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NETTING ANALYSER LIBRARY

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11 December 2013

Dear Sirs,

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

You have asked us to give an opinion in respect of the laws of the Hong Kong Special Administrative Region of the People's Republic of China ("**Hong Kong**" or "**this jurisdiction**") in respect of the enforceability and validity of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision contained in a FOA Netting Agreement or a Clearing Agreement.

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

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

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Hong Kong (situs)/Prudential Regulation/Counterparty/Netting

1. TERMS OF REFERENCE AND DEFINITIONS

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

1.1.1 a company which is incorporated under the Companies Ordinance (a "**Hong Kong Company**");

1.1.2 a company incorporated or formed under the laws of another jurisdiction and which is registered as a non-Hong Kong company under Part XI of the Companies Ordinance (a "**Non-Hong Kong Company**"); and

1.1.3 a Hong Kong Company or a Non-Hong Kong Company which is an "authorized institution" under the Banking Ordinance (a "**Hong Kong Banks**"),

subject to the terms of reference, definitions, assumptions and qualifications set out in the main body of text of this opinion letter.

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 Hong Kong Companies which are licensed to carry on a business in a regulated activity in accordance with the Securities and Futures Ordinance ("**Hong Kong Investment Firms**") (Schedule 1);

1.2.2 Hong Kong Companies or Non-Hong Kong Companies which are authorised under the Insurance Companies Ordinance to carry on an insurance business in Hong Kong ("**Hong Kong Insurance Companies**") (Schedule 2);

1.2.3 Hong Kong Individuals (as defined below) (Schedule 3);

1.2.4 persons in their capacity as trustees of trusts which have been validly constituted under Hong Kong law ("**Hong Kong Trusts**"), including charitable trusts, unit trusts that are authorized by the Securities Futures Commission as collective investments schemes under the Securities and Futures Ordinance and provident fund schemes registered under the Mandatory Provident Fund Schemes Ordinance (Schedule 4);

1.2.5 persons in their capacity as partners in partnerships or limited partnerships ("**Hong Kong Partnerships**") within the meaning of the Partnership Ordinance or the Limited Partnerships Ordinance respectively (Schedule 5); and

1.2.6 the Monetary Authority (Schedule 6).

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- 1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the Netting Agreement and the Clearing Agreement are expressed to be governed by English law.
- 1.4 This opinion letter is given in respect of only those Transactions or, as the case may be, Client Transactions which:
- 1.4.1 fall within any of paragraphs (A)(i) to (iv), (B), (C), (D) and (E) of the list of Transactions or Client Transactions provided in Annex 2 to this opinion letter; or
 - 1.4.2 otherwise, are futures, options, contracts for differences, swaps, spot or forward contracts of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof,
- in each case, whether entered into on a recognised investment exchange, any other form of organised market place or multilateral trading facility, or over the counter.
- 1.5 This opinion is given in respect of only such of those Transactions which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.
- 1.6 In this opinion, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.
- 1.7 Section 264 of the Companies Ordinance provides, among other things, that, in the winding up of an insolvent company, the same rules shall apply with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy. Accordingly, and because this opinion is given in respect of Parties which may be Hong Kong Companies or Non-Hong Kong Companies, in this opinion letter we refer to winding-up, winding-up petitions and winding-up orders, notwithstanding that the relevant provisions of the Bankruptcy Ordinance refer to bankruptcy, bankruptcy petitions and bankruptcy orders, as the case may be.
- 1.8 We express no opinion:
- 1.8.1 as to any provision of the FOA Netting Agreement or the Clearing Agreements other than those to which express reference is made in this opinion letter;
 - 1.8.2 as to any matter of fact;
 - 1.8.3 on any specific Transaction or Clearing Transaction;

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- 1.8.4 on the availability of any judicial remedy in respect of any net obligation resulting from any netting or set off;
- 1.8.5 as to any right or obligation which the FOA Netting Agreement or the Clearing Agreement purports to impose, confer or establish in respect of any person who is not a party thereto;
- 1.8.6 on any accounting or regulatory matters; and
- 1.8.7 as to any matter relating to tax law or as to any liability to tax which may arise or be suffered as a result of or in connection with the FOA Netting Agreement or the Clearing Agreement, or any Transaction or Clearing Transaction.

1.9 Definitions

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

- 1.9.1 **"Banking Ordinance"** means the Banking Ordinance, Chapter 155 of Hong Kong;
- 1.9.2 **"Bankruptcy Ordinance"** means the Bankruptcy Ordinance, Chapter 6 of Hong Kong;
- 1.9.1 **"Commencement Point"** means:
 - (a) in relation to a Compulsory Winding-up, the time the relevant petition is presented to the court (if a winding-up order is made pursuant to the petition);
 - (b) in relation to a Voluntary Winding-up, the time of the passing of the resolution of members for such Voluntary Winding-up; and
 - (c) in relation to a s228A Winding-up, the time of the delivery to the Hong Kong Registrar of Companies of a statement in accordance with Section 228A of the Companies Ordinance;
- 1.9.2 **"Companies Ordinance"** means the Companies Ordinance, Chapter 32 of Hong Kong;
- 1.9.3 **"Company"** means a Hong Kong Company or a Non-Hong Kong Company;
- 1.9.4 **"Compulsory Winding-up"** has meaning given to it in paragraph 3.1.1(b)(i);

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- 1.9.5 **"Conveyancing and Property Ordinance"** means the Conveyancing and Property Ordinance, Chapter 219 of Hong Kong;
- 1.9.6 **"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);
- 1.9.7 **"Hong Kong Individual"** means an individual (natural person) who:
- (a) is domiciled in Hong Kong;
 - (b) is personally present in Hong Kong on the date on which a petition for his/her bankruptcy is presented to a court under Section 3 of the Bankruptcy Ordinance (the **"Petition Date"**); or
 - (c) at any time in the period of three years ending with the Petition Date (i) has been ordinarily resident, or has had a place of residence, in Hong Kong; or (ii) has carried on business in Hong Kong;
- 1.9.8 **"Insolvency Proceedings"** means the procedures listed in paragraph 3.1;
- 1.9.9 **"Insolvency Representative"** means a liquidator, a trustee in bankruptcy or analogous or equivalent official in this jurisdiction;
- 1.9.10 **"Insurance Companies Ordinance"** means the Insurance Companies Ordinance, Chapter 41 of Hong Kong;
- 1.9.11 **"Limited Partnerships Ordinance"** means the Limited Partnerships Ordinance, Chapter 37 of Hong Kong;
- 1.9.12 **"Mandatory Provident Fund Schemes Ordinance"** means the Mandatory Provident Fund Schemes Ordinance, Chapter 485 of Hong Kong;
- 1.9.13 **"Netting Provisions"** means the FOA Netting Provision, the Clearing Module Provision and the Addendum Netting Provision;
- 1.9.14 **"Partnership Ordinance"** means the Partnership Ordinance, Chapter 38 of Hong Kong;
- 1.9.15 **"s228A Winding-up"** has the meaning given to it in paragraph 3.1.1(b)(iii);
- 1.9.16 **"Securities and Futures (Client Money) Rules"** means the Securities and Futures (Client Money) Rules, Chapter 571I of Hong Kong;
- 1.9.17 **"Securities and Futures Ordinance"** means the Securities and Futures Ordinance, Chapter 571 of Hong Kong;

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1.9.18 "**Set-Off Provisions**" means the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision;

1.9.19 "**SISO Point**" means:

- (a) in relation to a Compulsory Winding-up, the time of the making of a winding-up order by the court;
- (b) in relation to a Voluntary Winding-up, the time of the passing of the resolution of members for such Voluntary Winding-up; and
- (c) in relation to a s228A Winding-up, the time of the delivery to the Hong Kong Registrar of Companies of a statement in accordance with Section 228A of the Companies Ordinance;

1.9.20 "**Statutory Insolvency Set-Off**" has the meaning given to it in paragraph 4.2.1;

1.9.21 "**Voluntary Winding-up**" has the meaning given to it in paragraph 3.1.1(b)(ii);

1.9.22 a reference to a "**court**" is to a Hong Kong court; and

1.9.23 a reference to a "**paragraph**" is to a paragraph of this opinion letter;

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

2. **ASSUMPTIONS**

We assume:

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

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- 2.4 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction.
- 2.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any Insolvency Proceedings against either Party.
- 2.6 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.
- 2.7 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 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as a "Firm" (as defined in the FOA Clearing Module) or as a "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates, and (b) will be a Hong Kong Bank or a Hong Kong Investment Firm.
- 2.10 In relation to the opinions set out at paragraphs 3.8 and 3.9 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.
- 2.11 That each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such Margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).
- 2.12 That all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by 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.
- 2.13 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

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2.14 The matters set out in the Appendix to this opinion letter.

3. OPINION

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

3.1 Insolvency Proceedings

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

- (a) in relation to any Company, the appointment of one or more provisional liquidators;
- (b) in relation to:
 - (i) any Company, a winding-up by the court pursuant to Section 177(1) or (2) of the Companies Ordinance (a "**Compulsory Winding-up**");
 - (ii) any Hong Kong Company, a winding-up commenced by the passing of a resolution of the members in accordance with Section 228(1)(a), (b) or (c) of the Companies Ordinance (a "**Voluntary Winding-up**");
 - (iii) any Hong Kong Company, a winding-up commenced in accordance with Section 228A of the Companies Ordinance (a "**s228A Winding-up**"); and
- (c) schemes of arrangement.

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

3.2 Recognition of choice of law

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

3.2.2 An Insolvency Representative or court in this jurisdiction would have regard exclusively to English law as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the enforceability or effectiveness of the (i) FOA Netting Provision and the

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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,

provided, in each case, that:

- (a) the choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement was made in good faith and not with a view to avoiding any provision or effect of any other applicable law;
- (b) English law is pleaded and proved to the satisfaction of the Hong Kong courts (which satisfaction is within the discretion of the Hong Kong courts);
- (c) English law will be disregarded if its application will be illegal or contrary to public policy or mandatory rules in this jurisdiction; and
- (d) matters of procedure are, as a general rule, governed by the law of this jurisdiction to the exclusion of the relevant chosen governing law.

3.2.3 We express no opinion on the binding effect of the choice of law provisions in the Agreement insofar as they relate to non-contractual obligations arising from or connected with the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

3.3 Enforceability of FOA Netting Provision

3.3.1 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:

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

3.3.2 We are of this opinion because 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 Provisions or which would render such terms ineffective.

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- 3.3.3 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.
- 3.3.4 No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in paragraph 3.3.1 to apply.

3.4 Enforceability of the Clearing Module Netting Provision

- 3.4.1 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.
- 3.4.2 We are of this opinion because 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 Clearing Module Netting Provision or which would render such terms ineffective.
- 3.4.3 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.
- 3.4.4 No amendments to the Clearing Module Netting Provision are necessary in order for the opinions expressed in this paragraph 3.4 to apply.
- 3.4.5 However, in the event of a winding-up of a Party (the Insolvent Party) under the laws of this jurisdiction, there would be a mandatory Statutory Insolvency Set-Off of amounts due between the Parties (as described in paragraph 4.2.1 below). The effect of Statutory Insolvency Set-Off would be, subject to the other comments in this paragraph and paragraph 4.2, to aggregate and set off all Cleared Set Termination Amounts together with all other amounts due between the Parties so that only a single net sum is payable, notwithstanding that the Clearing Module Netting Provision provides for each Cleared Set Termination Amount to be payable separately in respect of each Agreed CCP Service. Under the laws of this jurisdiction it is not possible to contract out of Statutory Insolvency Set-off, so that the Clearing Module Netting Provision may be overridden to the extent they are inconsistent with Statutory Insolvency Set-off.

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

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- (a) If an amount due between the Parties is not "mutual" with any other amount due between them, Statutory Insolvency Set-off does not apply. Mutuality is discussed further in paragraph 4.2.2 below.
- (b) If an amount due between the Parties does not constitute a provable debt, Statutory Insolvency Set-Off does not apply to that amount due. For example, where an amount owed by the Insolvent Party is a secured obligation owed to the other Party (the Solvent Party), the amount of such secured obligation which may be included in any Statutory Insolvency Set-Off will be limited to the amount which the Solvent Party elects to prove for in the winding-up. The inclusion of secured obligations in Statutory Insolvency Set-Off is discussed further in paragraph 4.2.3 below.

Notwithstanding the observations made above, if Statutory Insolvency Set-Off does apply, the Solvent Party would be unlikely to be left in a worse position than in the absence of Statutory Insolvency Set-off. This is because as a practical matter the Solvent Party would be able to determine separate mutual amounts equal to amounts which may have been aggregated and set-off under Statutory Insolvency Set-off.

3.5 Enforceability of the Addendum Netting Provision

- 3.5.1 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.
- 3.5.2 We are of this opinion because 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 Addendum Netting Provision or which would render such terms ineffective.
- 3.5.3 Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of rights under the Addendum Netting Provision.
- 3.5.4 No amendments to the Addendum Netting Provision are necessary in order for the opinions expressed in this paragraph 3.5 to apply.
- 3.5.5 The analysis set out in paragraph 3.4.5 above in relation to the effect of Statutory Insolvency Set-Off on the Clearing Module Netting Provision applies equally to the Addendum Netting Provision as if references in that analysis to "Clearing Module Netting Provision" were references to the

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"Addendum Netting Provision" and references to "Cleared Set Termination Amount" were references to "Available Termination Amount".

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 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.

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:

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

We are of this opinion because 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 Set-Off Provisions or which would render such terms ineffective.

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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:

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

We are of this opinion because 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 Set-Off Provisions or which would render such terms ineffective.

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

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

3.8.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions is a Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms

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so that the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:

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

We are of this opinion because 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 Clearing Module Set-Off Provision or which would render such terms ineffective.

