

NETTING ANALYSER LIBRARY

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5 December 2013

Dear Sirs,

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

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

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

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

**1. TERMS OF REFERENCE AND DEFINITIONS**

**1.1 Subject as provided at paragraph 1.2, this opinion is given:**

**1.1.1 generally, in respect of persons which are**

- (a) private commercial entities organised or incorporated under the laws of France having one of the forms referred to in Book II of the Commercial Code and being *sociétés en nom collectif* (SNC), *sociétés en commandite simple* (SCS), *sociétés à responsabilité limitée* (SARL), *sociétés anonymes* (SA), *sociétés par actions simplifiées* (SAS) and *sociétés en commandite par actions* (SCA) which are not any of the entities referred to in paragraph 1.2 below (each, a "Company"); and
- (b) credit institutions within the meaning of directive n° 2006/48/EC of the European Parliament and of the Council dated 14 June 2006, whether:
  - (i) established under French law and duly authorised under French law pursuant to articles L. 511-1 *et seq.* of the French *Code monétaire et*



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*financier* (the "Financial Code"); or (ii) under the laws of any other state being a party to the agreement on the European economic area (EEA) (an "EEA Member State"), acting in France in accordance with the rules of European passport set forth in the aforementioned directive as implemented into French law under articles L. 511-21 *et seq.* of the Financial Code (each: a "Credit Institution").

By way of the exception to the foregoing, covered bond issuers (being *sociétés de credit foncier* (SCF) and *sociétés de financement à l'habitat* (SFH)) respectively governed by articles L. 515-13 *et seq.* and article L. 515-34 *et seq.* of the Financial Code, as well as those credit institutions being public bodies (such as municipal credit banks (*crédit municipaux*), local development banks (*sociétés de développement régional*), etc.), are expressly excluded from the scope of this opinion letter.

- (c) natural persons acting in the capacity as merchant (*commerçant*)<sup>1</sup> or craftsman (*artisans*)<sup>2</sup>.
- 1.1.2 generally, in respect of Parties incorporated or formed under the laws of another jurisdiction which are companies or banks which have a branch or branches located in this jurisdiction.
- 1.2 This opinion is also given in respect of Parties that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:
  - 1.2.1 Investment Firms (*Schedule 1*);
  - 1.2.2 Insurance companies (*Schedule 2*);
  - 1.2.3 French collective investment schemes organised as OPCVMs (*Organismes de placement collectif en valeurs mobilières*) under the Financial Code (*Schedule 3*) which include SICAVs (*Sociétés d'investissement à capital variable*) and FCPs (*fonds communs de placement*).
- 1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the Netting Agreement and the Clearing Agreement are expressed to be governed by English law.
- 1.4 This opinion 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. We have not considered for the purposes of this

<sup>1</sup> Merchants are persons other than Companies who carry out, on a professional basis, commercial transactions listed in articles L. 110-1 and L. 110-2 of the Commercial Code.

<sup>2</sup> According to the article 19-I of the law No. 96-603 of 5 July 1996, craftsmen are the natural persons and legal entities who employ no more than ten (10) employees and who exercise in main or secondary title a professional activity independent from production, for transformation (processing), for repair or for service offer recovering from the small business sector (crafts) and appearing on a list established by decree in *Conseil d'état* after consultation of the permanent assembly of professional associations, chamber of business and industry (*chambre de commerce et de l'industrie*) and the representative professional organizations. Craftsmen must be registered in the trade directory or in the register of companies referred to in part IV of the law of 5 July 1996.

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opinion any rule or procedure issued by a clearing house (including any rule governed by French law).

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

#### 1.6 Definitions

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

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

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

## 2. ASSUMPTIONS

We assume:

- 2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision or any provision of a rule or procedure of a clearing house (including, for the avoidance of doubt, any such rule governed by French law). In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.
- 2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party



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has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

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

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2.15 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates; and (b) will be a Credit Institution or an Investment Firm.

### 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

3.1.1 The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a French Party<sup>1</sup> (in respect of Foreign Parties we refer you to paragraph 3.15 below) would be subject in this jurisdiction are the following:

- (i) safeguard proceeding (*procédure de sauvegarde*) ("Safeguard Proceeding") governed by articles L. 620-1 *et seq.* of the Commercial Code<sup>2</sup>;
- (ii) accelerated financial safeguard proceeding (*procédure de sauvegarde financière accélérée*) ("Accelerated Financial Safeguard

<sup>1</sup> Note that, in addition to Insolvency Proceedings, a French Party may become subject in France to the following pre-insolvency proceedings: (i) *mandat ad hoc*, as provided for in article L. 611-3 of the Commercial Code; and (ii) conciliation proceeding (*procédure de conciliation*), as provided for in article L. 611-4 of the same code. The opening of a *mandat ad hoc* proceeding or a conciliation proceeding does not entail an automatic stay of payments or actions. Nevertheless, the competent court can order a stay or deferral of payments for a period of up to two years if a creditor has started legal action against the debtor (article 1244-1 *et seq.* of the Civil Code). A conciliation proceeding only binds the parties to the conciliation agreement and remains confidential, save that where the conciliation agreement is acknowledged by the court (*homologué*) the terms thereof are no longer confidential.

<sup>2</sup> Pursuant to articles L. 620-2, L. 628-1, L. 631-2 and L. 640-2 of the Commercial Code, which determines the scope of French Insolvency Rules, its provisions apply to any merchant, craftsman, any farmer, any other individual who carries out an independent business including a professional subject to a statutory or regulatory status or whose title is protected, or any private law legal person. As a consequence, FCPs (*fonds commun de placement*), public establishments (*établissements publics*), the French State and municipalities (*collectivités locales*) may not be subject to Insolvency Proceedings. In addition, securitisation vehicles (*organismes de titrisation*) governed by articles L. 211-43 *et seq.* of the Financial Code are expressly excluded from the scope of application of Insolvency Proceedings.

<sup>3</sup> Safeguard Proceedings are only available to any French party who, although not in actual state of cessation of payments (a debtor is in a state of cessation of payments when it is unable to pay its debts when due with its available cash and assets it has available that can be immediately converted into cash, or with respect to credit institutions, when it is unable to meet its current liabilities, immediately or in the near future), establish that it is facing difficulties which it cannot overcome. The purpose of Safeguard Proceedings is to facilitate, at an early stage of the difficulties, a consensual restructuring in the framework of formal proceedings, triggering a stay of payments and actions. If recovery is possible the court decides on a safeguard plan which provides for the rehabilitation and continuation of the operations of the debtor. At the request of the debtor concerned and to the extent that such debtor is eligible for a Safeguard Proceeding, the court orders the commencement of the observation period ("période d'observation") allowing continuation of the operations of the debtor under the protection of the court (the observation period can last for up to 12 months with a possible extension up to a maximum duration of 18 months).

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**Proceeding")** governed by articles L. 628-1 *et seq.* of the Commercial Code<sup>6</sup>;

(iii) rehabilitation proceedings (*redressement judiciaire*) ("**Judicial Rehabilitation Proceeding")** governed by articles L. 631-1 *et seq.* of the Commercial Code<sup>7</sup>; and

(iv) judicial liquidation (*liquidation judiciaire*) ("**Judicial Liquidation Proceeding")** governed by articles L. 640-1 *et seq.* of the Commercial Code<sup>8</sup>.

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

**3.1.2 Special considerations regarding Credit Institutions**

Credit Institutions established in France are subject to the supervision and control of the ACPR. Under article L. 613-27 of the Financial Code, Insolvency Proceedings may only be opened against a Credit Institution by a French commercial court having jurisdiction following advice by the *Autorité de contrôle prudentiel* (the "ACPR") (*avis conforme*). Under article L. 613-27 of the Financial Code, the ACPR may, among other things, designate a provisional administrator (*administrateur provisoire*) either at the request of the directors of the Credit Institution concerned or upon its own initiatives when the management of such Credit Institution cannot be pursued under normal conditions or when it has been subject to disciplinary sanctions. Such provisional administrator shall manage the activities of the Credit Institution concerned. The ACPR also designate a liquidator (*liquidateur*) for a Credit Institution, in case a Judicial Liquidation Proceeding is opened or pronounced. As the case may be, the liquidator may be entrusted with all powers of administration, management and representation of the relevant Credit Institution. The ACPR may also take resolution measures against a French Credit Institution.

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<sup>6</sup> Accelerated Financial Safeguard Proceedings enable a debtor to impose a pre-packaged restructuring plan (negotiated with a majority of creditors in the framework of a confidential conciliation proceeding) on dissenting financial creditors, without affecting the position of its trade creditors. These proceedings are only available to debtors whose balance-sheet total exceeds (i) 25 million euro, or (ii) 10 million euro when the debtors control a company having (a) more than 150 employees or 20 million euro turnover or (b) a balance-sheet total exceeding 25 million euro. The main difference with the Safeguard Proceedings is that only financial creditors (mainly credit institutions and bondholders) are involved in the procedure and affected by the general stay of creditors' claims and actions. These proceedings cannot last more than one month (subject to a one month extension under certain circumstances).

<sup>7</sup> Rehabilitation Proceedings are available to French Parties which are in a state of cessation of payments but appear viable. The opening of a Rehabilitation Proceeding triggers a stay of payments and actions.

<sup>8</sup> Judicial Liquidation Proceedings are available to French Parties which are in a state of cessation of payments and for which recovery through a rehabilitation plan is not possible. The competent court appoints a liquidator who exercises all the powers of the management and a representative of the creditors. In a Judicial Liquidation Proceeding the court realises the assets.

## 3.2 Recognition of choice of law

3.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England.

In "*situations involving a conflict of laws*"<sup>9</sup>, within the meaning of article 1.1 of regulation (EC) No. 593/2008 dated 17 June 2008 on the law applicable to contractual obligations ("Rome I")<sup>10</sup>, a French court would apply article 3 (*Freedom of choice*) thereof and give effect to the choice of English law to govern the relevant Agreement.

Such recognition would in any event be subject to all limitation provided for under the Rome I Regulation, in particular article 3.3 (on internal mandatory provisions of the law of the country in which all elements of the situation are located), article 9 (*Overriding mandatory provisions*) and article 21 (*Public policy of the forum*).

In addition, it should be noted that the scope and effect of a choice of law made by the parties is likely to be limited or contained by special conflict of laws rules applicable to specific matters and/or to specific situations, in particular in the context of Insolvency Proceedings.

3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law, as appropriate, as the governing law of the FOA Netting Agreement or, as the case may be, 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.

