and the other Party to the FOA Netting Agreement or, as the case may be, Clearing Agreement), or where a Party's rights or obligations or any interest therein have been assigned, charged attached or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order. Accordingly, where such mutuality does not exist in respect of any Transactions or Client Transactions (as the case may be), amounts in respect of such Transactions shall not be included in any Insolvency Set-Off

We qualify and limit our opinion expressed herein, to the extent that it is held by a court of this jurisdiction that the obligations created pursuant to the termination and liquidation provisions are not in the nature of mutual debts within the meaning of Section 37 of the 1989 Act. To the extent a court of this jurisdiction holds that the obligations created by such provisions

¹ A contingent debt is one which depends on the occurrence of some contingency. Debts that are immature in the sense that they depend only on the passage of time may not be "contingent" but a determination of that point will depend on the precise nature and circumstances of the debt. Once an agreement has been terminated and liquidation values are derived, the liquidated balances are unlikely to be "contingent" for the purpose of insolvency set off. Note that the entire statement pertains only to contingent debts owed to the insolvent company rather than debts owed in the other direction.

are not in the nature of such mutual debts, these provisions may be held not to be enforceable in the Insolvency Proceedings.

Notwithstanding our limitation in the previous paragraph, in our opinion the methodology adopted by the termination and liquidation provisions for arriving at the Liquidation Amount upon the insolvency of the Insolvent Party is consistent with the rules contemplated by Section 37 of the 1989 Act. Further, this methodology does not offend against public policy in Bermuda which would prevent the enforcement of a penalty.

To the extent that we have expressed the opinion that Bermuda law may defer to or give effect to the laws of another jurisdiction(s), we give no opinion as to the effect of or interpretation of those laws. In particular, our understanding of the operation of the FOA Clearing Module and the ISDA/FOA Clearing Addendum alluded to at various points in this opinion depends on the construction of those documents under their proper law, being English law.

The opinions expressed above are subject to any prior rights obtained by third parties where any party to one of the Agreements has been assigned, attached or encumbered in any way in favour of such third party.

A statutory stay of proceeding comes into force automatically upon the obtaining of a winding-up order or the appointment of a provisional liquidator to a company established in Bermuda (or before those events but after the presentation of a petition by order of the court). However, the stay of proceedings does not prevent (a) the operation of Insolvency Set-off or (b) a secured creditor from enforcing its security unless the secured party for some reason requires the assistance of the court for that purpose (and even then leave to proceed is normally granted in favour of a secured creditor wishing to enforce its security).

The courts of Bermuda have a general jurisdiction to grant injunctions (a jurisdiction not connected with the commencement of any insolvency proceedings). It is conceivable that in proceedings in which the scope or validity of a security or other proprietary interest were contested, the Bermuda court might enjoin a creditor from taking irrevocable steps in connection with the property it claimed under the security or proprietary interest. This jurisdiction could be invoked in circumstances where an insolvency proceeding other than liquidation happened to be pending; however, we reiterate that the jurisdiction issue has no direct legal (or obvious practical) connection with any insolvency proceeding.

Our opinions are subject to the doctrines under Bermuda law whereby a transaction may be set aside in the context of an insolvent liquidation. These doctrines are summarised below:

1. A disposition in favour of a creditor by an insolvent company, within six months prior to the filing of a petition for the winding-up of the company and for the purpose of preferring the creditor is void. An express statutory exemption protects the interests of any person obtaining title to property through or under a creditor of the

insolvent company in good faith and for valuable consideration. See section 237 of the Companies Act, 1981, which incorporates by reference section 47 of the Bankruptcy Act, 1989.

2. Within certain limits, a disposition of property
 - (a) made with the dominant intention of putting property beyond the reach of a person (or class of persons) who has a claim or may at some time have a claim against the transferor; and
 - (b) without adequate consideration is voidable at the instance of certain eligible creditors. This rule applies within or outside liquidation (and in fact a liquidator appears not to have standing in relation to this particular jurisdiction). Insolvency is not a prerequisite. A creditor will be an eligible creditor if it falls into one of the following categories: (a) person to whom on, or within two years after, the date of the transfer the transferor owed an obligation which obligation remains unsatisfied on the date of the action or proceeding; (b) a person to whom, on the date of the transfer, the transferor owed a contingent liability and since that date the contingency has fallen in, with the liability remaining unsatisfied; or (c) a person to whom the transferor owed an obligation in consequence of a claim that he made against the transferor, where the cause of action giving rise to the claim occurred prior to, or within two years of, the transfer. See part IV A of the Conveyancing Act, 1983.
3. A void disposition under our law is any disposition of the property of a company after the filing of a petition for the winding-up of a company. Such a disposition is void unless approved by the court. See section 166 of the Companies Act, 1981.
4. There is under our law a concept of fraudulent trading, which may apply only if a company goes into liquidation. Fraudulent trading entails the carrying on of the business of a company with intent to defraud creditors of the company or for any other fraudulent purpose. Any person found by a court to have been conducting business in this way may be held personally liable for any or all of the debts of the company. It must be proven that the respondent was knowingly a party to the carrying on of such business. Positive steps in relation to the carrying on of the business of the company with intent to defraud must have been taken by the person sought to be held liable. Actual dishonesty must be proven, although it may be enough to demonstrate that the company continued to incur debt at a time when the directors knew that there was no reasonable prospect of the creditors ever being paid. If the directors can demonstrate that they genuinely believed that the company would come out of its financial difficulties, however, they may be exonerated. See section 246 of the Companies Act, 1981.
5. There is a statutory jurisdiction for a court to compel repayment or compensation from any director or officer who has misappropriated any

money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company. See section 247 of the Companies Act, 1981. This provision is not thought to provide any substantive remedies which would not otherwise exist but provides a summary mechanism.

