

Your Ref:

Our Ref: 1003799/0251/G5570917v17

PO Box 98

Carey House

Les Banques

St Peter Port

Guernsey

GY1 4BZ

The Futures and Options Association

2nd Floor

36-38 Botolph Lane

London

EC3R 8DE

T +44(0) 1481 727272

F +44(0) 1481 711052

E [info@careyolsen.com](mailto:info@careyolsen.com)

Dear Sirs

12 December 2013

**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 Guernsey ("Guernsey Law") as applicable to the Island of Guernsey ("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 an 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 are given in paragraph 3 of this opinion letter.

Further, this opinion letter covers the enforceability (hereinafter defined) 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:

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BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY  
CAPE TOWN LONDON

**PARTNERS:**

C Anderson A Boyce T Carey R Clark T Corfield D Crosland M Dunster K Friedlaender  
J Greenfield G Hall K Le Cras D Le Marquand B Morgan J Morgan

**CONSULTANTS:** N Carey M Eades

- 1.1.1 generally, in respect of persons (including banks and financial institutions) which are companies limited by shares incorporated under the Companies (Guernsey) Law, 2008 (as amended) (the "Companies Law"); and
- 1.1.2 foreign banks and corporations 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 Parties acting as trustees of Trusts under the Trusts (Guernsey) Law 2007 (the "Trusts Law") (Schedule 1); and
- 1.2.2 Parties acting as general partners of Limited Partnerships under the Limited Partnership (Guernsey) Law 1995 (Schedule 2).

1.3 This Opinion does not cover Parties who are individuals and general partnerships between individuals or public bodies.

1.4 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.

1.5 This opinion covers all types of Transactions.

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

1.7 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. We do not opine on the availability of any judicial remedy and to that end the natural and ordinary meaning of the word "enforceable" and cognate terms is not to be applied in its construction. Any opinion as to enforceability and cognate terms in this jurisdiction is given specifically on the assumption that the relevant rights are enforceable in accordance with its terms under the laws of England and Wales, and on the basis that the laws of this jurisdiction will not prevent enforcement of the relevant rights.

- 1.8 We do not opine on the enforceability of any net obligation resulting from any netting or set-off, whether pursuant to the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision or otherwise.
- 1.9 This opinion letter relates solely to matters of Guernsey Law and does not consider the impact of any laws (including insolvency laws) other than Guernsey Law, even where, under Guernsey Law, any foreign law fails to be applied. This opinion letter and the opinions given in it are governed by Guernsey law and relate only to Guernsey Law as applied by the Guernsey courts as at today's date. All non-contractual obligations and any other matters arising out of or in connection with this opinion letter are governed by Guernsey Law. We express no opinion in this opinion letter on the laws of any other jurisdiction.
- 1.10 We express no opinion as to any provisions of the FOA Netting Agreement or, as the case may be, the Clearing Agreement (other than those to which express reference is made in this opinion letter) except insofar as any such provision relates to the effectiveness of the FOA Netting Provisions, 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.
- 1.11 We do not express any opinion as to any matters of fact.

#### 1.12 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 an 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.

1.12.1 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1.

1.12.2 "**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction.<sup>1</sup>

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<sup>1</sup> The Companies (Guernsey) Law 2008 (as amended) enables the appointment of both liquidators and administrators but there is no analogous or equivalent official to an "administrative receiver" which we understand to be the creation of an English law statute. Note that floating charges, which we understand are necessary for the appointment of an administrative receiver, are not recognised in respect of Guernsey situs assets.

1.12.3 "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).

1.12.4 References to "termination and liquidation of Transactions or, as the case may be, Client Transactions" are to the termination of obligations to make any further payment or deliveries under (i) such Transactions which would have fallen due for performance on or after the Termination Date under an FOA Netting Agreement or (ii) such Client Transactions which would have fallen due for performance on or after the occurrence of a Firm Trigger Event or the date the related CM/CCP Transactions, are terminated or Transferred and, except for the obligation to settle the Termination Amount or Cleared Set Termination Amount in respect of such Transactions or, as the case may be, Client Transactions, and references to "terminated Transactions" or, as the case may be, "terminated Client Transactions" or like expressions shall be construed accordingly.

1.12.5 Any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter.

1.12.6 A reference to a "paragraph" is to a paragraph of this opinion letter (except where the context otherwise requires).

1.12.7 Headings are for ease of reference only and shall not affect the interpretation of this opinion letter.

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

## 2. ASSUMPTIONS

We assume:

2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.

- 2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.
- 2.4 That each Party has obtained, complied with the terms of and maintained all authorisations, 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 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.8 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.
- 2.9 In relation to the opinions set out at paragraphs 3.3 and 3.14 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.

- 2.10 That each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).
- 2.11 That all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of margin pursuant to the Title Transfer Provisions will have been effectively carried out.
- 2.12 That each Party which receives margin from the other party pursuant to the title transfer provisions does not treat that margin in any manner which could indicate that the other party retains any proprietary interest in that margin.
- 2.13 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.14 That the entity incorporated in this jurisdiction will only act under the FOA Module or the ISDA/FOA Addendum as Client.
- 2.15 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction will not act as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum).
- 2.16 That no Migration (as defined in Paragraph 4.18) of any Party occurs.

### 3. **OPINION**

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

#### 3.1 **Insolvency Proceedings**

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

- 3.1.1 Winding up under the Companies Law.
- 3.1.2 Administration under the Companies Law.