3.2.3 To determine the impact of opening of Insolvency Proceedings on the validity, enforceability and effectiveness of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision (together: the "**Netting Provisions**"), the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision, and the Title Transfer Provisions, a French court would apply the French law provisions related to Insolvency Proceedings (the "**French Insolvency Rules**") (or, as applicable, Regulation Proceedings) except to the extent specifically provided otherwise. In particular:

(a) with respect to a Credit Institution: (i) in accordance with article L. 613-31-5-4° of the Financial Code<sup>11</sup>, netting agreements ("*conventions*

<sup>9</sup> The notion of "*situations involving conflict of laws*" has been discussed by several scholars in the context of the 1980 Rome Convention, which contains a similar wording. Most of such scholars are the view that the mere fact that the parties have chosen a law other than the law to which all other elements of the matter are linked will create a "*situation involving a conflict of laws*". Based on such interpretation, even in respect of Transactions which does not present any specific link to English law, a French court would apply the Rome I Regulation.

<sup>10</sup> The Rome I Regulation applies to contracts concluded on or after 17 December 2009 (Article 28 of the Rome I Regulation). A choice of English law made in a contract prior to 17 December 2009 will be subject to the 1980 Rome Convention on law applicable to Contractual Obligations.

<sup>11</sup> Implementing article 25 of the Credit Institution WUD.



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*de compensation")* are exclusively governed by the law applicable to the contract governing such agreements;

- (b) pursuant to article L. 613-31-6-4° of the Financial Code<sup>12</sup>, the opening of an Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set off rights by the Non-Defaulting Party. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim
- (c) pursuant to article L. 613-31-5-5° of the Financial Code<sup>13</sup>, where, by an act concluded after the adoption of a reorganization measure or the opening of winding-up proceedings, a credit institution disposes, for consideration, of financial instruments or rights in such instruments the existence or transfer of which presupposes their being recorded in a register, an account or a centralised deposit system held or located in a Member State, the validity of that act shall be governed by the law of the Member State within the territory of which or under the authority of which that register, account or deposit system is kept.
- (d) within the scope of EU Insolvency Regulation, in accordance with article 6 thereof, the opening of Regulation Proceedings (as defined below) does not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such set-off is permitted by the law applicable to the insolvent debtor's claim, without prejudice however to actions for voidness, voidability or unenforceability.

**3.3 Enforceability of FOA Netting Provision**

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

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

We are of this opinion because in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the FOA Netting Provision (please refer to our developments in paragraph 4.1 below).

In addition to the above, in respect of a Credit Institution being the Defaulting Party:

- (i) pursuant to article L. 613-31-6-1-4° of the Financial Code, the opening of an

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<sup>12</sup> Implementing article 23.1 of the Credit Institution WUD.

<sup>13</sup> Implementing article 31 of the Credit Institution WUD.



Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set off rights by the Non-Defaulting Party. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim; and (ii) pursuant to article L. 613-31-5-4° of the Financial Code, netting agreements ("*conventions de compensation*") are exclusively governed by the law applicable to the contract governing such agreements.

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 right to enforce the FOA Netting Provision, where the same benefit from the Financial Netting and Collateral Regime.

### 3.4 Enforceability of the Clearing Module Netting Provision

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

- 3.4.1 in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the Clearing Module Netting Provision (*please refer to our developments in paragraph 4.1 below*); and
- 3.4.2 in respect of a Credit Institution: (i) pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set-off rights by the Parties. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim; and (ii) pursuant to article L. 613-31-5-4° of the Financial Code, netting agreements ("*conventions de compensation*") are exclusively governed by the law applicable to the contract governing such agreements.

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, where the same benefit from the Financial Netting and Collateral Regime

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

### 3.5 Enforceability of the Addendum Netting Provision

In relation to a Clearing Agreement which includes the Addendum Netting Provision, the Addendum Netting Provision will be immediately (and without fulfilment of any



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further conditions) enforceable in accordance with its terms so that, following (i) a CM Trigger Event or (ii) a CCP Default, the Parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of the relevant individual Client Transactions that are terminated in accordance with the Clearing Agreement. We are of this opinion because:

- 3.5.1 in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the Addendum Netting Provision (*please refer to our developments in paragraph 4.1 below*); and
- 3.5.2 in respect of a Credit Institutions: (i) pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set off rights by the Parties. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim; and (ii) pursuant to article L. 613-31-5-4° of the Financial Code, netting agreements ("*conventions de compensation*") are exclusively governed by the law applicable to the contract governing such agreements.

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 Provision, where the same benefit from the Financial Netting and Collateral Regime.

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

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

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

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

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



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the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

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

We are of this opinion because:

- (i) in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the FOA Set-Off Provisions (please refer to our developments in paragraph 4.1 below); and
- (ii) in respect of a Credit Institutions: (i) pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set off rights by the Parties. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim; and (ii) pursuant to article L. 613-31-5-4° of the Financial Code, netting agreements ("*conventions de compensation*") are exclusively governed by the law applicable to the contract governing such agreements.

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

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

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

against the Liquidation Amount (where such liquidation amount is owed by the Client); or

(b) the value of any cash balance owed by the Client to the Firm or, as the case may be, the Clearing Member would be set off against the Liquidation Amount (where such liquidation amount is owed by the Firm or, as the case may be, the Clearing Member); or

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

We are of this opinion because:

(i) in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the FOA Set-Off Provisions (please refer to our developments in paragraph 4.1 below); and

(ii) in respect of Credit Institutions only, pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set off rights by the Parties. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim.

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

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

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

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

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



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We are of this opinion because:

- (a) in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the Clearing Module Set-Off Provision (*please refer to our developments in paragraph 4.1 below*); and
- (b) in respect of a Credit Institutions: (i) pursuant to article L. 613-31-6-1-4° of the Financial Code, the opening of an Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set off rights by the Parties. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim; and (ii) pursuant to article L. 613-31-5-4° of the Financial Code, netting agreements ("*conventions de compensation*") are exclusively governed by the law applicable to the contract governing such agreements.

- 3.8.2 No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.8.1 to apply.
- 3.8.3 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision for which the FOA Set-Off Provision (insofar as constituting part of the FOA Netting Agreement) is not a Disapplied Set-Off Provision, the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 3.8.1 above; and the FOA Set-Off Provision will, to the extent that set-off is not already covered by the Clearing Module Set-Off Provision, be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 3.7.1 above.

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

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

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

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

We are of this opinion because:



- (i) in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the Addendum Set-Off Provision (*please refer to our developments in paragraph 4.1 below*); and
- (ii) in respect of a Credit Institutions: (i) pursuant to article L. 613-31-6-I-4° of the Financial Code, the opening of an Insolvency Proceeding against a Credit Institution would not affect the exercise of netting and set off rights by the Parties. Indeed, the adoption of reorganisation measures or the opening of liquidation proceedings against a Credit Institution shall not affect the rights of creditors to demand the set-off of their claims against the claims of such Credit Institution, where such set-off is permitted by the law applicable to the Credit Institution's claim; and (ii) pursuant to article L. 613-31-5-4° of the Financial Code, netting agreements ("*conventions de compensation*") are exclusively governed by the law applicable to the contract governing such agreements.

3.9.2 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.
- 3.10.5 We are of this opinion because article L. 211-38 of the Financial Code (which aim to implement the provisions of the Directive No. 2002/47/EC of the European Parliament and of the Council of 6 June 2002, as amended (the "**Collateral Directive**") into French law) allows the parties to provide collateral either by way of title transfer or by way of security, provided the



Financial Netting and Collateral Regime applies (*please see 4.1 below*). In addition, articles L. 440-7 of the Financial Code expressly states that collateral may be provided by a client to a clearing member or by a clearing member to a clearing house on a full title transfer basis under a financial collateral arrangement governed by article L. 211-38 of the same code. According to such provision, "*deposits posted by clients with (...) members of a clearing house or posted by the said members with a clearing house to cover or guarantee positions on financial instruments take the form of a financial collateral arrangement in the form prescribed in article L. 211-38 or any other form provided for in the operating rules*". However, article L. 440-7 of the Financial Code only applies if such clearing house is a French clearing house duly licensed as a credit institution under French law and whose rules have been approved by the *Autorité des Marchés Financiers* (AMF). In addition, both articles L. 211-38 and L. 440-7 of the Financial Code apply only if the securities transferred pursuant to the Title Transfer Provisions are constituted solely of book entry securities within the meaning of article 2(1)(g) ('*book entry securities collateral*') of the Collateral Directive. In addition, in order for such regime to apply, the Transfers of Margin under the Title Transfer Provisions should be recorded by way of appropriate credit entries to the Non Defaulting Party.

3.10.6 In addition to the foregoing:

- (a) in accordance with article L. 211-40 of the Financial Code, the provisions of the Commercial Code regarding Insolvency Proceedings shall not impede the application of the Title Transfer Provisions; and
- (b) pursuant to the provision of article L. 440-7 of the Financial Code, no creditor of a member of a clearing house, an investment service provider, or, if applicable, the clearing house itself, may avail himself of any right whatsoever over such deposits, even on the basis of Part I or Part II of Book VI of the Commercial Code (*in respect of the Collateral Directive and Financial and Collateral Regime, please see our developments in paragraph 4.1 below*).

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

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

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



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

#### 3.12 Single Agreement

3.12.1 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. However, the Parties must determine in writing the methods of assessment and calculation of the single amount upon termination pursuant to Netting Provisions in order to avoid the challenge by third parties (including any Insolvency Representative).

3.12.2 As a result, subject to the foregoing, termination, valuation and netting procedures and rules as determined by the Parties would be enforceable *vis-à-vis* third parties. The Financial Netting Regime and Collateral Regime referred to in articles L. 211-36 through L. 211-40 of the Financial Code provides that when netting occurs pursuant to a civil execution or the exercise of a right of opposition by any such third party, such termination, valuation and netting procedures and rules shall be protected and given full effect, and thus be deemed to have taken place before the said procedures or actions. Finally, such rules and procedures are enforceable, irrespective of any French Insolvency Rules to the contrary.

#### 3.13 Automatic Termination

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

#### 3.14 Multibranch Parties

We do not consider that the use of the FOA Netting Agreement or, as the case may be, the Clearing Agreement by a French 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 France are concerned.

We are of this opinion because, subject to our conclusions on paragraph 3.15 below, if a French Party licensed as a Credit Institution becomes insolvent, we believe that a French court would take a universal approach of such Credit Institution patrimony. We believe the insolvency official would then be bound by the terms of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, even in respect of Transactions entered into by a foreign branch of such Credit Institution, irrespective of their place of booking or of the location of the relevant branch of such Credit Institution.

#### 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

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occurs in respect of such Party (a "Foreign Defaulting Party"), the Foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction subject to a case-per-case analysis of the circumstances under which French Insolvency Rules would be regarded as applicable based on principles including, mainly: (i) the general rule that a French creditor has a right to request the opening of insolvency proceedings pursuant to the French Insolvency Rules against any foreign debtor, on the basis of article 14 of the French *Code civil* (the "Civil Code"); (ii) the directive No. 2001/24/EC of the European Parliament and of the Council of 4 April 2001 (the "Credit Institution WUD") as implemented in France (*see below*); (iii) the EU Insolvency Regulation (*see below*); as well as (iv) those principles agreed upon pursuant to any other applicable treaty.