6. A floating charge granted by a company while it was insolvent and within 12 months prior to the presentation of a petition is void, except to the extent of cash advances made in consideration for the floating charge. See section 39 of the Companies Act, 1981.
7. A conveyance or assignment by a company of all its property to trustees for the benefit of its creditors shall be void to all intents. See section 237(2) of the Companies Act 1981.
8. A liquidator on behalf of a company in liquidation may set aside a transaction in any case in which the company outside of liquidation could have done so. For example if there are questions of ultra vires, authority, or breach of fiduciary duties, the liquidator on behalf of the company may take proceedings.
9. A transaction is void to the extent that it purports to convey, assign, charge, anticipate or give as security:
 - (a) a right to receive money payable under a pension plan; or
 - (b) assets being transferred from a pension fund. See section 44(3) of the National Pension Scheme (Occupational Pensions) Act 1998.
10. In any case where:
 - (a) any warrant of distress is executed against the property of an employer and the property is seized or sold in pursuance of the execution; or
 - (b) on the application of a secured creditor the property of an employer is sold, the proceeds of the sale of the property shall not be distributed to any person entitled thereto until the court ordering the sale has made provision for the payment into a pension fund of any amounts due in respect of contributions payable by the employer. See section 25 of the National Pension Scheme (Occupational Pensions) Act 1998.

For the avoidance of doubt, one or more of the doctrines described above is may be implicated if any Party, when Transferring Margin pursuant to the Title Transfer Provisions or the Margin and Collateral Provisions, is insolvent.

A scheme of arrangement under section 99 of the Companies Act may be implemented and is binding on creditors targeted by the scheme provided that it is approved by a majority in number and 75% in value of each class of creditors it purports to bind and it is approved by the Bermuda court. The courts will not sanction a scheme of arrangement unless reasonable efforts were made to notify those creditors whose rights would be affected by the scheme of the meeting to approve that scheme. Approval of the terms of a scheme of arrangement at the creditors' meeting does not require unanimity of the affected creditors, whether or not present at the meeting.

Such arrangements could affect both set-off rights of creditors and the value of claims which the creditors may have against the insolvent Party. However, creditors whose interests conflict with those of other creditors must be established as a separate class. Accordingly, we do not consider that it would be appropriate to include secured creditors or other creditors having proprietary interests (collectively, "secured creditors") in any class of unsecured creditors. Nor should one secured creditor be readily included in the same class as another secured creditor, if (for example) the arrangement purports to change the relative priority positions as between the two secured creditors or if their interests differ because one has adequate security and one is unsecured. Consequently, a secured creditor should frequently have an effective veto on any such arrangement and as a practical matter it is difficult to see how an arrangement would be approved in a way that binds a secured creditor without its consent.

It is not necessary for any particular formalities to be followed by a secured party in exercising its right of sale provided that the agreement expressly waives the entitlement conferred by Section 29 of the Conveyancing Act 1983 (to the extent applicable) and excludes the application of Section 31 of the Conveyancing Act.

Under the law of Bermuda, the conversion of foreign currency for the purpose of determining the value of net claims against a company in liquidation in Bermuda is to be calculated as at the date of the winding-up order: *Re Dynamics Company of America* [1976] 2 All ER 669; *Re Lines Brothers Limited* [1983] Ch. 1. If under any contract a different date for converting foreign currencies may apply, the rates as at the date of the winding-up order will likely prevail over the contractual date, if these are different, although this is not a settled point. The conversion will have to be calculated by reference to the winding-up order not only for the purpose of filing any proof of claim in respect of net liability of a Bermuda Company, but probably also for the purposes of calculating rights of set-off.

In exercising its power of sale, a secured party is subject to a duty to take reasonable care to obtain the best price reasonably available at the time.

If an asset or right which is the subject of a transfer of title pursuant to the Title Transfer Provisions is situated outside England, the courts of Bermuda may take into account the law of the place where the asset or right is legally situated and the governing law of the asset (despite the choice of English law as the governing law).

If the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the Bermuda courts may recognise the extinction of those claims or liabilities. In particular, in relation to any Transaction or Client Transaction which is governed by a law other than the law of this jurisdiction, such proceedings may affect whether or not that Transaction or Client Transaction is available for inclusion in any netting or set-off pursuant to a FOA Netting Agreement or a Clearing Agreement.

Under the laws of this jurisdiction, interest imposed upon a Party by the FOA Netting Agreement or, as the case may be, Clearing Agreement might be held to be irrecoverable on the grounds that it is a penalty, or to the extent that it accrues on an unsecured debt after the making of a winding-up or bankruptcy order or the passing of a winding-up resolution by the company liable to pay such interest. We do not think this risk is likely to arise if indeed the interest represents the cost of funding to the non-defaulting party. Furthermore, Trades collateralised by way of Margin would be considered to be secured claims and therefore not subject to this risk.