- 3.1.3 Voluntary arrangements under the Companies Law.
- 3.1.4 Désastre (when a person or corporate person is unable to pay his debts he is said to be "en état de désastre" in that his current liabilities exceed the value of his assets. Désastre allows all the creditors to share the proceeds of sale of a debtor's chattels, as opposed to a single creditor liquidating assets entirely for their benefit. Désastre is not equivalent to a bankruptcy order. Neither does désastre constitute a discharge for the debtor from his liabilities. Creditors may continue to pursue the debtor for the remainder of the debt should assets of the debtor appear after the initial désastre).
- 3.1.5 Saisie (governed by the Saisie Procedure (Simplification) (Bailiwick) Order 1952).
- 3.1.6 Receivership orders in relation to cells of a protected cell company.
- 3.1.7 In the case of a limited partnership, the Limited Partnership (Guernsey) Law, 1995.
- 3.1.8 In respect of a corporate trustee, the Trusts Law.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings. However it could be improved by the addition of the following definitions of "similar laws":

- (i) any step taken in connection with the commencement of proceedings towards the making of a declaration that the affairs of the entity are en désastre (or the making of such a declaration);
- (ii) any step taken in connection with the commencement of proceedings towards the making of an application for a preliminary vesting order in saisie proceedings in Guernsey in respect of any realty of the entity (or the making of such a preliminary vesting order);
- (iii) a receivership order is made in respect of a cell of a protected cell company; and
- (iv) any insolvency or similar proceedings includes désastre and saisie and any proceedings in connection with désastre and saisie.

### 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.

3.2.2 An Insolvency Representative should and a court in this jurisdiction would have regard to English law, as appropriate, as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the enforceability or effectiveness of (i) the FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions.

### 3.3 Enforceability of FOA Netting Provision

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

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

We are of this opinion because (i) there is no rule of the laws of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the FOA Netting Provision or which would render such terms ineffective; and (ii) whilst there is no specific legislation or published Guernsey case law on netting (understood as a two stage process involving the termination and valuing of competing rights or interests before set off is applied to produce a single amount due), the Royal Court is likely to regard English common law (other than, without limitation, English common law decisions based on the application of UK Specific legislation or regulations) as persuasive in determining the question of enforceability of the Netting Provisions.

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

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

### 3.4 Enforceability of the Clearing Module Netting Provision

In relation to a Clearing Agreement which includes the Clearing Module Netting Provision, the Clearing Module Netting Provision will be 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 for the reasons stated in paragraph 3.3 above in respect of the FOA Netting Provisions.

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

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

### 3.5 Enforceability of the Addendum Netting Provision

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

We are of this opinion for the reasons given in paragraph 3.3 above in respect of the FOA Netting Provisions.

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

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

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

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

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

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

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

We are of this opinion because:

Section 1 of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 as amended by Section 9 of the Security Interests (Guernsey) Law 1993 contains a declaration "*for the removal of doubt*" that where there is for the time being in force an agreement (whether written or oral whether express or implied) whereby, in respect of mutual dealings between them, any debt from one party is to be set off against any debt from the other party, the effect of that agreement is, *unless the parties have expressly or by implication agreed to a different effect*, that the only action which may be taken at any time in relation to what would otherwise be those mutual debts (whether by or at the instance of either party or any third party, and whether by way of enforcement, assignment, arrest, restraint or otherwise) is in respect of the balance (if any) then due after that set off;

but:

- (a) in a case where the affairs of one party have been declared in a state of "Désastre" at a meeting of his arresting creditors held before a Jurat as Commissioner of the Royal Court this is subject to subsection (2) of Section 1 of the Law of Property Miscellaneous Provisions (Guernsey) Law, 1979 (as summarised in section 4 (Qualifications) of this opinion); and
- (b) in ascertaining the balance due as described in this subsection (but only for the purpose of this subsection) if a contingent liability is to be taken into account the contingency is to be treated as having occurred, and if a future liability is to be taken into account it is to be treated as if presently payable.
- (c) Section 419 of the Companies Law provides that a company's assets in a winding up shall be realised and shall be applied in satisfaction of the company's debts and liabilities pari passu subject as provided in that law, any rule of law as to preferential payments, any agreement between the company and any creditor thereof as to the subordination of the debts due to that creditor to the debts due to the company's other creditors, and (of relevance here) *any agreement between the company and any creditor thereof as to set-off*.
- (d) Section 377 B of the Companies Law provides that in the case of the appointment of an administrator of a company under that law, no proceedings may be commenced or continued against the company except with the

consent of the administrator or the leave of the Royal Court and subject (where the Royal Court gives leave) to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation and (of relevance here), "*rights of set-off* and secured interests, including security interests (within the meaning of the Security Interests (Guernsey) Law, 1993) and *rights of enforcement thereof, are unaffected*").

(e) In the case of a protected cell company ("PCC"), section 461 (5) of the Companies Law provides that where an application has been made for, and during the period of operation of, a receivership order, no proceedings may be commenced or continued against the PCC in relation to the cell in respect of which the receivership order was applied for or made except with the consent of the receiver or the leave of the Royal Court and subject (where the Royal Court gives leave) to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, *rights of set-off* and secured interests, including security interests (within the meaning of the Security Interests (Guernsey) Law, 1993) and *rights of enforcement thereof, are unaffected by the provisions of this subsection*).

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Non-Defaulting Party. Note however that corporates in this Jurisdiction in circumstances have been made subject to insolvency procedures in other jurisdictions (for example and without limitation where a company's centre of main interests is in England) and we express no opinion on whether such insolvency procedures would impose such a moratorium or stay.

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 for the reasons set out in paragraph 3.7.2 above.

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 Provision is a Disapplied Set-Off Provision, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:

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

We are of this opinion for the reasons given in paragraph 3.7.2 above.

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

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

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

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

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

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

We are of this opinion for the reasons given in paragraph 3.7.1 above.

