

Our ref TKM/605815/28581571v5

The Futures & Options Association
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London EC3R 8DE

4 December 2013

Dear Sirs,

Netting Analyser Library

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 the Cayman Islands ("**this jurisdiction**") in respect of the enforceability and validity of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision contained in 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 This opinion is given in respect of a Party which is:

- (a) a company, including any exempted, ordinary resident, segregated portfolio, ordinary non-resident and limited duration company, incorporated under the Companies Law (2013 Revision) (the "**Companies Law**") of the Cayman Islands (a "**Company**") and any previous revision of the Companies Law;
- (b) a branch established or located in the Cayman Islands of a company incorporated or organised outside the Cayman Islands;
- (c) an exempted limited partnership (an "**Exempted Limited Partnership**") established under the Exempted Limited Partnership Law (2013 Revision) (the "**Exempted Limited Partnership Law**") and a limited partnership established under the Partnership Law (2013 Revision) (the "**Partnership Law**"), each established in the Cayman Islands (together, a "**Partnership**"); and

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- (d) a trust or unit trust established under Cayman Islands law with a trustee incorporated in the Cayman Islands (a "Trust").
- 1.2 The rules applicable to the entity types listed below will depend upon the form such party takes. There are no special rules applicable to such parties as such (and such parties do not take any special forms and are not established as special entity types in the Cayman Islands) except to the extent that such entities are regulated in the Cayman Islands when the insolvency provisions described below will be applicable. This opinion is also given in respect of Parties that are any of the following:
- (a) banks/financial institutions;
 - (b) investment firms/broker dealers;
 - (c) insurance companies/providers;
 - (d) funds;
 - (e) pension entities; and
 - (f) building societies.
- 1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when such FOA Netting Agreement and the Clearing Agreement are expressed to be governed by English law.
- 1.4 This opinion covers all Transactions.
- 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 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.
- 1.7 **Definitions**
- Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the FOA Netting Agreement or the Clearing Agreement, unless the context specifies otherwise. Where, in an FOA Netting Agreement or, as the case may be, a Clearing Agreement, a defined term has been changed but the changed term corresponds to a term defined in a FOA Published Form Agreement or, as the case may be, the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or this opinion letter, this opinion letter may be read as if terms used herein were the terms as so changed:
- (a) "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1;
 - (b) "**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction;
 - (c) "**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

- (d) 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 the following:

- 2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.
- 2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws and there is nothing under the governing law or any other applicable law (other than the laws of the Cayman Islands) that affects or will affect the validity of either the FOA Netting Agreement or, as the case may be, the Clearing Agreement or any Transaction.
- 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; and that the choice of the governing law of the FOA Netting Agreement and, as the case may be, the Clearing Agreement has been made in good faith and would be regarded as a valid and binding selection which will be upheld by the courts of the jurisdiction of governing law.
- 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 The FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.

- 2.9 That, in relation to a Clearing Agreement, a Party incorporated in the Cayman Islands will not act as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FA Clearing Addendum;
- 2.10 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.
- 2.11 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).
- 2.12 That all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by English law and the law which as a matter of Cayman Islands conflict of law rules governs the issue of the transfer of title to the margin has been done to transfer title to the transferor to ensure the validity of each transfer of margin pursuant to the Title Transfer Provisions will have been effectively carried out.
- 2.13 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.14 All cash, securities and margin are located and held by each Party under the FOA Netting Agreement or the Clearing Agreement, as the case may be, outside this jurisdiction and are not governed by Cayman Islands law.
- 2.15 The opinion at paragraph 3.10 in respect of the Title Transfer Provisions is given only in respect of Margin consisting of securities located outside this jurisdiction.
- 2.16 That at the time at which the FOA Netting Agreement or, as the case may be, the Clearing Agreement and each Transaction is entered into, neither Party is insolvent.
- 2.17 That each of the Parties has entered into the FOA Netting Agreement or, as the case may be, the Clearing Agreement and each Transaction as principal for its own account.
- 2.18 That none of the provisions of the Proceeds of Crime Law, 2008, relating to money laundering or the Misuse of Drugs Law (2010 Revision) relating to drug trafficking are relevant to the Transactions entered into under the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

3 Opinion

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

3.1 Insolvency Proceedings

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

- (a) the Companies Law: this is the principal law under which (i) a Company incorporated in the Cayman Islands, (ii) a foreign company falling within Section 91 of the Companies Law, and (iii) in certain circumstances, an Exempted Limited Partnership, is subject to insolvency proceedings;

- (b) the Bankruptcy Law (1997 Revision) (the "**Bankruptcy Law**"): the Bankruptcy Law is only relevant to Partnerships (other than an Exempted Limited Partnership for the purposes of this Clause 3.1(b)) and allows proceedings to be taken against partners in the name of a Partnership. A bankruptcy petition presented against a Partnership under the Bankruptcy Law is an administratively convenient way of commencing bankruptcy proceedings against the partners to the extent those partners can be made subject to bankruptcy proceedings under the Bankruptcy Law. In general terms bankruptcy proceedings may be brought against individuals who are present, ordinarily resident, have a place of residence or carry on a business (either personally, through an agent or through a Partnership of which they are a partner) in the Cayman Islands. If a partner of a Partnership is not susceptible to bankruptcy jurisdiction (a receiving order cannot be made against a Company – the procedure for winding up companies incorporated in the Cayman Islands is provided for in the Companies Law) an order can still be made against the Partnership. English authority suggests that, in such a case, a petition may be presented against the Partnership "other than" the relevant partner. The procedure under the Bankruptcy Law is therefore not a proceeding against the Partnership as such and is unlikely to be relevant in the context of the issues raised in this opinion (because most Partnerships are unlikely to have individuals as partners who are subject to jurisdiction under the Bankruptcy Law); and
- (c) certain regulatory laws under which such parties may be licensed as a result of carrying on a regulated activity (such laws include the Banks and Trust Companies Law (2013 Revision) (the "**Banks and Trust Companies Law**"), the Mutual Funds Law (2013 Revision), the Securities Investment Business Law (2011 Revision) and the Insurance Law, 2010 (the "**Insurance Law**")): such laws make provision for the appointment of controllers and liquidators to an entity regulated under the relevant regulatory law. As the provisions are very similar, the following discussion in relation to banks can be taken to be generally applicable to the other regulated entities. Sections 18(1)(iv) and (v) of the Banks and Trust Companies Law empowers the Cayman Islands Monetary Authority to appoint a controller to (a) advise the licensee on the proper conduct of its affairs and to report to the Cayman Islands Monetary Authority, or (b) assume control of the licensee's affairs who shall have all the powers of a person appointed as a receiver of a business appointed under section 18 of the Bankruptcy Law. It should be noted that this provision is not available to creditors generally. Furthermore, the powers may only be exercised if the Cayman Islands Monetary Authority is of the opinion that the licensee has breached the Banks and Trust Companies Law, has failed to comply with a condition of its licence, is carrying on its business in a manner detrimental to certain persons or the licensee is or it appears likely that the licensee will become unable to meet its obligations as they fall due. The controller is required to prepare a report for the Cayman Islands Monetary Authority and on receipt of such report the Cayman Islands Monetary Authority may revoke the license of the licensee and apply to the court for an order that the licensee be forthwith wound up by the court and in such winding up the provisions of the Companies Law relating to the winding up of a Company apply. In our view, the exercise of these powers would result in the appointment of a liquidator of the Company, trust or Partnership with the powers given to a liquidator by the Companies Law.