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.

The analysis set out in paragraph 3.4.5 above in relation to the effect of Statutory Insolvency Set-Off on the Clearing Module Netting Provision applies equally to the Addendum Netting Provision as if references in that analysis to "Clearing Module Netting Provision" were references to the "Addendum Netting Provision" and references to "Cleared Set Termination Amount" were references to "Available Termination Amount".

- 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):

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

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

We are of this opinion because 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 Addendum Set-Off Provision or which would render such terms ineffective.

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

The analysis set out in paragraph 3.4.5 above in relation to the effect of Statutory Insolvency Set-Off on the Clearing Module Netting Provision applies equally to the Addendum Netting Provision as if references in that analysis to "Clearing Module Netting Provision" were references to the "Addendum Netting Provision" and references to "Cleared Set Termination Amount" were references to "Available Termination Amount".

3.10 Enforceability of the Title Transfer Provisions

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

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

3.10.5 We are of this opinion because:

- (a) 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 Title Transfer Provisions or which would render such terms ineffective;
- (b) in accordance with the principles set out in *Re Inglefield (George) Ltd.* [1933] Ch. 1, as considered and applied by the English Court of Appeal in *Welsh Development Agency v. Export Finance Co Ltd.* [1992] BCC 270, and followed by the House of Lords in *Lloyds and Scottish Finance Ltd v Cyril Lord Carpets*, a court would find that a purported transfer of a beneficial interest in any of the Margin by the transferor Party (the "**Transferor**") to the transferee Party (the "**Transferee**") under the Title Transfer Provisions should not be regarded as the creation of a security interest over the Margin to secure a loan made by the Transferor to the Transferee. This is on the basis, in part, that:
 - (i) the Transferor will have no right to acquire a beneficial interest in any of the Margin transferred by it to the Transferee by making any payment to the Transferee or any other person. In contrast, the grantor of a security interest is entitled to recover the subject property from the person to whom the security interest was granted (the "**Secured Party**"), before the security is enforced, by paying to the Secured Party the amount secured by the security interest; and
 - (ii) the Transferor has no obligation to account to the Transferee for any amount received or any profit made on a sale or other disposal by the Transferor of any interest in the Margin. In contrast, if, on the sale of property subject to a security interest by the Secured Party, the proceeds are more than is required to discharge the relevant secured amount(s), the Secured Party must account to the grantor of the security interest for the surplus; and
- (c) the decision in *Re Inglefield (George) Ltd.* has been cited with approval by the Hong Kong Court of Appeal in *Chase Manhattan (Asia) Ltd v First Bangkok City Finance Ltd* [1988] 2 HKLR 618 and more recently by the Court of First Instance in *Hallmark Cards Incorporated v Yun Choy Ltd (in compulsory liquidation)* [2011] 5 HKC 453.

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

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

In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions, the opinions expressed above in paragraph 3.10 (*Enforceability of the Title Transfer Provisions*) in relation to the Title Transfer Provisions are not affected by the use 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:

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

3.12 Single Agreement

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

We are not aware of any rule of the laws of this jurisdiction which would apply to prohibit the Parties from entering a contract upon the terms that the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and Transactions are part of a single agreement.

3.13 Automatic Termination

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

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3.14 Multibranch Parties

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

3.15 Insolvency of Foreign Parties

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

3.16 Special legal provisions for market contracts

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

4. QUALIFICATIONS

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

4.1 Contractual set-off

Except as expressly stated in this paragraph 4, a contractual provision for set-off (and/or netting) will be effective and binding on a Party which is a Company unless and until that Party is wound-up in this jurisdiction and then only to the extent that such contractual provision does not contravene or infringe a mandatory rule of insolvency law.

4.2 Liquidation: Statutory Insolvency Set-Off

4.2.1 *Mandatory insolvency rules of set-off*

Section 35 of the Bankruptcy Ordinance, which is made applicable to Companies by Section 264 of the Companies Ordinance, provides that, in a winding-up of a Company (the Insolvent Party), where there have been mutual credits, mutual debts or other mutual dealings between the Insolvent Party and any other person, any amount owing by that Insolvent Party to that other person shall be set off against any amount owing by that other person to the Insolvent Party, and only the balance shall be owing by that Insolvent Party or, as the case may be, that other person.

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Set-off pursuant to Section 35 of the Bankruptcy Ordinance ("**Statutory Insolvency Set-Off**") is mandatory and occurs automatically at the SISO Point. It is not possible for parties to contract out of Statutory Insolvency Set-Off. Accordingly, a contractual set-off provision between the Insolvent Party and another person will be effective in the winding-up of that Insolvent Party only if, and to the extent that, such set-off provision is not inconsistent with Statutory Insolvency Set-Off. However, any set-off (pursuant to a contractual set-off provision) that took effect prior to the SISO Point will generally not be affected by Statutory Insolvency Set-Off (although if the set-off took effect during a specified period ending at the SISO Point, then it may be affected by Statutory Insolvency Set-Off in the circumstances described in paragraph 4.2.2 below); and Section 35 of the Bankruptcy Ordinance does not entitle a liquidator to require the payment by the Solvent Party to the Insolvent Party of the gross amount that had been the subject of such set-off (pursuant to a contractual set-off provision).

In our view, the operation of the Netting Provisions, insofar as they relate to the aggregation of amounts representing terminated obligations, may be viewed as a mere accounting between the Parties which does not involve set-off. However, there is currently insufficient case law in Hong Kong for us to be confident that the Netting Provisions are effective on this basis alone.

Even if the Netting Provisions are viewed as involving set-off of amounts representing terminated obligations, each of the Netting Provisions and the Set-Off Provisions would, if they were implemented at the SISO Point, operate to produce a net amount very similar to the net amount that would have been produced if set-off had been implemented under Statutory Insolvency Set-Off, subject to the other qualifications set out in this opinion letter.

4.2.2 ***Mutuality***

Statutory Insolvency Set-off applies only where there have been, and in respect of, mutual credits, mutual debts or other mutual dealings between the Insolvent Party and another person. Accordingly, in the winding-up of a Company, Statutory Insolvency Set-off will not apply to credits, debts or dealings between the Parties that are not "mutual".

"Mutuality" generally exists where each Party is personally and solely liable as regards obligations owing by it and is solely entitled to the benefit of obligations owed to it. Circumstances in which the requisite mutuality will not be established include, without limitation:

- (a) where a Party is acting as agent for another person, in which case sums owed by (or to) the agent acting in its capacity as such are not mutual with sums owed to (or by) it arising from obligations such Party incurs as principal;

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- (b) where a Party is acting as a trustee, in which case sums owed by (or to) the trustee acting in its capacity as such are not mutual with sums owed to (or by) it arising from obligations such Party incurs in its own interest;
- (c) where a Party has a joint interest (other than where a Party is a Hong Kong Partnership and then only in relation to the position between the Hong Kong Partnership and the other Party to the FOA Netting Agreement or, as the case may be, Clearing Agreement), in which case sums owed by (or to) the partnership are not mutual with sums owed to (or by) a partner acting in his or her or its own interest;
- (d) where a Party's rights or obligations or any interest therein have been assigned 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 will not be included in any Statutory Insolvency Set-Off.

4.2.3 ***Secured obligations***

Where an amount owed by the Insolvent Party is a secured obligation owed to the Solvent Party, the better view is that the amount of such secured obligation which may be included in any Statutory Insolvency Set-Off will be limited to the amount which the Solvent Party elects to prove for in the winding-up. Except where the Solvent Party has elected to waive its security, such provable amount will be limited to the amount by which the secured obligation exceeds the proceeds of enforcement of the security (net of the costs and expenses of enforcement). Where the secured obligation is itself a net sum (such as, for example, a Cleared Set Termination Amount), Statutory Insolvency Set-Off would not impair the calculation of that net sum.

4.2.4 ***Obligations incurred after certain times***

In the winding-up of a Company, an obligation (a "**Post-Notice Obligation**") incurred by the Company during a relevant period will not be included in any aggregation or set-off pursuant to the Netting Provisions, the Set-Off Provisions or Statutory Insolvency Set-Off, if the Post-Notice Obligation (looked at in isolation) gives rise to an amount owing by such Insolvent Party to the other Party (the Solvent Party).

The relevant period referred to above is:

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- (a) in the case of a Compulsory Winding-up, the period between (i) the date on which the Solvent Party has notice of the winding-up petition and (ii) the SISO Point in respect of such Compulsory Winding-up;
- (b) in the case of a Voluntary Winding-up, the period between (i) the time at which the Solvent Party has notice that a members' meeting has been summoned to pass a winding-up resolution and (ii) the SISO Point in respect of such Voluntary Winding-up; and
- (c) in the case of a s228A Winding-up, the period between (i) the time at which the Solvent Party has notice that there has been passed a directors' resolution as contemplated in Section 228A(1) of the Companies Ordinance and (ii) the SISO Point in respect of such s228A Winding-up (although we are not aware of any decisions of the courts which support this view).

However, this would not affect the aggregation or set-off of the obligations of the Parties in respect of (i) any obligation incurred before such Solvent Party had notice of the winding-up petition, the summoning of the members' meeting or the passing of the directors' resolution contemplated in Section 228A(1) (as the case may be) and (ii) any Post-Notice Obligation (looked at in isolation) giving rise to an amount owing to such Insolvent Party by such Solvent Party.

4.2.5 Contingent debts

Section 34 of the Bankruptcy Ordinance provides that contingent debts owing by a Company in winding up (the Insolvent Party) to another person are provable and that an estimate can be made by the liquidator of the value of such contingent debts. However, these provisions do not apply to contingent debts owing to the Insolvent Party. Accordingly, if a debt to the Insolvent Party remains contingent, the fact that nothing is "due" in respect of it, whether by way of an estimate of its value or otherwise, means that it cannot be brought into account in a set-off, unless the contingency is fulfilled during the course of the winding-up proceeding. *Re Daintrey* [1900] 1 QB 546 is authority for the proposition that, in such circumstances (the fulfilment of the contingency), the debt would be subject to Statutory Insolvency Set-Off. The position in *Re Daintrey* was followed by the Supreme Court of Hong Kong (as it was then known) in *William Young v Bank of Credit and Commerce (in liquidation)* [1993] HKCU 346.

4.2.6 Valuation

Any calculation or valuation made by the Solvent Party to determine the net amount resulting from the Netting Provisions could be challenged by a liquidator of the Insolvent Party if the valuation was not done fairly or in a manner consistent with Statutory Insolvency Set-Off and other applicable laws.

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In our view, on the basis of the English cases of *Australia and New Zealand Banking Group Ltd v Société Générale* [2000] CLC 833 and *Peregrine Fixed Income Limited v Robinson Department Store Public Co Limited* [2000] CLC 1328, if the net amount determined in respect of the Transactions or Client Transactions (as the case may be) was calculated on the basis of the mark-to-market values of the individual Transactions or Client Transactions (as the case may be) and/or the loss which a Party has suffered as a result of the early termination of such Transactions or Client Transactions, and such calculation was made fairly and consistently, the net amount calculated would likely be upheld by a Hong Kong court. However, we are not aware of any case law directly on point.

4.3 Liquidation: Reviewable transactions

4.3.1 *Dispositions of property void*

A Compulsory Winding-up is initiated by the presentation to the court of a winding-up petition in respect of the relevant Company. Typically, a hearing of such a petition by the court takes place about ten weeks after the date of presentation of the petition: at that hearing, if the basis of the petition is established, the court will make a winding-up order in respect of the relevant Company. The Compulsory Winding-up of the relevant Company is deemed to commence at the time the petition was presented to the court (there is accordingly an element of 'retroactivity').

In a Compulsory Winding-up of a Company (the Insolvent Party), any disposition of the Insolvent Party's property ("disposition" being interpreted widely, so as to include the transferring of property and the undertaking of obligations) made after the Commencement Point of the Compulsory Winding-up of that Insolvent Party is void under Section 182 of the Companies Ordinance, unless a court otherwise orders. Accordingly, we express no opinion as to whether or not an obligation incurred after the commencement of a Compulsory Winding-up of the Insolvent Party could properly be included in an aggregation or a set-off pursuant to the Netting Provisions, the Set-Off Provisions or Statutory Insolvency Set-Off. The avoidance of any obligation on this basis would not prejudice the effectiveness of the aggregation and set-off of other obligations pursuant to the Netting Provisions, the Set-Off Provisions or Statutory Insolvency Set-Off.

Section 182 of the Companies Ordinance does not apply in a Voluntary Winding-up or a s228A Winding-up.

4.3.2 *Unfair preference*

Pursuant to Section 50 of the Bankruptcy Ordinance and Section 266B of the Companies Ordinance, anything done or suffered by a Company (including the transferring of property and the undertaking of obligations) within a

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specified period ending at the Commencement Point of the winding-up of that Company may be set aside as an unfair preference.

The specified period is: (a) in the case of an unfair preference given to a person who is an associate (as defined in the Bankruptcy Ordinance), two years and (b) in any other case of an unfair preference, six months.

The thing done or suffered will be liable to be set aside if at the time it was done or suffered that Company was insolvent or became insolvent in consequence of the thing done or suffered and that thing has the effect of putting any of that Company's creditors or a surety or guarantor of any of that Company's debts or other liabilities in a better position, in the event of that Company's winding-up, than that person would have been in if the thing had not been done. However, the court cannot make such an order if it is satisfied that the Company which gave the preference was not influenced to give it by a desire to put that person in such better position.