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 may characterise 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 where the asset transferred is legally situated in Guernsey.
- 3.10.4 Subject to our comments in paragraph 3.10.3, a Party shall be entitled to use or invest for its own benefit, as outright owner and without restriction, any Margin Transferred to it pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

We are of this opinion because:

- 3.10.5 With regard to the opinion given in paragraph 3.10.3, the Security Interests (Guernsey) Law 1993 (the "Security Interests Law") may apply. The Security Interests Law provides that a security interest in any intangible moveable property is created (inter alia) where the secured party (or some person on his behalf other than the debtor or some person on behalf of the debtor) has title to the collateral pursuant to a "security agreement". A "security agreement" may be in such form and may contain or refer to such matters as may be agreed between the parties. A security agreement must:
  - (a) be in writing,
  - (b) be dated,

- (c) identify and be signed by "the debtor",
- (d) identify "the secured party",
- (e) contain provisions regarding the collateral sufficient to enable its precise identification at any time,
- (f) specify the events which are to constitute events of default, and
- (g) contain provisions regarding the obligation payment or performance of which is to be secured, sufficient to enable it to be identified.

The above characteristics could be argued to be present in the FOA Agreement (with Title Transfer Provisions).

No amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.10 to apply. However, if the risk of the creation of a security interest under the Title Transfer Provisions is not desired, it would be prudent to state that the Parties do not intend to create any security interest by virtue of the Title Transfer Provisions whether by virtue of the Security Interests (Guernsey) Law 1993 or otherwise in the FOA Netting Agreement (with Title Transfer Provisions) and in a Clearing Agreement which includes the Title Transfer Provisions.

### 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 of the Security Interest Provisions (whether in respect of non-cash margin and/or cash margin) as part of an FOA Netting Agreement (with Title Transfer Provisions), or as part of a Clearing Agreement which includes the Title Transfer Provisions, 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;

- (ii) the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated; and
- (iii) it is expressly provided in the relevant agreement that it is not a security agreement within the meaning of the Security Interests Law and that no security interest is to arise by virtue of the Title Transfer Provisions.

### 3.12 Single Agreement

Under the laws of this jurisdiction it is necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision to be enforceable. In our view, the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and Transactions are part of a single agreement.

### 3.13 Automatic Termination

Under the laws of this jurisdiction, it is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provisions, 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, Clearing Agreement in the event of bankruptcy, liquidation, or other similar circumstances.

### 3.14 Multibranch Parties

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

### 3.15 Insolvency of Foreign Parties

Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default or a Firm Trigger Event or, as the case may be, a CM Trigger Event occurs in respect of such Party (a "Foreign Defaulting Party") there can be no separate Insolvency Proceedings in this jurisdiction in relation to the Foreign Defaulting Party and the authorities in this jurisdiction would defer to the proceedings in the Foreign Defaulting Party's home jurisdiction.

### 3.16 Special legal provisions for market contracts

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

## 4. QUALIFICATIONS

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

### 4.1 Guernsey Customary Law

Guernsey law is founded on customary law, originally derived from the customary law of Normandy as adopted in this jurisdiction in ancient times, as commented on by recognised jurists, as amended by legislation and developed by case law. There is no dedicated netting legislation applicable to Guernsey or Guernsey case law on the legal issues the subject of Netting Provisions, nor is the issue addressed in the authoritative texts. Our opinion, particularly on the enforceability of netting arrangements, is therefore qualified to reflect the absence of such legislation and case law and the uncertainty of any possible development of Guernsey case law on the subject. Where asked to determine a point of law that is not covered by any local law, the Royal Court will look to other jurisdictions for persuasive authorities. The Royal Court is likely, but not obliged, to regard English common law (other than English common law decisions determined with regard to specific UK statutes) on the enforceability of netting arrangements to be persuasive.

### 4.2 Transactions at an Undervalue, Preferences etc.

- 4.2.1 We express no opinion on whether or not any Transaction under the Agreement may constitute a Transaction at an undervalue or a preference under the Companies Law.
- 4.2.2 Transactions may be set aside where they are determined to be a preference over other creditors in the event of insolvency of a company. The liquidator of a company may apply to the Royal Court for an order in respect of a company if the relevant company has given a preference six months (or in the case of a connected party two years) prior to either an application for compulsory winding up of the relevant company or the date of the passing by the company of a resolution to voluntarily wind up the company. In order for the Royal Court to make an order it must be of the opinion that the company may at the time of giving the preference or as a result of

giving the preference be unable to pay its debts. A preference is given to a person if that person is one of the company's creditors or is a surety or guarantor for any of the company's debts or other liabilities and the company does anything, or permits anything to be done which improves the person's position in the company's liquidation.

- 4.2.3 Where a compromise or arrangement is proposed between a Guernsey company and its creditors, the Royal Court can order a meeting of the creditors to be summoned. The application for an order can be made by, among others, the company, any company creditor and any company member. If a majority in number representing 75% in value of the creditors agree the compromise or arrangement then the Royal Court can sanction the compromise or arrangement. If the sanction is given then the compromise or arrangement is binding on all creditors and the company, among others. While a creditor can have an arrangement or compromise imposed on him, the sanctioning of the arrangement or compromise by the Royal Court does not affect the enforcement of security rights. Such arrangements could affect both set-off rights of creditors and the value of claims which the creditors may have against the insolvent Party. There is no Guernsey case law authority directly on this point.
- 4.2.4 Where the affairs of one party have been declared to be in a state of "Désastre" at a meeting of his arresting creditors held before a Jurat as Commissioner of the Royal Court, and where the presiding Jurat has reasonable cause to believe that any Agreement or Transaction was entered into by the party whose affairs have been declared in a state of Désastre less than six months before the date of the meeting, the matter of the Agreement or Transaction shall be referred to the Royal Court sitting as an Ordinary Court in such manner as shall be prescribed by rules made by the Royal Court under Section 1 of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979; and where, on such a reference, the Royal Court is satisfied that the agreement was entered into as less than six months before the date of the meeting and with a view of giving to the other party a preference over the other creditors of the debtor, the Royal Court may make an order directing that the Agreement or Transaction shall be treated as being fraudulent and void as against the other creditors of the debtor.