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

Segregated Portfolio Companies

- (a) Whilst segregated portfolio companies are subject to the insolvency provisions of the Companies Law there are particular rules which apply to them which are relevant to insolvency and set off. These are discussed below.
- (b) Under Part XIV of the Companies Law, the assets and liabilities of a segregated portfolio company are allocated to segregated portfolios as determined by the directors or to the general assets of the Company. In order for any liability or asset to be binding on or enure to the benefit of a segregated portfolio, that liability or asset must be contracted for by the segregated portfolio company on behalf of the relevant segregated portfolio and any written contract must identify the relevant segregated portfolio to which such asset or liability relates. Under the Companies Law, assets of a segregated portfolio may only be used to meet liabilities attributable to that segregated portfolio and are not available to meet liabilities attributable to any other segregated portfolio notwithstanding that the segregated portfolios are simply segregated pools of assets and liabilities of the same legal entity and the segregated portfolios themselves do not constitute separate legal entities. In a winding up of a segregated portfolio company, the liquidator is required to deal with the Company's assets in discharge of liabilities attributable to a segregated portfolio in accordance with Part XIV and Section 140(2) of the Companies Law (which contains the statutory right of set off), which are to be applied to segregated portfolio companies in accordance with Part XIV. In the event of any conflict between Section 140(2) and Part XIV, Part XIV will prevail.
- (c) As a result of the provisions described above, we believe that it is not possible to provide for set off both pre and post insolvency of a segregated portfolio company of a liability attributable to one segregated portfolio against an asset attributable to another segregated portfolio notwithstanding that the liability and asset are the liability and asset of the same legal entity (i.e. the segregated portfolio company). This is because were such set off permitted, the result would be that the assets of one segregated portfolio would be used to meet the liabilities of another which is prohibited under Part XIV.
- (d) The usual set off rules in Section 140(2) as set out in this opinion will continue to apply, however, to the liabilities and assets of each separate segregated portfolio.
- (e) As a result of the provisions described above, we believe Part XIV also prevents the assets of one portfolio being used to secure a liability attributable to another portfolio.
- (f) The Court also has the power to make receivership orders in respect of segregated portfolios where the Court is satisfied that (i) the assets attributable to the segregated portfolio and, if relevant, the general assets of the Company are or are likely to be insufficient to discharge the claims of creditors of that segregated portfolio in full and (ii) that the making of a receivership order would achieve the orderly closing down of the business carried on by the segregated portfolio and the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse to them. An application for a receivership order may be made by the segregated portfolio company itself, the directors of the Company, any creditor of the Company and any holder of shares referable to the relevant segregated portfolio and, if the segregated portfolio company is regulated by the Cayman Islands Monetary Authority, the Cayman Islands Monetary Authority.
- (g) A receivership order may not be made if the Company is already in winding up. A resolution for the voluntary winding up of a segregated portfolio company of which any segregated portfolio is subject to a receivership order is ineffective without

leave of the court. There is no general requirement for creditors of a segregated portfolio to be notified in advance of an application for a receivership order being made. This means that secured creditors will not be able to pre-empt the application for a receivership order by petitioning to wind up the Company unless they are otherwise aware that an application for a receivership order is to be made.

3.2 Recognition of choice of law

- (a) 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.
- (b) An Insolvency Representative or court in this jurisdiction would have regard exclusively 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 Provisions

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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships) immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following an Event of Default, including as a result of the opening of any Insolvency Proceedings:

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

We are of this opinion because:

Upon the insolvency of a Company, Section 140(2) of the Companies Law provides, *inter alios*, that the collection in and application of the property of a Company is without prejudice to and after taking into account and giving effect to any contractual rights of set-off or netting of claims between the Company and any person or persons (including without limitation any bilateral or any multi-lateral set-off or netting arrangements between the Company and any person or persons), provided always that any such agreement between the Company and any person or persons has not been waived or limited in any way.

Section 140(2) of the Companies Law also applies upon the insolvency of an Exempted Limited Partnership established under the Exempted Limited Partnership Law by virtue of Section 15(4) of the Exempted Limited Partnership Law.

Accordingly, in respect of Companies and Exempted Limited Partnerships, the FOA Netting Provision would be effective under the provisions of Section 140(2) of the Companies Law, subject to the following qualifications:

- (a) The right of set-off under the FOA Netting Provision will be restricted to the extent that giving effect to such right deprives a secured creditor of one of the parties of a debt over which such creditor has taken security in circumstances where the security taken over the debt is not subject to the right of set-off under the FOA Netting Provision. In practice as the parties rights under the FOA Netting Agreement or the Clearing Agreement, as the case may be, may not be assigned, charged or otherwise dealt with without the other party's written consent this is unlikely to be an issue. Furthermore, it is difficult to envisage a situation in which a party's rights under either the FOA Netting Agreement or the Clearing Agreement, as the case may be, could be assigned or charged otherwise than subject to the right of set-off in the FOA Netting Provision.
- (b) If the claim against one of the parties is subordinated or deferred to other creditors, the rights under the FOA Netting Provision will be restricted to the extent of such subordination or deferral. In practice, we assume that no agreement to subordinate or defer claims will be entered into by either party or, if one is, that appropriate advice will be obtained at that time concerning its effect

Trusts

The Nature of a Trust

A Trust is not a separate legal entity as a matter of Cayman Islands law. It is simply a fiduciary relationship whereby a fund is held by the Trustee that is subject to equitable obligations to deal with the fund under the terms of the trust instrument and in equity for the benefit of the beneficiaries who may enforce such equitable obligations. A unit trust is a Trust, the beneficiaries' interests in which have been unitised into specific fractional interests but this does not affect the analysis and we will refer to Trust throughout this analysis.