For the purposes of Section 50 of the Bankruptcy Ordinance, a Company is insolvent if it is unable to pay its debts when they fall due or if the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

4.3.3 *Extortionate credit transactions*

Pursuant to Section 264B of the Companies Ordinance, the liquidator of a Company may apply to set aside an extortionate transaction which occurred within three years prior to the Commencement Point of the winding up involving the provision of credit to that Company. A transaction will be extortionate if, having regard to the risk accepted by the party providing the credit (i) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit, or (ii) it otherwise grossly contravenes ordinary principles of fair dealing. A court would presume, unless the contrary is proved, that such a transaction is extortionate.

Some types of Transaction envisaged under the FOA Netting Agreement or Client Transactions under a Clearing Agreement may involve the provision of credit to a Company and accordingly Section 264B of the Companies Ordinance may apply.

4.3.4 *Disclaimer of unprofitable contracts*

Section 268 of the Companies Ordinance entitles the liquidator, in a winding-up of a Company (the Insolvent Party), to disclaim an unprofitable contract with the leave of the court. A liquidator may therefore, following the Commencement Point of the winding-up of that Insolvent Party, seek to disclaim any contract entered into by that Insolvent Party, if the liquidator considers that contract to be an unprofitable contract. If any contract is so

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disclaimed, any damages or injury suffered by the other Party (the Solvent Party) as a result may be claimed by such Solvent Party as a debt in the winding-up of the Company.

However, any liability or obligation which was incurred by the Insolvent Party prior to such Commencement Point and which has become payable or due to be performed or discharged on or before such Commencement Point will not be affected by such disclaimer; and Section 268 of the Companies Ordinance does not entitle a liquidator to:

- (a) recover any sum paid by the Insolvent Party to the Solvent Party before such Commencement Point; or
- (b) disclaim any contract so as to determine, or release the Insolvent Party from, any liability or obligation of the Insolvent Party in respect of any amount that became due and payable by it before such Commencement Point.

In addition, Section 268 of the Companies Ordinance does not entitle a liquidator of the Insolvent Party to disclaim a contract:

- (i) if and to the extent that automatic termination has been effective to convert into an amount due and payable any liability or obligation which, but for the operation of automatic termination, would have been required to be discharged or performed by the Insolvent Party at some future time; or
- (ii) if and to the extent that (A) the Solvent Party has properly exercised an effective right to close-out any liability or obligation which, but for such close-out, would have been required to be discharged or performed by the Insolvent Party at some future time; and (B) such close-out has become effective (so as to produce an amount due and payable) before the time at which the liquidator seeks to disclaim the relevant contract.

Moreover, even if a liquidator of the Insolvent Party, with the leave of the court, is able to disclaim a contract which has not been effectively closed-out at the time at which the liquidator seeks to disclaim such contract, the amount representing the damages or injury suffered by the Solvent Party would be provable in the winding-up of the Insolvent Party, and would therefore be mandatorily included in the Statutory Insolvency Set-Off between the Parties.

4.3.5 ***Anti-deprivation principles***

- (a) The Clearing Module Netting Provisions contain provisions (the "**Ported Transactions Valuation Provisions**") that if, following a Firm Trigger Event, any Firm/CCP Transaction (together with any collateral or margin relating to such Firm/CCP Transaction which has

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been posted to the relevant Agreed CCP) is Transferred from the Firm to another clearing member of the Agreed CCP Service, then the value of the corresponding Client Transaction shall be zero (and the Relevant Collateral Value in respect of such Client Transaction shall be zero or reduced, as the case may be) for the purpose of determining the applicable Cleared Set Termination Amount.

- (b) In our view, following the winding-up of a Firm, the Ported Transactions Valuation Provisions may not be effective by virtue of the application of the anti-deprivation principles, for the following reasons:
 - (i) The courts will not permit, under the common law anti-deprivation principles, an insolvent company to arrange its affairs to frustrate the legitimate interests of that company's creditors. The anti-deprivation principles were most recently considered in the UK Supreme Court judgment of *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited* [2011] UKSC 38 ("**Belmont Park**"). The principles have also been applied in Hong Kong in the Court of Appeal case of *Peregrine Investments Holdings Limited (in liquidation) v Asian Infrastructure Fund Management Company Limited L.D.C.* [2004] 1 HKLRD 598 ("**Peregrine**").
 - (ii) While the law in this area is still subject to a degree of uncertainty, the cases have established that a contractual arrangement will be invalidated under the anti-deprivation principles if:
 - (A) the arrangement removes an asset from a party that would otherwise be capable of realisation for the benefit of that party's creditors; and
 - (B) the arrangement takes effect as a consequence of the insolvency of that party.
 - (iii) In our view, following a winding-up of a Firm in this jurisdiction, there is a risk that the Ported Transactions Valuation Provisions may be challenged under the anti-deprivation principles because the Ported Transactions Valuation Provisions:
 - (A) are contractual arrangements;
 - (B) entitle the Party other than the Firm (the Client) to either:
 - (1) ascribe a zero value to a Client Transaction that is "in-the-money" in respect of the Firm;

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- (2) ascribe a zero value to any collateral transferred by the Firm to the Client in respect of a Client Transaction that is "out-of-the-money" in respect of the Firm; and
- (C) take effect following a Firm Trigger Event that is the insolvency of the Firm.
- (iv) It may be argued that, overall, the Firm is not "deprived" of any asset because:
 - (A) in relation to the situation described in paragraph (iii)(B)(1) above, the Client is entitled to ascribe a zero value to a Client Transaction that is "in-the-money" in respect of the Firm only where the Firm's liability to account for the value of any collateral that is attributable to such Client Transaction has been eliminated. In other words, the "in-the-money" Client Transactions (which are assets of the Firm) will be terminated for zero payment in accordance with the Ported Transactions Valuation Provisions only when the Firm's obligation to pay an amount equal to the Relevant Collateral Value in respect of such Client Transaction (which is a liability of the Firm) has also been eliminated; and
 - (B) in relation to the situation described in paragraph (iii)(B)(2) above, the Client is entitled to ascribe a zero value to any collateral transferred by the Firm to the Client in respect of a Client Transaction that is "out-of-the-money" in respect of the Firm only where the Firm's liability in respect of such "out-of-the-money" Client Transaction has been eliminated. In other words, the Firm's entitlement to receive an amount equal to the Relevant Collateral Value in respect of such Client Transaction (which is an asset of the Firm) will be reduced to zero in accordance with the Ported Transactions Valuation Provisions only when the Firm's obligation in respect of such "out-of-the-money" Client Transaction (which is a liability of the Firm) has also been eliminated.

There is authority, in decisions of the English courts, for the proposition that an arrangement whereby an asset (the "**Deprived Asset**") is removed from the estate of party as a consequence of the insolvency of that party will not be invalidated under the anti-deprivation principles if that party receives another asset of comparable value in consideration for

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the removal of the Deprived Asset. However, we are not aware of any direct authority, whether in Hong Kong or another common law jurisdiction, for the proposition that such an arrangement would not be invalidated under the anti-deprivation principles if, instead of receiving another asset of comparable value, a liability of the party is discharged in consideration for the removal of the Deprived Asset.

In any case, the argument referred to above is applicable only where:

- (x) in relation to the situation described in paragraph (iii)(B)(1) above, the marked-to-market value of the "in-the-money" Client Transactions is equal to or is less than the Relevant Collateral Value in respect of such Client Transactions; or
- (y) in relation to the situation described in paragraph (iii)(B)(1) above, the marked-to-market value of the "out-of-the-money" Client Transactions is equal to or is more than the Relevant Collateral Value in respect of such Client Transactions.

If that were not the case, the effect of the Ported Transactions Valuation Provisions (if upheld) would be that the assets (or their proceeds) available for distribution to the unsecured creditors of the insolvent Firm would be less than the assets (or their proceeds) that would have been available for distribution in the absence of the Ported Transactions Valuations Provisions.

- (v) It may also be argued that the Ported Transactions Valuation Provisions serve a legitimate commercial purpose (that is, to permit a client's positions with the insolvent clearing member (the Firm) to be effectively "ported" to another solvent clearing member in order to mitigate the effect of a defaulting clearing member on the wider market). Indeed, arguments to such effect have been accepted by the UK Supreme Court in *Belmont Park*: in that decision, it was held that the anti-deprivation principles will apply only where there is an intention to evade the insolvency rules. *Belmont Park* is, however, of merely persuasive authority in Hong Kong. In contrast, the Hong Kong Court of Appeal decision of *Peregrine* seems to suggest that a provision that has been agreed in good faith and applies equally to all parties may still be invalidated by the anti-deprivation principles. In addition, whilst there exists under English law a relatively comprehensive regime (consisting of primary and secondary legislation) concerning

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the avoidance of transactions to which an insolvent person was party, the legislative provisions in Hong Kong are rudimentary.

- (vi) Finally, it may be argued that the Clearing Module Netting Provisions should be upheld on the basis that they are merely an accounting between the Parties, and that amounts representing terminated "in-the-money" Client Transactions or the Relevant Collateral Value in respect of "out-of-the-money" Client Transactions should not be viewed as "assets" of the Firm. However, as indicated above, there is currently relatively little case law in Hong Kong on this topic, and on the basis of what little exists our view is that the Clearing Module Netting Provisions not be held to constitute mere accounting.
- (c) For these reasons, we are unable to discount completely the risk of the Ported Transactions Valuation Provisions being invalidated by the anti-deprivation principles if the Firm became insolvent, particularly where the scenario described in paragraph (iv)(x) or (y) above does not apply.

4.4 Other insolvency issues

- 4.4.1 The court may, in some circumstances, stay Insolvency Proceedings where the court is of the view that proceedings in another forum would be more convenient or if concurrent proceedings are being brought elsewhere, but will take into account whether or not this will prejudice creditors whose claims have a close connection with Hong Kong.
- 4.4.2 For the purpose of proving a claim in a winding up, the claim must be expressed in Hong Kong dollars and, to the extent that any amounts are not denominated in Hong Kong dollars, they will be converted into Hong Kong dollars at the midpoint between the selling and buying telegraphic transfer rates of exchange quoted by The Hong Kong Association of Banks on the day the winding-up commenced or, where no such rates are quoted, at an exchange rate determined by the court. Therefore, any provision in the FOA Netting Agreement, or as the case may be, the Clearing Agreement for the time and rate of conversion of one currency into another may, in the winding up of a Company, be superseded by a conversion, or conversions, at the time and rate specified by the liquidator, determined as described above.
- 4.4.3 It is possible that:
 - (a) the valuation and calculation made to determine the net amount resulting from the set-off implemented under the Netting Provisions or the Set-Off Provisions;
 - (b) any currency conversion rate applied; or

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- (c) any other valuation, calculation or determination made or other action or discretionary decision taken under the Netting Provisions or the Set-Off Provisions,

could be challenged by a liquidator if they were or it was not done fairly or in a manner consistent with applicable law.

- 4.4.4 We express no opinion as to the effectiveness of the Netting Provisions or the Set-Off Provisions in relation to any obligation owing by one Party the benefit of which is acquired by a Company after the winding up of that Company has commenced.

4.5 Disposition to defraud creditors

Under Section 60 of the Conveyancing and Property Ordinance, any disposition (for example, entering into and performing the FOA Netting Agreement, or as the case may be, the Clearing Agreement) by a Company made with the intention to defraud creditors may be set aside (where such fraudulent intention is proved by the person seeking to set aside the disposition). However, Section 60 does not affect the operation of the Bankruptcy Ordinance and the Companies Ordinance in respect of those provisions for the time being in force under which Transactions may be avoided for the protection of creditors upon the Company's winding-up.

4.6 Schemes of Arrangement

There is provision in the Companies Ordinance for a scheme of arrangement in respect of a Company to be approved by creditors or, in some cases, shareholders of the Company. The courts will not sanction a scheme of arrangement unless reasonable efforts were made to notify those creditors whose rights would be affected by the scheme of the meeting to approve that scheme. Approval at the creditors' meeting of the terms of a scheme of arrangement does not require unanimity of the affected creditors, whether or not present at the meeting. Such a scheme of arrangement could affect both set-off rights of creditors and the amount of claims which the creditors may have against the Company. However, any such scheme of arrangement could impair the effectiveness of the Netting Provisions or the Set-Off Provisions only if the aggregation or set-off provided for in the Netting Provisions or the Set-Off Provisions, as applicable, has not taken place before the coming into effect of such scheme of arrangement. If the aggregation or set-off has taken place before the coming into effect of such scheme of arrangement, that scheme of arrangement could affect only the amount (and other terms) of any resulting net claim.

4.7 Transfer of Margin

Under the conflict of laws rules of Hong Kong, matters concerning the title to, and rights and obligations of persons generally with respect to, Margin Transferred pursuant to the Title Transfer Provisions are generally governed by the law of the place where the Margin is situated. Accordingly, our opinion in paragraph 3.10 is given on the assumption that, in accordance with Hong Kong's conflict of laws rules,

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the *situs* of that Margin is deemed to be Hong Kong and accordingly, Hong Kong law applies to such matters.

4.8 Section 45 of the Securities and Futures Ordinance

- 4.8.1 Section 45 of the Securities and Futures Ordinance provides that, among other things, a market contract shall not be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to distribution of the assets of a person on insolvency, bankruptcy or winding up, or on the appointment of a receiver over any of the assets of a person.
- 4.8.2 A market contract is defined in the Securities and Futures Ordinance as a contract subject to the rules of a recognized clearing house entered into by the clearing house with a clearing participant pursuant to a novation which is both in accordance with those rules and for the purposes of the clearing and settlement of transactions in securities or futures contracts effected on a recognized stock market or a recognized futures market or subject to the rules of a recognized exchange company. A Transaction between two Parties (including a Client Transaction that is back-to-back with a transaction to be cleared by a central counterparty) does not constitute a market contract as defined in the Securities and Futures Ordinance.
- 4.8.3 It follows that the provisions of Section 45 of the Securities and Futures Ordinance do not apply to Transactions (including Client Transactions).