#### 4.3 **Penalty Provisions**

Any provision of the Agreements purporting to provide for certain payments to be made in the event of a breach of any term of the Agreements would not be enforceable to the extent that the Royal Court was to construe it to be a penalty which was excessive. For example, provisions

for default interest to be paid on overdue amounts may amount to such an excessive penalty under the laws of Guernsey and such interest may therefore not be recoverable.

#### 4.4 **Usury**

The Royal Court may refuse to:

- 4.4.1 give effect to any provision of an agreement it considers usurious; or
- 4.4.2 allow unjust enrichment.

#### 4.5 **Unsecured Claims**

The obligations under the Agreement to the extent that the same are unsecured would rank at least *pari passu* with all other present or future Guernsey unsecured and unsubordinated indebtedness of the Company with the exception of any obligations which are mandatorily preferred by law and not by contract. The Preferred Debts (Guernsey) Law, 1983 (as amended) ranks classes of debt that shall be paid in priority to all other debts in insolvency proceedings. These include any rents owing to a landlord by his tenant secured by goods subject to tacit hypothecation, tax payable to the Guernsey authorities on a Guernsey employee's wages, a proportion of an employee's wages, holiday pay, unpaid income tax, unpaid social security contributions and the costs of the liquidator in a winding up.

#### 4.6 **Administration**

Under section 375 of the Companies Law the Royal Court has power to make an administration order in respect of a company. Under section 377 of the Companies Law, on the making of an administration order any application for the company's winding up shall be dismissed. During the period for which an administration order is in force, no resolution may be passed or order made for the company's winding up and no proceedings may be commenced or continued against the company except with the consent of the administrator or the leave of the Royal Court and subject (where the Royal Court gives leave to such terms and conditions as the Royal Court may impose (but, for the avoidance of doubt and without limitation, *rights of set-off* and secured interests, including security interests (within the meaning of the Security Interests (Guernsey) Law, 1993) and *rights of enforcement thereof*, are unaffected by such provision.

#### 4.7 **Power of Royal Court to Give Directions**

A member of a company which is being or which is to be voluntarily wound up may apply to the Royal Court for directions concerning any aspect of the winding up; and upon such application

the Royal Court may make such order as it thinks fit. The statutory provision is wide and we consider that directions could be given in respect of any part of a voluntary winding up where a course of action might require direction or clarification.

#### 4.8 **Effect of Application for Compulsory Winding Up**

Pursuant to the Companies Law, on the making of an application for the compulsory winding up of a company or at any time thereafter any creditor of a company may apply to the Royal Court for an order (a) restraining, on such terms and conditions as the Royal Court thinks fit, any action or proceeding pending against the company, and (b) appointing a provisional liquidator to ascertain the company's assets and liabilities, manage its affairs and do all acts authorised by the Royal Court.

#### 4.9 **Effect of Appointment of Liquidator on Compulsory Winding Up**

Upon the appointment of a liquidator in a compulsory winding up, all powers of the directors cease, except to the extent that the liquidator of the Royal Court sanctions their continuance.

#### 4.10 **Recognition of Foreign Liquidators etc.**

4.10.1 The Royal Court can act in aid of foreign insolvency proceedings on the basis of comity or, in limited circumstances, statute. Aspects of section 426 of the UK Insolvency Act 1986 form part of Guernsey's domestic legislation. This allows for cross-border recognition of insolvency procedures, through letters of request from courts in the UK, Bailiwick of Jersey and the Isle of Man to the Royal Court.

4.10.2 Under Customary Law, it may also be possible for a foreign office holder to obtain recognition in Guernsey by satisfying the "sufficient connection" test. This was first applied to the case of *Roy Terry Junior and Durette Bradshaw Plc v Bank of Butterfield (Guernsey) Limited* (2005-06 GLR 327). The Royal Court held that a sufficient connection is determined by reference to the following criteria:

- (i) The office holder is appointed in the jurisdiction where the company is incorporated.
- (ii) The defendant submits to the jurisdiction where the company is incorporated.
- (iii) The foreign court's order is recognised by the law of the place the company is incorporated.

(iv) The office holder is appointed in a jurisdiction where the management and control of the company is exercised.

However, the Royal Court maintained discretion whether to grant the relief sought, even where there is a sufficient connection.

#### 4.11 **Investment Funds**

Dealings with companies incorporated in this jurisdiction that act as investment funds must be approached with special care to ensure that any intended transaction is within the scope of the fund's objectives and therefore within its legal capacity.

#### 4.12 **Types of Companies**

Companies limited by shares in Guernsey may take the form of:

4.12.1 a cell company, which may be either:

- (i) a PCC; or
- (ii) an incorporated cell company,

4.12.2 an incorporated cell of an incorporated cell company; or

4.12.3 a company which is neither of the above (a non-cellular company).

#### 4.13 **Protected Cell Companies**

4.13.1 A PCC is a single legal person and the creation of a cell does not create, in respect of that cell, a legal person separate from the company. The PCC may create one or more cells for the purpose of segregating and protecting cellular and core assets in the manner provided under the Companies Law.

4.13.2 The assets of a PCC are either cellular assets or core assets, (the "core" is the PCC excluding its cells). It is the duty of the directors of a PCC to keep cellular assets separate and separately identifiable from core assets and to keep the cellular assets attributable to each cell separate and separately identifiable from the cellular assets attributable to other cells. Cellular assets comprise assets represented by the proceeds of that cell's share capital and reserves attributable to that cell and all other assets attributable to that cell. The core assets of a PCC comprise the assets of the company attributable to the core of the company and comprise assets represented by the

proceeds of core share capital and reserves attributable to the core and all other assets attributable to the core. ("Reserves" include retained earnings, capital reserves and share premiums).