The Trustee will typically although not necessarily delegate certain functions to advisors, managers or other agents who will often have the authority, based on such delegation, to act on behalf of the Trustee and to execute documents on its behalf.

The Trustee is personally liable for obligations it incurs, even if expressed to be incurred as Trustee, in the sense that they are obligations of the Trustee and it can be sued personally on them. If it has duly entered into the obligations as Trustee of the Trust, it will have a right to discharge those obligations out of the Trust funds, or if it pays them out of its own resources, to be indemnified or reimbursed out of the Trust funds (such indemnity may be excluded or limited in the trust deed). If the Trust funds are insufficient to meet the liability in full (assuming the Trustee's right to the indemnity has not been excluded), the Trustee will be personally liable to the relevant creditor for the balance. Trusts therefore do not afford limited liability as a matter of their structure. It is permissible, however, for the Trustee to enter into contracts which themselves provide limitations of liability or recourse as a matter of contract. In certain circumstances the Trustee may also have a personal indemnity from the beneficiaries but this right is usually excluded in the trust deed.

The discussion below considers whether a set off right is enforceable viewed in the context of a solvent or insolvent Trust where the Trustee, being a Company incorporated in the Cayman Islands, is either solvent or subject to winding up proceedings in the Cayman Islands.

If the Trustee of the Trust is not incorporated in the Cayman Islands then the insolvency rules of the jurisdiction in which the Trustee is established will need to be investigated.

Solvent Trust, Insolvent Trustee

On a winding up of a Trustee, assets held by the Trustee as Trustee and their proceeds (provided they have not been mixed with the general assets of the Trustee and are readily identifiable) would not be available to satisfy the claims of general creditors of the Trustee (as such assets and their proceeds will be held on trust for the beneficiaries of the Trust), except:

- (a) to the extent that the Trustee has a personal right against such assets under the Trust (e.g. an indemnity for expenses); or
- (b) in respect of a secured creditor granted security over assets of the Trust, such a creditor would be entitled to rely on such security interest in such assets (at least to the extent the security was granted by the Trustee in accordance with its rights, powers and duties under the Trust).

If the Trust is solvent but the Trustee is in winding up proceedings, we believe that the FOA Netting Provision should be effective as a contractual matter and that no insolvency rule should apply to displace this. The insolvency rules applicable to companies incorporated in the Cayman Islands (in particular the requirement for *pari passu* distribution of assets) should not be relevant as the assets held by the Trustee as assets of the Trust (assuming they have not been mixed with the personal assets of the Trustee and are readily identifiable) are not available to the Trustee's general creditors in any event. Furthermore, even if a *pari passu* rule did apply to the distribution of the assets of the Trust, the Trust is solvent and so all creditors in respect of obligations regarding the Trust can be paid in full (even if the Trustee's general creditors cannot).

Insolvent Trust, Solvent Trustee

There are no specific insolvency proceedings in the Cayman Islands applicable to an insolvent Trust and no specific rules regarding how assets related to an insolvent Trust will be distributed amongst the outstanding creditors in respect of the Trust. In such circumstances, where the Trust fund is insufficiently valuable to discharge the contractual obligations regarding the Trust, the Trustee will bear the shortfall itself unless its liability is expressly limited in recourse to the Trust assets as a contractual matter. If a creditor in respect of an obligation regarding the Trust has a valid security interest over the Trust assets, such a creditor should be able to realise his security out of the secured Trust assets ahead of the other creditors in respect of the Trust (subject to the application of general insolvency rules, for example, fraudulent preference – see further below). Where the Trustee is faced by claims of competing unsecured creditors in respect of obligations regarding the Trust, there are no statutory rules as such which are applicable. The Trustee may therefore either:

- (a) choose to pay out creditors in the order that they make their claims: (when the Trustee would be bound by the contractual arrangements including any right of set off); or
- (b) alternatively, the Trustee might simply refer the matter to the court for a determination¹. The court has an equitable discretion to determine how to deal with matters arising in relation to the administration of a Trust, such as the payment of creditors to effect the orderly distribution of the Trust assets in such circumstances. We believe that there should be no basis on which a court may ignore an otherwise enforceable contractual set off in such proceedings, including in circumstances where the court might impose a *pari passu* basis of distribution of Trust assets.

¹ A trustee has power to seek advice and directions from the court under section 48 of the Trusts Law (2011 Revision).

Accordingly whether the Trustee elects simply to collect in assets and pay creditors itself or if the Trustee makes an application to the Cayman Islands Court for directions, we believe that there should be no basis arising out of the insolvency of the Trust on which the Trustee or a court (in an application under the Trusts Law) would refuse to enforce the Netting Provisions.

Insolvent Trust, Insolvent Trustee

If the Trust is insolvent and the Trustee is in winding up, then whilst the above would still be applicable in relation to the Trustee's general creditors, the Trustee would also be liable to creditors in respect of obligations regarding the Trust and hold assets of the Trust (and its own general assets which would also be available to such creditors assuming the obligations regarding the Trust are not limited in recourse to the Trust assets) which are insufficient to meet such obligations. In the absence of any insolvency rules applicable to Trusts as such, it is likely that if the matter came before a Cayman Islands court (because orders are sought from the court under the Trusts Law or because it is considered as part of a separate distribution scheme in relation to the Trust assets in the winding up of the Trustee) the court may either deal with the matter on the basis that the insolvency of the Trust does not affect the analysis because there are no separate insolvency rules applicable to Trusts or the court may apply a *pari passu* basis of distribution of the Trust assets (they may do this by analogy with the position under the Companies Law or because it is just and equitable).

If, following consideration of the FOA Netting Provision, a *pari passu* rule is applied then, although there is no authority on the point, we believe that a court should also allow set off as an exception – either because it is provided by the Companies Law (if it is treated as a separate distribution scheme of the Trust assets in the Trustee's winding up) or because it is just and equitable to do so.