4.9 Hong Kong Bank

Winding-up of Hong Kong Banks

- 4.9.1 A Voluntary Winding-up of a Hong Kong Company can be either: (a) a members' voluntary winding-up if directors of the Hong Kong Company have issued and delivered to the Registrar of Companies for registration a certificate of solvency in accordance with Section 233 of the Companies Ordinance; or (b) a creditors' voluntary winding-up if no such certificate of solvency has been so issued and delivered. A s228A Winding-up is probably to be considered a creditors' voluntary winding-up.
- 4.9.2 Section 122(1) of the Banking Ordinance provides that the provisions of the Companies Ordinance with regard to a creditors' voluntary winding-up shall not apply to Hong Kong Banks.

Date of commencement of winding-up

- 4.9.3 Section 122(3) of the Banking Ordinance provides that where before the presentation of a petition for the Compulsory Winding-up of a Hong Kong Bank, the Hong Kong Monetary Authority has given a direction, pursuant to Section 52(1)(C) of the Banking Ordinance, that the affairs, business and property of the Hong Kong Bank business shall be managed by a manager

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appointed by the Hong Kong Monetary Authority, and such authority has continued in force at all times until the presentation of the petition for winding-up, then, notwithstanding Section 184(2) of the Companies Ordinance, the winding up of the Hong Kong Bank shall be deemed to have commenced at the time the direction was given by the Hong Kong Monetary Authority.

- 4.9.4 Accordingly, in the case of a Compulsory Winding-up of a Hong Kong Bank, if before the presentation of a petition for winding-up, the Hong Kong Monetary Authority has given a direction pursuant to Section 52(1)(C) of the Banking Ordinance, the Commencement Point shall be deemed to be the time such direction was given by the Hong Kong Monetary Authority.

Disposition of Property

- 4.9.5 Section 122(4) of the Banking Ordinance provides that Section 182 of the Companies Ordinance shall not apply to invalidate any disposition of the business or property of a Hong Kong Bank in certain circumstances.

Securities and Futures Ordinance

- 4.9.6 A Hong Kong Bank which is also registered with the Securities and Futures Commission as a "registered institution" under the Securities and Futures Ordinance (a "**Registered Institution**") may enter into Transactions for the Registered Institution's own account or for the account of the Registered Institution's clients whose monies are required to be treated by the Registered Institution as client money under the Securities and Futures (Client Money) Rules (such monies "**client money**" and such client "**segregated clients**"). A Registered Institution cannot aggregate or set off (or permit there to be aggregation or set off of) its own liabilities owed to the other Party against client money to be received from such other Party.
- 4.9.7 Accordingly, if a Party were a Registered Institution, the FOA Netting Agreement, or as the case may be, the Clearing Agreement might need to be amended to provide for two discrete amounts to be calculated in order to produce, separately, a net amount due in respect of transactions made for the account of segregated clients and a net amount due in respect of all other transactions; or the Registered Institution might need to enter into two separate agreements, one to apply to transactions made with the other Party for the account of segregated clients and the other to cover all other transactions. Alternatively, in such circumstances, the other Party might obtain a representation in the FOA Netting Agreement, or as the case may be, the Clearing Agreement from a Party that is a Registered Institution that such Registered Institution is dealing in relation to the agreement only for its own account and not for the account of its clients. We express no opinion as to the effect under Hong Kong law of any failure by a Registered Institution to adopt one of the above courses of action.

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4.10 General

- 4.10.1 If any creditor ("**the attaching creditor**") of a Party ("**the defendant Party**") were (whether before or after judgment) to attach, execute, levy execution or otherwise exercise a creditor's process (each such process an "**attachment**") over or against any amount owing under the FOA Netting Agreement, or as the case may be, the Clearing Agreement, or a Transaction to the defendant Party by the other Party ("**the debtor Party**"), then the debtor Party would be able, following the date the relevant netting or set-off is to take effect (the "**Relevant Date**"), to exercise its rights under the Netting Provisions or the Set-Off Provisions against the attaching creditor of the defendant Party in respect of claims which existed at the date of the attachment, including the amount which is the subject of the attachment. However, if a winding-up has commenced or a bankruptcy order has been made in respect of the attaching creditor before the Relevant Date, it may be possible for the liquidator or trustee in bankruptcy of the attaching creditor to claim from the debtor Party the amount which is subject to the attachment free of the debtor Party's rights under the Netting Provisions (so that the claim by the liquidator or trustee in bankruptcy would be for an amount not reduced by the operation of the Netting Provisions). This is because it may be argued that the debtor Party seeks to exercise a set-off right in respect of an amount which has come to be owed by the debtor Party to the attaching creditor rather than to the defendant Party, and a contractual provision which purports to create a right of set-off in respect of non-mutual claims may not be effective in the winding-up or bankruptcy of the attaching creditor.

However, after the commencement of a winding-up or the bankruptcy of the defendant Party any attachment will be ineffective unless the court otherwise orders, and in our view the court would not validate the attachment in order to defeat the rights of the debtor Party under the Netting Provisions or the Set-Off Provisions.

- 4.10.2 Where any Party is vested with a discretion or may determine a matter, Hong Kong law may require that such discretion is exercised or determination is made reasonably. Any provision in the FOA Netting Agreement, or as the case may be, the Clearing Agreement providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by a Party. The court may regard any calculation, determination or certification as no more than prima facie evidence of the matter calculated, determined or certified.
- 4.10.3 If the effect of proceedings in a forum other than Hong Kong is to extinguish claims or liabilities under the governing law of those claims or liabilities, the court may recognise the extinction of those claims or liabilities.

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- 4.10.4 Any provision of the FOA Netting Agreement, or as the case may be, the Clearing Agreement which constitutes, or purports to constitute, a restriction on the exercise of any statutory power by any Party or any other person may be ineffective.
- 4.10.5 Under Hong Kong law, interest imposed upon a Party by the FOA Netting Agreement, or as the case may be, the Clearing Agreement might be held to be irrecoverable on the grounds that it is a penalty, or to the extent that it accrues on an unsecured debt after the commencement of a winding-up or a bankruptcy in respect of the Party liable to pay such interest; but the fact that such interest was held to be irrecoverable would not of itself prejudice the legality or validity of any other provision of such agreement.
- 4.10.6 While the court has power to give judgment in a currency other than Hong Kong dollars, it has the discretion to decline to do so.
- 4.10.7 A new Companies Ordinance is expected to come into force in March 2014. However, the provisions in the "old Companies Ordinance" relating to the winding-up of a Hong Kong company will remain in that Ordinance, which is to be renamed as the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32). Crucially, Section 264 of Cap. 32, which provides that the same rules with regard to the respective rights of secured and unsecured creditors and to debts provable under the law of bankruptcy shall apply in winding up of insolvency companies, will remain unchanged. Accordingly, we believe there will be no substantive change to the terms of our opinion (including the effect of Statutory Insolvency Set-Off, or the grounds upon which a liquidator may invalidate a transaction) as a result of the coming into force of the new Companies Ordinance.
- 4.10.8 A Securities and Futures (Amendment) Bill 2013 was published in the Hong Kong Gazette on 28 June 2013: the bill is currently being considered by the Bills Committee of the Hong Kong Legislative Council. In addition, we understand that the Bankruptcy Ordinance is currently being reviewed and may be amended; however, we are not aware of any timetable having been set for any amendment to the Bankruptcy Ordinance to come into force. This opinion letter makes no reference to any proposed changes to any of these Ordinances..
- 4.10.9 This opinion is subject to the effects of United Nations or Hong Kong sanctions or other similar measures implemented or effective in Hong Kong with respect to a Party which is, or is controlled by or otherwise connected with, a person resident in, incorporated or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply.

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

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

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

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

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

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

Yours faithfully,

Clifford Chance

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**SCHEDULE 1
HONG KONG INVESTMENT FIRMS**

Subject to provisions of this Schedule 1 (*Hong Kong Investment Firms*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party which is a Hong Kong Investment Firm.

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 1 (*Hong Kong Investment Firms*):

"Securities and Futures (Client Money) Rules" means the Securities and Futures (Client Money) Rules, Chapter 571I of Hong Kong.

2. QUALIFICATIONS

The following additional qualification shall apply:

Securities and Futures Ordinance

A Hong Kong Investment Firm may enter into Transactions for the Hong Kong Investment Firm's own account or for the account of the Hong Kong Investment Firm's clients whose monies are required to be treated by the Hong Kong Investment Firm as client money under the Securities and Futures (Client Money) Rules (such monies "**client money**" and such client "**segregated clients**"). A Hong Kong Investment Firm cannot aggregate or set off (or permit there to be aggregation or set off of) its own liabilities owed to the other Party against client money to be received from such other Party.

Accordingly, if a Party were a Hong Kong Investment Firm, the FOA Netting Agreement, or as the case may be, the Clearing Agreement might need to be amended to provide for two discrete amounts to be calculated in order to produce, separately, a net amount due in respect of transactions made for the account of segregated clients and a net amount due in respect of all other transactions; or the Hong Kong Investment Firm might need to enter into two separate agreements, one to apply to transactions made with the other Party for the account of segregated clients and the other to cover all other transactions. Alternatively, in such circumstances, the other Party might obtain a representation in the FOA Netting Agreement, or as the case may be, the Clearing Agreement from a Party that is a Hong Kong Investment Firm that such Hong Kong Investment Firm is dealing in relation to the agreement only for its own account and not for the account of its clients. We express no opinion as to the effect under Hong Kong law of any failure by a Hong Kong Investment Firm to adopt one of the above courses of action.

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**SCHEDULE 2
HONG KONG INSURANCE COMPANIES**

Subject to the provisions of this Schedule 2 (*Hong Kong Insurance Companies*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party which is a Hong Kong Insurance Company.

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

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 2 (*Hong Kong Insurance Companies*):

We express no opinion in respect of marine insurance companies, mutual insurance companies and any entity, whether or not having separate legal personality (other than a Hong Kong Insurance Company) that may be authorized to carry on insurance business in Hong Kong, including, but not limited to, the Society of Lloyd's and associations of underwriters approved by the Insurance Authority of Hong Kong.

2. QUALIFICATIONS

The following additional qualifications shall apply:

2.1 Winding-up of a Hong Kong Insurance Company

Section 45 of the Insurance Companies Ordinance provides that, unless the court otherwise orders, a Hong Kong Insurance Company shall not be wound up voluntarily (i.e. a Hong Kong Insurance Company may not be the subject of a Voluntary Winding-up or a s228A Winding-up).

2.2 Insurance Companies Ordinance

2.2.1 Insurance business under the Insurance Companies Ordinance is broadly divided into "long-term insurance business" and "general insurance business".

2.2.2 Section 22 of the Insurance Companies Ordinance requires a Hong Kong Insurance Company carrying on "long-term insurance business" to *identify* assets and liabilities attributable to its long-term insurance business (and differentiate those from the assets and liabilities attributable to its general insurance business) and to maintain a separate account in respect of each of:

- (a) its Class G insurance;¹

¹ Class G insurance covers (in summary) guaranteed capital or return retirement contracts.

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- (b) its Class H insurance;² and
- (c) the remaining classes of long-term insurance business excluding Classes G and H

(each of (a), (b) and (c) an "**LTB Fund**").

2.2.3 Any receipts (being premium and investment income) from any one LTB Fund should be recorded by the Hong Kong Insurance Company in a separate account maintained for that LTB Fund. The account balance of each LTB Fund will form a separate fund identified and named specifically for that relevant part of the long-term insurance business of the Hong Kong Insurance Company.

2.2.4 Accordingly, each Hong Kong Insurance Company may be classified as either:

- (a) a Single-Fund Insurance Company - because it carries on only general insurance business or, if it carries on only long-term business, because the long-term business it carries on is such as to require it to maintain only one LTB Fund; or
- (b) a Multi-Fund Insurance Company - because it carries on any long-term business and general insurance business or, if it carries on only long-term business, because the long-term business it carries on is such as to require it to maintain two or three LTB Funds.

2.3 Multi-Fund Insurance Companies

2.3.1 Section 23(1) of the Insurance Companies Ordinance stipulates that (subject to certain exceptions) *"assets representing a fund maintained by an insurer in respect of its long term business shall be applicable only for the purposes of that part of that business to which the fund relates."*

2.3.2 Our view is that the Insurance Companies Ordinance requires Multi-Fund Insurance Companies, as a matter of *internal* organisation and accounting, to identify assets and liabilities that are attributable to the relevant LTB Fund. An asset within a particular LTB Fund cannot be used for any other business (including any other LTB Fund) to which that LTB Fund does not relate.

2.3.3 The requirement in Section 23 of the Insurance Companies Ordinance is of general application and is expressed in respect of relevant assets, instead of being a prohibition on the relevant Multi-Fund Insurance Company. We are of this view because:

² Class H insurance covers (in summary) non-guaranteed capital or return retirement contracts.

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- (a) the language of Section 23(1) appears to have been deliberately drafted in the passive voice (in contrast to Section 23(6)); and
- (b) the relevant words in Section 23(1) ("assets" and "shall be applicable") can therefore be broken down to mean "the assets shall not be capable of being applied": this is on the basis of interpreting "applicable" as "able or capable of being applied".

2.3.4 Consequently, a Multi-Fund Insurance Company cannot apply the relevant assets for any purpose other than the purposes of the relevant fund and, in addition, no other legal person may apply the relevant assets for any purpose other than the purposes of the relevant fund. Any contractual term purportedly agreed between a Hong Kong Insurance Company and its counterparty contrary to Section 23 will not be enforceable to the extent it contravenes Section 23.