- 4.13.3 The directors of a PCC may cause or permit cellular assets and core assets to be held by or through a nominee or by a company, the shares and capital interests of which may be cellular or core assets, or a combination of both.
- 4.13.4 A recourse agreement is a written agreement between a PCC and a third party which provides that, pursuant to an arrangement effected by the PCC, protected assets may be subject to a liability owed to that third party ("protected assets" are defined in the Companies Law as (a) any cellular assets attributable to any cell of a protected cell company, in respect of a liability not attributable to that cell, and (b) any core assets, in respect of a liability attributable to a cell).

#### 4.14 Position of Creditors of a PCC

The position of creditors (subject to the terms of any recourse agreement) corresponds with the liabilities described below.

- 4.14.1 Section 451 of the Companies Law provides that, subject to the provisions of subsection (2) (set out below) (and to the terms of any recourse agreement), where any liability arises which is attributable to a particular cell of a PCC (a) the cellular assets attributable to that cell are liable, and (b) the liability is not a liability of any protected assets.
- 4.14.2 Subsection (2) of Section 451 of the Companies Law provides that in the case of loss or damage which is suffered by a particular cell of a PCC and which is caused by fraud perpetrated by or upon the core or another cell, the loss or damage is the liability solely of the company's core assets or (as the case may be) that other cell's assets, without prejudice to any liability of any person other than the company.
- 4.14.3 Any liability not attributable to a particular cell of a PCC is the liability solely of the company's core assets.
- 4.14.4 Notwithstanding the above provisions the liabilities of the cellular assets attributable to a particular cell of a PCC shall abate rateably until the value of the aggregate liabilities equals the value of those assets: but this does not apply in any situation where there is a recourse agreement or where any of the liabilities of the PCC's cellular assets arises from fraud such as is referred to in subsection (2).

4.14.5 Section 452 of the Companies Law provides that, subject to subsection (2) (set out below) (and to the terms of any recourse agreement), where any liability arises which is attributable to the core of a PCC (a) the core assets are liable, and (b) the liability is not a liability of any protected assets.

4.14.6 Subsection (2) of Section 452 of the Companies law provides that in the case of loss or damage which is suffered by the core of a PCC and which is caused by fraud perpetrated by or upon a cell, the loss or damage is the liability solely of the cellular assets of that cell, without prejudice to any liability of any person other than the company.

#### 4.15 **Liquidation of a PCC**

In a liquidation of a PCC, the liquidator is bound to deal with the PCC's assets so as to keep cellular assets separate and separately identifiable from core assets and to keep the cellular assets attributable to each cell separate and separately identifiable from the cellular assets attributable to other cells.

#### 4.16 **Receivership Orders in Relation to Cells**

Subject to the provisions of Section 459 of the Companies Law, if in relation to a PCC the Royal Court is satisfied (a) that the cellular assets attributable to a particular cell of the company (and, where the company has entered into a recourse agreement, the assets liable under that agreement) are or are likely to be insufficient to discharge the claims of creditors in respect of that cell, (b) that the making of an administration order in respect of that cell would not be appropriate, and (c) that the making of an order under that section would achieve the purposes set out in subsection (3), the Royal Court may make an order under that section (a "receivership order") in respect of that cell. A receivership order is an order directing that the business and cellular assets of or attributable to a cell shall be managed by a person specified in the order (the "receiver") for the purposes of (a) the orderly winding up of the business of or attributable to the cell, and (b) the distribution of the cellular assets attributable to the cell (and, where the company has entered into a recourse agreement, the assets liable under that agreement) to those entitled to have recourse thereto. A receivership order (a) may not be made if (i) a liquidator has been appointed to act in respect of the PCC, or (ii) the PCC has passed a resolution for voluntary winding up, (b) may be made in respect of a cell subject to an administration order, and (c) shall cease to be of effect upon the appointment of a liquidator to act in respect of the PCC, but without prejudice to prior acts. No resolution for the voluntary winding up of a PCC, any cell of which is subject to a receivership order, shall be effective without leave of the Royal Court.

#### 4.17 Incorporated Cell Companies

- 4.17.1 An incorporated cell company ("ICC") is a single legal person. An incorporated cell is a single legal person separate from its ICC. An incorporated cell is not a subsidiary of its ICC. It is the duty of the directors of an ICC and its incorporated cells (a) to keep the assets and liabilities of the ICC separate and separately identifiable from the assets and liabilities of its incorporated cells, and (b) to keep the assets and liabilities of each incorporated cell separate and separately identifiable from the assets and liabilities of the other incorporated cells of the ICC. These duties are not breached by reason only that the directors cause or permit assets of the ICC or any of its incorporated cells to be collectively invested, or collectively managed by an investment manager, provided that the assets in question remain separately identifiable.
- 4.17.2 An ICC has no power, by virtue of its position as an ICC, to enter into transactions on behalf of any of its incorporated cells. An incorporated cell has no power, by virtue of its position as an incorporated cell, to enter into transactions on behalf of its ICC, or other incorporated cells of its ICC.
- 4.17.3 The directors and officers of an ICC and its incorporated cells must ensure that, in respect of every transaction that the ICC or incorporated cell enters into, it is stated whether the transaction is being entered into by the ICC or by an incorporated cell and, if it is by an incorporated cell, which incorporated cell.

#### 4.18 Migrations of Companies

The Companies Law permits a company registered in Guernsey to be removed from the Guernsey Register of Companies for the purposes of becoming registered as a limited liability company under the law of a district, territory or place outside Guernsey in accordance with the provisions of part VII of that Law ("Migration"). Pursuant to Section 98 of the Companies Law, upon Migration the Company shall cease to be a company incorporated in Guernsey and the registered office of the Company shall cease to be situated in Guernsey.