In particular and without affecting the generality of the foregoing:

- 3.15.1 The French branch of a Company that is incorporated and established in another jurisdiction will not, in principle, be subject to the Insolvency Proceedings mentioned above, but to the insolvency proceedings existing in the jurisdiction within the territory of which its "centre of the main interest", for the purpose of the EU Insolvency Regulation (its "COMI") is situated.
  - (a) In accordance with article 3(1) of EU Insolvency Regulation, the place of the registered office of a debtor is presumed to be the COMI in the absence of proof to the contrary. Article 3(2) of EU Insolvency Regulation provides that where the COMI of a debtor is situated within the territory of an EU Member State in which EU Insolvency Regulation applies, the courts of another EU Member State have jurisdiction to open insolvency proceedings (*i.e.* secondary proceedings) against that debtor only if it possesses an establishment within the territory of that other Member State.
  - (b) Pursuant to article 29 of EU Insolvency Regulation, the opening of secondary proceedings may be requested in France by: (a) the liquidator in the main proceedings; or (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the EU Member State within the territory of which the opening of secondary proceedings is requested, if such party possesses an establishment within the territory of France, *i.e.* a place of operation where such party carries out a non-transitory economic activity with human means and goods. The effects of secondary proceedings are restricted to the assets of the debtor situated within the territory of France and will be governed, in respect of the matters referred to in article 4(2) of EU Insolvency Regulation, by French law.
  - (c) EU Insolvency Regulation only applies to insolvency proceedings listed in Annex A to EU Insolvency Regulation, as amended by Regulation n° 694/2006 dated 27 April 2006 *i.e.* with respect to Safeguard Proceedings<sup>14</sup>, Judicial Rehabilitation Proceeding and Judicial Liquidation Proceedings only ("Regulation Proceedings"). EU Insolvency Regulation does not apply to any other Insolvency Proceedings and to (among other entities) Credit Institutions.

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<sup>14</sup> According to French scholars, Accelerated Financial Safeguard Proceedings should also fall within the scope of Regulation 1346/2000. However, this point remains uncertain.

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### 3.15.2 French branches of EEA Credit Institutions

- (a) In accordance with article L. 613-31-3 of the Financial Code<sup>15</sup>, the authorities of the home country Member State (*Etat membre d'origine*), where the Credit Institution's registered office is located are exclusively competent to open Insolvency Proceedings for such a Credit Institution, including in respect of any branch it may have in France. The effects of such Insolvency Proceedings will (but subject to the provisions of articles L. 613-31-5 and L. 613-31-6 of the same code which provide otherwise) apply in France in relation to French branches of such Credit Institution according to the legislation of such home country Member State.
- (b) In accordance with article L. 613-31-3 of the Financial Code<sup>16</sup>, the authorities of the home country Member State are exclusively competent to decide on the opening of liquidation proceedings with respect to such a Credit Institution, including in respect of any branch it may have in France. Although the French implementing legislation of article 9(2) of the Credit Institution WUD has not specified or stated that such measures shall be applied in accordance with such laws, regulations and procedures as are applicable in the home country Member State, the prevailing view is, however, that article L. 613-31-3 of the Financial Code should be interpreted in the light of article 9(2) of the Credit Institution WUD and, accordingly, the French branch of such Credit Institution should be liquidated in accordance with the laws, regulations and procedures applicable in the home country Member State to the extent that articles L. 613-31-1 to L. 613-31-10 of the Financial Code do not provide otherwise.
- (c) The decision of opening of Insolvency Proceedings taken by the authorities of the home country Member State is recognised without any formality on the territory of France and takes effect once it is effective in the country of opening of liquidation proceedings (including a Judicial Liquidation Proceeding).

### 3.16 Special legal provisions for market contracts

There are no special provisions of French 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 Financial Netting and Collateral Regime

- 4.1.1 Our opinions in paragraphs 3.3 (included) to 3.14 (included) above only apply in the event that: (i) the Transactions are Qualifying Transactions benefiting from the provisions of articles L. 211-36 through L. 211-40 of the Financial

<sup>15</sup> Implementing article 3(1) of the Credit Institution WUD.

<sup>16</sup> Implementing article 9(1) of the Credit Institution WUD.

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Code (being part of the French provisions having implemented the Collateral Directive into French law); and (ii) the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision contained in a FOA Netting Agreement or a Clearing Agreement, as the case may be, would benefit from the Financial Netting and Collateral Regime; and (iii) the Title Transfer Provisions is characterized as a financial collateral arrangement benefiting from the provisions of article L. 211-36 *et seq* of the Financial Code.

**"Qualifying Transaction"** means, for the purpose of this opinion letter, any transaction which consists in one of the following transactions on financial instruments:

- (a) options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields or other derivative instruments, financial indices or financial measures which may be settled physically or in cash;
- (b) options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise by reason of a default or other termination event);
- (c) options, futures, swaps, and any other derivative contract relating to commodities that can physically be settled provided that they are traded on a regulated market and or a multilateral trading facility;
- (d) options, futures, swaps forward and any other derivative contracts relating to commodities that can physically be settled, which are not otherwise mentioned in paragraph (c) above and not being for commercial purposes, which bear the characteristics of other derivative contracts (*instruments financiers à terme*) taking account of the fact that, among other things, they are cleared and settled through recognized clearing houses or are subject to regular margin calls;
- (e) derivative instruments for the transfer of credit risk;
- (f) financial contracts for differences;
- (g) options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event); and
- (h) any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in paragraphs 4.1.1(a) through 4.1.1(g) above, which bear the characteristics of other derivative contracts (*instruments financiers à terme*), taking account of the fact that, among other things, they are traded on a regulated market or a multilateral trading facility, they are cleared and settled through recognized clearing houses or are subject to regular margin calls, all within the meaning of article D. 211-1-A of the Financial Code; and



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(i) option contracts, forward contracts, swap contracts and any other forward contracts other than those mentioned in paragraphs (a) to (h) above, under the condition that when they shall be settled physically, they are either recorded with a recognized clearing house or subject to regular margin calls, which are referred to in article L. 211-36-II of the same code.

4.1.2 The provisions of articles L. 211-36 through L. 211-40 of the Financial Code set out a number of rules applicable to close-out netting of financial transactions and to enforcement of certain type of security which derogate<sup>17</sup> from generally applicable French insolvency and security laws, pursuant to article L. 211-40 of the Financial Code, provided that certain conditions are met and subject to the reservations set out below: (i) condition relating to the status of the parties to the transactions concerned; and /or (ii) legal characterization of obligations arising thereunder (the "**Financial Netting and Collateral Regime**"), where "enforcement" means, in relation to collateral, the act of: (i) sale and application of proceeds of the sale of such collateral against monies owed; or (ii) appropriation of such collateral, in either case in accordance with the Title Transfer Provisions.

4.1.3 In order for the Transactions, the Netting Provisions, the FOA Set-off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision and the Title Transfer Provisions to benefit from the Financial Netting and Collateral Regime, it is required that:

- (a) one of the Parties is a Qualifying Entity (*as defined in paragraph 4.1.4 below*) and the financial obligations which are owed by the other Party to the Qualifying Entity and are secured by margin transferred pursuant to the Title Transfer Provisions, have arisen from Transactions which qualify as "transactions on financial instruments" (*opérations sur instruments financiers*), i.e. Qualifying Transactions (as defined above); or
- (b) both parties to the FOA Netting Agreement or, as the case may be, Clearing Agreement are Qualifying Entities (but other than those entities referred to in paragraphs 4.1.4(e)(vi) to (xvi) below and the financial obligations which are owed by one Qualifying Entity to the other, have arisen from a contract giving a right to a settlement in cash (*règlement en espèces*) or a delivery of financial instruments (*instruments financiers*). In such case indeed, it is not necessary that the financial obligations arise from transactions on financial instruments.

4.1.4 For the purposes of this opinion letter: "**Qualifying Entity**" means either:

- (a) a credit institution (*établissement de crédit*) which, in compliance with article L. 511-9 of the Financial Code, may be licensed either as a bank, a mutual or cooperative bank (*banque mutualiste ou coopérative*), a pawn broker (*Caisse de Crédit Municipal*), a finance company

<sup>17</sup> The provisions of laws governing insolvency proceedings would not impede (*faire obstacle*) the termination, valuation, netting and set-off procedures provided for by the netting provisions and enforceability of the Title Transfer Provisions.



(*société financière*)<sup>18</sup>, or a specialised financial institution (*institution financière spécialisée*);

- (b) an investment firm (*entreprise d'investissement*) which, in accordance with article L. 531-4 of the Financial Code, are legal entities, other than credit institutions, which provide investment services in the normal course of their business, and duly licensed as such;
- (c) a public establishment (*établissement public*);
- (d) a territorial authority (*collectivité territoriale*);
- (e) an institution, a person or an entity referred to in paragraphs (1) and (2) of article L. 531-2 of the Financial Code, *i.e.:*
  - (i) the French State, the *Caisse de la dette publique* and the *Caisse d'amortissement de la dette sociale*;
  - (ii) the *Banque de France*;
  - (iii) the *Institut d'émission des départements d'outre-mer* (IEDOM) and the *Institut d'émission d'outre-mer* (IEOM);
  - (iv) insurance and reinsurance companies governed by the French *Code des assurances* (the "**Insurance Code**");
  - (v) undertakings for collective investment referred to in article L. 214-1-II of the Financial Code, as well as the management companies of alternative investment funds (AIF) (*fonds d'investissement alternatif*) of real-estate investment companies (*sociétés civiles de placement immobilier*), forestry investment companies (*sociétés d'épargne forestière*) or securitization vehicles (*organismes de titrisation*) referred to in articles L. 214-167 *et seq.* of the Financial Code;
  - (vi) institutions for occupational retirement provision (*institutions de retraites professionnelles*) referred to in article L. 370-1 of the Insurance Code in relation to those transactions set out in article L. 370-1 of such code which they undertake, as well as those legal persons administering an institution for occupational retirement provision referred to in article 8 of the ordinance n° 2006-344 of 23 March 2006 relating to supplementary occupational retirement schemes;
  - (vii) persons who only provide investment services to legal entities controlling them, to those the latter controls, as well as those they are controlling themselves. For the purposes of this paragraph, "control" shall be construed as direct or indirect control within the meaning of article L. 233-3 of the French *Code de commerce* (the "**Commercial Code**");

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<sup>18</sup> The category of *sociétés financières* includes, pursuant to articles L. 515-1 *et seq.* of the Financial Code the *sociétés de crédit bail mobilier et immobilier*, the *sociétés de caution mutuelle* and the *sociétés de crédit foncier*.