Pre-insolvency analysis

2.3.5 It follows that:

- (a) despite a Multi-Fund Insurance Company's agreement to a contractual provision that close-out netting or set-off may be applied in respect of ***all*** Transactions (with a particular counterparty) to which that Multi-Fund Insurance Company is party, close-out netting and/or set-off pursuant to such provision will not be enforceable in respect of such Transactions if and to the extent that the effect of such close-out netting and/or set-off would be the application of assets representing one fund to the liabilities of another fund; but
- (b) if the FOA Netting Agreement, or as the case may be, the Clearing Agreement to which a Multi-Fund Insurance Company is party specifies the fund to which the relevant Transactions or Transaction relate, then before the winding-up of the Multi-Fund Insurance Company, close-out netting and/or set-off can be effected in respect of those Transactions relating to each specified fund (but not "across funds" nor across all Transactions to which the relevant Multi-Fund Insurance Company is a party), without any contravention of Section 23 of the Insurance Companies Ordinance.

Post-insolvency analysis

2.3.6 As mentioned in paragraph 4.2.1 (*Mandatory insolvency rules of set-off*) of this opinion letter, in a winding-up of a Hong Kong Company or a Non-Hong Kong Company (including a Multi-Fund Insurance Company) (the Insolvent Party), a contractual set-off provision between the Insolvent Party and another person will be effective in the winding-up of that Insolvent Party only if, and to the extent that, such set-off provision is consistent with Statutory Insolvency Set-Off.

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- 2.3.7 Statutory Insolvency Set-Off applies across the entire range of mutual credits, mutual debits and other mutual dealings between the Insolvent Party and another person (provided that the test of mutuality is satisfied), irrespective of the origins of the claims and the business units, branches or trading divisions to which the claims may have been allocated or to which they are referable (i.e. the set-off applies "across the board").
- 2.3.8 Section 43 of the Insurance Companies Ordinance provides that a court may order the winding up of a Hong Kong Insurance Company in accordance with the provisions of the Companies Ordinance, and there is no provision saving Hong Kong Insurance Companies from the application of Statutory Insolvency Set-Off. This might suggest that, on the making of an order for the winding up of a Hong Kong Insurance Company, Statutory Insolvency Set-Off would apply in respect of all mutual credits, mutual debits and other mutual dealings between the Hong Kong Insurance Company and another person, regardless of the respective funds to which such credits, debits and other dealings have been allocated or to which each may be referable (i.e. set-off on an "across the board" basis).
- 2.3.9 However, our view (while the contrary position may be argued) is that, on the making of a winding-up order in respect of a Multi-Fund Insurance Company, Statutory Insolvency Set-Off will apply on a "per fund" basis only, and not "across the board".
- 2.3.10 The reasoning for our preferring "per fund" set-off rather than "across the board" set-off is as follows:
- (a) First, having regard to our analysis of the position prior to a winding-up (in section 2.3.5 of this Schedule 3) - based on Section 23 of the Insurance Companies Ordinance - it would be a strange result if, on the winding-up of a Multi-Fund Insurance Company, "across the board" set-off were to apply, when this was prohibited prior to a winding-up.
 - (b) Second, Section 45 of the Insurance Companies Ordinance stipulates that on the winding-up of a Hong Kong Insurance Company:
 - (i) assets within each LTB Fund shall be available for meeting only the liabilities of the Insurance Company attributable to that LTB Fund;
 - (ii) the other assets of the Insurance Company shall be available for meeting only the liabilities of the Insurer attributable to its other business(es);
 - (iii) only if the assets within a LTB Fund exceed the liabilities of that respective LTB Fund may the excess be used to meet the liabilities of other LTB Funds, on a pro rata basis; and

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- (iv) only where (A) there are excess assets after meeting the liabilities of other LTB Funds or (B) there are no liabilities of other LTB Funds that are not already covered by their respective assets, may the excess assets be used to cover liabilities attributable to the general insurance business of that Hong Kong Insurance Company.

It follows that "across the board" set-off would be wholly inconsistent with the substance of Section 45 of the Insurance Companies Ordinance.

- (c) Thirdly, Section 46 of the Insurance Companies Ordinance appears to support the concept of "segmentation" of a Multi-Fund Insurance Company's assets and liabilities, according to the funds required to be maintained by the Multi-Fund Insurance Company. Section 46 requires the liquidator, on the winding up of a Hong Kong Insurance Company, to continue carrying on its long-term business as a going concern with a view to transferring the long-term insurance business to another insurer. The liquidator will have the right to vary any contracts in existence at the commencement of the winding up, but will not have the right to effect any new contracts of insurance. The purpose of these provisions is to protect the interests of long-term insurance business policy holders (such as life insurance policy holders) so that their interests will not be affected by the insolvency of the Hong Kong Insurance Company. Despite the requirement placed by Section 46 on the liquidator to continue the carrying-on of the long-term business, there is no express provision in the Insurance Companies Ordinance saving the long-term business from Statutory Insolvency Set-Off on the commencement of a winding-up of the relevant Insurance Company. However, the requirement to continue the carrying-on of the long-term business is not fundamentally incompatible with set-off - despite the clear burden imposed by set-off on the carrying-on of the long-term business. (For example, in relation to a company in English law administration, contractual set-off remains available to the relevant company's creditors, despite rehabilitation of the company's business being a primary objective of the administration process).

- 2.3.11 If, on the winding-up of a Multi-Fund Insurance Company, Statutory Insolvency Set-Off applies on a "per fund" basis (and not on an "across the board" basis), we believe that the Netting Provisions and the Set-Off Provisions will be effective under Hong Kong law in relation to a Multi-Fund Insurance Company only to the extent it is consistent with Statutory Insolvency Set-Off applied on a "per fund" basis. Accordingly, a provision for "across the board" close-out netting will not be effective; but, in our view, a provision for "per fund" close-out netting will be effective.

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- 2.3.12 We are not aware of any decision of the courts which supports the view expressed above.

Single-Fund Insurance Companies

- 2.3.13 Our discussion above in respect of Multi-Fund Insurance Companies is not relevant to Single-Fund Insurance Companies, because the provisions of Sections 22 and 23 of the Insurance Companies Ordinance do not apply to Single-Fund Insurance Companies. Accordingly, the additional qualifications set out in this section 2.3 do not apply to Single-Fund Insurance Companies.

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**SCHEDULE 3
HONG KONG INDIVIDUALS**

Subject to the provisions of this Schedule 3 (*Hong Kong Individuals*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party who is a Hong Kong Individual.

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

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 3 (*Hong Kong Individuals*):

"Insolvency Proceedings" means, in relation to a Hong Kong Individual, the laws and procedures referred to in section 3.1.

2. ASSUMPTIONS

The following additional assumption shall apply:

Each Hong Kong Individual is of full age and sound mind and has the mental capacity and full legal capacity under any applicable law relating to him/her to enter into and to exercise his/her rights and to perform his/her obligations under the FOA Netting Agreement, or as the case may be, the Clearing Agreement and Transactions.

3. OPINIONS

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

3.1 Insolvency Proceedings: Hong Kong Individuals

3.1.1 The only bankruptcy, composition, rehabilitation or other insolvency procedures to which a Party who is a Hong Kong Individual could be subject in this jurisdiction, and which are relevant for the purposes of this opinion, are:

- (a) bankruptcy; and
- (b) individual voluntary arrangements.

3.1.2 The legislation applicable to Insolvency Proceedings is the Bankruptcy Ordinance, as modified up to the date hereof, together with any subsidiary legislation.

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

4. QUALIFICATIONS

The following additional qualifications shall apply:

4.1 Bankruptcy

- 4.1.1 All references to "*Company*" in paragraph 4 shall be replaced with "*Hong Kong Individual*".
- 4.1.2 All references to "*winding up*", "*winding-up petition*" and "*winding-up order*" in paragraph 4 shall be replaced with "*bankruptcy*", "*bankruptcy petition*" and "*bankruptcy order*", as applicable.
- 4.1.3 "**Commencement Point**" means, in relation to a bankruptcy proceeding, the date of the making of a bankruptcy order by the court.
- 4.1.4 "**SISO Point**" means, in relation to a bankruptcy proceeding, the date of the making of a bankruptcy order by the court.
- 4.1.5 The words "*which is made applicable to Companies by Section 264 of the Companies Ordinance*" in paragraph 4.2.1 (*Mandatory insolvency rules of set-off*) shall be disregarded.
- 4.1.6 Paragraph 4.2.2 (*Dispositions of property void*) shall be disregarded and replaced with:

*"Where a Hong Kong Individual (the Insolvent Party) is adjudged bankrupt, any disposition of property made by the Insolvent Party after the presentation of the petition for the bankruptcy order and before the vesting of the bankrupt's estate in a trustee (the "**Relevant Period**") is void under Section 42 of the Bankruptcy Ordinance, except to the extent that it is or was made with the consent of the court, or it is or was subsequently ratified by the court. Accordingly, we express no opinion as to whether or not obligations incurred during the Relevant Period, could validly be included in an aggregation or set-off pursuant to the Netting Provisions, the Set-Off Provisions or Statutory Bankruptcy Set-Off. The avoidance of any obligation on this basis would not prejudice the effectiveness of the aggregation or set-off of obligations in respect of other obligations pursuant to the Netting Provisions, the Set-Off Provisions or Statutory Bankruptcy Set-Off."*

- 4.1.7 Paragraph 4.2.3 (*Obligations incurred after certain times*) shall be disregarded and replaced with:

*"Where a Hong Kong Individual (the Insolvent Party) is adjudged bankrupt, an obligation (a "**Post-Notice Obligation**") incurred by the Insolvent Party*

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during a relevant period will not be included in any aggregation or set-off pursuant to the Netting Provisions, the Set-Off Provisions or Statutory Insolvency Set-Off, if the Post-Notice Obligation (looked at in isolation) gives rise to an amount owing by such Insolvent Party to the other Party (the Solvent Party).

The relevant period referred to above is the period between (i) the date on which the Solvent Party has notice that the bankruptcy petition has been presented and (ii) the SISO Point.

However, this would not affect the aggregation or set-off of the obligations of the Parties in respect of (i) any obligation incurred before such Solvent Party had notice of the bankruptcy petition and (ii) any Post-Notice Obligation (looked at in isolation) giving rise to an amount owing to such Insolvent Party by such Solvent Party."

- 4.1.8 The references to "*Section 266B of the Companies Ordinance*" in paragraph 4.2.4 (*Unfair preference*) shall be disregarded.
- 4.1.9 The references to "*Section 264B of the Companies Ordinance*" in paragraph 4.2.5 (*Extortionate credit transactions*) are replaced with "*Section 71A of the Bankruptcy Ordinance*".
- 4.1.10 The references to "*Section 268 of the Companies Ordinance*" in paragraph 4.2.6 (*Disclaimer of unprofitable contracts*) are replaced with "*Section 59 of the Bankruptcy Ordinance*".

4.2 Other bankruptcy issues

4.2.1 *Transactions at an undervalue*

Under Section 49 of the Bankruptcy Ordinance, a transaction entered into by a Hong Kong Individual at any time within a period of five years ending on the date of presentation of a bankruptcy petition with a person on terms that provide for the Hong Kong Individual to receive:

- (a) no consideration;
- (b) a consideration of marriage; or
- (c) a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by him or her,

may be set aside as a transaction at an undervalue, if at the time the transaction is entered into that individual was insolvent or became insolvent in consequence of the transaction unless:

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- (i) the transaction in question takes place within two years before the presentation of the petition, in which case there is no need to establish the Hong Kong Individual's insolvency at the relevant time; or
- (ii) the person who benefits from the transaction is an associate of the individual (otherwise than by reason only of being the Hong Kong Individual's employee), in which case the Hong Kong Individual is deemed to have been insolvent at the relevant time unless the contrary is shown.

Transactions entered into on arm's length terms and at the then prevailing market rates are unlikely to constitute transactions at an undervalue. However, this is a question of fact in each case.

4.2.2 *Individual Voluntary Arrangements*

There is provision in the Bankruptcy Ordinance (Sections 20 to 20K) for a voluntary arrangement in respect of a Hong Kong Individual to be approved by creditors of that Hong Kong Individual. Before approval of the proposal, the Hong Kong Individual may make an application to the court for an interim order preventing any Insolvency Proceeding or other legal proceeding from being taken or continued against the individual without the permission of the court. If so requested, the court may order that a creditors' meeting may be held.

Approval at the creditors' meeting of the terms of a proposal in respect of an individual does not require unanimity of the affected creditors. An approved proposal binds every person who had notice of, and was entitled to vote at, the creditors' meeting (whether or not present or represented at the meeting) as if such person were a party to the arrangement.

Such a proposal could affect both netting or set-off rights of creditors and the amounts of claims which creditors may have against the Hong Kong Individual. However, any such proposal could impair the effectiveness of the Netting Provisions or the Set-off Provisions only if the aggregation or set-off provided for in the Netting Provisions or the Set-Off Provisions, as applicable, has not taken place before the coming into effect of such a proposal. If the aggregation or set-off has taken place before the coming into effect of such a proposal, that proposal could affect only the amount (and other terms) of any resulting net claim.

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**SCHEDULE 4
HONG KONG TRUSTS**

Subject to the provisions of this Schedule 4 (*Hong Kong Trusts*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party who or which is a Hong Kong Trustee.