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

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

Yours faithfully



APPLEBY (BERMUDA) LIMITED

SCHEDULE 1**Partnerships**

Subject to the modifications and additions set out in this Schedule 1, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Partnerships. For the purposes of this Schedule "Partnership" means partnerships¹.

- i. that are general partnerships formed under the laws of this jurisdiction;
- ii. that are limited partnerships formed pursuant to the provisions of the Limited Partnership Act 1883, where the general partners are all individuals domiciled in this jurisdiction, corporations incorporated under the laws of this jurisdiction or a combination of the foregoing description of individuals and corporations; or
- iii. that are either general or limited partnerships which are not formed under the laws of this jurisdiction, but which maintain a registered office located in this jurisdiction consequent upon their registration in Bermuda as "overseas partnerships" (within the meaning given such term in the Overseas Partnerships Act 1995)

Notwithstanding the recent growth in limited partnerships as investment vehicles, there is no case law on the effect of netting provisions on Bermuda general or limited partnerships.

Bermuda Partnerships are not regarded as separate legal entities under Bermuda law unless they so elect under the Bermuda Partnership Amendment Act 2006. As a matter of Bermuda law, there is no procedure as such for winding up a Bermuda Partnership.

However, partners of a Bermuda Partnership may be the subject of bankruptcy, winding up or equivalent proceedings. Where the partners of the Bermuda Partnership are individuals present in Bermuda, or companies incorporated in Bermuda, they may be the subject of bankruptcy or insolvent winding up proceedings under Bermuda law. In such cases, partnership assets under such proceedings would be available, first, for creditors of the Bermuda Partnership, partner creditors, and then for distribution amongst the partners thus being available to discharge the separate liabilities of the partners. Similarly, non-partnership assets of a partner would be available first to that partner's creditors, with the surplus being available for unsatisfied partnership creditors.

¹ Under Bermuda law, partnerships may be formed by two or more separate legal entities (e.g. two or more partnerships or corporations) and/or individuals; there is no upper limit on the number of partners of Bermuda partnerships.

When a party contracts with a Bermuda Partnership it is in fact contracting with each partner, in the case of a general partnership or with each general partner in the case of a limited partnership.

There should be no problem applying contractual set off where all the relevant parties are solvent. Difficulties may arise in the context of insolvency set off under the law of Bermuda, as outlined below.

The basic problem in applying the insolvency set off principles set out above in the section entitled Bermuda Companies to Bermuda Partnerships is the requirement for mutuality in relation to debits and credits sought to be set off. Only claims owed by and against each general partner (or in the case of joint rights and obligations, group of the same) may be set off if the mutuality requirement is satisfied in respect of each partner (or group of the same). This mutuality requirement will be affected by changes in respect of partners of the partnership, brought about either by agreement amongst the partners (e.g. admissions or withdrawals), or by operation of law as a result of the dissolution, bankruptcy or death of a partner. The effect of such a change in the partnership can only be analysed in the light of the agreement between the partners and the nature of the interests the relevant partners have in the partnership. However, it seems clear that Transactions carried out under the Agreement after such a change in a partnership will not be brought into the same insolvent set off account as those taking place prior to such change, unless:

- (a) The assets of the partnership prior to the change have been assigned to the partnership as constituted immediately after such change; and
- (b) The liabilities existing prior to such change have been novated so that they are liabilities of the partnership as constituted after that change.

Even where a Bermuda Partnership is structured to achieve the results set out in (a) and (b), we would note that this has not been tested by any judicial authority of which we are aware. However, provided that the necessary assignments and novations referred to in paragraphs (a) and (b) have been complied with, in our opinion, our analysis and opinion as to the enforceability of the netting and set-off provisions of the Agreement should be as set out in the opinion.

In practice, the above complications with respect to maintaining mutuality have more relevance to Bermuda Partnerships that are general partnerships than where a Bermuda Partnership is a limited partnership. Where an Agreement is made with a Bermuda Partnership that is a limited partnership, and a Bermuda Company as general partner executes the Agreement and all Transactions thereunder, mutuality would only be an issue when changes are made to the general partner of the Bermuda Partnership.

The discussion set out above relating to the conversion of delivery obligations and foreign currency conversions would also apply to Bermuda Partnerships.

SCHEDULE 2**Trusts**

Subject to the modifications and additions set out in this Schedule 2, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Trusts. For the purposes of this Schedule "Trust" means a trust or unit trust that is a "unit trust scheme" as defined in Section 1 of the Stamp Duties Act 1976 of Bermuda where the named counterparty to the Agreement is a Bermuda Company and acts in its capacity as trustee of the relevant trust or unit trust¹ ("Bermuda Trust").

There should be no problem applying contractual set off where all the relevant parties are solvent. Difficulties may arise in the context of insolvency set off under the law of Bermuda, as outlined below.

Bermuda trusts give rise to special issues in the event of Insolvency Proceedings. While no definitive opinion is possible based on the current state of the jurisprudence, we consider that (subject to what we say below) insolvency set off likely applies to trusts in the same way as it does to insolvent companies (as described above).