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- (viii) companies whose investment services activities are limited to the management of employee saving schemes (*système d'épargne salariale*);
- (ix) companies whose activities are limited to those referred to in paragraphs (xii) and 4.1.4(xiii) below;
- (x) persons who provide investment advice services or services or reception and transmission of orders for the account of third parties as an accessory activity and within the framework of a professional and non-financial activity or a public accountant activity (*expert comptable*), to the extent it is governed by statutory or regulatory provisions or by a code of conduct (*code de déontologie*) approved by a public authority which do not formally prohibit it;
- (xi) persons who do not provide investment services but dealing on own account, unless they are market makers (*teneurs de marchés*) or deal in their own account outside a regulated market or a multilateral trading facility on an organized, frequent and systematic basis, by providing as system accessible to third parties in order to engage in dealings with them. For the purposes of this paragraph, a market maker means a person who intervenes on the financial markets on a continuing basis for dealing on own account by buying and selling financial instruments against its proprietary capital at prices defined by such person;
- (xii) persons dealing financial instruments on own account or providing investment services on commodities futures or other futures specified by decree, to the clients of their main business, provided that this is an ancillary activity to their main business, when considered on a group basis within the meaning of paragraph III of article L. 511-20 of the Financial Code, and that main business does not consist of providing investment, banking or payment services;
- (xiii) financial investment advisers (*conseillers en investissements financiers*), within the conditions and limits set out in chapter 1 of title IV of the Financial Code;
- (xiv) persons other than financial investment advisers providing investment advice in the course of carrying out another professional activity which is not regulated by title III (investment service providers) of book V of the Financial Code, provided that the provision of such advice is not remunerated *per se*;
- (xv) persons whose main business consists of dealing on own account in commodities or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities or commodity derivatives are part of the group within the meaning of paragraph III of article L. 511-

20 of the Financial Code, the main business of which is the provision of investment, banking and payment services;

(xvi) firms which provide investment services exclusively in dealing on own account on markets in futures (*marchés d'instruments financiers à terme*) or on spot markets (*marchés au comptant*) for the sole purpose of hedging positions on derivative markets or which deal for the account of other members of those markets or make prices for them (*participent à la formation des prix*) and which are guaranteed by a clearing member (*adhérent d'une chambre de compensation*), where responsibility for ensuring the performance of contracts entered into by such firms is assumed by a clearing member;

- (f) a clearing house;
- (g) a non-resident establishment with a comparable status which shall mean, subject to the others terms of this opinion letter, an entity that is effectively subject to prudential supervision similar to the supervisions which the credit institutions are subject to in France by French authorities in accordance with the Financial Code ; or
- (h) an international financial organisation or body of which France or the European Union is member.

4.1.5 There is no definition under French law of the concept of "*transaction on financial instruments*". It is meant to include derivative contracts generally and securities repurchase or lending transactions ("repos"). Whilst we believe that all Qualifying Transactions may qualify as "transactions on financial instruments", within the meaning of article L. 211-36-1° of the Financial Code, generally, in the light of their sole definition and general economic features, such opinion is qualified by the fact that the question of whether a Transaction so qualifies will very much depends on its actual characteristics and the factual pattern surrounding it. Pursuant to article 12 of the French *code de procédure civile*, a French court is vested with the power to recharacterise a contract or transaction.

4.1.6 In the event that the Financial Netting and Collateral Regime does not apply, the provisions of French Insolvency Rules (Book VI of Commercial Code) would affect the enforcement of the Transaction, the Netting Provisions, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Title Transfer Provisions generally (whether or not, but subject, however, to our observation set out in paragraphs 4.2 and 4.3 below, it is located in France). In particular (but without prejudice to the generality of the foregoing):

(a) any payment of debts having arisen before the start of such proceedings is strictly prohibited. This is because the opening of Insolvency Proceedings freezes the right of a creditor to operate set off even though the conditions for such set-off are met after such opening. Indeed, set-off is viewed as a means of payment and, therefore, falls within the scope of such prohibition.

However, by way of exception to such rule, reciprocal claims are capable of being set-off after the start of Insolvency Proceedings provided they are connected claims, *i.e.* they notably arises from the

same contract or from a master agreement). French case law held that obligations are connected when resulting from one contract or when carried out pursuant to one and the same contract which has defined the framework of the business relationship of the parties such as a master agreement<sup>19</sup>, or when, in the absence of a master agreement, the obligations are carried out pursuant to different contracts which constitute a single global contractual arrangement;

- (b) any *in rem* security (*sûreté réelle*) granted, substituted or topped-up by the insolvent party in respect of any of its assets (e.g. securities or cash) during the fraudulent conveyance period would be declared void mainly on the following grounds:
  - (i) if the same is provided as security for pre-existing transactions;
  - (ii) if it entails a significant undervalue for the provider of collateral; or
  - (iii) if it is a payment of debts that are not yet due and payable.
- The same security may also be voidable if the counterparty (*i.e.* Firm) of the debtor (*i.e.* the Party being subject to Insolvency Proceedings) was aware, at the time of conclusion of such acts, that the debtor was in a state of cessation of payments;
- (c) the opening of an Insolvency Proceeding freezes all enforcement actions against the insolvent party, including enforcement of any security;
- (d) no security can be given or registered after the opening of Insolvency Proceedings and no disposal of property of the company can be made outside the ordinary course of business after the making of a safeguard or rehabilitation order, save with the prior leave of the court; and
- (e) the opening of Insolvency Proceedings prevents a secured creditor, a creditor or any third party to enforce actions against the insolvent party, including enforcement of any security and taking possession of (or more generally appropriating the) secured asset; and
- (f) no security can be given or registered after the opening of Insolvency Proceedings and no disposal of property of the company can be made outside the ordinary course of business after the making of a safeguard or rehabilitation order, save with the prior leave of the court.

#### 4.2 EU Insolvency Regulation and Credit Institution WUD

- 4.2.1 Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (the "EU Insolvency Regulation"), as amended by Regulation n° 694/2006 dated 27 April 2006, (article 5(1) (*rights in rem*) and, in respect of Credit Institutions: article 21 (*rights in rem*) of the Credit Institution WUD (as implemented by article L. 613-31-6-1° of the Financial Code) provide that the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties (which includes *in rem* security interests) in respect of tangible or intangible, moveable or immoveable assets – both specific assets

<sup>19</sup> Cass. Com. 12 December 1995.

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and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State (other than Denmark) at the time of the opening of proceedings. Pursuant to such provision, such rights shall in particular mean the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage or the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled.

Please note that if the assets are not located in a EU Member State or are located in Denmark, the above exception will not be available and, accordingly, French Insolvency Rules will affect the security interests granted in relation to such assets as aforesaid.

4.2.2 Having said that, pursuant to article 5(4) of the EU Insolvency Regulation (and, in respect of Credit Institutions, pursuant to article 21(3) of the Credit Institution WUD as implemented by article L. 613-31-6-II of the Financial Code), where the collateral would benefit from the right *in rem* exception provided for by article 5(1) thereof (and, in respect of Credit Institutions: provided by article 21 thereof), it may still be vulnerable to the application of the fraudulent conveyance rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors under French insolvency laws, provided, however, that such rules may not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (i) the said act is subject to the law of a Member State other than that of the state of the opening of proceedings, and (ii) that law does not allow any means of challenging that act in the relevant case<sup>20</sup>.

**4.3 Validity and perfection of the Title Transfer Provisions**

**4.3.1 *Conflict of laws situation: lex contractus vs lex situs***

In an international context, the question of the validity and perfection of a title transfer arrangement from a French law perspective is subject to the application of several conflict of laws rules. Indeed, if, pursuant to article 3(3) of Rome I, the Parties may freely choose the laws of England and Wales to govern the Title Transfer Provision and a French court may give effect to such choice (the *lex contractus*), based on article 3 al. 2 of the Civil Code, French case law traditionally holds that rights *in rem* created over assets located in France are exclusively governed by French law, as being the *lex rei sitae* (or *lex situs*).<sup>21</sup> Accordingly, French case law<sup>22</sup> draws a distinction between the "acquisition" and the "content" of the right *in rem*, where the *lex situs* determines the scope and prerogatives of the holder of the right *in rem*, whilst the acquisition thereof, which results from a contractual document, is subject to the *lex contractus*.

<sup>20</sup> Article 13 of EU Insolvency Regulation, and in respect of Credit Institutions: article 30 of the Credit Institution WUD (as implemented by article L. 613-31-7<sup>o</sup> of the Financial Code).

<sup>21</sup> Cass. Com. 3 February 2010.

<sup>22</sup> Civ. I, 21 July 1987.



4.3.2 *Recognition of the choice of law governing the Title Transfer Provisions (lex contractus)*

As mentioned above, the French courts will generally recognise the choice of English law to govern the Title Transfer Provisions in accordance with article 3(1) of Rome I. French courts may, however:

- (a) give effect to mandatory provisions of the law of the country where the obligations arising out of an agreement have to be or have been performed, insofar as those overriding mandatory provisions render the performance of such agreement unlawful (article 9(3) of Rome I);<sup>23</sup>
- (b) apply overriding mandatory provisions of French law (article 9(2) of Rome I) irrespective of the choice of the laws of England and Wales which is the case of article 3 of the Civil Code as interpreted by French Courts, which provide that the *lex situs* is solely applicable to rights *in rem* created over movables located in France as aforesaid in paragraph 4.3.1 above ;
- (c) refuse to apply the laws of England and Wales to the Title Transfer Provisions, to the extent the application of such laws is manifestly incompatible with French public policy (article 21 of Rome I);
- (d) have regard to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance (article 12 (2) of Rome I); and
- (e) apply the provisions of the law of another Member State which cannot be derogated from by agreement, if English law was chosen to govern the Title Transfer Provisions but all elements relevant to the situation at the time that such provisions were entered into were located in another Member State than the United Kingdom (article 3(3) of Rome I).

In addition, it should be noted that the scope and effect of a choice of law made by the parties is likely to be limited or contained by special conflict of laws rules applicable to specific matters and/or to specific situations, in particular in the context of insolvency proceedings (which include the Insolvency Proceedings)<sup>24</sup>.

4.3.3 *Validity and perfection of the Title Transfer Provisions under the lex situs*

The determination of the *lex situs* depends on the locality of the assets provided as collateral under the Title Transfer Provisions. In respect of securities, pursuant to article L. 211-39 of the Financial Code, the rights and obligations of the collateral provider and of the collateral taker and of any third parties, in respect of the collateral including securities materialised by a

<sup>23</sup> In accordance with art. 9 (1) of Rome I, mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under Rome I.

<sup>24</sup> Please see for example article 4.1 of the EU Insolvency Regulation on the scope of the *lex fori concursus* or article 9 of the same regulation on the law governing the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market.

book entry and falling within the scope of the French law provisions implementing the Collateral Directive are governed by the law of the country where the account recording the securities provided as collateral is located.