Although the position is not entirely clear, we believe that mutuality is a general requirement for set off under Cayman Islands law and this raises the question whether set off, in the context of an insolvent Trust and Trustee, is restricted by the absence of mutuality. The absence of mutuality arises, if at all, because the Trustee is personally liable for obligations related to the Trust but holds the assets, which includes the benefit of any claims, on trust for the beneficiaries. Whilst the necessary mutuality exists in one sense in respect of the claims arising under either the FOA Netting Agreement or the Clearing Agreement, as the case may be, because they are assets and liabilities of the Trust, such assets and liabilities would not necessarily be beneficially owned by or wholly the liability of the Trustee².

If the court determines that a *pari passu* rule, with a set off qualification, applies in circumstances where Trust assets are to be applied to meet claims of the creditors related to the Trust, we believe it would produce an unfair and unexpected result if it was not also accepted that mutuality exists in the broad sense that assets of the Trust are being used to satisfy liabilities related to the Trust. Accordingly whilst there is no authority exactly on this point in the Cayman Islands or, we believe, in England (which would otherwise be persuasive but not binding in the Cayman Islands), we believe that the fact that a Trust is insolvent and that the Trustee is in winding up, should not affect the enforceability of set off under the FOA Netting Provision either because no insolvency rules apply to the Trust (and therefore the *pari passu* rule is irrelevant) or because, if a *pari passu* rule does apply, set off should be permitted and sufficient mutuality should be established.

² It is arguable that the trustee's right of indemnity under the Trusts Law (or under an express provision in the trust deed) may give the trustee sufficient interest in the trusts assets to establish the necessary mutuality but this is an uncertain area.

Partnerships

The Nature of a Partnership

A Partnership is not a separate legal entity under Cayman Islands law. The General Partner is liable for Partnership debts (i.e. debts validly contracted for on behalf of the Partnership) to the extent the assets of the Partnership are insufficient to meet such debts, unless the General Partner has limited a creditor's claim or recourse to the Partnership assets. The General Partner enters into all agreements on behalf of the Partnership under general legal principles of agency as modified by the terms of the partnership agreement and either the Partnership Law or the Exempted Limited Partnership Law, as appropriate. It should be noted that at least one General Partner of an Exempted Limited Partnership formed under the Exempted Limited Partnership Law must be either incorporated in the Cayman Islands, an Exempted Limited Partnership, a foreign company registered in the Cayman Islands or an individual resident in the Cayman Islands.

The statutory insolvency proceedings that exist in respect of Partnerships are:

- (a) certain provisions in the Bankruptcy Law, as discussed above in paragraph 3.3 (although this is an administratively convenient way of commencing bankruptcy proceedings against the partners to the extent those partners can be made subject to bankruptcy proceedings under the Bankruptcy Law); and
- (b) in the case of Exempted Limited Partnerships, except to the extent that the Companies Law is inconsistent with the Exempted Limited Partnership Law or there are any express provisions to the contrary, certain provisions of Part V of the Companies Law relating to the winding-up of a Company will now apply to Exempted Limited Partnerships as if each reference in Part V of the Companies Law to a "Company" were instead to an "Exempted Limited Partnership". Under the Exempted Limited Partnership Law the court has been given a general power, upon the application of a partner or creditor, to decree dissolution of an Exempted Limited Partnership and make such orders in connection with the winding up of its affairs as the court thinks just and equitable.

A Partnership may have a General Partner that is not established in the Cayman Islands and, in such a case, we recommend that the insolvency rules applicable in the jurisdiction in which such General Partner is established be checked to ensure that there is nothing under the applicable local law which may affect the enforceability of the Netting Provisions. The following discussion assumes that the General Partner is incorporated in the Cayman Islands.

Partnerships, excluding Exempted Limited Partnerships

Solvent Partnership, Insolvent General Partner

If the Partnership is solvent but the General Partner, being a Company incorporated in the Cayman Islands, is in winding up proceedings, we believe that the Netting Provisions should be effective and that there should be no basis on which they could be challenged simply as a result of the existence of winding up proceedings in respect of the General Partner. We believe that the insolvency rules applicable to Companies (in particular the requirement for *pari passu* distribution of assets) should not affect the outcome because the Partnership assets held by the General Partner are not available to the General Partner's general creditors³. Furthermore, even if the Partnership assets were required

³ section 7(8) of the Exempted Limited Partnership Law provides for Partnership assets to be held or deemed to be held by the General Partner and, if more than one then by the General Partners jointly, upon trust as an asset of the Partnership in accordance with the terms of the partnership agreement. The assets of a Partnership formed under the Partnership Law would

to be distributed on a *pari passu* basis to the Partnership's creditors, the Partnership is solvent and so all Partnership creditors can be paid in full (even if the General Partner's general creditors cannot).

Insolvent Partnership, Insolvent General Partner

If the Partnership is insolvent and the General Partner is in winding up, then whilst the above analysis would still be applicable in relation to the General Partner's general creditors, the General Partner would also be liable to Partnership creditors and hold assets, both Partnership assets and, if the creditor's claim has not been limited to the Partnership assets, its own general assets, which are insufficient to meet such claims.

In these circumstances, if the General Partner is a Company incorporated in the Cayman Islands or is registered as a foreign company under the Companies Law, such General Partner will be subject to the statutory rights of set off provided by Section 140 of the Companies Law. Accordingly, subject to the qualifications discussed in paragraph 3.3 above, any contractual rights of set off, such as those provided under the FOA Netting Provision, would be effective in accordance with Section 140(2) of the Companies Law.

In the absence of any contractual right of set-off or non set-off that would be caught within Section 140(2) of the Companies Law, it should be noted that account shall also be taken of what is due from the General Partner to its creditors (including Partnership creditors if the recourse of such creditors extends to the assets of the General Partner) and from its creditors to the General Partner, each in respect of their mutual dealings. In accordance with Section 140(3) of the Companies Law, the sums due from one party shall be set off against the sums due from the other.

In the absence of any insolvency rules applicable to a Partnership, we believe it is likely that if the matter came before a Cayman Islands court, either because orders are sought under the Partnership Law or because it is considered as a separate distribution scheme of the Partnership assets in the winding up proceedings relating to the General Partner, the court may either deal with the matter on the basis that the insolvency of the Partnership does not affect the analysis because there are no separate insolvency rules applicable to the Partnership or the court may apply a *pari passu* basis of distribution (they may do this by analogy with the position under the Exempted Limited Partnership Law and the Companies Law or simply because it is a just and equitable basis to proceed). If a *pari passu* rule is applied then, although there is no authority on the point, we believe that a court would also allow set off as an exception – either because it is provided by the Exempted Limited Partnership Law and the Companies Law or because it is just and equitable.