If the position were to be determined by application of Insolvency Set-off, we consider that the commercial result would not be in accordance with the Agreement unless the Bermuda counterparty (i) is the beneficial owner of the claims against the other party thereto that arise pursuant to that Agreement, and is personally liable to the other party in respect of each Transaction entered into pursuant thereto and (ii) in entering into each Transaction under such Agreement, each party is acting in the same capacity (and as principal rather than as agent or in any other capacity). Our reasoning is set out in the immediately following paragraphs.

The basic problem in applying the termination and closeout provisions of the Agreement in relation to the Bermuda counterparty in respect of the Bermuda Trust is the requirement of mutuality in relation to debits and credits sought to be netted. Netting and set-off of obligations of the Bermuda counterparty in its capacity as trustee of the Bermuda Trust, where the trustee is personally liable for debts of the Bermuda Trust may only be netted and set off against obligations owed to the Bermuda counterparty in the same capacity. Further, a trustee of a Bermuda Trust is not strictly speaking the person beneficially entitled to debts owed to the trust for the purposes of Insolvency Set-off and netting mutuality. The trustee is not a beneficial owner of such claims. However, since the trustee has a lien over those claims to the extent of obligations undertaken by him on behalf of the trust, we consider that a Bermuda court would likely hold that the necessary mutuality exists and insolvency set off would apply.

¹ As a matter of Bermuda law, trusts and unit trusts do not have separate legal personality. It is the trustee of a trust that, pursuant to the powers granted by the terms of the trust deed or settlement establishing or governing the trust, in accordance with those terms and in its capacity as trustee of the trust, will take certain actions in relation to the trust, to bind the assets of the trust.

In practice, insolvency of the Bermuda counterparty (as opposed to the trust itself) may not have a substantive impact upon enforcement of rights under the Agreement as it is likely that a liquidator (or similar insolvency representative) of the Bermuda counterparty would be appointed to administer the Agreements upon its insolvency. Alternatively, following insolvency the Bermuda counterparty's obligations in its trustee capacity of a solvent trust could be transferred to a third party, as its replacement. Set-off rights of and against the beneficially entitled parties under the Agreements (the beneficiaries of the solvent Bermuda Trust) would therefore survive the Bermuda counterparty's insolvency.

SCHEDULE 3**Segregated Accounts Companies**

Subject to the modifications and additions set out in this Schedule 3, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Segregated Accounts Companies. For the purposes of this Schedule), "Segregated Accounts Company" means a Bermuda Company registered as a segregated accounts company under the Segregated Accounts Companies Act 2000 (as amended) where it is acting in respect of a segregated account .

All Transactions to be included for the purposes of set off with a Segregated Accounts Company must be linked to the same segregated account. If that is done, both contractual and insolvency set off will result in all claims being netted into a single net sum payable by one party or the other.

Where the contractual requirements imposed for establishing and maintaining segregated accounts are not established in the constitution of a Segregated Accounts Company or where assets and liabilities are not appropriately allocated in accordance with the contractual intentions of the parties, problems may arise. In such circumstances, there is, in our view, a risk that the parties' attempts to segregate their dealings and transactions to such segregated account will be unsuccessful or that some of the protections afforded by the Segregated Accounts Companies Act may not be available. Where segregation is not achieved, then the counterparty would be contracting with the general account of the Segregated Accounts Company generally, and insolvency set off would apply to all contracts executed in this manner and to all claims in either directions arising under such contracts. The problem is that in these circumstances there is a possibility that two or more netting or set off accounts will have to be calculated, as described below.

Contractual and insolvency set off rights may be compromised under the hypothesis posed above since some transactions may be allocated to a given segregated account and others may be allocated either to other segregated accounts, or to the general account, of the Segregated Accounts Company. This is so even though, in our opinion, the fact that assets, rights, obligations and liabilities which relate to the Transactions are not successfully segregated to a particular segregated account of a Segregated Account Company will not necessarily affect the enforceability per se of the contractual set off provisions as between the Segregated Account Company itself and its counterparty. Following a failed attempt to segregate, the liabilities and rights in relation to a given Transaction will fall into the general account of the segregated accounts of the Segregated Accounts Company, which is to say the assets and liabilities of the Segregated Account Company that have not been attributed to a segregated account. As regards all claims by and against the general account of the Segregated Accounts Company, the netting process will operate on the basis set out in the body of this opinion. Only the assets allocated to the general account of the Segregated Accounts Company (being those assets not allocated to a segregated account) will be available to apply towards the settlement of any net sum which the Segregated Account Company is liable to pay as the result of the netting. In these circumstances, it is possible that two (or more) separate netting or set off accounts will have to be calculated: one in respect of claims in either direction under contracts or transactions allocated to the general account of the

Segregated Account Company and one (or more) in respect of claims in either direction under any contracts or transactions allocated to any segregated accounts.

Section 24 of the 2000 Act provides that a Segregated Accounts Company registered under that Act shall be wound up in accordance with the provisions of that Act, the 1981 Act and any other Act which applies to the company's winding up, save that in the event of conflict, the provisions of the 2000 Act shall prevail.