However, the letter of article L. 211-39 is not fully in line with those provisions of the Collateral Directive, which such article aims to implement, *i.e.* article 9 of the directive. If one would have to abide by the sole letter of such article, the Title Transfer Provisions should be governed by French law rather than by English law, as even the very rights of the collateral provider and the collateral taker should be determined by French law, pursuant to the letter of article L. 211-39. However, since the aim of article L. 211-39 is to implement article 9 and the French legislator has shown no intention to depart from the scope of such article, we believe that the fact that the Title Transfer Provisions are governed by English law is not incompatible with article L. 211-39, to the extent that French law will govern the matters referred to in article 9.2 of the Collateral Directive (as the Collateral Directive provides that it is French law which would govern such matters – legal nature and proprietary effects of book entry securities collateral, etc. –, as the law of the country where the account recording the Securities provided as collateral will be located).

Finally, we should note that French law is not relevant to determine the perfection requirements in respect of collateral held outside France and French law would not interfere with the relevant *lex situs*, provided that such law deems itself applicable.

#### 4.4 Enforcement

When the Title Transfer Provisions benefit from the Financial Netting and Collateral Regime and both parties qualify as a Qualifying Entity (other than one of those entities listed in paragraphs 2(c) to 2(n) of article L. 532-1 of the Financial Code), then no specific formalities are required for the sake enforcing such collateral provided under the Title Transfer Provisions, save however that article L. 211-38-II-3° of the Financial Code imposes that the enforcement is made at normal market conditions in accordance with valuation terms that shall have been agreed upon the parties in the collateral arrangement (*i.e.* under the Title Transfer Provisions).

#### 4.5 Fraudulent conveyance period

4.5.1 Although an extensive interpretation of article L. 211-40 of the Financial Code may lead to the conclusion that the rules pertaining to the nullity of acts concluded during the fraudulent conveyance period (*période suspecte*)<sup>25</sup> shall be entirely disapplied in respect of arrangements of the kind of the Netting Provisions, the FOA Set-off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions, it cannot be asserted with complete certainty. The fraudulent conveyance period is a period of time the duration of which is determined by the bankruptcy judge upon the judgment recognising that the cessation of payments (*cessation des paiements*) of the insolvent company has occurred<sup>26</sup>. The fraudulent conveyance period commences on the date of such judgment and extends for

<sup>25</sup> As provided for in articles L. 632-1 and L.632-2 of the Commercial Code.

<sup>26</sup> Article L. 631-8 of the Commercial Code.



up to eighteen (18) months prior to the date of such judgment<sup>27</sup>. Articles L. 211–36 to L. 211–40 of the Financial Code derive from the Collateral Directive, which states in its article 8(1) that: "*Member States shall ensure that a financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided [...] in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures*" and in its article 8(3) that: "*where a financial collateral arrangement contains (a) an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or (b) a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, Member States shall ensure that the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be treated as invalid or reversed or declared void on the sole basis that [...] the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral*".

4.5.2 Considering that the EU Member States have the duty to implement the provision of the Collateral Directive without diminishing their import, it is reasonable to consider that article L. 211–40 of the Financial Code shall exclude application of articles L. 632–1 of Commercial Code, which provides for an automatic nullity of certain transactions entered into or performed during the fraudulent conveyance period (such as, in particular, notably imbalanced transactions, non–customary means of payment or payment of debt which are not due and payable) and, therefore, that the operations of the Netting Provisions, the FOA Set-off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provisions or the Title Transfer Provisions (and in particular, set-off) would not be avoided on the basis of said article L. 632–1 of Commercial Code.

4.5.3 However, article 8 of the Collateral Directive also states that "*this Directive leaves unaffected the general rules of national insolvency law in relation to the voidance of transactions entered into during the prescribed period [...]*" (namely, the fraudulent conveyance period). In addition, recital n°16 of the preamble of the Collateral Directive makes it clear that this directive "*does not prejudice the possibility of questioning under national law the financial collateral arrangement and the provision of financial collateral as part of the initial provision, top-up or substitution of financial collateral, for example where this has been intentionally done to the detriment of the other creditors (this covers inter alia actions based on fraud or similar avoidance rules which may apply in a prescribed period)*".

<sup>27</sup> *Ibid.*



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4.5.4 Therefore, it cannot be excluded that article L. 211-40 of the Financial Code does not intend to overrule article L. 632-2 of the Commercial Code, which provides for a potential nullity of non-gratuitous acts (*actes à titre onéreux*) if the counterparty of the debtor (i.e. the French Party being subject to Insolvency Proceedings) was aware, at the time of conclusion of such acts, that the debtor was in the state of cessation of payments.

### 4.6 Default interests and indemnities

4.6.1 Pursuant to article L. 622-28 of the Commercial Code interest ceases to accrue as of the date of the court decision ordering the commencement of the insolvency proceedings. This applies to contractual and statutory rates of interest including penalty interest and increase in rates of interest except in case of interest accruing on loans with a maturity of one year or more or in respect of deferred payment terms contracts with a maturity of one year or more. Accordingly, the inclusion in the calculation provided for in the Netting Provisions of interest accrued after the commencement of the insolvency proceedings might not be enforceable.

4.6.2 Under article 1152 of the Civil Code, French courts have discretion to decrease the amount of those agreed indemnities, damages and penalties which they regard as manifestly excessive.

4.6.3 A French court may in its discretion decline to give effect to any indemnity for legal costs incurred by an unsuccessful litigant.

### 4.7 Foreign law and jurisdiction

4.7.1 If the performance of the provisions of the FOA Netting Agreement or, as the case may be, Clearing Agreement is contrary to French public policy as applicable in international matters (*ordre public international*), then French courts would refuse to give effect to those provisions. French Law does not provide for a definition of French public policy as applicable in international matters (*ordre public international*) or of French mandatory rules (*lois de police*). Whether a rule belongs to one of these categories would be determined ex-post and on a case by case basis, by the courts and such a determination reflects a very unpredictable vision of what French courts consider public policy in international matters should be in the absence a general theory that may sustain the analysis.

4.7.2 Despite the parties' submission to the jurisdiction of the courts of England, the parties to the FOA Netting Agreement or, as the case may be, Clearing Agreement may apply to French courts for such provisional or protective measures as may be available (such as provisional attachments on assets located in France, or summary proceedings to obtain an order for payment).

4.7.3 Application of foreign insolvency laws

(a) the French rules of conflicts of laws provide that the law of the jurisdiction of opening of Insolvency Proceedings governs the question whether executory contracts may be closed out upon or by reason of Insolvency Proceedings<sup>28</sup>, and that the question whether set-off may be invoked in Insolvency Proceedings is governed by various

<sup>28</sup> Article 4.2(e) of the EU Insolvency Regulation; article 10.2(d) of the Credit Institution WUD.

combinations of the law of the jurisdiction of opening of Insolvency Proceedings, the law that governs the claim of an insolvent debtor, and the law that governs the Netting Provisions, the FOA Set-off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision between the parties<sup>29</sup>.

- (b) in the case that a Party has its COMI in France and is subject to Insolvency Proceedings in France, there may be a possibility that the French courts would give effect to the insolvency laws of a foreign jurisdiction where such Party (unless it is a Credit Institution) has an establishment and is subject to secondary insolvency proceedings, to the extent that such foreign insolvency laws regulate the right to close out the FOA Netting Agreement or, as the case may be, Clearing Agreement or any Transaction (for instance by allowing the liquidator in charge of these secondary proceedings to "cherry pick" which Transactions to close out or to continue) and that such FOA Netting Agreement or, as the case may be, Clearing Agreement or such Transaction are deemed situated in that foreign jurisdiction. Although the determination of the situation of a contract is not free from doubt, there can be an argument that it is situated in the jurisdiction where the Counterparty to the Insolvent Party has its COMI<sup>30</sup>.
- (c) In the case that a Party has only an establishment in France and is subject to secondary or territorial Insolvency Proceedings in France, the enforceability of the Netting Provision, the FOA Set-off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision may be affected in particular by the laws of the jurisdiction of the main proceedings.

#### 4.8 Enforceability of claims

An enforceable obligation is an obligation of a type which the French courts enforce. This does not mean however that a French court would always order the defaulting party to comply with its obligations in accordance with the exact terms of the FOA Netting Agreement or, as the case may be, Clearing Agreement, in particular:

##### 4.8.1 *Specific performance*

Depending on the circumstances and the characteristics of a non-monetary obligation, the remedy of specific performance (*exécution en nature*) of that obligation may not be available in a French court, which often will only give remedies culminating in a judgment for the payment of money.

##### 4.8.2 *Good faith and abuse of rights*

The principles concerning *inter alia* good faith (*bonne foi*) and abuse of rights (*abus de droit*) in the performance of contracts governed by French law may operate to limit the exercise of rights and powers under the FOA Netting Agreement or, as the case may be, Clearing Agreement or in certain cases may operate to impose liability on the party acting in breach of such principles.

<sup>29</sup> Articles 4.2(d), 6 and 9 of the EU Insolvency Regulation; articles 10.2(c), 23 and 25 of the Credit Instituton WUD.

<sup>30</sup> Article 2(g) of the EU Insolvency Regulation.

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#### 4.8.3 *Debt rescheduling*

In respect of payment obligations, a French court has power under articles 1244-1 to 1244-3 of the Civil Code to grant time to a debtor or reschedule its debts (in either case for a maximum period of two years), taking into account the position of the debtor and the needs of the creditor.

#### 4.8.4 *Judgment currency*

In the event of any proceedings being brought in a French court in respect of a monetary obligation expressed to be payable in a currency other than euro, a French court would probably render a judgment expressed as an order to pay, not such currency, but its euro equivalent at the exchange rate prevailing on the date of the judgment or, if the court so decides at the request of the plaintiff, at the date of payment. French law requires that all debt claims in insolvency proceedings be converted into euro at an exchange rate determined by the French court at the date of commencement of the proceedings.

#### 4.8.5 *Force majeure, etc.*

Enforcement of non-monetary obligations may be restricted by certain general principles of French law including the rules relating to *force majeure* or *exception d'inexécution*.

#### 4.8.6 *Judge's interpretation*

The judge in interpreting a contract is not limited to considering its express terms but may also take into account all relevant circumstances; his interpretation cannot, save in exceptional circumstances, be set aside by the *Cour de cassation*.

#### 4.8.7 *Claims under French law*

Under French law, claims may become barred by effluxion of time (*prescription*) or may be or become subject to a defense of set-off (*compensation*) or counterclaim (*demande reconventionnelle*).

### 4.9 Powers of the ACPR

#### 4.9.1 General administrative powers of the ACPR.

Under article L. 613-27 of the Financial Code, insolvency proceedings under the French Insolvency Law may only be opened by a competent French commercial court against a French credit institution, with the prior consent (*avis conforme*) of the ACPR.

In accordance with article L. 612-34 of the Financial Code, the ACPR may, among other things, appoint a provisional administrator (*administrateur provisoire*) either at the request of the directors of a Party being a Credit Institution or upon its own initiative when the management of such Credit Institution cannot be pursued under normal conditions or when one or several directors of this Credit Institution have been suspended. Such provisional administrator shall manage the activities of the said Credit Institution. The ACPR may also designate a liquidator (*liquidateur*) for such Credit Institution in case it has been removed from the list of credit institutions (*établissements de crédit*).