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

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 4 (*Hong Kong Trusts*):

- 1.1 "**Authorized Unit Trust**" means a Hong Kong Trust which is a unit trust that is authorized by the Securities Futures Commission as a collective investment scheme under the Securities and Futures Ordinance.
- 1.2 "**Charitable Trust**" means a Hong Kong Trust that has been established for exclusively charitable purposes.
- 1.3 "**Hong Kong Trustee**" means a Hong Kong Company, a Non-Hong Kong Company or a Hong Kong Individual acting as trustee of a Hong Kong Trust.
- 1.4 "**Mandatory Provident Fund Schemes Ordinance**" means the Mandatory Provident Fund Schemes Ordinance, Chapter 485 of Hong Kong.
- 1.5 "**MPF Scheme**" means a Hong Kong Trust that is a provident fund scheme registered under the Mandatory Provident Fund Schemes Ordinance.
- 1.6 "**Rules of the High Court**" means the Rules of the High Court, Chapter 4A of Hong Kong.
- 1.7 "**Trust Quasi-Insolvency Proceedings**" means the laws and procedures referred to in section 3.1.2.
- 1.8 "**Trustee Ordinance**" means the Trustee Ordinance, Chapter 29 of Hong Kong.
- 1.9 Paragraph 1.9.8 is deemed deleted and replaced with the following:

"**Trustee Insolvency Proceedings**" means:

- (a) in respect of a Hong Kong Trustee that is a Company, the laws and procedures referred to in paragraph 3.1; and
- (b) in respect of a Hong Kong Trustee who is a Hong Kong Individual, the laws and procedures referred to in section 3.1 of Schedule 4 (*Hong Kong Individuals*).

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- 1.9 References in this opinion to a trustee shall include a body of persons acting jointly as trustees.

2. ASSUMPTIONS

- 2.1 The following additional assumptions shall apply:

- 2.1.1 Where a Party is expressed to be a Hong Kong Trust, the contracting party is the Hong Kong Trustee of such Hong Kong Trust, acting in his, her or its capacity as such.
- 2.1.2 Each Hong Kong Trust is an express trust validly constituted under a written trust instrument governed by Hong Kong law (including a Charitable Trust, an Authorized Unit Trust and an MPF Scheme), but excluding (without limitation) any trust arising by operation of law, any statutory trust, any trust of which a judicial trustee is trustee, any trust of which an official trustee is trustee, any bare trust (simple trust), and any trust of which a person is trustee by virtue of being a personal representative of a deceased estate.
- 2.1.3 Each trustee of a Hong Kong Trust is a Hong Kong Trustee.
- 2.1.4 Each Hong Kong Trustee, in entering into the FOA Netting Agreement, or as the case may be, the Clearing Agreement and each Transaction, is not in breach of any of his, her or its express or implied duties under the relevant trust instrument or otherwise in connection with the relevant Hong Kong Trust and is acting in accordance with the terms, express or implied, and conditions and purpose of the relevant Hong Kong Trust.
- 2.1.5 During the life of all Transactions, each Hong Kong Trustee will remain a trustee of the relevant Hong Kong Trust.
- 2.1.6 Each Hong Kong Trustee will have assumed or undertaken all obligations and liabilities under the FOA Netting Agreement, or as the case may be, the Clearing Agreement in his, her or its capacity as trustee of the relevant Hong Kong Trust and not in his, her or its personal capacity, and will have agreed with the other Party, by express contractual provision, that any power or right conferred on the other Party under such agreement, or any recourse therefor, shall not extend to any personal assets of that Hong Kong Trustee or any assets held by that Hong Kong Trustee as trustee of any trust other than the relevant Hong Kong Trust.

- 2.2 The assumption set out in paragraph 2.1.1 of this opinion letter does not apply.

3. OPINIONS

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

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3.1 Insolvency Proceedings: Hong Kong Trusts

- 3.1.1 Hong Kong Trusts are not legal persons. However, a Hong Kong Trust may in some circumstances be treated as if it were a separate legal person in the context of its insolvency.
- 3.1.2 A Hong Kong Trust may be the subject of the following bankruptcy, composition, rehabilitation or other insolvency procedures in this jurisdiction:
- (a) administration order; and
 - (b) (if a Hong Kong Trust is an MPF Scheme) winding-up.
- 3.1.3 The legislation applicable to Trust Quasi-Insolvency Proceedings is as follows:
- (a) the Rules of the High Court; and
 - (b) (in relation to winding-up of an MPF Scheme), the Mandatory Provident Fund Schemes Ordinance,
- each as modified up to the date hereof, together with any subsidiary legislation.
- 3.1.4 We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Trust Quasi-Insolvency Proceedings, if supplemented by the following:
- "The commencement of any action for administration of [the Hong Kong Trust] under Order 85 of the Rules of the High Court or any analogous proceeding."*
- 3.1.5 In addition, the FOA Netting Agreement, or as the case may be, the Clearing Agreement will need to provide expressly that each reference to "a Party" in the Insolvency Events of Default Clause is deemed to include a Hong Kong Trust.

4. QUALIFICATIONS

The following additional qualifications shall apply:

4.1 Trustee Insolvency Proceedings

- 4.1.1 Any power or right of a Hong Kong Trustee under or in connection with the FOA Netting Agreement, or as the case may be, the Clearing Agreement (and the benefit of any obligation or liability owing to that Hong Kong Trustee under or in relation to such agreement) is not a power or right held by (or an obligation or liability owing to) such Hong Kong Trustee personally, but is held by or owing to the Hong Kong Trustee in a representative capacity. Accordingly, such Hong Kong Trustee is not the beneficial owner of any such power or right (or of the benefit of any such obligation or liability). It follows

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that, if the Hong Kong Trustee becomes the subject of any Trustee Insolvency Proceeding, any such right of power (or the benefit of any such obligation or liability) is not an asset of the Hong Kong Trustee for the purpose of such Trustee Insolvency Proceeding, and in particular:

- (a) any amount owing by another person (the other Party) by virtue of any such right of power (or obligation or liability) does not contravene or infringe a mandatory rule of insolvency law; and
- (b) any such amount cannot be the subject of Statutory Insolvency Set-Off.

4.1.2 In relation to obligations and liabilities undertaken or incurred by a Hong Kong Trustee under or in connection with the FOA Netting Agreement, or as the case may be, the Clearing Agreement, a Hong Kong Trustee is personally liable (as a matter of contract) in respect of any such obligation or liability. However, if (as we assume at section 2.1.6), the other Party to such agreement has agreed with such Hong Kong Trustee by express contractual provision that the recourse of such other Party for such obligations or liabilities does not extend to any personal asset of such Hong Kong Trustee (or any assets held by him, her or it as trustee of any other trust), the other Party has no recourse to any such personal assets, and in particular:

- (a) any amount owing to such other Party cannot be claimed by such other Party for the purpose of any Trustee Insolvency Proceeding of which the Hong Kong Trustee is the subject;
- (b) any contractual provision for set-off (and/or netting) in respect of any such amount does not contravene or infringe a mandatory rule of insolvency law; and
- (c) any such amount cannot be the subject of Statutory Insolvency Set-Off.

4.1.3 In order for credits, debts or other dealings (i.e. amounts owing in respect of powers and rights and obligations and liabilities respectively) to be "*mutual*" for the purpose of Statutory Insolvency Set-Off:

- (a) in the case of a power or right, it must be capable of constituting an asset for the purpose of the relevant Trustee Insolvency Proceeding, and
- (b) in the case of an obligation or liability, it must be capable of constituting a claim or debt for the purpose of the relevant Trustee Insolvency Proceeding.

4.1.4 Accordingly, in our view:

- (a) all such amounts lie outside the relevant Trustee Insolvency Proceeding;

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- (b) any contractual provision for set-off (and/or netting) in respect of such amounts is not capable of contravening or infringing a mandatory rule of insolvency law;
- (c) Statutory Insolvency Set-Off and the requirement of mutuality are not relevant to the setting-off (and/or netting) of such amounts; and
- (d) the Set-Off Provisions and the Netting Provisions (to the extent the Netting Provisions are viewed as involving set-off) operate or are exercisable in accordance with their terms.

4.1.5 It follows that, if a Trustee Insolvency Proceeding was commenced in respect of a Hong Kong Trustee:

- (a) the terms of the Netting Provisions and the Set-Off Provisions would not be invalidated or rendered ineffective; and
- (b) the other Party would be entitled to exercise its rights under the Netting Provisions and the Set-Off Provisions.

4.1.6 The foregoing analysis depends on the effectiveness of the express contractual provision referred to at section 2.1.6. On the basis of the decision in the English case of *Re Robinson's Settlement* [1912] 1 Ch 717, and the comments made in respect of that decision in Philip R. Wood, *English and International Set-off* (1989) and Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd ed., 2010), the effectiveness of such a provision is a matter of contractual construction, and such a provision is not, by its nature or effect alone, void or unenforceable.

4.2 Schemes of Arrangements and Individual Voluntary Arrangements

A Hong Kong Trustee that is a Company or who is a Hong Kong Individual may be the subject of a scheme of arrangement under the Companies Ordinance or an individual voluntary arrangement under the Bankruptcy Ordinance, respectively. If a "no recourse" provision has been incorporated into the FOA Netting Agreement, or as the case may be, the Clearing Agreement (as referred to in section 2.1.6 above), a proposal in respect of the Hong Kong Trustee may have the effect of removing the "no recourse" provision and reinstating recourse against the Hong Kong Trustee in his/her/its personal capacity. However, any such arrangement could impair the effectiveness of the Netting Provisions or the Set-Off Provisions only if the aggregation or set-off provided for in the Netting Provisions or the Set-Off Provisions, as applicable, has not taken place before the coming into effect of such arrangement. If the aggregation or set-off has taken place before the coming into effect of a scheme of arrangement or individual voluntary arrangement, that arrangement could affect only the amount (and other terms) of any resulting net claim.

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4.3 Trusts And Trustees

- 4.3.1 In the event of a Trustee Insolvency Proceeding in respect of a Hong Kong Trustee of a Hong Kong Trust (other than a charitable trust), it might be asserted by an Insolvency Representative of such Hong Kong Trustee that (although any sums recovered by the Insolvency Representative would fall outside the insolvency or bankruptcy estate), it is the duty of the Insolvency Representative, by virtue of his/her fiduciary responsibilities to the beneficiaries of the Hong Kong Trust, to pursue a claim against the other Party for any amount owing by it in respect of any Transaction, without any netting or set-off under the Netting Provisions, the Set-Off Provisions or otherwise. The basis for such a claim would be absence of mutuality for the purpose of Statutory Insolvency Set-Off. For the reasons discussed above, we consider that such a claim would be unsuccessful. If such a claim were successful, it would give the beneficiaries of the Hong Kong Trust a windfall benefit attributable solely to the winding-up or bankruptcy of such Hong Kong Trustee; and at the same time the claim of a creditor would be admitted to the winding-up or bankruptcy, to the detriment of other creditors. In our view, the fiduciary responsibilities of the Insolvency Representative would not require him/her to act in a manner so detrimental to creditors of the winding-up or bankruptcy.
- 4.3.2 There is some authority for the proposition that, where a trustee is a nominee or bare trustee for one or more beneficiaries, Statutory Insolvency Set-Off should apply as if powers, rights, obligations and liabilities held or owed by such trustee were powers, rights, obligations and liabilities held or owed by such beneficiary or beneficiaries.

4.4 Charitable Trusts

Under Section 57A of the Trustee Ordinance, upon an application made to a court by:

- (a) two or more persons who have the consent in writing of the Secretary for Justice to make the application;
- (b) the Secretary for Justice; or
- (c) all or any one or more of the trustees or persons administering a charitable trust, or persons claiming to administer the charitable trust, or persons otherwise interested in the charitable trust; and

either

- (i) complaining of a breach of the trust or supposed breach of the trust; or
- (ii) for the purposes of the better administration of the trust,

the court may provide such relief, make such order, or give such direction, as it thinks just. It is possible that such relief, order or direction given by the court might

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adversely affect the operation or enforceability of the Netting Provisions or the Set-Off Provisions.

4.5 Trust Quasi-Insolvency Proceedings

- 4.5.1 A Hong Kong Trust is not a legal person and may not be the subject of a Trustee Insolvency Proceeding.
- 4.5.2 However, where the Hong Kong Trust is technically insolvent, in the sense that the assets of the Hong Kong Trust are insufficient to meet the liabilities properly incurred by the Hong Kong Trustee(s) for the relevant Hong Kong Trust, it is possible for the court to make an order concerning the administration of the Hong Kong Trust under Order 85 of the Rules of the High Court.
- 4.5.3 As a Hong Kong Trust is not a Company or an Individual, a winding-up of a Hong Kong Trust pursuant to Order 85 of the Rules of the High Court does not constitute a bankruptcy or winding-up under the Bankruptcy Ordinance or the Companies Ordinance. Accordingly, provisions in the Bankruptcy Ordinance or the Companies Ordinance concerning the making of a bankruptcy order in respect of an individual or the winding up of a company, including Statutory Insolvency Set-Off under Section 35 of the Bankruptcy Ordinance, do not apply.
- 4.5.4 However, as the court has broad discretion in relation to administration orders made under Order 85, it is possible that an administration order made under Order 85 would provide that the Set-Off Provisions and/or the Netting Provisions should not operate or be exercisable in accordance with their terms.
- 4.5.5 Although we are not aware of any decision of the court which supports such view, it is possible that the court might treat a technically insolvent Hong Kong Trust as a "quasi-person" and apply automatic set-off by analogy with Statutory Insolvency Set-Off (applicable to Companies and Hong Kong Individuals). If that occurred, on the making of an administration order in respect of a Hong Kong Trust, all amounts owing in respect of powers and rights, and obligations and liabilities, attributable to the Hong Kong Trust would be mandatorily and automatically set-off against each other.