#### 4.19 Sanctions etc

The opinions expressed in this opinion letter are subject to the effects of any United Nations, European Union or UK sanctions or other similar measures implemented or effective in Guernsey with respect to any Party which is, or 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.

#### 4.20 Choice of Law

Choices of law in documents are recognised by the Royal Court provided that the choice of governing law was bona fide (for example not made with any intention of avoiding provisions of the law with which the transactions under the Agreement has the closest and most real connection) and legal and there is no reason for avoiding that choice of law on grounds of public policy or otherwise. However, there are some matters which are not determined by reference to governing law, but which are mandatory in the forum irrespective of the choice of governing law. In particular, where all the elements relevant to a situation being adjudicated upon were, at the time the choice of law was made, connected with a particular country, the courts of this jurisdiction may apply rules of law of that country which cannot be derogated from by contract. We express no opinion on the binding effect of the choice of law provisions in the FOA Netting Agreement or, as the case may be, Clearing Agreement insofar as they relate to non-contractual obligations arising from or connected with the FOA Netting Agreement or, as the case may be, Clearing Agreement.

#### 4.21 Mutuality

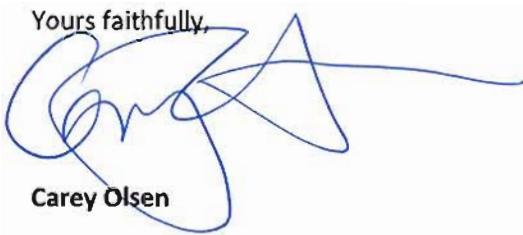
"Set-Off under Section 1 of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 as amended by Section 9 of the Security Interests (Guernsey) Law 1993 only applies where the amounts being set-off are "mutual" between the parties. In this context, our opinion is to be qualified so that "mutual" means that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, where a Party is acting as a trustee, where a Party has a joint interest (other than where a Party is a partnership organised under the laws of this jurisdiction and then only in relation to the position between the partnership and the other Party to the FOA Netting Agreement or, as the case may be, Clearing Agreement), or where a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order. Accordingly, where such mutuality does not exist in respect of any Transactions or Client Transactions (as the case may be), amounts in respect of such Transactions shall not be included in any set-off."

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

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library

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

Yours faithfully,



A handwritten signature in blue ink, appearing to read 'Carey Olsen', is placed over a blue rectangular background. The signature is fluid and cursive.

Carey Olsen

## SCHEDULE 1

### Parties acting as trustees of trusts

Subject to the modifications and additions set out in this Schedule 1 (*Parties acting as trustees of trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Guernsey companies limited by shares acting as trustee. For the purposes of this Schedule 1 (*Parties acting as trustees of trusts*), "*Counterparty type*" means a Guernsey company limited by shares acting as trustee under the Trusts (Guernsey) Law 2007.

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.

This opinion is not given in respect of any person found or alleged to be a trustee of a constructive, implied, resulting or other trust constituted by operation of law, nor is it given in respect of a person who is a trustee in bankruptcy, or a personal representative as defined in section 80 of the Trusts (Guernsey) Law 2007 acting in that capacity.

#### 1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

- 1.1 To the extent this opinion relates to Trustees, it is given in respect of a Party which, in entering into the FOA Netting Agreement or, as the case may be, Clearing Agreement acts as Trustee in respect of a single Trust. Where a Party acts as Trustee of more than one Trust, no opinion is expressed in relation to the FOA Netting Agreement or, as the case may be, Clearing Agreement except to the extent that the terms of the FOA Netting Agreement or, as the case may be, Clearing Agreement apply separately in relation to each Trust. The opinions are not given in respect of any Trust which is a pension scheme, charitable Trust, or a trust for sale.
- 1.2 A Defaulting Party may for the purposes of this opinion be regarded as acting as Trustee only if it comprises a single trustee or a body of trustees, and references in this opinion to a Trustee include a body of persons acting jointly as Trustee.

#### 2. ADDITIONAL ASSUMPTIONS

We assume the following:

- 2.1 That each Party has the capacity, power and authority under the terms of any applicable Trust of which a Party is a Trustee to enter into the FOA Netting Agreement or, as the case may be, Clearing Agreement and Transactions or, as the case may be, Client Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, Clearing Agreement and

Transactions or, as the case may be, Client Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, Clearing Agreement.

- 2.2 That during the life of any Transaction or, as the case may be, Client Transaction, the Trustee(s) of the relevant Trust in respect of which a Party is acting as Trustee will remain unchanged.
- 2.3 That the Trustee(s) has entered into the FOA Netting Agreement or, as the case may be, Clearing Agreement and each Transaction or, as the case may be, Client Transaction (and has provided all collateral) in its capacity as Trustee of the same Trust.

#### **ADDITIONAL QUALIFICATIONS**

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

- 1.1 The laws of the Island of Guernsey do not recognise trusts (whether private trusts or those operating as authorised collective investment schemes) as entities with separate legal personality and accordingly a trust cannot:
  - 1.1.1 sue or be sued in its own name;
  - 1.1.2 hold title to its assets or property in its own name;
  - 1.1.3 hold a bank account in its own name; and
  - 1.1.4 be considered as conducting business itself;and all such activities must be conducted in the name of its trustee. A trustee of an authorised collective investment scheme must be licenced under the POI Law.
- 1.2 Under the laws of the Island of Guernsey, the liability of a trustee for its obligations under the Agreement may be limited to the assets comprised in the trust fund of the Fund regardless that English law or the law of the State of New York is the governing law of the Agreement. This may apply whether proceedings are brought directly in the Royal Court or enforcement of a judgment obtained outside this jurisdiction is sought to be enforced in the Royal Court. Section 42 of the Trusts (Guernsey) Law, 2007 (the "Trusts Law") provides as follows:
  - (1) *"Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by a third party in respect of the transaction or matter extends only to the trust property.*

(3) *Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority."*

1.3 Where a trustee becomes bankrupt, or upon his property becoming liable to arrest, saisie or similar process of law, his creditors have no recourse against the trust property except to the extent that the trustee himself has a claim against it or a beneficial interest in it.