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Such provisional administrator or liquidator may also declare a Credit Institution or an Investment Firm's insolvency, if need be, as such administrator or liquidator, as the case may be, would be entrusted with all powers of administration, management and representation of such Credit Institution.

#### 4.9.2 Resolution Measures.

- (a) A Party which is, among other entities, a Credit Institution referred to in article L. 613-31-11 of the Financial Code may be subject to resolution measures (the "**Resolution Measures**") ordered by the ACPR, if it were to fall, or (based on objective elements showing that it) were likely to fall, the near term, into any of the following situations: (i) its own funds fall below the capital requirements upon which the maintenance of its license is conditioned; or (ii) it is unable to pay its debt or is likely to be unable to pay its debt whether immediately or in the near term; or (iii) it requires extraordinary public financial assistance.
- (b) Such Resolution Measures which are governed by article L. 613-31-16-I of the Financial Code, as amended by the law n° 2013-672 of 26 July 2013, may notably include:
  - (i) the appointment by the ACPR of a provisional administrator, it being specified that, according to such provision, any contractual arrangement providing that such appointment triggers an event of default would be void<sup>31</sup>;
  - (ii) the transfer to a third party (the "**Receiving Entity**") of all or part of one or several business units (*branches d'activités*) of the Credit Institution<sup>32</sup>; and/or the transfer to a bridge institution (*établissement-relais*) (the "**Bridge Institution**") of all or part of its assets, rights and obligations<sup>33</sup> (each of such measures being referred herein to as a "**Transfer**"). The Financial Code further provides that in case of Transfer, outstanding agreements relating to the business, assets, rights or obligations so transferred shall remain executory and may not be terminated nor give rise to any set-off merely as a result of such transfer, notwithstanding any contractual or statutory provisions to the contrary<sup>34</sup>; and
  - (iii) the suspension of close-out netting rights in relation to any contracts entered into by the Credit Institution which is subject to Resolution Measures until 5:00 pm at the latest on the business day following the day of publication of the ACPR's decision.<sup>35</sup>

<sup>31</sup> Paragraph 2<sup>o</sup> of article L. 613-31-16-I of the Financial Code.

<sup>32</sup> Paragraph 4<sup>o</sup> of article L. 613-31-16-I of the Financial Code.

<sup>33</sup> Paragraph 5<sup>o</sup> of article L. 613-31-16-I of the Financial Code.

<sup>34</sup> Paragraphs 4 and 5<sup>o</sup> of article L. 613-31-16-I of the Financial Code.

<sup>35</sup> Paragraph 14<sup>o</sup> of article L. 613-31-16-I of the Financial Code.



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(c) However, the effects of Resolution Measures may be subject to the following limitations or attenuations set out in the Financial Code:

- (i) where a Transfer is made in relation to part, but not all, of the assets, rights and obligations of a Credit Institution subject to such Transfer, such Transfer may not affect the functioning of a system governed by article L. 330-1 of the Financial Code, nor the rules of such system<sup>36</sup>;
- (ii) (x) assets, rights and obligations which are subject to a contract referred to in article L. 211-36-1 of the Financial Code, which includes derivative contracts, together with their ancillary rights, may be capable of being assigned or transferred only in whole, but not in part; and (y) a counterparty under such a contract may not be entitled to exercise its acceleration and close-out netting rights thereunder on the sole ground of a Resolution Measure having been ordered by the ACPR, unless such Resolution Measure entails a Transfer, and such rights are exercised in relation to assets, rights and obligations governed by those contracts (as well as their ancillary rights) which are not assigned or transferred to the Receiving Entity or the Bridge Institution as the case may be<sup>37</sup>.

#### 4.10 Other qualifications

4.10.1 Our opinion as to the enforceability and effectiveness of the Netting Provisions, the FOA Set-off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision relates only to the enforceability and effectiveness of the termination and liquidation mechanisms contained therein; it does not mean that the resulting claim of the non-defaulting party will be satisfied or that any particular remedy will be available in respect thereof. In this respect, it should be noted that under the Commercial Code, if a claim is not properly and in a timely fashion declared to the *représentant des créanciers* (the creditors' representative), the claim will be extinguished and, as a result, the creditor will be prevented from receiving any distributed proceeds. It is also advisable for the non-defaulting party to declare each of its individual gross claims against the defaulting party to the *représentant des créanciers* within the time-frame imposed by the Commercial Code, including those claims in respect of Contracts which have been terminated and liquidated in accordance with the Netting Provisions, the FOA Set-off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision.

4.10.2 Notwithstanding anything to the contrary in the FOA Netting Agreement or, as the case may be, the Clearing Agreement, the FOA Netting Agreement or, as the case may be, the Clearing Agreement as a whole may be declared null and void if a particular provision of the FOA Netting Agreement or, as the case may be, Clearing Agreement: (i) is found to be null; and (ii) held by the

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<sup>36</sup> Article L. 613-31-16-IV bis of the Financial Code.

<sup>37</sup> Article L. 613-31-16-IV of the Financial Code.



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French court to have been an essential element without which the parties would not have entered into that agreement.

- 4.10.3 Any power of attorney or other mandate would lapse on the bankruptcy of the French party that granted it, and may lapse on an application for an Insolvency Proceeding.
- 4.10.4 If a payment by way of set-off occurs on or after the commencement of an Insolvency Proceeding in respect of a French party, the relevant counterparty will have to declare its claims against such French party to the creditors' representative (*représentant des créanciers*) in accordance with, and within the time period provided for by article L. 622-24 *et seq.* of the Commercial Code, including those claims which have been extinguished by application of the set-off provisions of such Netting Provisions, FOA Set-off Provisions and Clearing Module Set-Off Provision.
- 4.10.5 The FOA Netting Agreement or, as the case may be, Clearing Agreement as well as any Transactions documents, where not in the French language, may need to be translated into French by an official sworn translator (*traducteur juré*) if submitted as evidence in any proceedings before a French court.
- 4.10.6 This opinion expresses and describes French legal concepts in the English language rather than in their original form and such expressions and/or descriptions may not be fully identical in their meaning to the underlying French law concepts. Any issues of interpretation arising in respect of the FOA Netting Agreement or, as the case may be, the Clearing Agreement or this opinion will be determined by the French courts in accordance with French law and we express no opinion on the interpretation that the French courts may give to such expressions or descriptions.
- 4.10.7 This opinion relates solely to matters of French law and does not consider the impact of any laws other than French law, even where, under French law, any foreign law fails to be applied. This opinion letter and the opinions given in it are governed by French law and relate to French law as applied by French courts as at today's date. All non contractual obligations and any other matters arising out of or in connection with this opinion are governed by French law. For the purposes of this opinion letter, the term "France" refers (and the term "French" shall be construed accordingly) to the metropolitan territory of the French Republic and all overseas departments (*départements d'outre-mer*) and overseas provinces (*régions d'outre-mer*) but excludes overseas collectivities (*collectivités d'outre-mer*), Nouvelle Calédonie and the Austral and Antarctic territories. For the avoidance of doubt, Monaco is also excluded.
- 4.10.8 Pursuant to article 55 of decree n° 2005-1677 of 28 December 2005, the court decision opening insolvency proceeding enters into effect on the date when such *judgment* is rendered in public hearing. This has the effect of implementing such judgment as of 00:00 a.m. of such date of entry.
- 4.10.9 We express no opinion as to the effect of the provisions of the FOA Netting Agreement or, as the case may be, Clearing Agreement which entitle a party to determine facts unilaterally and conclusively, or entitle it to act on the basis of such determinations; a French court may, therefore, not consider as conclusive the certificates, calculations or determinations which the FOA Netting



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Agreement or, as the case may be, Clearing Agreement provides are to be conclusive.

- 4.10.10 No opinion (other than where expressly opined upon herein) is expressed or implied in relation to the accuracy of any representation or warranty given by or concerning any of the parties to the FOA Netting Agreement or, as the case may be, Clearing Agreement or whether such parties or any of them have complied with or will comply with any covenant or undertaking given by them or the terms and conditions of any obligations binding upon them.
- 4.10.11 Accounts to which the book-entry securities will be transferred pursuant to the Title Transfer Provisions will from time to time be credited are the "relevant" accounts within the meaning of article 1(5) and 2(1)(h) ('*relevant account*') of the Collateral Directive.
- 4.10.12 The provision of margin should be evidenced in writing or by electronic means and any other durable medium and such evidencing allows for the identification of the margin (provided that, for this purpose, it is sufficient to prove that the book entry securities collateral has been credit to, or forms a credit in such relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account).
- 4.10.13 In a decision dated 26 September 2012, the French supreme court (Cour de cassation) held that a jurisdiction clause giving, for the sole benefit of one party, an unrestricted right to select the courts of its choice, was contrary to the purpose of article 23 of Regulation (EC) No. 44/2001, on the basis that such provision was "potestative". The supreme court confirmed the decision of the Paris court of appeal that considered the jurisdiction clause (even though inserted in a contract governed by foreign law) to be without effect. The scope of such decision is yet to be ascertained and therefore there is some doubt as to whether jurisdiction clauses of this kind will be found to be effective by French courts. The Supreme court casts also some doubts as to whether the enforceability of unbalanced clauses such as one-way netting clauses could be challenged on the ground of "potestativité", although, as already mentioned above, it is not possible to draw firm conclusions as the exact scope of such decision.
- 4.10.14 Under French law, validity of any agreement is subject to the general rules of public order as to, in particular, the absence of breach of consent, certainty of object, legality of cause and the absence of fraud.
- 4.10.15 In accordance with article 1154 of the Civil Code on compound interest (*anatocisme*), the capitalisation of interest is permitted only where the said interest has accrued for at least one year.
- 4.10.16 The opinions expressed in this opinion letter are subject to the effects of any United Nations, European Union or French sanctions or other similar measures implemented or effective in France with respect to any party to the Agreement or which is controlled by or otherwise connected with a person resident in, incorporated in or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.



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

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library and whose terms of subscription give them access to this opinion (each a "subscribing member").