Although the position is not entirely clear, we believe that mutuality is a general requirement for set off under Cayman Islands law. This raises the question whether set off, in the context of an insolvent Partnership, is restricted by the absence of mutuality. The absence of mutuality arises, if at all, because the General Partner is personally liable for Partnership obligations but, in relation to a limited Partnership formed under the Partnership Law, the Partnership assets are held by all the partners jointly. Whilst the necessary mutuality exists in a general sense in respect of the claims arising under the Agreement, because they are liabilities and assets of the Partnership, the asset and liability would not necessarily be wholly beneficially owned by or wholly the liability of the General Partner.

Having accepted that a *pari passu* rule, with a set off qualification, applies in circumstances where Partnership assets are to be applied to meet claims of the

be held jointly. The General Partner's rights under the partnership agreement in respect of such assets would be an asset available to its creditors.

Partnership's creditors, it would produce an unfair and unexpected result if it was not also accepted that mutuality exists in the broad sense that Partnership assets are being used to satisfy Partnership liabilities. Accordingly whilst there is no authority on this point in the Cayman Islands or, we believe, in England (which would otherwise be persuasive but not binding in the Cayman Islands)⁴ we believe that the fact that a Partnership is insolvent and that the General Partner is in winding up should not affect the enforceability of the FOA Netting Provision, either because there are no insolvency rules which apply that are capable of displacing the otherwise effective contractual set off or, if there are insolvency rules, they recognise the contractual set off and mutuality is not an issue.

Insolvent Partnership, Solvent General Partner

If the Partnership is insolvent but the General Partner is solvent and not in winding up proceedings we believe that the position would be the same as that discussed above. As the General Partner is not in winding up the basis of any possible insolvency proceedings is limited to orders sought under the Exempted Limited Partnership Law.

Changes to Partners

We would also mention that it has been suggested that changes of partners may give rise to mutuality issues because of the change of ownership of assets or in relation to changes of General Partners, changes to those liable in respect of claims. We do not consider this to be an issue in relation to Exempted Limited Partnerships because of the application of the Companies Law and the entity type attributes accorded to them under the Exempted Limited Partnership Law, in particular, the fact that the assets are expressed to be held by the General Partner on trust for the Partnership and the fact that it is expressly provided that a change of limited partner or General Partner does not terminate or dissolve the Partnership. We think it would be usual in practice for liabilities of an outgoing General Partner of an Exempted Limited Partnership to be novated as no outgoing General Partner would wish to remain liable for Partnership obligations. Limited Partnerships formed under the Partnership Law (which are less common) may be affected by this issue but in practice liabilities would be novated and assets would be transferred in respect of any departing partner. It should also be noted that this point should not affect set off or netting under the same agreement because unless there is a transfer or novation the parties entitled to or liable under the agreement would remain the same.

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 Section 3.3 to apply.

3.4 Enforceability of the Clearing Module Netting Provision

In relation to a Clearing Agreement which includes the Clearing Module Netting Provision, the Clearing Module Netting Provision will be, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships), 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

⁴ There is authority in England in relation to the setting off of personal claims or personal liabilities of a partner against Partnership liabilities and assets see eg *Piercy v Fynney* (1871) L.R. 12 Eq 69 and *Jones v Fleeming* (1827) 7 B&C 217 (which say that this is not permitted unless, in the case of a Partnership liability, a partner is wholly liable for such debt when such debt may be set off against a personal claim of the partner).

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.

The opinion given in this paragraph 3.4 is subject to the analysis contained in paragraph 3.3 with respect to each type of Party. All references therein to "FOA Netting Provision" shall instead be deemed to be "Clearing Module Netting Provision".

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

No amendments to the Clearing Module Netting Provision are necessary in order for the opinions expressed in this Section 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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships), 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.

The opinion given in this paragraph 3.5 is subject to the analysis contained in paragraph 3.3 with respect to each type of Party. All references therein to "FOA Netting Provision" shall instead be deemed to be "Addendum Netting Provision".

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 Section 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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than

Exempted Limited Partnerships) immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms so that following an Event of Default (where the Defaulting Party is the Client), the Non-Defaulting Party would be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

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

The opinion given in this paragraph 3.7.1 is subject to the analysis contained in paragraph 3.3 with respect to each type of Party. All references therein to "FOA Netting Provision" shall instead be deemed to be "FOA Set-Off Provisions".

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

- 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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships) 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:

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

The opinion given in this paragraph 3.7.2 is subject to the analysis contained in paragraph 3.3 with respect to each type of Party. All references therein to "FOA Netting Provision" shall instead be deemed to be "FOA Set-Off Provisions".

No amendments to the General Set-off Clause or the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.2 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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships) 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; or
- (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.

The opinion given in this paragraph 3.8.1 is subject to the analysis contained in paragraph 3.3 with respect to each type of Party. All references therein to "FOA Netting Provision" shall instead be deemed to be "Clearing Module Set-Off Provision".

No amendments to the Addendum 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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships), 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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships), immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 3.8.1 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, in the case of Companies and Exempted Limited Partnerships, and should be, in the case of Trusts and Partnerships (other than Exempted Limited Partnerships) 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.

The opinion given in this paragraph 3.9 is subject to the analysis contained in paragraph 3.3 with respect to each type of Party. All references therein to "FOA Netting Provision" shall instead be deemed to be "Addendum Set-Off Provision".

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

3.10 Enforceability of the Title Transfer Provisions

- 3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.
- 3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value.
- 3.10.3 The courts of this jurisdiction would not recharacterise Transfers of Margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest.
- 3.10.4 A Party shall be entitled to use or invest for its own benefit, as outright owner and without restriction, any Margin Transferred to it pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

We are of this opinion because:

- (a) there are no filing or perfection requirements that are necessary or desirable or procedures which must be followed to establish, enforce or continue such ownership interest; and
- (b) on the basis that the Title Transfer Provisions are governed by English law and English law would not recharacterise such Title Transfer Provisions as creating a security interest, we do not believe that a transfer pursuant to the Title Transfer Provisions would be recharacterised as creating a security interest as a matter of Cayman Islands law. However, as the applicable conflict of law rule in relation to recharacterisation is not free from doubt we believe that the recharacterisation risk under the lex situs should also be considered. If Cayman Islands law is relevant because the Margin is located in the Cayman Islands, we believe the English authorities would be regarded as persuasive and accordingly, provided the arrangement is not a sham, the court would respect the intentions of the Parties.