The said restrictions will apply both to the voluntary winding up of a Segregated Accounts Company and to petitions for its winding up presented to the Bermuda court by any person. The effect of such restrictions is that consent of the Bermuda Registrar of Companies is required for the winding up to proceed. Further, any Insolvency Representative who is appointed to conduct the winding up will be required to ensure that assets linked to one segregated account are not applied to discharge liabilities linked to any other segregated account (unless the relevant liability is in fact linked to more than one segregated account), and will be obliged to deal with the assets and liabilities of the respective segregated accounts of the Segregated Accounts Company in accordance with the terms of any relevant contracts that are linked to such accounts. In this regard, assets linked to the respective segregated accounts established by a Segregated Accounts Company are deemed to be "owned" by the company as separate funds that are not part of the company's general assets; such assets are instead held subject to the rights and entitlements of parties who have entered into contracts, or who hold securities, that are linked to such accounts.

In the case of Segregated Accounts Companies that becomes involved in proceedings in other jurisdictions that are the equivalent of Insolvency Proceedings, we regard that there is a risk that a court in such other jurisdiction might reject the legal segregation of the segregated accounts as being contrary to public policy, as understood in that jurisdiction. However, should a foreign court reject the legal segregation of the segregated accounts on the basis of the public policy of its jurisdiction, such rejection would not defeat or impair the effectiveness of the legal segregation of such accounts, as a matter of Bermuda law.

The effect of separate legislation to create a company may vary widely from case to case. Accordingly, advice of local counsel should be sought whenever the Bermuda counterparty is a company formed by the Private Act process, or where it has become subject to separate legislation enabling it to establish segregated accounts, after incorporation. We express no opinion in respect of such entities because private legislation is bespoke and conceivably may provide for an outcome that is inconsistent with the opinions expressed in this opinion in respect of entities created under general public legislation.

SCHEDULE 4**Bermuda Insurance Companies**

Subject to the modifications and additions set out in this Schedule 4, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Bermuda Insurance Companies. For the purposes of this Schedule, "Bermuda Insurance Company" means a Bermuda Company that is licensed to carry on insurance business, as that term is understood under the Bermuda Insurance Act 1978 (as amended) and the regulations promulgated thereunder (the "Insurance Act").

Bermuda Insurance Companies operate in a complex legal and regulatory environment, and the precise netting analysis that applies to a given Bermuda Insurance Company can only be determined in light of the specific circumstances of that Bermuda counterparty. Accordingly, in order for non-Bermuda Counterparties to effectively structure their Transactions, it is advisable to seek transactional advice rather than relying on generic advice concerning netting.

Introduction

There are three types of Bermuda Insurance Companies from a netting perspective, which is determined by the nature of the insurance business the Bermuda Insurance Company is licensed to carry, or otherwise carries, on:

- (a) Bermuda Insurance Companies that carry on general business only (a **"General Business Insurance Company"**);
- (b) Bermuda Insurance Companies that carry on long-term business only (a **"Long-term Business Insurance Company"**); and
- (c) Bermuda Insurance Companies that carry on both general and long-term business (a **"Composite Insurance Company"**).

Accordingly, it is vital for the non-Bermuda counterparty to identify the type of business its Bermuda Insurance Company counterparty is licensed to carry on and, in addition, whether the Transaction(s) entered into pursuant to an Agreement is attributable to a particular line of insurance business, be it general business, long-term business, or both general and long-term business. To this end, the non-Bermuda counterparty should obtain a copy of any conditions attached to the Bermuda Insurance Company's licence, which is issued by the Bermuda Monetary Authority.

General Business Insurance Companies

Our opinion as to the enforceability of the Agreement relating to General Business Insurance Companies is as set out above in the body of this opinion, i.e. we are of

the opinion that the provisions of the Agreement providing for the netting claims (even upon the insolvency of a General Business Insurance Company) are enforceable under the law of Bermuda.

A General Business Insurance company may be wound up under the Companies Act and, pursuant to the Insurance Act, is deemed for the purposes of section 161 of the Companies Act (winding up of company by the court) to be unable to pay its debts if at any time the value of its assets does not exceed the amount of its liabilities. In computing the amount of liabilities of a General Business Insurer, all contingent and prospective liabilities must be taken into account (but not liabilities in respect of share capital).

Long-term Business Insurance Companies

Section 24 of the Insurance Act requires that a Long-term Business Insurance Company must maintain its accounts in respect of that long-term business separate from any accounts it has in respect of any other business. All receipts of a Long-term Business Insurance Company are required to be carried to, and form part of, a special fund with an appropriate name, referred to in the Insurance Act as the 'long-term business fund'. A Long-term Business Insurance Company is required to maintain books of account and other records such that the assets of its long-term business fund and the liabilities of its long-term business can be readily identified at any time. No payment from a Long-term Business Insurance Company's long-term business fund may be made directly or indirectly, other than for a purpose of the Long-term Business Insurance Company's long-term business; notwithstanding any arrangement for its subsequent repayment out of receipts of business, other than the long-term business, except insofar as such payment can be made out of any surplus certified by the Long-term Business Insurance Company's approved actuary to be available for distribution otherwise than to policyholders.

In addition, Section 36 of the Insurance Act applies in any winding up of a Bermuda Insurance Company which immediately before the winding up was carrying on or entitled to carry on long-term business, i.e. Section 36 applies in any winding up of a Long-term Business Insurance Company. Section 36 provides that on any such winding up:-

- (a) the assets in the insurer's long-term business fund shall be available only for meeting the liabilities of the insurer attributable to its long-term business; and
- (b) other assets of the insurer shall be available only for meeting the liabilities of the insurer attributable to its other business.