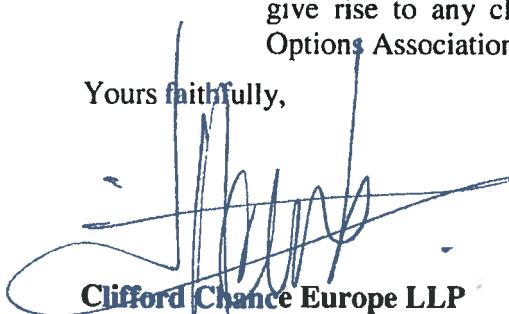
This opinion may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

- (a) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, auditors and professional advisers of such affiliate;
- (b) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings;
- (c) the officers, employees, auditors and professional advisers of any addressee; and
- (d) any competent authority supervising a subscribing member or its affiliates in connection with their compliance with their obligations under prudential regulation

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

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

Yours faithfully,



Clifford Chance Europe LLP

Frédéric Lacroix

*Avocat à la Cour, associé*



SCHEDULE 1  
INVESTMENT FIRMS

Subject to the modifications and additions set out in this Schedule 2, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Firms. For the purposes of this Schedule 2, "Investment Firms" refers to investment firms within the meaning of MiFID, *i.e.* legal entities, which are not investment management companies (*sociétés de gestion*) and which are whether: (i) established under French law and duly authorised under French law pursuant to articles L. 531-1 of the Financial Code to carry out investment services within the meaning of MiFID on a professional basis; or (ii) under the laws of any other EEA Member State, having a branch in France and acting in France in accordance with the rules of European passport set forth in the aforementioned directive as implemented by French law under articles 532-16 *et seq.* of the Financial Code.

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

**1. MODIFICATIONS TO OPINIONS**

**1.1 Insolvency Proceedings**

Our opinion at paragraph 3.1.2 shall apply *mutatis mutandis* to Investment Firms others than investment management companies (*sociétés de gestion*) as if any reference to a "*Credit Institution*" or "*Credit Institutions*" in 3.1.2 was a reference to an "*Investment Firm*" or "*Investment Firms*" respectively.

**1.2 Insolvency of Foreign Parties**

Our opinions stated in paragraph 3.15 of this opinion letter shall apply *mutatis mutandis* to Investment Firms, although it should be noted that Investment Firms which provide services involving the holding of funds or securities for third parties do neither fall within the scope of EU Insolvency Regulation nor within that of the Credit Institution WUD.

Consequently, our opinion stated in paragraph 3.15.1(c) shall apply *mutatis mutandis* to Investment Firms which provide services involving the holding of funds or securities for third parties as if the reference to "*Credit Institutions*" in 3.15.1(c) was a reference to "*Investment Firms which provide services involving the holding of funds or securities for third parties*".

**2. MODIFICATIONS TO QUALIFICATIONS**

When relevant to an Investment Firm (*i.e.* when such Investment Firm does not hold client assets), the qualifications at paragraph 4 are deemed modified as follows.

**2.1 Paragraph 4.2 is replaced with the following paragraph:**

**4.2 "EU Insolvency Regulation**

*4.2.1 Where the Insolvency Proceedings are either of those listed in Annex A and Annex B of the EU Insolvency Regulation, the EU Insolvency Regulation notably provides (article 5 (Third parties' rights in rem)) that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties (which includes in rem security interests) in respect of tangible or*

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*intangible, moveable or immovable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State (other than Denmark) at the time of the opening of proceedings. Pursuant to such provision, such rights shall in particular mean the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage or the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled.*

*Please note that if the assets are not located in a EU Member State or are located in Denmark, the exception provided for by article 5 will not be available and, accordingly, French Insolvency Rules will affect the security interests granted in relation to such assets as aforesaid.*

*4.2.2 Having said that, pursuant to article 5(4) of the EU Insolvency Regulation, where the Collateral would benefit from the right in rem exception provided for by article 5(1) thereof, it may still be vulnerable to the application of the fraudulent conveyance rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors under French insolvency laws, provided, however, that such rules may not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (i) the said act is subject to the law of a Member State other than that of the state of the opening of proceedings, and (ii) that law does not allow any means of challenging that act in the relevant case (Article 13 of the EU Insolvency Regulation).*

2.2 Paragraph 4.9 (*Powers of the ACPR*) shall apply *mutatis mutandis* to Investment Firms others than investment management companies (*sociétés de gestion*) as if any reference to a "*Credit Institution*" or "*Credit Institutions*" in 4.9 was a reference to an "*Investment Firm*" or "*Investment Firms*" respectively.

SCHEDULE 2  
INSURANCE COMPANIES

Subject to the modifications and additions set out in this Schedule 3 (*Insurance companies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Companies. For the purposes of this Schedule 3 (*Insurance companies*), "**Insurance Companies**" means insurance undertakings within the meaning of article L. 310-1 of the Insurance Code, whether: (i) established under French law and duly authorised under French law pursuant to article L. 321-1 of the Insurance Code; or (ii) under the laws of any other EEA Member State, having a branch in France and acting in France in accordance with the rules of European passport (articles L. 310-2 and L. 362-1 of the Insurance Code).

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

1. **MODIFICATIONS TO OPINIONS**

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

1.1 **Insolvency Proceedings**

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

1.2 **Insolvency Proceedings**

Paragraph 3.1.2 of this opinion letter shall be replaced by the following paragraph:

*"Insurance Companies established in France are subject to the supervision and control of the ACPR. Under article L. 310-25 of the Insurance Code, Insolvency Proceedings may only be opened against an Insurance Company at the request of the ACPR (the supervisory authority in respect of French Insurance Companies authorized as such in France) or by a French commercial court having jurisdiction, either at its own initiative or upon request of the public prosecutor, following conforming advice (avis conforme) by the ACPR. In the case of Judicial Liquidation Proceedings, the ACPR will among other things designate an additional liquidator for the verification of insurance claims and insurance assets, and one or more receivers in order to assist the official receiver designated by the competent court."*

1.3 **Recognition of choice of law**

Paragraph 3.2.3(a) and (b) of this opinion letter shall be replaced by the following single paragraph:

*"in accordance with article L. 326-25 of the Insurance Code<sup>18</sup>, the taking of reorganisation or liquidation measures does not affect the right of a creditor to claim the set-off of its claim with a claim of the Insurance Company, if such set-off is allowed by the law applicable to the claim of the Insurance Company, without prejudice however to actions for voidness, voidability or unenforceability."*

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<sup>18</sup> Implementing article 22 of the Insurance WUD.



1.4 Insolvency of Foreign Parties

Paragraph 3.15 of this opinion letter should be replaced with the following:

*"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 subject to a case-per-case analysis of the circumstances under which French Insolvency Rules would be regarded as applicable based on principles including, mainly: (i) the general rule that a French creditor has a right to request the opening of insolvency proceedings pursuant to the French Insolvency Rules against any foreign debtor, on the basis of article 14 of the French Code civil (the "Civil Code"); (ii) the directive No. 2001/17/EC of the European Parliament and of the Council of 19 March 2001 (the "Insurance WUD"), as implemented into French law under articles L.326-20 et seq. of the Insurance Code; and (iii) those principles agreed upon pursuant to any other applicable treaty.*

*In particular and without affecting the generality of the foregoing:*

- (a) *Paragraph 1 of article L. 326-20 of the Insurance Code provides in particular that, unless otherwise provided for in articles L. 326-21 to L. 326-29 of the Insurance Code, reorganisation measures defined in article L. 323-8 of the Insurance Code and decisions concerning the opening of liquidation proceedings taken by the competent authorities of a Member State of the European Community other than the French Republic against an Insurance Company whose registered office is situated within the territory of such state shall be fully effective within the territory of the French Republic including as against third parties once they are effective in such state. Paragraph 2 of the aforementioned article provides that the same rule applies to decisions taken by said authorities with regards to voluntary liquidation proceedings;*
- (b) *Article L. 326-25 of the Insurance Code provides a special conflict of laws rule for set-off similar to that of article L. 613-31-6 of the Financial Code in respect of Credit Institutions, the effects of a reorganisation or liquidation measure over set-off (compensation) shall be governed solely by the law of the country of the claim of the Insurance Company to be netted."*

2. MODIFICATIONS TO QUALIFICATIONS

The qualifications set out in paragraph 4.2.1 of this opinion letter are deemed modified as follows.

*"As a general rule, assets that are pledged are not eligible to cover insurance technical provisions. Consequently, although a pledge over a deposit security account owned by a French Insurance Company may be granted, it would need to be taken over this insurer's free reserves.*

*French Insurance Companies may constitute cash deposit account with a bank. However in order to be eligible to cover insurance technical provisions, a deposit account must comply with certain requirements (e.g. the account must be opened with French or EEA credit institution, not be pledged, etc).*

*Please also note that in application of article L. 327-2 of the Insurance Code movable and immovable assets of the French Insurance Company shall be encumbered by a general lien to guarantee: (i) settlement of their undertakings with*



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*regard to the insured and beneficiaries of contracts; and (ii) repayment first and foremost of premiums paid by the persons who exercised their cancellation right."*

*In addition, by exception to paragraph 4.1.6 above, the Insurance WUD (article 20, rights in rem), as implemented under French law by article L. 326-22 of the Insurance Code thereof, provides that the opening of insolvency proceedings in another Member State shall not affect the rights in rem of creditors or third parties (which includes in rem security interests) in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of France at the time of the opening of proceedings.*

*As to the question of whether the collateral would be considered as being held outside France, please see our observations set out in paragraph 4.3.3.*

*Having said that, pursuant to article 21(3) of the Insurance WUD, where the collateral would benefit from the right in rem exception provided for by article 20 thereof, it may still be vulnerable to the application of the fraudulent conveyance rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors under French insolvency laws, provided, however, that such rules may not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (i) the said act is subject to the law of a Member State other than that of the state of the opening of proceedings; and (ii) that law does not allow any means of challenging that act in the relevant case."*

### 3. ADDITIONAL QUALIFICATIONS

The opinions in this opinion letter are subject to the following additional qualification:

- (a) The entering into transactions in relation to forwards financial instruments by Insurance Companies is regulated by articles R. 332-45 *et seq.* of the Insurance Code.

Under such rules, Insurance Company cannot be a protection seller.



**SCHEDULE 3  
OPCVMs**

Subject to the modifications and additions set out in this Schedule 4 (*OPCVMs*) the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are OPCVMs (*organismes de placement collectif en valeurs mobilières*) (undertakings for collective investment in transferable securities regulated under directive 2009/65/EC and article L. 214-2 of the Financial Code).

Securitisation vehicles (as defined and governed by articles L. 214-167 *et seq.* of the Financial Code) enter into the category of *fonds d'investissements alternatifs* (FIA) (Alternative Investment Funds (AIF)).

AIF are defined by article L. 214-24 of the Financial Code means collective investment undertakings, including investment compartments thereof, which: (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy (defined by such AIF or its investment management company) for the benefit of those investors; and (ii) are not OPCVMs;

The statements made under this Schedule can only be of a general nature and an assessment of the rules applicable to each category of OPCVM must be made on a case by case basis.

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

**1. ADDITIONAL ASSUMPTIONS**

We assume that:

The OPCVM and its management company is duly authorised by the *Autorité des Marchés Financiers* (AMF) or, as the case be, passported in accordance with UCITS IV Directive;

- (a) the entering into the FOA Netting Agreement or, as the case may be, Clearing Agreement by an OPCVM is made in compliance with applicable rules, its by-laws and prospectus; and
- (b) the management company of an OPCVM enters into a separate FOA Netting Agreement or, as the case may be, Clearing Agreement for the account of each OPCVM.