The effect upon the contractual arrangements between the parties of the right of the collateral taker to substitute collateral, for example in accordance with clause 4.1 of the Title Transfer Securities and Physical Collateral Annex of 2011, will depend upon its effect as a matter of English law. Assuming the right of substitution is not inconsistent with the transfer analysis as a matter of English law, we believe this would be respected under Cayman Islands law. If the securities are located in the Cayman Islands, Cayman Islands law may then be relevant to the question of recharacterisation (see the discussion above). Under Cayman Islands law we do not believe that the right of the collateral taker to substitute securities affects the characterisation of the transfers and the presence or absence of consent by the collateral provider does not have any bearing on the answer.

Whilst Cayman Islands law would not prevent or restrict the Party's from agreeing as a matter of contract the terms of any substitution of securities, the validity of such terms would be determined in accordance with the governing law of the applicable agreement.

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

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

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

- (a) 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
- (b) the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

3.12 Single Agreement

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

If the affairs of the foreign branch of a party are wound up in the jurisdiction in which the branch is situated, the Cayman Islands Court cannot recognise any foreign order in respect of such winding up. Instead, the Party must be wound up under the rules of Part V of the Companies Law and the liquidator of the Party should bring the branch assets into account in the winding up. This may be difficult to achieve as a practical matter if the official administering the winding up of the branch in the foreign jurisdiction is unwilling or unable to cooperate with the liquidator in the Cayman Islands.

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.

In accordance with the Companies Law the Cayman Islands court may make winding up orders in respect of any foreign company which has property located in the Cayman Islands, is carrying on business in the Cayman Islands, is the general partner of a Partnership, or is registered under Part IX of the Companies Law. A Cayman Islands branch of a foreign company regulated under certain regulatory laws e.g. the Banks and Trust Companies Law, the Mutual Funds Law (2013 Revision), the Securities Investment Business Law (2011 Revision), the Insurance Law, 2010 and certain other laws may also be wound up in accordance with such regulatory laws. As the provisions are very similar, the discussion below in relation to banks can be taken to be generally applicable to the other regulated entities.

Sections 18(1)(iv) and (v) of the Banks and Trust Companies Law empowers the Cayman Islands Monetary Authority to appoint a controller to (a) advise the licensee on the proper conduct of its affairs and to report to the Cayman Islands Monetary Authority, or (b) assume control of the licensee's affairs who shall have all the powers of a person appointed as a receiver of a business appointed under section 18 of the Bankruptcy Law. It should be noted that this provision is not available to anyone other than the Cayman Islands Monetary Authority (for example it is not available to creditors generally). Furthermore, the powers may only be exercised if the Cayman Islands Monetary Authority is of the opinion that the licensee has breached the Banks and Trust Companies Law, has failed to comply with a condition of its license, is carrying on its business in a manner detrimental to certain persons or the licensee is or it appears likely that the licensee will become unable to meet its obligations as they fall due. The controller is required to prepare a report for the Cayman Islands Monetary Authority and on receipt of such report the Cayman Islands Monetary Authority may revoke the license of the licensee and apply to the court for an order that the licensee be forthwith wound up by the court and in such winding up the provisions of the Companies Law relating to the winding up of a company apply. In our view, the exercise of these powers would result in the appointment of a liquidator of the Company, Trust or Partnership with the powers given to a liquidator by the Companies Law. Theoretically a liquidator would, in the case of a Party that is a Company and regulated as a bank, have power in relation to all the assets of the Company, if it is the only insolvency official appointed in respect of the Company. Although this opinion only extends to matters of Cayman Islands law, it is

difficult to see how, in the circumstances, the liquidator could or would exercise his powers in relation to assets located outside the Cayman Islands. If an insolvency official is appointed in respect of the Company in a country other than the Cayman Islands, which is likely if there was an insolvency, then a Cayman Islands court is likely to limit the power of the liquidator appointed under the Banks and Trust Companies Law to collecting assets situated in the Cayman Islands.

The provisions of the Banks and Trust Companies Law will also apply to a foreign Trust or Partnership that has a branch in the Cayman Islands which is licensed as a bank. In such a case we believe the provisions of the Banks and Trust Companies Law discussed above in relation to foreign banks that are Companies would apply.

3.16 Special legal provisions for market contracts

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

4 Qualifications

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

4.1 In the event of the insolvency of a Party, the rights of a non-defaulting party as set forth in the FOA Netting Agreement or, as the case may be, the Clearing Agreement may be affected by the following insolvency provisions of Cayman Islands law:

- (a) Voidable Preference under the Companies Law - the enforceability of set-off or netting against a Company and any insolvent partner may, in certain circumstances, be qualified if, for example, the pre-conditions for a voidable preference under Section 145(1) of the Companies Law were present. In accordance with Section 145(1), every conveyance or transfer of property or charge therein, every payment, every obligation and every judicial proceeding made, incurred, taken or suffered by any Company or Exempted Limited Partnership which is unable to pay its debts as they become due from its own monies in favour of any creditor with a view to giving such creditor a preference over the other creditors will be invalid if made within, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation. Furthermore, in accordance with Section 145(2) and for the purposes of Section 145(1), if any such payment has made to a related party of the Company, such payment shall automatically be deemed to have been made with a view to giving such creditor a preference. For this purpose, a creditor shall be treated as a "related party" if it has the ability to control the Company or exercise significant influence over the Company in making financial and operating decisions. Sections 145 (1) and (2) shall only apply to Exempted Limited Partnerships upon an involuntary dissolution of such Exempted Limited Partnership.
- (b) Transactions at an undervalue under the Companies Law – in accordance with Section 146(2) of the Companies Law, every disposition of property made at an undervalue by or on behalf of a Company or Exempted Limited Partnership with intent to defraud its creditors shall be voidable at the instance of its official liquidator. The burden of establishing an intent to defraud for the purposes of section 146 (2) shall be upon the official liquidator.
- (c) If in the course of the winding up of a Company it appears that any business of the Company has been carried on with intent to defraud creditors of the Company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under Section 147(1) of the Companies Law.