4.6 Mandatory Provident Fund Schemes Ordinance

- 4.6.1 An MPF Scheme may be the subject of the following "winding-up" procedures:
 - (a) in respect of an MPF Scheme that is an "employer sponsored scheme", a voluntary winding-up pursuant to Section 34 of the Mandatory Provident Fund Schemes Ordinance; or

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- (b) in respect of any MPF Scheme (including an "employer sponsored scheme", a "master trust scheme" or an "industry scheme") a winding-up by the court on application made by the Mandatory Provident Fund Schemes Authority pursuant to Section 34A of the Mandatory Provident Fund Schemes Ordinance.
- 4.6.2 As an MPF Scheme is not a Company or a Hong Kong Individual, a winding-up proceeding under Section 34 or 34A of the Mandatory Provident Fund Schemes Ordinance does not constitute a bankruptcy or winding-up under the Bankruptcy Ordinance or the Companies Ordinance. Accordingly, provisions in the Bankruptcy Ordinance or the Companies Ordinance concerning the making of a bankruptcy order in respect of an individual or the winding up of a company, including Statutory Insolvency Set-Off under Section 35 of the Bankruptcy Ordinance, do not apply.
- 4.6.3 It follows that the Set-Off Provisions and the Netting Provisions should, in principle, operate and be exercisable in accordance with their terms. However, as the courts have broad discretion in relation to the conduct of a winding-up proceeding under Section 34 or 34A of the Mandatory Provident Fund Schemes Ordinance, it is possible that an order or direction by the courts might adversely affect the operation or enforceability of the Netting Provisions or the Set-Off Provisions.

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**SCHEDULE 5
HONG KONG PARTNERSHIPS**

Subject to the provisions of this Schedule 5 (*Hong Kong Partnerships*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of Parties who or which are partners in a Hong Kong Partnership.

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

1. TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 5 (*Hong Kong Partnerships*):

1.1 "General Partner" means:

1.1.1 in respect of a General Partnership, a "partner" as defined in the Partnership Ordinance; and

1.1.2 in respect of a Limited Partnership, a "general partner" as defined in the Limited Partnerships Ordinance.

1.2 "General Partnership" means a "partnership" as defined in the Partnership Ordinance.

1.3 "Limited Partner" means a "limited partner" as defined in the Limited Partnerships Ordinance.

1.4 "Limited Partnership" means a "limited partnership" as defined in the Limited Partnerships Ordinance.

1.5 "Partner" means a General Partner or a Limited Partner.

1.6 "Partner Sole Insolvency Proceedings" means:

(a) in respect of a Partner that is a Company, the laws and procedures listed in paragraph 3.1; and

(b) in respect of a Partner that is a Hong Kong Individual, the laws and procedures listed in section 3.1 of Schedule 3 (*Hong Kong Individuals*).

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1.7 **"Partnership Insolvency Proceedings"** means the laws and procedures listed in section 3.1.2.

1.8 Paragraph 1.9.8 is deemed deleted.

2. ASSUMPTIONS

The following additional assumptions shall apply:

2.1 Where a Party is expressed to be a Hong Kong Partnership, the contracting party is one or more General Partners of such Hong Kong Partnership, acting as agent on behalf of all the Partners of the Hong Kong Partnership.

2.2 Each Hong Kong Partnership that is a General Partnership is validly formed and existing in accordance with the Partnership Ordinance throughout the life of each Transaction and the FOA Netting Agreement, or as the case may be, the Clearing Agreement.

2.3 Each Hong Kong Partnership that is a Limited Partnership is validly formed, registered and existing in accordance with the Limited Partnerships Ordinance throughout the life of each Transaction and the FOA Netting Agreement, or as the case may be, the Clearing Agreement.

2.4 Each General Partner which enters into the FOA Netting Agreement, or as the case may be, the Clearing Agreement and/or each Transaction on behalf of a Hong Kong Partnership:

2.4.1 has the capacity, power and authority under all applicable laws to enter into each such Transaction and/or such agreement; and

2.4.2 has taken all necessary steps to execute, deliver and perform such agreement and/or each such Transaction,

such that it creates legal, valid and binding obligations of such Hong Kong Partnership.

2.5 Each Partner in a Hong Kong Partnership is a Company or a Hong Kong Individual.

2.6 A General Partner, by entering into the FOA Netting Agreement, or as the case may be, the Clearing Agreement on behalf of a Hong Kong Partnership, is not in breach of any of his/her/its express or implied duties under the relevant partnership agreement, the Partnership Ordinance or the Limited Partnerships Ordinance (as applicable).

2.7 Each Limited Partner in a Limited Partnership does not take part in the management of the business of such Limited Partnership.

2.8 The membership of each Hong Kong Partnership remains unchanged throughout the life of the FOA Netting Agreement, or as the case may be, the Clearing Agreement and any Transaction.

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3. OPINIONS

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

3.1 Insolvency Proceedings: Hong Kong Partnerships

3.1.1 Hong Kong Partnerships are not legal persons. However, a Hong Kong Partnership may in some circumstances be treated as if it were a separate legal person in the context of its insolvency.

3.1.2 A Hong Kong Partnership may be the subject of the following bankruptcy, composition, rehabilitation or other insolvency procedures in this jurisdiction:

- (a) winding-up; and
- (b) bankruptcy.

3.1.3 The legislation applicable to Partnership Insolvency Proceedings is as follows:

- (a) the Bankruptcy Ordinance; and
- (b) the Companies Ordinance,

each as modified up to the date hereof, together with any subsidiary legislation.

3.1.4 As a Hong Kong Partnership cannot be a Party to the FOA Netting Agreement, or as the case may be, the Clearing Agreement, it may be argued that the events specified in the Insolvency Events of Default Clause does not refer to Partnership Insolvency Proceedings. However, we are of the view that such an argument could not be made (where a Party to such agreement is a General Partner in a Hong Kong Partnership, acting in his/her/its capacity as such) if it is clearly provided in such agreement that all references to "*a Party*" in the Insolvency Events of Default Clause be deemed to include such Hong Kong Partnership. Accordingly, provided that this is clearly provided in such agreement that all references to "*a Party*" in the Insolvency Events of Default Clause be deemed to include a Hong Kong Partnership, we confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Partnership Insolvency Proceedings, without the need for any additions.

4. QUALIFICATIONS

The following additional qualifications shall apply:

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4.1 Debts owed to and by a Hong Kong Partnership

- 4.1.1 Under the Partnership Ordinance, every Partner of a Hong Kong Partnership is an agent of the other Partners for the purpose of the business of that Hong Kong Partnership. Accordingly, where a Partner has incurred a debt or obligation for the Hong Kong Partnership, each Partner will be jointly liable with the other Partners for such debt and obligation (except that, in the case of a Limited Partnership, a Limited Partner is not liable for the debts or obligations of the Limited Partnership beyond the amount contributed at the time of entering into such Limited Partnership). For convenience, in this Schedule, we refer to such debts or obligations incurred by a Partner for the Hong Kong Partnership as **"joint debts of the Hong Kong Partnership"**, even though a Hong Kong Partnership is not a legal person and cannot be liable for any debt.
- 4.1.2 Under the Partnership Ordinance, "partnership property" consists of all property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, and which are applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement. We believe the better view is that, unless the partnership agreement provides otherwise, each Partner has a beneficial interest in every partnership asset (including debts and obligations owed by third parties), even though a Partner's interest in the partnership assets is not a title to specific property but a right to his/her/its proportion of the surplus after the realisation of assets and the payment of debts and liabilities of the Hong Kong Partnership. For convenience, in this Schedule, we refer to such debts owed by each Partner of a Hong Kong Partnership as **"debts owed to the Hong Kong Partnership"**, even though a Hong Kong Partnership is not a legal person and cannot own any property.

4.2 Partner Sole Insolvency Proceedings

- 4.2.1 A Partner which or who is a Company or a Hong Kong Individual may be the subject of a Partner Sole Insolvency Proceeding.
- 4.2.2 There is a lack of mutuality between (a) a joint debt of the Hong Kong Partnership owing to a third party; and (b) a debt owed by a third party to one of the Partners; and (c) a separate debt of one of the Partners and a debt owed to the Hong Kong Partnership.
- 4.2.3 It follows that, if a Partner became the subject of a Partner Sole Insolvency Proceeding, save for a few limited circumstances, neither a joint debt of the Hong Kong Partnership nor a debt owed to the Hong Kong Partnership can be the subject of Statutory Insolvency Set-Off in such Partner Sole Insolvency Proceeding. However, in exceptional cases, if a Partner agrees to be severally liable for any joint debt of the Hong Kong Partnership, then it is possible that

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such joint debt may be included in Statutory Insolvency Set-Off in such Partner Sole Insolvency Proceeding.

- 4.2.4 Moreover, *Stanniforth v Fellowes* (1814) 1 Marsh 184 is authority for the proposition that Statutory Insolvency Set-Off in such Partner Sole Insolvency Proceeding would not apply to set off a joint debt of the Hong Kong Partnership against a debt owed to the Hong Kong Partnership unless the Hong Kong Partnership becomes the subject of a Partnership Insolvency Proceeding.

4.3 Partnership Insolvency Proceedings

- 4.3.1 A Hong Kong Partnership may be the subject of a Partnership Insolvency Proceeding pursuant to the Bankruptcy Ordinance and the Companies Ordinance, but these Ordinances are not clear on such proceedings and may overlap in some respects.

Winding up under the Companies Ordinance

- 4.3.2 The Companies Ordinance generally deals with matters concerning companies. Although Hong Kong Partnerships are not companies, Section 327(1) of the Companies Ordinance provides that an "unregistered company" may be wound up under the Companies Ordinance and Section 326(1) provides that, for the purposes of Part X of the Companies Ordinance, the expression "unregistered company" shall include any partnership, whether limited or not, **except:**

- (a) a partnership which consists of "*less than 8 members*" and is not "*formed or established outside Hong Kong*" (a "**Small Local Partnership**"); and
- (b) a Limited Partnership.

- 4.3.3 Accordingly, it follows that, by virtue of Sections 326(1) and 327(1), there may be wound up under the Companies Ordinance:

- (a) any General Partnership which has eight or more members (partners), whether or not "*formed or established outside Hong Kong*"; and
- (b) any General Partnership that is "*formed or established outside Hong Kong*",

(any such partnership, a "**Part X Partnership**").

- 4.3.4 There appears to be no specific guidance on what is meant by "*formed or established outside Hong Kong*". There is no formal condition to be satisfied in order for a General Partnership to be created. Therefore, it may not always be clear whether a General Partnership with fewer than eight Partners constitutes a Small Local Partnership and accordingly may not be wound up

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under Part X of the Companies Ordinance (for example, if such General Partnership's place of business is outside Hong Kong).

- 4.3.5 Section 264 of the Companies Ordinance provides that, in the winding up of an insolvent company (including a Part X Partnership), the rules regarding the bankruptcy proceedings of individuals shall apply to such company (or Part X Partnership, as the case may be), including Statutory Insolvency Set-off (which occurs automatically on the date of the winding-up order). This suggests that, in the winding-up of a Part X Partnership under the Companies Ordinance, such Part X Partnership would be treated as a separate legal person, with its own liabilities (even though, as a strict matter of general law, a Hong Kong Partnership does not have a separate legal personality).

Limited Partnership Insolvency

- 4.3.6 Section 5 of the Limited Partnerships Ordinance provides that a Limited Partnership may be wound up by petition under the Companies Ordinance and that the provisions of the Companies Ordinance relating to the winding-up of companies shall apply to the winding-up of limited partnerships, with the substitution of General Partners for directors.
- 4.3.7 While it is not clear which specific provisions of the Companies Ordinance are referred to in Section 5 of the Limited Partnerships Ordinance (because there are a number of types of insolvency proceedings that could be instituted under the Companies Ordinance), we are of the view that the provisions intended to be referred to by Section 5 of the Limited Partnerships Ordinance are the provisions that apply to a Compulsory Winding-up of a Company.
- 4.3.8 Accordingly, by virtue of Section 264 of the Companies Ordinance, the rules regarding bankruptcy proceedings in respect of individuals shall apply also to Limited Partnerships, including Statutory Insolvency Set-off (which occurs automatically on the date of the winding-up order). Like Part X Partnerships, a Limited Partnership does not have separate legal personality, but for the purpose of winding-up a Limited Partnership under the Companies Ordinance such Limited Partnership would be treated as a separate legal person, with its own liabilities.

Bankruptcy proceedings in respect of partnerships under the Bankruptcy Ordinance

- 4.3.9 The Bankruptcy Ordinance generally deals with bankruptcies of individuals. However, Section 7(1) seems to suggest that a bankruptcy order may be made in respect of any partnership carrying on business in Hong Kong. It follows that any General Partnership (including a Small Local Partnership and a Part X Partnership), if it satisfies the "*carrying on business in Hong Kong*" condition, may be the subject of a bankruptcy order under the Bankruptcy Ordinance.

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- 4.3.10 Section 111 of the Bankruptcy Ordinance, however, expressly excludes Limited Partnerships from the scope of the Bankruptcy Ordinance.
- 4.3.11 Similar to the winding-up of Part X Partnerships or Limited Partnerships under the Companies Ordinance, Section 7(1) of the Bankruptcy Ordinance seems to suggest that a bankruptcy order may be made in respect of a General Partnership itself as if the General Partnership were a separate legal person, with its own liabilities. Accordingly, it seems that Statutory Insolvency Set-Off would apply automatically on the making of a bankruptcy order in respect of the General Partnership under the Bankruptcy Ordinance.
- 4.3.12 Section 38(7) of the Bankruptcy Ordinance further suggests (though not explicitly) that when a bankruptcy order is made in respect of a General Partnership:
- (a) that order is a bankruptcy order in respect of each Partner in that General Partnership; and
 - (b) the bankruptcies of the General Partnership and each Partner will be conducted separately, with any surplus from the Partnership bankruptcy (after all its debts have been settled) being remitted to the bankruptcies of the Partners (in proportion to the partnership interests of the Partners in the Partnership), and vice versa.