1.4 Dealings with trusts that act as investment funds must be approached with special care to ensure that any intended transaction is within the scope of the investment fund's objectives and therefore within its legal capacity.

1.5 When there is a change of trustee in respect of a trust, incoming trustees will have no liability for the acts of their predecessors in office unless they undertake such liability.

## SCHEDULE 2

### Parties acting as general partners of limited partnerships

Subject to the modifications and additions set out in this Schedule 2 (*Parties acting as general partners of Limited Partnerships*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Guernsey companies limited by shares acting as general partner of a limited partnership. For the purposes of this Schedule 2 (*Parties acting as general partners of Limited Partnerships*), "**Counterparty type**" means Guernsey company limited by shares acting as general partner of a limited partnership under the Limited Partnerships (Guernsey) Law 1995.

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.

#### ADDITIONAL QUALIFICATIONS

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

- 1.1 Under Section 20 of the Limited Partnerships (Guernsey) law, 1995, ("LP Law") any property of a limited partnership which is (a) transferred to, vested in or held on behalf of any general partner, or (b) transferred to or vested in the name of the partnership, shall be held or, as the case may be, deemed to be held by the general partner (and if more than one jointly) on trust as an asset of the partnership in accordance with the terms of the partnership, in which case the general partner will act as trustee of a trust. The laws of the Island of Guernsey do not recognise trusts as entities with separate legal personality and accordingly a trust cannot:
  - 1.1.1 sue or be sued in its own name;
  - 1.1.2 hold title to its assets or property in its own name;
  - 1.1.3 hold a bank account in its own name; and
  - 1.1.4 be considered as conducting business itself;and all such activities must be conducted in the name of the general partner. A general partner of an authorised collective investment scheme must be licenced under the POI Law.
- 1.2 Under Guernsey law the liability of a trustee for its obligations under the Agreement may be limited to the assets comprised in the trust fund regardless that English law is the governing law of the Agreement. This may apply whether proceedings are brought directly in the Royal Court

or enforcement of a judgment obtained outside the Island is sought to be enforced in the Royal Court. Section 42 of the Trusts (Guernsey) Law, 2007 (the "Trusts Law") provides as follows:

- (1) *"Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by a third party in respect of the transaction or matter extends only to the trust property.*
- (3) *Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority.*

1.3 Under Section 14 (1) of the LP Law, legal proceedings by, against or otherwise in relation to a limited partnership (including proceedings to enforce a foreign judgment by or against the partnership) may only be instituted by or against any one or more of the general partners; and, subject to limited exceptions no limited partner shall be a party to or named in such proceedings.

1.4 Where a trustee becomes bankrupt, or upon his property becoming liable to arrest, saisie or similar process of law, his creditors have no recourse against the trust property except to the extent that the trustee himself has a claim against it or a beneficial interest in it.

1.5 Under Section 29 (1) of the LP Law the Royal Court may order the dissolution of a limited partnership on the application of any partner or creditor thereof or on the application of the Committee or Commission if in its opinion:

- 1.5.1 it is not reasonably practicable to carry on the partnership's business in conformity with the partnership agreement,
- 1.5.2 the partnership is insolvent,
- 1.5.3 without prejudice to the generality of paragraph (b), the following conditions are satisfied:
  - (a) the partnership is indebted to a creditor in a sum exceeding £750 or such other sum as may be prescribed,
  - (b) the creditor has, by Her Majesty's Sergeant, served a significiation on the partnership demanding payment of the debt, and

- (c) the partnership does not, within a period of 21 days immediately following the date of service of that demand, pay the debt or give security for it to the creditor's satisfaction,
- (d) there has been, in relation to the partnership, a failure to comply with any provision of an order of the Royal Court under section 5(4),
- (e) the partnership is being conducted in a manner which is (i) oppressive to any of the limited partners or prejudicial to their interests as limited partners, or (ii) calculated to affect prejudicially the carrying on of the partnership business,
- (f) the limited partners are not being given all information relating to the affairs of the partnership which they might reasonably expect,
- (g) the affairs of the partnership are being conducted in such a way as to defraud creditors (whether of the partnership or of any other person) or in an unlawful manner,
- (h) there has been persistent default by the partnership or by any general partner thereof in complying with the requirements or conditions imposed by or under this Law, any regulation made under it or the Control of Borrowing Ordinance,

(NB, the Control of Borrowing Ordinance was abolished in February 2013 but there was no amnesty for past breaches).
- (i) persons connected with the formation or management of the partnership have, in connection therewith, been guilty of fraud, misfeasance, breach of fiduciary duty or other misconduct in relation to the partnership or any partner thereof, or
- (j) it is just and equitable to do so.

1.6 Upon the making of an order under Section 29(1) of the LP Law for the dissolution of a limited partnership or at any time thereafter, the Royal Court may make such other orders in relation to the dissolution as it thinks fit, including one for the appointment of one or more liquidators to wind up the partnership's affairs and distribute its assets.

(NB references to "the Committee" mean the States of Guernsey's Commerce and Employment Department or such other committee or body as the States of Guernsey may by Ordinance appoint for the purposes of the LP Law).