- (d) Fraudulent Preference under the Bankruptcy Law - Section 111(1) of the Bankruptcy Law (1997 Revision) (the "**Bankruptcy Law**") deals with fraudulent preference in the context of partnerships (and other persons subject to bankruptcy proceedings such as individuals) and applies when the relevant step is made, incurred, taken or suffered within 6 months before the provisional order takes effect. In the case of Exempted Limited Partnerships, the provisions relating to voidable preferences set out in 8.1 should instead apply.
- (e) It should be noted that a provisional order referred to in 4.1 (d) is deemed to have effect from the first "act of bankruptcy" committed by the debtor within 6 months preceding the date of presentation of the bankruptcy petition (provided at that time the debtor was indebted to a creditor(s) in an amount sufficient to support a petition (CIS\$40) and such debt or debts were still outstanding at the date of the provisional order). The effect of a provisional order is to vest all the bankrupt's property in the Trustee with the result that any disposition made by the partnership from the first act of bankruptcy is void. However, Section 118 of the Bankruptcy Law validates certain transactions (including the payment of debtors, conveyance of property and grant of security) occurring prior to the filing of the petition but after the first act of bankruptcy provided the other party had no notice of any act of bankruptcy which could have formed the basis of a petition at the time the petition was filed. Any act of bankruptcy must have occurred within 6 months of the presentation of the petition to form the basis of that petition.
- (f) Fraudulent Disposition under the Fraudulent Dispositions Law (1996 Revision) - Under the Fraudulent Dispositions Law (1996 Revision) every disposition of property made with an intent to defraud (which means an intention wilfully to defeat an obligation owed to another creditor) and at an undervalue shall be voidable at the instance of the creditor thereby prejudiced. It should be noted however that there is no "suspect period" in the case of this provision and that it would apply where the debtor is located in the Cayman Islands or outside the Cayman Islands and to any form of debtor (company, partnership, trust, individual etc.).
- (g) It should also be noted that a creditor of a Cayman Islands company may have a compromise or arrangement imposed upon him under Section 86(1) of the Companies Law if a majority in number representing three fourths in value of the creditors (or class of creditors including the affected creditor) have approved the compromise or arrangement and it has been sanctioned by the Grand Court of the Cayman Islands. Although this is not a mandatory insolvency provision it is a circumstance in which a creditor of a Cayman Islands company may be made subject to an arrangement or compromise affecting his rights without his consent. It would not however affect the enforcement of netting rights under either the FOA Netting Agreement or, as the case may be, the Clearing Agreement.
- (h) In the context of proceedings taken against a partner of a partnership under the Bankruptcy Law, there are specific provisions in the Bankruptcy Law which allow a trustee in bankruptcy to disclaim onerous contracts. Whilst we believe that disclaimer could apply to rights of set off, we do not believe that it could apply to different parts of the same contract and any such disclaimer would apply only to entire contracts i.e. the Agreement as a whole.

4.2 Section 99 of the Companies Law provides that, when a winding up order has been made in respect of a Company, any disposition of the Company's property and any transfer of shares or alteration in the status of the Company's members made after the commencement of the winding up is, unless the Court otherwise orders, void. If the counterparty and the Company enter into Transactions or the Company makes a payment under a Transaction after the commencement of the Company's winding up

without the approval of the Grand Court, such Transaction or payment would be void. This provision will also apply to Exempted Limited Partnerships.

- 4.3 Section 140(1) of the Companies Law provides for the mandatory *pari passu* distribution of assets to unsecured creditors in a voluntary winding-up. Section 140(1) is subject to Section 140(2) which, as discussed above, provides that the *pari passu* distribution and collection of assets is without prejudice to and after taking into account and giving effect to any rights of set off or netting of claims (including without limitation any bilateral or any multi-lateral set off or netting arrangements) between the Company or Exempted Limited Partnership and any person or persons (whether conferred by agreement or law), subject to any agreement between the Company or Exempted Limited Partnership and any person or persons to waive or limit the same. The distribution of assets will not impact any assets subject to a validly created security interest given the provisions of Section 142 of the Companies Law, which provides that secured creditors may enforce their security notwithstanding that a winding up order has been made in respect of the Covered Customer.
- 4.4 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 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 set-off effected under or pursuant to any statutory insolvency proceedings. Mutuality should be considered in relation to any Party that is a Trust or a Partnerships (other than Exempted Limited Partnerships), as discussed in Section 3.3 above.
- 4.5 There are no other material issues relevant to the issues raised by this opinion which we wish to draw to your attention except to note that:
- (a) The term "enforceable" means that the obligations assumed by a Party under 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 and the Title Transfer Provisions are of a type which the courts of the Cayman Islands enforce. It does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms, including the following general limitations:
 - (i) enforcement may be limited by general principles of equity for example, equitable remedies such as specific performance for the delivery of physical securities may not be available, inter alia, where damages are considered to be an adequate remedy; and
 - (ii) claims may become barred under statutes of limitation or may become subject to defences of counterclaims, estoppel, laches and similar defences (the defence of set off is considered in detail above).
 - (b) Nominal Cayman Islands stamp duty will be payable if an original FOA Netting Agreement or, as the case may be, the Clearing Agreement is executed in or brought into the Cayman Islands - payment of such duty is required for either the

FOA Netting Agreement or the Clearing Agreement, as the case may be, to be admitted in evidence in the courts of the Cayman Islands.

- (c) The obligations of a party under the FOA Netting Agreement or, as the case may be, the Clearing Agreement which involve the government of any country which is currently the subject of United Nations sanctions (an "Affected Country"), any person or body resident in, incorporated in or constituted under the laws of any Affected Country or any persons or body controlled by any of the foregoing or by any person acting on behalf of any of the foregoing may be subject to restrictions pursuant to such restrictions as implemented under the laws of the Cayman Islands.
 - (d) We have reservations as to the ability of a party to obtain interest on judgments at a default rate after judgment in the courts of the Cayman Islands.
 - (e) The determination or calculation of Margin and other amounts under the FOA Netting Agreement or, as the case may be, the Clearing Agreement might be held by a Cayman Islands court not to be binding in the event of manifest error or if it could be shown to have an unreasonable or arbitrary basis.
- 4.6 The Firm's or Clearing Member's rights under the FOA Netting Agreement or the Clearing Agreement, as the case may be, would not be subject to any stay or freeze or otherwise be affected by the commencement of the insolvency or winding up of the Client.
- 4.7 Where the Client is a Company or Exempted Limited Partnership, Section 97(1) of the Companies Law will apply to it and provides:

"When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose."

This prohibition in our view extends to judicial proceedings and does not include security enforcement methods which do not require an order of the court in the Cayman Islands. Furthermore, subject to any debts preferred by law as discussed above, Section 142 of the Companies Law provides that secured creditors may enforce their security notwithstanding that a winding up order has been made in respect of the Covered Customer.