**2. MODIFICATIONS TO OPINIONS**

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

**2.1 Insolvency Proceedings**

OPCVMs do not fall within the scope of the EU Insolvency Regulation, and, accordingly French case law governing private international law issues involving this kind of Counterparties.

In addition, French FCPs are not subject to Insolvency Proceedings.



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The case of OPCVMs in incorporated form, being *sociétés d'investissement à capital variable* (SICAV) is less clear. While there is no explicit exclusion from the application of French Insolvency Rules to them (which therefore suggests that SICAV should be treated like regular corporates and, as such, be subject to French Insolvency Rules generally), article L. 214-12 of the French Financial Code, as redrafted following a reform in August 2011, now provides that the conditions of liquidation and the method of allocation of the assets of an OCVM are determined by the by-laws of the OPCVM. The management company or the depositary will assume the functions of liquidator (unless there are serious issues for the management company or the depositary to assume these functions); failing that the liquidator will be appointed by the judge at the request of any person who has an interest in this regard.

#### 2.2 Single Agreement

A management company of an OPCVM shall enter into a separate FOA Netting Agreement or, as the case may be, Clearing Agreement on behalf of each OPCVM managed.

#### 2.3 Netting and Set-off

Netting and Set-off Provisions must be applied separately in respect of each OPCVM managed by a management company which might have entered on the account of several OPCVMs managed into a FOA Netting Agreement or, as the case may be, Clearing Agreement with the same Firm.

Assets (which include the collateral provided under the Title Transfer Provisions and related obligations) of the OPCVMs managed by a same management company must not be commingled at any time.

### 3. ADDITIONAL QUALIFICATIONS

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

#### 3.1 In accordance with article L. 214-4 of the Financial Code, OPCVM may be set up:

- (i) as *société d'investissement à capital variable* (SICAV), authorised by the AMF pursuant to article L. 214-3 of the Financial Code and registered with the French Commercial Registry; or
- (ii) as *fonds communs de placement* (FCP), authorised by the AMF pursuant to article L. 214-3 of the Financial Code which have no legal personality and are co-ownerships of securities.

#### 3.2 French OPCVM generally constitute regulated entities which are subject to strict regulatory constraints with respect to, among other things their ability to enter into derivatives contracts and temporary transfers of securities (such as repos or stock-lending transactions), and to grant security or collateral. Such restrictions include specific requirements in terms of valuation, investment restrictions, eligible counterparties etc. In addition, an OPCVM's constitutive documents and prospectus may include specific conditions and restrictions with respect to such (and other types of) agreements and transactions. It would therefore be necessary to review these specific regulations and documents for any restrictions before entering into a FOA Netting Agreement or, as the case may be, Clearing Agreement with an OPCVM.

As a matter of principle, such transactions may be concluded only under the conditions contemplated in the Financial Code and in particular the following



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provisions: articles R. 214–15 to R. 214–30 of the Financial Code. Additional provisions may apply in relation to the specific legal nature of the OPCVM.

Pursuant to article R. 214–19 of the Financial Code, an OPCVM may not act as guarantor on behalf of third parties.

3.3 A OPCVM may, for the purposes of achieving its management objective, receive or grant the guarantees referred to in article L. 211–38, under the following conditions:

- (a) When the guarantees granted by an OPCVM create a security interest over its assets, the constitutive deed of these security shall set forth:
  - (i) The nature of goods or rights that the beneficiary of the security may use or dispose, failing that the beneficiary may only use or dispose deposits, cash or financial instruments referred to in 1°, 2° or 3° of I of article L. 214–20 of the Financial Code;
  - (ii) The maximum amount of goods or rights that the beneficiary of the securities may use or provide shall not exceed 100% of the beneficiary's claim against the OPCVM. The general regulations (*règlement général*) (the "General Regulations") of the AMF set forth the methods of calculation of the beneficiary's claim against the OPCVM.
- (b) The methods of assessments of the goods and rights provided by a OPCVM as security interest are defined in the constituting act of guarantees or in an ancillary agreement entered into between parties. In case of failure to comply with this requirement, enforcement of security interest could only be made with respect to deposits remitted as security interest, cash or financial instruments referred to in 1°, 2° or 3° of I of article L. 214–20 of the Financial Code. The General Regulations of the AMF specifies the methods of assessment of the goods and rights provided by the fund.
- (c) When guarantees take the form of cash deposits, such deposits shall be made with a credit institution mentioned in article R. 214–14 (credit institution which has its headquarter within the EEA or an non EEA credit institution provided that it complies with certain rules including being subject to prudential rules of an equivalent level to those in force in EU).

3.4 Pursuant to article R. 214–20 of the Financial Code, an OPCVM could not enter into short selling of financial instruments referred to in article L. 214–20 of the Financial Code (including shares and assimilated instruments, and bonds, money market instruments, shares or units of French or foreign funds which are proposed to redemption to shareholders/unitholders, deposits made with French or foreign credit institutions, financial contracts within the meaning of article L. 211–1 (see Annex 5).

In addition to the foregoing, specific conditions may apply depending on the legal nature of the OPCVM.

ANNEX 1

FORMS OF FOA NETTING AGREEMENTS

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

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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.



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



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**ANNEX 2  
List of Transactions**

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

- (A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
  - (i) a contract made on an exchange or pursuant to the rules of an exchange;
  - (ii) a contract subject to the rules of an exchange; or
  - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,  
in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
  - (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
  - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC, including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.



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:

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;

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

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

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

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

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

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

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

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

"Client Money Additional Security Clause" means:

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



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"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;
- (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.



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

"Defaulting French Party" means a Defaulting Party that is a French Party.

"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:

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;

- (a) which is governed by the law of England and Wales; and
- (b) 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*);



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(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*); and

(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 provides 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



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(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*); and
- (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.

"French Party" means a Party incorporated or having its COMI in France.

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

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



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

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

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

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

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

**"Member"** has the meaning set forth in the FOA Clearing Module.

**"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***); and
  - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (***Security interest***); or



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(x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (Security Interest Provisions) of Annex 4 which are highlighted in yellow; and

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

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

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

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

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

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

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

"Rehypothecation Clause" means:



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- (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 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).

**"Rome I"** means the regulation (EC) No. 593/2008 dated 17 June 2008 on the law applicable to contractual obligations.

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

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

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

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

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

A.

PART 1  
CORE PROVISIONS

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

1. **FOA Netting Provision:**

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

2. General Set-Off Clause:

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

3. Margin Cash Set-Off Clause:

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

4. Insolvency Events of Default Clause:

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

"The following shall constitute Events of Default:

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

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

"The following shall constitute Events of Default:

- i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];

you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)."

## 5. Title Transfer Provisions:

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

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

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

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

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

Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;

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

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

b) CCP Default

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

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[ as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];
2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;
3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the date on which the CCP Default occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the day on which the relevant Client Transactions had all been terminated and, in either case, will be an amount equal to the sum, but without duplication, of (1) the Aggregate Transaction Value, (2) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (3) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (4) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[ and any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in [Clauses 5.3.3(1) to 5.3.3(3)] [Sections 8(c)(iii)(1) to 8(c)(iii)(3)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing member]);

f.

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

c) Hierarchy of Events

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

Or

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

Or

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

d) Definitions

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

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

reflects a positive value for the relevant Agreed CCP vis-à-vis [Firm/Clearing Member], the value determined in respect of [or otherwise ascribed to] such terminated Client Transaction(s) will reflect a positive value for [Firm/Clearing Member] vis-à-vis Client (and will constitute a negative amount for any determination under this [Module/Addendum]). The value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set may be equal to zero.

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

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

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

## 7. Clearing Module Set-Off Provision

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

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

## 8. Addendum Set-Off Provision

- (i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("CM Other Amounts"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its

set-off against any other termination amount payable by or to X (where "X" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing Agreement at such time ("EP Other Amounts" and together with CM Other Amounts, "Other Amounts"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

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

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

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

**PART 2**  
**NON-MATERIAL AMENDMENTS**

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B", using synonyms, changing the order of the words) provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
2. Any change to a provision or provisions for the purposes of correct cross-referencing or by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the agreement provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
3. A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes effect.
4. Any change to the scope of the agreement clarifying that certain transactions (e.g., OTC derivatives governed by an ISDA Master Agreement) shall not be transactions or contracts for purposes of the agreement.
5. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), where such addition may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, and such addition may be expressed to apply to one only of the Parties.<sup>1</sup>
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.<sup>1</sup>
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.<sup>1</sup>
8. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.

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

## C L I F F O R D

### C H A N C E

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

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

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

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

PART 3  
SECURITY INTEREST PROVISIONS

**1. Security Interest Clause:**

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

**2. Power of Sale Clause:**

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

**3. Client Money Additional Security Clause**

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

**4. Rehypothecation Clause**

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

**DEFINITION OF FINANCIAL INSTRUMENTS WITHIN THE MEANING OF  
ARTICLE L. 211-1 AND D.211-1 OF THE FINANCIAL CODE**

**Article L. 211-1**

- I. Financial instruments are securities and financial contracts.
- II. Securities are:
  1. Shares instruments issued by the joint stock companies;
  2. Debt instruments, with the exception of bills of exchange and certificates of deposit;
  3. Unit trust units or shares.
- III. Financial contracts, also named "forward financial instruments" (*instruments financiers à terme*), are the forward contracts appearing on a list established by decree."

**Article D. 211-1 A**

"I. The forward financial instruments referred to in III of article L.211-1 are:

1. Put and call options, forward contracts, exchange contracts, future rate agreements and any other forward contracts on financial instruments, currencies, interest rates, returns, financial indexes or financial measures which can be settled in cash or in kind;
2. Put and call options, forward contracts, exchange contracts, future rate agreements and any other forward contracts on commodities which must be cash settled or may be cash settled at the request of one of the parties otherwise than in case of a default or any other incident leading to termination;
3. Put and call options, forward contracts, exchange contracts and any other contracts on commodities which may be settled in kind, provided that they are traded on a regulated market or a multilateral trading facility;
4. Put and call options, forward contracts, exchange contracts and any other contracts on commodities which may be settled in kind, in other respects not referred to in 3, and not intended for commercial purposes, which present the characteristics of other forward financial instruments, provided that they are, among others, set-off and cleared through a recognised clearing house or that they are the subject of periodic margin calls.
5. Forward contracts hedging a credit risk;
6. Financial contracts with payment of a differential;
7. Put and call options, forward contracts, exchange contracts, future rate agreements and any other forward contracts on climatic variables, freight fares, emission authorisations or inflation rates or any other official economic statistics which must be cash settled or may be cash settled at the request of

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one of the parties otherwise than in case of a default or any other incident leading to termination;

8. Any other forward contract on assets, rights, obligations, indexes and measures, not referred in 1 to 7 above, which present the characteristics of other forward financial instruments, provided that it is, among others, traded on a regulated market or a multilateral trading facility, is set-off and cleared through a recognised clearing house or is the subject of periodic margin calls.