Statutory Insolvency Set-Off

- 4.3.13 There is some uncertainty as to how Statutory Insolvency Set-Off would be applied in the context of a Partnership Insolvency Proceeding. If in a Partnership Insolvency Proceeding a Hong Kong Partnership is treated as a separate legal person with its own liabilities, we believe the court would consider that there is sufficient mutuality between joint debts of the Hong Kong Partnership and debts owed to the Hong Kong Partnership. Accordingly, subject to the other qualifications of this opinion letter and the inclusion of other mutual debts, we are of the view that:
- (a) the Set-Off Provisions and the Netting Provisions would operate to produce the same net amount that would have been produced if set-off had been implemented under such Statutory Insolvency Set-Off and
 - (b) the Netting Provisions and the Set-Off Provisions would be enforceable in accordance with their terms.

4.4 Other Qualifications

- 4.4.1 In the case of Hong Kong Partnerships to which the Partnership Insolvency Proceeding described at section 3.1.2(a) is applicable, references to "Company" in paragraph 4 shall be construed as references to "*Hong Kong Partnership wound up under the Companies Ordinance*".

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- 4.4.2 In the case of a Hong Kong Partnership to which the Partnership Insolvency Proceeding described at section 3.1.2(b) is applicable, the modifications to the qualifications set out at section 4 of Schedule 4 (*Hong Kong Individuals*) shall apply as if set out herein and references to "*Hong Kong Individual*" in the qualifications shall be construed as references to "*Hong Kong Partnership adjudged bankrupt under the Bankruptcy Ordinance*".

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**SCHEDULE 6
MONETARY AUTHORITY**

Subject to the provisions of this Schedule 6 (*Monetary Authority*), the opinions, assumptions and qualifications set out in the main body of text of this opinion letter apply in respect of a Party who is the Monetary Authority.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

In this Schedule 6 (*Monetary Authority*):

"Exchange Fund Ordinance" means the Exchange Fund Ordinance, Chapter 66 of Hong Kong.

"Financial Secretary" means the Financial Secretary of Hong Kong.

"Financial Secretary Incorporation Ordinance" means the Financial Secretary Incorporation Ordinance, Chapter 1015 of Hong Kong.

"Hong Kong Government" means the Government of the Hong Kong Special Administrative Region of the People's Republic of China.

2. ASSUMPTIONS

The following additional assumptions shall apply:

2.1 The Monetary Authority is entering into the FOA Netting Agreement, or as the case may be, the Clearing Agreement and each Transaction not in his or her personal capacity but in his or her capacity as either:

- (a) a delegate of the Financial Secretary; or
- (b) an officer of the Hong Kong Government in performance of his or her statutory functions.

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- 2.2 If the Monetary Authority is entering into the FOA Netting Agreement, or as the case may be, the Clearing Agreement and each Transaction as a delegate of the Financial Secretary, he or she is acting within the proper parameters of the powers that have been delegated to him or her by the Financial Secretary.
- 2.3 If the Monetary Authority is entering into the FOA Netting Agreement, or as the case may be, the Clearing Agreement and each Transaction in performance of his or her statutory functions, he or she is acting within the proper parameters of such statutory functions.

3. QUALIFICATIONS

The following additional qualifications shall apply:

3.1 Parties to the Agreement

- 3.1.1 The Monetary Authority is an individual appointed by the Financial Secretary under the Exchange Fund Ordinance. The individual who has been appointed to be the Monetary Authority is a legal person. That individual is currently Norman T.L. Chan, GBS, JP.
- 3.1.2 Under the Financial Secretary Incorporation Ordinance, the person for the time being performing the duties of the Financial Secretary shall be a corporation sole and shall have the name of "the Financial Secretary Incorporated". Accordingly, "the Financial Secretary Incorporated" is a separate legal person from the individual who for the time being holds the position of Financial Secretary (currently John C Tsang, GMB, JP).
- 3.1.3 The Monetary Authority is the chief executive of an organisation commonly known as the "Hong Kong Monetary Authority". The Hong Kong Monetary Authority does not have legal personality.
- 3.1.4 In a letter dated 25 June 2003 from the then Financial Secretary addressed to the "Monetary Authority" entitled "*Functions and Responsibilities in Monetary and Financial Affairs*", the then Financial Secretary (in his capacity as the Financial Secretary Incorporated) delegated certain of his powers to the Monetary Authority. Accordingly, we are of the view that any contract entered into by (or on behalf) of the Monetary Authority, within the proper parameters of such powers, is a contract entered into by the Financial Secretary Incorporated (rather than a contract entered into by the individual appointed to be the Monetary Authority or the Financial Secretary in his or her respective personal capacity).
- 3.1.5 In addition, the Monetary Authority is directly assigned certain functions by or pursuant to a number of statutory provisions, including provisions of the Banking Ordinance. Accordingly, we are of the view that any contract entered into by (or on behalf) of the Monetary Authority in the performance of such statutory functions is a contract entered into by the Hong Kong Government

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(rather than a contract entered into by the individual appointed to be the Monetary Authority in his or her personal capacity).

3.2 Insolvency of the Financial Secretary Incorporated or the Hong Kong Government

3.2.1 There are no bankruptcy, composition, rehabilitation or other insolvency laws and procedures to which the Financial Secretary Incorporated or the Hong Kong Government may be subject in this jurisdiction.

3.2.2 Accordingly, it is not necessary to consider whether the Set-Off Provisions and the Netting Provisions contravene or infringe a mandatory rule of insolvency law.

3.3 Insolvency of the individual who is appointed for the time being as the Financial Secretary or the Monetary Authority

3.3.1 On the assumption that contracts entered into by (or on behalf) of the Monetary Authority are within the proper parameters of the powers that have been delegated to him or her or his or her statutory functions, such contracts would not have been entered into by the Monetary Authority in his or her personal capacity. Accordingly, any amounts owing in respect of powers and rights and obligations and liabilities under or in respect of such contracts would lie outside any Insolvency Proceeding in respect of the individual for the time being appointed as the Monetary Authority.

3.3.2 By virtue of Section 3 of the Financial Secretary Incorporation Ordinance, all property and rights transferred to the Financial Secretary Incorporated shall vest or remain vested in the corporation and shall not vest in any individual occupant in his or her personal capacity. Accordingly, we are of the view that any amounts owing in respect of powers and rights (and, by implication, any obligations and liabilities) under or in respect of contracts entered into by the Financial Secretary in the performance of his duties as such would lie outside any Insolvency Proceeding in respect of the individual for the time being appointed as the Financial Secretary.

3.4 Political risks

In theory, it is possible that the Hong Kong Government might repudiate its or the Financial Secretary Incorporated's obligations under the FOA Netting Agreement, or as the case may be, the Clearing Agreement or pass legislation to invalidate them. However, any such action might be inconsistent with Article 105 of the Basic Law of the Hong Kong Special Administrative Region and it is possible that such action might be successfully challenged before a court.

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**ANNEX 1
FORMS OF FOA NETTING AGREEMENTS**

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

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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**")

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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.

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ANNEX 2
List of Transactions

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

- (A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
 - (i) a contract made on an exchange or pursuant to the rules of an exchange;
 - (ii) a contract subject to the rules of an exchange; or
 - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,

in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or

 - (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
 - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC³, including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

³ Non-EU counsel should discuss with Clifford Chance if clarification is needed.

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**ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS**

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

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

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

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

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

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

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

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

"Clearing Agreement" means an agreement:

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

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

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

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

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

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

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

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

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

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

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

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- (d) for the purposes of paragraph 3.7.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;
- (e) for the purposes of paragraph 3.7.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;
- (f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;
- (g) for the purposes of paragraph 3.8.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provision;
- (h) for the purposes of paragraph 3.9 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;
- (i) for the purposes of paragraph 3.10.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and
- (j) for the purposes of paragraphs 3.10.3 and 3.10.4, the Title Transfer Provisions;

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

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

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

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

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

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

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

"FOA Netting Agreement" means an agreement:

- (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*);

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

"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**);

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

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

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

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- (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
 - (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);
 - (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or
 - (vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and
- (b) where the FOA Member's counterparty is a natural person:
- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
 - (ii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);
 - (iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or
 - (iv) any modified version of such clauses provided that it includes at least those parts of paragraph 4(b) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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

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

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

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

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

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

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

"Rehypothecation Clause" means:

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

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

"Non-Cash Security Interest Provisions" means:

- (a) the **"Non-Cash Security Interest Clause"**, being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (*Security interest*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (*Security interest*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (*Security interest*);

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- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (*Security interest*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (*Security interest*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (*Security interest*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (*Security interest*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (*Security interest*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (*Security interest*); or
 - (x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow; and
- (b) the "**Power of Sale Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (*Power of sale*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (*Power of sale*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (*Power of sale*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (*Power of sale*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (*Power of sale*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (*Power of sale*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (*Power of sale*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (*Power of sale*);

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

"Client Money Additional Security Clause" means:

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

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

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

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

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

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

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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."

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2. General Set-Off Clause:

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

3. Margin Cash Set-Off Clause:

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

4. Insolvency Events of Default Clause:

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

"The following shall constitute Events of Default:

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

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

"The following shall constitute Events of Default:

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

5. Title Transfer Provisions:

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

6. Clearing Module Netting Provision / Addendum Netting Provision:

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

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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

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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 [Cor Provisions of the relevant] Rule Set, be dealt with as set out below:

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

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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.]

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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;

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- (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

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default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

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

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PART 2
NON-MATERIAL AMENDMENTS

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

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

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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 an FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).

21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).

22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.

23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.

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**PART 3
SECURITY INTEREST PROVISIONS**

1. Security Interest Clause:

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

2. Power of Sale Clause:

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

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

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and was retained by you on the date on which such income was paid.".

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**ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS**

1. Necessary amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Hong Kong Trustee:

For the purposes of our opinion at paragraph 3.1, the following amendments should be made to the Insolvency Events of Default Clause:

"The following shall constitute Events of Default:

[...]

the commencement of any action for administration of [the Hong Kong Trust] under Order 85 of the Rules of the High Court or any analogous proceeding."

2. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, a Clearing Agreement with a Hong Kong Bank that is a "registered institution" under the Securities and Futures Ordinance, or a Hong Kong Investment Firm (a "**regulated Party**"):

For the purposes of our opinion at paragraphs 3.3, 3.4, 3.5, 3.6, 3.7, 3.8 and 3.9, the following additional representation should be obtained from the regulated Party:

"If [the regulated Party] is a registered institution or a licensed corporation under the Securities and Futures Ordinance, [the regulated Party] represents and warrants that it is dealing in relation to the [FOA Netting Agreement/ Clearing Agreement] either: (i) only for its own account and not for the account or accounts of any of its clients; or (ii) only for the account or accounts of any of its clients and not for its own account."

3. Necessary amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, a Clearing Agreement with a Hong Kong Insurance Company:

For the purposes of our opinion at paragraphs 3.3, 3.4, 3.5, 3.6, 3.7, 3.8 and 3.9, the following additional representation should be obtained from the Hong Kong Insurance Company:

"if [the Hong Kong Insurance Company] carries on a long-term business (as defined in the Insurance Companies Ordinance (Cap. 41)), and any Transaction is attributable to that long-term business (or any category thereof), the [Hong Kong Insurance Company] represents and warrants that such Transaction has been entered into only in accordance with Section 23 of the Insurance Companies Ordinance."

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APPENDIX

1. On 1 July 1997, Hong Kong became the Hong Kong Special Administrative Region (the "**HKSAR**") of the People's Republic of China (the "**PRC**"). On 4 April 1990, the National People's Congress (the "**NPC**") of the PRC adopted the Basic Law of the HKSAR (the "**Basic Law**"). Under Article 8 of the Basic Law, the laws of Hong Kong in force at 30 June 1997, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the HKSAR. Under Article 160 of the Basic Law, the laws of Hong Kong in force at 30 June 1997 shall be adopted as laws of the HKSAR unless they are declared by the Standing Committee of the NPC (the "**Standing Committee**") to be in contravention of the Basic Law and, if any laws are later discovered to be in contravention of the Basic Law, they shall be amended or cease to have force in accordance with the procedure prescribed by the Basic Law.
2. On 23 February 1997, the Standing Committee adopted a decision (the "**Decision**") on the treatment of laws previously in force in Hong Kong. Under paragraph 1 of the Decision, the Standing Committee decided that "the laws previously in force in Hong Kong, which include, the common law, rules of equity, ordinances, subsidiary legislation and customary law, except for those which contravene the Basic Law, are to be adopted as the laws of the HKSAR". Under paragraph 2 of the Decision, the Standing Committee decided that the ordinances and subsidiary legislation set out in Annex 1 to the Decision "which are in contravention of the Basic Law" are not to be adopted as the laws of the HKSAR. One of the ordinances set out in that Annex is the Application of English Law Ordinance (Cap. 88) (the "**English Law Ordinance**"). The English Law Ordinance applied the common law and rules of equity of England to Hong Kong. We have assumed in giving the opinions in this opinion letter that the effect of paragraph 2 of the Decision, insofar as it relates to the English Law Ordinance, is to repeal the English Law Ordinance prospectively and that the common law and rules of equity of England which applied in Hong Kong on 30 June 1997 continue to apply, subject to their subsequent independent development which will rest primarily with the courts of the HKSAR which are empowered by the Basic Law to refer to precedents of other common law jurisdictions when adjudicating cases. In our view, the judgment of the Court of Appeal of the High Court in *HKSAR v Ma Wai Kwan David and Others* [1997] 2 HKC 315 supports the assumption that the common law and rules of equity of England which applied in Hong Kong on 30 June 1997 continue to apply to the HKSAR.