Where the value of the assets in (a) or (b) exceeds the amount of the liabilities mentioned in that paragraph, the restriction imposed does not apply to such of those assets as represents the excess.

Accordingly, subject to the possibility of there being a surplus, the assets in the insurer's long-term business fund shall only be available for meeting the liabilities of

the insurer attributable to its long-term business¹. Thus, for the purposes of netting, in order to preserve the contractual effect of the provisions of the Agreement, particularly in the insolvency of the Long-term Business Insurance Company, all Transactions must either be attributable to the long-term business fund or all transactions must be attributable to the Long-term Business Insurance Company's other business. In other words, Transactions entered into under an Agreement may only be netted and paid out of the fund to which those Transactions are attributed, be it the long-term business fund or the other assets (the general account) of the insurer.

Accordingly, where all Transactions entered into pursuant to an Agreement are attributable to the long-term business fund, then, and save as aforesaid, our opinion as to the enforceability of the Agreement relating to Long-term Business Insurance Companies is as set out above in the body of this opinion, i.e. we are of the opinion that the provisions of the Agreements providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Long-term Business Insurance Company are enforceable under the law of Bermuda.

Where, however, certain Transactions are not attributable to the long-term business fund, then recourse will lie only as against the general account of the Long-term Business Insurer and as against such assets (if any) as may be credited to its general account at the relevant time. As regards all claims by and against the general account in respect of Transactions not attributable to the long-term business fund, netting will apply.

Composite Insurance Companies

In relation to Composite Insurance Companies, we repeat the statements made above in relation to General Business Insurance Companies and Long-term Business Insurance Companies and, for emphasis, we draw attention to the point that Transactions entered into under an Agreement may only be netted and paid out of the fund to which those Transactions are attributed, be it the long-term business fund or the other assets (the general account) of the Composite Insurance Company.

¹ It is of note, however, that, in the winding up of a Long-term Business Insurer, a liquidator must, unless the Supreme Court of Bermuda orders otherwise, carry on the long-term business of the insurer with a view to its being transferred as a going concern to another insurer, whether an existing insurer or an insurer formed for that purpose; and, in carrying on that business as aforesaid, the liquidator may agree to the variation of any contracts of insurance in existence when the winding up order is made, but may not effect any new contracts of insurance. Where the insurance business or any part of the insurance business of an insurer has been transferred to an insurer under an arrangement in pursuance of which the first mentioned insurer (the subsidiary insurer) or the creditors thereof has or have claims against the insurer to which the transfer was made (the principal insurer) then, if the principal insurer is being wound up by or under the supervision of the Supreme Court of Bermuda, the Supreme Court must, subject to Section 28 of the Insurance Act of Bermuda, order the subsidiary insurer to be wound up in conjunction with the principal insurer, and may by the same or any subsequent order appoint the same person to be liquidator for the two insurers, and make provision for such other matters as may seem to the Supreme Court of Bermuda to be necessary, with a view to the insurers being wound up as if they were one insurer.

Composite Insurance Companies may also be wound up under the Companies Act. As stated above, for the purposes of section 161 of the Companies Act (winding up of company by the court), a Composite Insurance Company shall be deemed to be unable to pay its debts if at any time the value of its assets does not exceed the amount of its liabilities. In order to compute: (i) the amount of liabilities attributable to its general business, all contingent and prospective liabilities must be taken into account (but not liabilities in respect of share capital); and (ii) the amount of liabilities attributable to its long-term business, the amount equal to the total amount at that time standing to the credit of the Composite Insurance Company's long-term business fund or the amount of those liabilities at any time as determined in accordance with any applicable regulations will apply, whichever is the greater.

Section 36 of the Insurance Act, as outlined above, applies in the winding up of a Composite Insurance Company. Accordingly, the assets in the long-term business fund shall only be available to meet the long-term business liabilities of the Composite Insurance Company, and the general assets of the Composite Insurance Company shall be available only for meeting the liabilities of the insurer attributable to its general business. Any excess in either the long-term or general business accounts of the Composite Insurance Company may be used to meet other liabilities.

In addition, a liquidator must, unless the Supreme Court of Bermuda orders otherwise, carry on the long-term business of the insurer with a view to its being transferred as a going concern to another insurer.

General

In the case of all Bermuda Insurance Companies:

The Bermuda Insurance Company's legal capacity to enter into and perform its obligations under the Agreement will not be affected by the fact that it is regulated under the Insurance Act, assuming that its insurance licence exclude or restrict activities of the description contemplated by the Agreement. Absence of such exclusions and restrictions may be readily confirmed from an examination of the Memorandum of Association and Bye-Laws and the insurance licence of the Bermuda Insurance Company.

However, pursuant to its registration under the Insurance Act, it may not engage in non-insurance business. Non-insurance business is defined in the Insurance Act to include (a) carrying on investment business as defined under the IBA, managing an investment fund as an operator as defined under the Investment Funds Act 2006, carrying on business as a fund administrator as defined under the Investment Funds Act 2006, carrying on banking business as defined under the Banks and Deposit Companies Act 1999; (b) underwriting debt or securities or otherwise engaging in investment banking; (c) engaging in commercial or industrial activities; and (d) carrying on the business of management, sales or leasing of real property. While engaging in derivative transactions is not specifically identified as non-insurance business guidance papers issued by the Bermuda Monetary Authority have confirmed that derivative transactions may be entered into by Bermuda Insurance Companies. It is, therefore, possible for a Bermuda Insurance Company to be engaging in derivative transactions which do not form part of its insurance business. It should also be noted that in a given case, the insurance licence issued to a Bermuda Insurance Company may exclude it from engaging in derivative transactions, or may impose specific conditions upon its ability to enter into

derivative transactions. We accordingly assume, for the purposes of this Supplementary Opinion, that the relevant Bermuda Insurance Company is not prevented from entering into or engaging in derivative transactions and is otherwise in compliance with the terms of its insurance licence.