It should also be noted that Section 96 of the Companies Law provides that, at any time after the presentation of a winding up petition and before a winding up order has been made, the Company (or Exempted Limited Partnership) or any creditor or contributory may (a) where any action or proceeding against the Company, including a criminal proceeding, is pending in a summary court, the Court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and (b) where any action or proceeding is pending against the Company (or Exempted Limited Partnership) in a foreign court, apply to the Court for an injunction to restrain further proceedings therein, and the court to which application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

In practice the scope and effect of the stay under Section 96 is the same as Section 97(1). On a voluntary winding up there is no automatic moratorium. The Court does however have discretion to impose a moratorium on a blanket or a case by case basis. In practice, the court would only exercise its discretion if there was any doubt about the Company's (or Exempted Limited Partnership's) solvency.

Where the Party is a Partnership and proceedings are taken under the Bankruptcy Law, Section 34 provides that when a provisional or an absolute order has been made against

a debtor, no creditor shall have any remedy against the property or person of the debtor and all proceedings shall be stayed. It is expressly provided, however, that the provisions of Section 34 shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with the same if Section 34 had not been passed. We believe that proceedings under the Bankruptcy Law would not therefore prevent the Firm from enforcing its security against a Partnership. The conclusions reached in Section 3.3 in relation to the enforceability of the FOA Netting Provisions will not be affected by any proceedings brought under Section 34 of the Bankruptcy Law.

- 4.8 This opinion is given only as to, and based on, circumstances and matters existing on the date hereof and known to us and as to the laws of the Cayman Islands as the same are in force at the date hereof. We express no opinion with regard to any systems of law other than the laws of the Cayman Islands applied by the Courts of the Cayman Islands. To the extent that the laws of England may be relevant, we have made no independent investigation thereof and our opinion is subject to the effect of such laws.

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 given 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,

A handwritten signature in black ink, appearing to read "Maples and Calder", written in a cursive, flowing style.

Maples and Calder

ANNEX 1
FORMS OF FOA AGREEMENTS

- 1 One-Way Master Netting Agreement (1997 version) (the "**One-Way Master Netting Agreement 1997**")
- 2 Two-Way Master Netting Agreement (1997 version) (the "**Two-Way Master Netting Agreement 1997**")
- 3 Long-Form One-Way Clauses (2007 version) (the "**Long-Form One-Way Clauses 2007**")
- 4 Short-Form One-Way Clauses (2007 version) (the "**Short-Form One-Way Clauses 2007**")
- 5 Short-Form One-Way Clauses (2009 version) (the "**Short-Form One-Way Clauses 2009**")
- 6 Short-Form One-Way Clauses (2011 version) (the "**Short-Form One-Way Clauses 2011**")
- 7 Long-Form Two-Way Clauses (2007 version) (the "**Long-Form Two-Way Clauses 2007**")
- 8 Long-Form Two-Way Clauses (2009 version) (the "**Long-Form Two-Way Clauses 2009**")
- 9 Long-Form Two-Way Clauses (2011 version) (the "**Long-Form Two-Way Clauses 2011**")
- 10 Short-Form Two-Way Clauses (2007 version) (the "**Short-Form Two-Way Clauses 2007**")
- 11 Short-Form Two-Way Clauses (2009 version) (the "**Short-Form Two-Way Clauses 2009**")
- 12 Short-Form Two-Way Clauses (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

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- 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 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 with any transaction within paragraph (i), (ii) or (iii) of this definition, or
 - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product;
- (E) OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC, including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

ANNEX 3

DEFINITIONS RELATING TO THE AGREEMENTS

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

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

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

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

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

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

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

"Clearing Agreement" means an agreement:

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

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

- (a) Clause 6.2 (Firm Events), 6.3 (CCP Default) and 6.4 (Hierarchy of Events) of the FOA Clearing Module; or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow,

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

"Clearing Module Netting Provision" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module) Clause 5.2 (*Firm Events*), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module, together with the defined terms required properly to construe such Clauses:

- (a) Clause 6.5 (Set-Off) of the FOA Clearing Module; or
- (b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow,

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

"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) Clause 5.5 (*Set-Off*) of the FOA Clearing Module 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 (with Security Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Security Provisions) Agreement 2009, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009, the Eligible Counterparty (with Security Provisions) Agreement 2011 or the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

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

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

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

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

"**FOA Netting Agreements (with Title Transfer Provisions)**" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail

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

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

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

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

"FOA Set-off Provisions" means:

- (a) the **"General Set-off Clause"**, being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (**Set-off**);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (**Set-off**);
 - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (**Set-off**);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (**Set-off**);

- (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (**Set-off**);
 - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (**Set-off**);
 - (vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (**Set-Off**);
 - (viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (**Set-Off**); or
 - (ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or
- (b) the "**Margin Cash Set-off Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (**Set-off on default**);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (**Set-off upon default or termination**);
 - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (**Set-off on default**),
 - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (**Set-off upon default or termination**);
 - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (**Set-off on default**);
 - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (**Set-off upon default or termination**); or
 - (vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

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

- (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
 - (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);
 - (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or
 - (vi) provided that any modified version 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) (iii) 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 (with Security Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Security Provisions) Agreement 2009, the Professional Client

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

"Rehypothecation Clause" means:

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

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

"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.
- (c) the "**Client Money Additional Security Clause**", means
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);

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

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

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

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

- (a) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version); or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 3 (*Security Interest 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.

ANNEX4

PART1 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:

1. (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/Section];
- (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 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 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

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

b) CCP Default

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

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];
2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;
3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the

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

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

c) Hierarchy of Events

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

Or

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

Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the clause pursuant to

which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

d) Definitions

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

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

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

- (a) is attributable to such Client Transactions;
- (b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and
- (c) is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

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

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

(c) **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.

(d) **Addendum Set-Off Provision**

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

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

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

(iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right

of retention or withholding or similar right or requirement to which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.

PART 2

NON-MATERIAL AMENDMENTS

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

10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.
11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.
13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.
14. Any change to the FOA Set-Off 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:
 - (a) more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
 - (b) more than one FOA Clearing Module or Clearing Module Netting Provision
 - (c) one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision
 - (d) provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.

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

PART 3

SECURITY INTEREST PROVISIONS

1. Security Interest Clause:

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

2. Power of Sale Clause:

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

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