- 1.7 Upon the dissolution of a limited partnership or at any time thereafter, the Royal Court may, on the application of any partner or assignee thereof or any creditor, make such orders in relation to the dissolution as it thinks fit, including one for the appointment of one or more liquidators to wind up the partnership's affairs and distribute its assets.
- 1.8 All expenses properly incurred in the dissolution of a limited partnership, including the liquidator's remuneration, are payable from the partnership's assets in priority to all other debts.
- 1.9 Dealings with limited partnerships that act as investment funds must be approached with special care to ensure that any intended transaction is within the scope of the investment fund's objectives and therefore within its legal capacity.

ANNEX 1  
FORMS OF FOA NETTING AGREEMENTS

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

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

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

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

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

Agreements shall mean the Insolvency Events of Default and FOA Netting Provision in relation to the Two Way Clauses.

ANNEX 2  
List of Transactions

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

- (A) (futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
  - (i) a contract made on an exchange or pursuant to the rules of an exchange;
  - (ii) a contract subject to the rules of an exchange; or
  - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange, in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
  - (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition; or
  - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product;
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC<sup>2</sup>, including (but not limited to) interest rate swaps, credit default

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<sup>2</sup> Non-EU counsel should discuss with Clifford Chance if clarification is needed.

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) Clause 8(b) (*Clearing Member Events*), 8(c) (*CCP Default*) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum, 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) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement, together with the defined terms required properly to construe such Clause.

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

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

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

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

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

**"Clearing Module Set-Off Provision"** means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module) Clause 5.5 (*Set-Off*) of the FOA Clearing Module together with the defined terms required properly to construe such Clause.

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

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

- (a) for the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*) and 3.6 (*Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;
- (b) for the purposes of paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value";
- (c) for the purposes of paragraph 3.5 (*Enforceability of the Addendum Netting Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value";
- (d) for the purposes of paragraph 3.7.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;
- (e) for the purposes of paragraph 3.7.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;
- (f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;

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

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

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

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

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

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

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

"FOA Netting Agreement" means an Agreement:

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

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

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

- (a) in relation to the terms of the Long Form One-Way Clauses 2007 and the Long Form Two-Way Clauses, Clause 2.2 (*Liquidation Date*), Clause 2.4 (*Calculation of Liquidation Amount*) and Clause 2.5 (*Payer*);
- (b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (*Liquidation Date*), Clause 2.3 (*Calculation of Liquidation Amount*) and Clause 2.4 (*Payer*);
- (c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;

- (d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (*Liquidation Date*), Clause 10.3 (*Calculation of Liquidation Amount*) and Clause 10.4 (*Payer*);
- (e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*);
- (f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*); and
- (g) those parts of paragraph 1 of Part 1 (Core Provision) 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*); and/or
- (ix) those parts of paragraph 2 of Part 1 (Core Provisions) of Annex 4 which are highlighted in yellow.

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

- (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (*Set-off on default*);
- (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (*Set-off upon default or termination*);
- (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (*Set-off on default*),
- (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (*Set-off upon default or termination*);
- (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (*Set-off on default*);
- (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (*Set-off upon default or termination*); and
- (vii) those parts of paragraph 3 of part 1 (Core Provisions) of Annex 4 which are highlighted in yellow.

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

(a) where the FOA Member's counterparty is not a natural person:

- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);

- (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);
- (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
- (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);
- (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); and
- (vi) those parts of paragraph 4(a) of part 1 (Core Provisions) of Annex 4 which are highlighted in yellow; and

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

- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
- (ii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);
- (iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d).

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

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

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

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

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

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

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

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

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

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

**"Security Interest Provisions"** means:

- (a) the **"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***).

(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***); and
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (***Power of sale***).

(c) the "**Client Money Additional Security Clause**", being:

- (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); and
- (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).

**"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) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version).

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

ANNEX 4  
PART 1  
CORE PROVISIONS

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

1. FOA Netting Provision:

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

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

2. General Set-Off Clause:

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

3. Margin Cash Set-Off Clause:

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

4. Insolvency Events of Default Clause:

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

*"The following shall constitute Events of Default:*

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

iii. an involuntary case or other procedure is commenced against a party seeking or proposing liquidation, reorganisation, or moratorium, or other similar relief with respect to it or its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a Custodian of it or any substantial part of its assets."

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

***"The following shall constitute Events of Default:***

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

## 5. Title Transfer Provisions:

- a) **"Default:** If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date will be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "Default Margin Amount" means the amount, calculated in the Base Currency of the aggregate value as at the relevant Liquidation Date (as determined by us) of the Transferred Margin.
- b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien,

claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

6. Clearing Module Netting Provision / Addendum Netting Provision:

a) [Firm Trigger Event/CM Trigger Event]

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

- (a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];
- (b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;
- (c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and

Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (C) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[ or any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributed][attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included [Clauses 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)] , together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

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

b) CCP Default

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

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

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

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

c) Hierarchy of Events

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

Or

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

Or

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

d) Definitions

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

(which may be positive or negative or zero) equal to such [Firm/CM]/CCP Transaction Value.

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

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

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

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

## 7. Clearing Module Set-Off Provision

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

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

## 8. Addendum Set-Off Provision

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

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

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

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

(iii) Nothing in this Section 8(c) will be effective to create a charge or other security interest. This Section 8(c) 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>3</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>3</sup>.

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<sup>3</sup> Counsel to delete and if any such provisions would alter agreement so as to prevent opinion from applying.

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>4</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.
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>4</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

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<sup>4</sup> Counsel to delete and if any such provisions would alter agreement so as to prevent opinion from applying.

currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.

15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.
16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.
17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).
18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:
  - more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
  - more than one FOA Clearing Module or Clearing Module Netting Provision
  - one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision

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

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with equivalent effect to, clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.
20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in a FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).

21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).
22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.
23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.