The Bermuda Insurance Company's board of directors and managers will be responsible to ensure that its exposure from trading activities under the Agreement does not come into conflict with its Insurance Act obligations for reasons relating to the Bermuda Insurance Company's financial position. In particular, the Bermuda Insurance Company's obligations to meet and maintain the solvency margin and liquidity ratio requirements corresponding to its relevant liabilities under the Insurance Act must be balanced with the contingent obligations under the Agreement to deliver additional Collateral. This balance will be dynamic, given likely fluctuations in the Bermuda Insurance Company's exposure under the Agreement and its insurance business, and will require active monitoring. Concern as to maintaining a proper balance will be reduced, to the extent the value of the Bermuda Insurance Company's assets significantly exceed the amount of its Insurance Act requirements.

To the extent the Bermuda Insurance Company cannot meet a demand requiring it to deliver additional Collateral, because such delivery would impair the Bermuda Insurance Company's statutory solvency, then the Bermuda Insurance Company may become insolvent for the purposes of definitions under the Companies Act and/or the Insurance Act. Insolvency could then precipitate insolvent liquidation proceedings against the Bermuda Insurance Company under the Companies Act. Section 161 of the Companies Act provides that a company may be wound up by the Court where (inter alia) it is unable to pay its debts, taking into account contingent and prospective obligations. The Insurance Act also contains an additional test of insolvency for an insurer, which (by virtue of section 33) is deemed to be unable to pay its debts if the value of its assets does not exceed its total liabilities, taking into account contingent and prospective liabilities.

SCHEDULE 5**Individuals**

Subject to the modifications and additions set out in this Schedule 5, 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 5, "Individual" means a natural person domiciled in Bermuda.

No substantive qualifications to our general advice apply to individuals. Set off will operate as described in the body of our opinion. Individuals cannot be subject to liquidation proceedings under the Companies Act. They can be subject to bankruptcy proceedings only. Section 37 of the Bankruptcy Act 1989 concerning insolvency set off applies to such proceedings.

ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

1. Master Netting Agreement - One-Way (1997 version) (the "**One-Way Master Netting Agreement 1997**")
2. Master Netting Agreement - Two-Way (1997 version) (the "**Two-Way Master Netting Agreement 1997**")
3. Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Long-Form One-Way Clauses 2007**")
4. Short Form Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Short-Form One-Way Clauses 2007**")
5. Short Form Default, Netting and Termination Module (One-Way Netting) (2009 version) (the "**Short-Form One-Way Clauses 2009**")
6. Short Form Default, Netting and Termination Module (One-Way Netting) (2011 version) (the "**Short-Form One-Way Clauses 2011**")
7. Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Long-Form Two-Way Clauses 2007**")
8. Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Long-Form Two-Way Clauses 2009**")
9. Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Long-Form Two-Way Clauses 2011**")
10. Short Form Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Short-Form Two-Way Clauses 2007**")
11. Short Form Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Short-Form Two-Way Clauses 2009**")
12. Short Form Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Short-Form Two-Way Clauses 2011**")
13. Professional Client Agreement (2007 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2007**")
14. Professional Client Agreement (2009 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2009**")
15. Professional Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2011**")

16. Professional Client Agreement (2007 Version), excluding Module G (**Margin and Collateral**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2007**")
17. Professional Client Agreement (2009 Version), excluding Module G (**Margin and Collateral**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2009**")
18. Professional Client Agreement (2011 Version), excluding Module G (**Margin and Collateral**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2011**")
19. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2007**")
20. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2009**")
21. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2011**")
22. Retail Client Agreement (2007 Version), excluding Module G (**Margin and Collateral**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2007**")
23. Retail Client Agreement (2009 Version), excluding Module G (**Margin and Collateral**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2009**")
24. Retail Client Agreement (2011 Version), excluding Module G (**Margin and Collateral**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2011**")
25. Eligible Counterparty Agreement (2007 Version) including Module G (**Margin**) (the "**Eligible Counterparty (with Security Provisions) Agreement 2007**")
26. Eligible Counterparty Agreement (2009 Version) including Module G (**Margin**) (the "**Eligible Counterparty (with Security Provisions) Agreement 2009**")

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

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

Each of the Agreements listed at items 13 to 30 of this Annex 1 may be deemed to include FOA Netting Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement, in which case references to the Insolvency Events of Default and FOA Netting Provision in respect of such FOA Netting Agreements shall mean the Insolvency Events of Default and FOA Netting Provision in relation to the Two Way Clauses.

ANNEX 2
List of Transactions

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

- (A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
 - (i) a contract made on an exchange or pursuant to the rules of an exchange;
 - (ii) a contract subject to the rules of an exchange; or
 - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,
 in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
 - (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
 - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC¹, 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.

¹ Non-EU counsel should discuss with Clifford Chance if clarification is needed.

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:

- (c) 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;
- (d) which is governed by the law of England and Wales; and
- (e) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.

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

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

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

- (h) Clause 5.5 (*Set-Off*) of the FOA Clearing Module; or
- (i) 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;
- (f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;
- (g) for the purposes of paragraph 3.8.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provision;
- (h) for the purposes of paragraph 3.9 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;
- (i) for the purposes of paragraph 3.10.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and
- (j) for the purposes of paragraphs 3.10.3 and 3.10.4, the Title Transfer Provisions;

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

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

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

"Eligible Counterparty Agreements" means each of the Eligible Counterparty Agreement (with Security Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Security Provisions) Agreement 2009, the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2009, the Eligible Counterparty Agreement (with Security Provisions) Agreement 2011 or the

Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

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

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

"FOA Netting Agreement" means an agreement:

- (j) 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;
- (k) which is governed by the law of England and Wales; and
- (l) 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
- (m) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (***Core Provisions***) of Annex 4 which are highlighted in yellow.

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

"FOA Set-off Provisions" means:

- (a) the **"General Set-off Clause"**, being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (***Set-off***);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);
 - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (***Set-off***);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);
 - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (***Set-off***);
 - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (***Set-off***);
 - (vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);
 - (viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***); or

- (ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or
- (b) the "**Margin Cash Set-off Clause**", being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (**Set-off on default**);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (**Set-off upon default or termination**);
 - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (**Set-off on default**),
 - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (**Set-off upon default or termination**);
 - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (**Set-off on default**);
 - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (**Set-off upon default or termination**); or
 - (vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

- (a) where the FOA Member's counterparty is not a natural person:
 - (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
 - (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);
 - (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
 - (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);

- (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or
- (vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and

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

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

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

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

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

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

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

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

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

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

"Professional Client Agreements" means each of the Professional Client Agreement (with Security Provisions) Agreement 2007, the Professional Client Agreement (with Title Transfer Provisions) Agreement 2007, the Professional Client

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

"Rehypothecation Clause" means:

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

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

"Non-Cash Security Interest Provisions" means:

- (a) the **"Non-Cash Security Interest Clause"**, being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (**Security interest**);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (**Security interest**);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (**Security interest**);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (**Security interest**);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (**Security interest**);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (**Security interest**);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (**Security interest**);

- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (**Security interest**);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (**Security interest**); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow; and

(b) the "**Power of Sale Clause**", being:

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (**Power of sale**);
- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (**Power of sale**);
- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (**Power of sale**);
- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (**Power of sale**);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (**Power of sale**);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (**Power of sale**);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (**Power of sale**);
- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (**Power of sale**);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (**Power of sale**); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);
- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);

- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);
- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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

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

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

ANNEX 4

PART 1
CORE PROVISIONS

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

1. **FOA Netting Provision:**

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

2. General Set-Off Clause:

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

3. Margin Cash Set-Off Clause:

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

4. Insolvency Events of Default Clause:

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

"The following shall constitute Events of Default:

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

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

"The following shall constitute Events of Default:

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

5. Title Transfer Provisions:

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

6. Clearing Module Netting Provision / Addendum Netting Provision:

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

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

- (a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a

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

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

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

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

b) CCP Default

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

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

transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (3) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (4) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[and any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in [Clauses 5.3.3(1) to 5.3.3(3) [Sections 8(c)(iii)(1) to 8(c)(iii)(3)]], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing member]);

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

c) Hierarchy of Events

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

Or

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

Or

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

d) Definitions

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

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

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

- (a) is attributable to such Client Transactions;
- (b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement] or pursuant to Section 10(b)] and has not been returned at the time of

such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and

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

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

7. Clearing Module Set-Off Provision

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

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

8. Addendum Set-Off Provision

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

set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

- (ii) For the purposes of this Section 8(ii):
 - (A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;
 - (B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and
 - (C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that has previously been reduced in part by set-off pursuant to this Section 8(e).
- (iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.

PART 2**NON-MATERIAL AMENDMENTS**

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B", using synonyms, changing the order of the words) provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
2. Any change to a provision or provisions for the purposes of correct cross-referencing or by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the agreement provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
3. A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes 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.¹
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.¹
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.¹
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.

¹ Counsel to delete and if any such provisions would alter agreement so as to prevent opinion from applying.

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).¹
10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.
11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.
13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.
14. Any change to the FOA Set-Off Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the scope of the provision where a Party acts as agent, (iv) the use of currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.
15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.
16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.
17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).
18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:

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

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

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

PART 3**SECURITY INTEREST PROVISIONS****1. Security Interest Clause:**

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

2. Power of Sale Clause:

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

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

ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

1. **Necessary amendments**

None.

2. **Desirable amendments**

The following amendments to the Title Transfer Provisions are recommended in order for the opinions expressed in this paragraph 3.10 to apply:

It is not necessary for any particular formalities to be followed by a secured party in exercising its right of sale provided that in a case that involves a security interest over real property in Bermuda the agreement excludes the application of Section 31 of the Conveyancing Act. We recommend that in such a case Title Transfer Provisions include the words "section 31 of the Conveyancing Act 1983 shall not apply." Otherwise notice requirements under section 31 would apply before any powers of sale could be enforced.