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3 March 2014

Dear Sirs

CCP Opinion in relation to ICE Clear Europe Limited

You have asked us to give an opinion in respect of the laws of England and Wales ("this jurisdiction") as to the effect of any netting and set-off provisions and collateral arrangements in relation to ICE Clear Europe Limited (the "Clearing House") as between the Clearing House and its Members.

We understand that your requirement is for the enforceability and validity of any such netting and set-off provisions and collateral arrangements to be substantiated by a written and reasoned opinion letter.

References herein to "this opinion" are to the opinion given in paragraph 3.

1. TERMS OF REFERENCE

- 1.1 Except where otherwise defined herein, terms defined in the Clearing Rules (or, in relation to CDS Contracts, the CDS Rules) of the Clearing House have the same meaning in this opinion letter.
- 1.2 The opinions given in paragraph 3 are in respect of a Member's rights and obligations under the Clearing House Documentation as at the date of this opinion. We express no opinion as any provisions of the Clearing House Documentation and other rules and procedures of the Clearing House other than those on which we expressly opine.

In particular, we express no opinion on the application of any provisions of the Clearing House Documentation to any FCM/BD Clearing Member (as defined in the Clearing Rules, or in relation to CDS Contracts, in the CDS Rules).

- 1.3 The opinions given in paragraph 3 are given in relation to the exercise of rights and obligations under the Clearing House Documentation by a Member who is a non-natural person (as defined in the Financial Collateral Arrangements (No.2) Regulations 2003 (the "FCA Regulations")) and who is neither a recognised investment exchange (within the meaning of section 155 of the Companies Act 1989) nor a recognised clearing house.
- 1.4 The opinions given in paragraph 3.7 and (insofar as relevant to Pledged Collateral) paragraph 3.5 are given only in relation to Pledged Collateral pledged pursuant to the Pledged Collateral Addendum credited to an account and where the Company (as defined in the Pledged Collateral Addendum) is a Member.
- 1.5 The opinions contained in paragraph 3 are not limited to any specific clearing service provided by the Clearing House.

1.6 Definitions

In this opinion, unless otherwise indicated:

- (a) "**CDS Contract**" has the meaning given to such term by the Clearing Rules;
- (b) "**Clearing Agreement**" means the clearing membership agreement entered into between each Member and the CCP in the form attached hereto as Annex 1;
- (c) "**Clearing House Default Event**" means either of the events described in paragraphs (ii) and (iii) of Rule 209 (c) of the Clearing Rules (or, in relation to CDS Contracts, Rule 209(c)(i)(B) and 209(c)(ii) of the CDS Rules) being, a Failure to Pay or an Insolvency of the Clearing House;
- (d) "**Clearing House Documentation**" means the Clearing Agreement, Pledged Collateral Addendum, the CDS Rules and Clearing Rules;
- (e) "**Client Money Rules**" means the rules set forth in chapters CASS 7 and 7A of the Client Assets Sourcebook of the Financial Conduct Authority's Handbook of Rules and Guidance, as in force at the date of this opinion;

- (f) "**Contract**" means a Contract which is registered at the Clearing House;
- (g) "**Contract Category**" has the meaning given to such term by the Clearing Rules being, broadly, any of the three categories of Contracts cleared at the Clearing House, i.e. F&O Contracts, CDS Contracts and FX Contracts (as such terms are defined in the Clearing Rules);
- (h) "**Customer Account**" has the meaning ascribed to it in the Clearing Rules (or, in relation to CDS Contracts, the CDS Rules), being an account with the Clearing House opened in the name of a Member relating to Contracts to which the Member is a party as a result of it acting for one or more Customers and in which such Contracts are recorded and to which monies in respect of such Contracts are debited and credited;
- (i) "**Failure to Pay**" has the meaning given to such term by the Clearing Rules being, broadly, in respect of a particular Contract Category, the failure of the Clearing House to make any payment when due (including the return of assets equivalent to any Pledged Collateral) pursuant to Part 3 of the Clearing Rules (or, in relation to CDS Contracts, Part 3 of the CDS Rules) if such failure is not remedied on or before the expiry of a grace period as specified by the Clearing Rules;
- (j) "**Guaranty Funds**" means the Energy Guaranty Fund, the CDS Guaranty Fund and the FX Guaranty Fund;
- (k) "**Insolvency of the Clearing House**" has the meaning given to the term "Insolvency" in the Clearing Rules (or, in relation to CDS Contracts, the CDS Rules) applied in relation to the Clearing House;
- (l) "**Margin**" has the meaning given to it in the Clearing Rules (or, in relation to CDS Contracts, the CDS Rules);
- (m) "**Member**" means a Clearing Member as defined by the Clearing Rules but excluding an FCM/BD Clearing Member as defined in the Clearing Rules (or, in relation to CDS Contracts, the CDS Rules);
- (n) "**Netting Provision**" means Rules 209(c), 906 and 912 of the Clearing Rules (or, in relation to CDS Contracts, Rules 209(c)(i) and (ii), 906 and 912 of the CDS Rules);

- (o) "**Party**" means the Clearing House or the relevant Member;
- (p) "**Pledged Collateral Addendum**" means the New York law governed Pledged Collateral Addendum to a Clearing Agreement entered into between a Member and the Clearing House in the form attached hereto at Annex 2;
- (q) "**Proprietary Account**" means an account with the Clearing House opened in the name of a Member that is not a Customer Account;
- (r) "**Termination Amount**" has the meaning given to the term "N" in Rule 906 of the Clearing Rules (or, in relation to CDS Contracts, Rule 906 of the CDS Rules);
- (s) 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;
- (t) a reference to "**FSMA**" is to the Financial Services and Markets Act 2000;
- (u) a reference to the "**Settlement Finality Regulations**" is to the Financial Markets and Insolvency (Settlement Finality) Regulations 1999;
- (v) a reference to "**Part VII**" is a reference to Part VII of the Companies Act 1989 together with the Schedule to the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (to the extent applicable in the relevant context);
- (w) references to the "**Clearing Rules**" are to the Clearing Rules of the Clearing House in force as at the date of this opinion;
- (x) references to the "**CDS Rules**" are to the Continuing CDS Rule Provisions for CDS Contracts of the Clearing House in force as at the date of this opinion;
- (y) references to the "**CDS Procedures**" are to the CDS Procedures of the Clearing House in force as at the date of this opinion; and

(z) references to a "**paragraph**" are (except where the context otherwise requires) to a paragraph of this opinion.

2. ASSUMPTIONS

We assume the following:

- 2.1 That each Party has the capacity, power and authority under all applicable law(s) to enter into the relevant Clearing House Documentation and Contracts and to perform its obligations under the Clearing House Documentation and Contracts.
- 2.2 That each Party has taken all necessary steps and obtained and maintained all authorisations, approvals, licences and consents necessary to execute, deliver and perform its obligations under the Clearing House Documentation and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Clearing House Documentation and the Contracts in this jurisdiction.
- 2.3 That, except with regards to the provisions discussed and opined on in this opinion letter, the Clearing House Documentation and the Contracts are legal, valid, binding and enforceable against both Parties.
- 2.4 That the Clearing Agreement and (where relevant) the Pledged Collateral Addendum have been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.
- 2.5 For the purposes of the opinions set out in paragraphs 3.3 and 3.4, that the Member is at all relevant times able and not likely to become unable to meet its obligations in respect of one or more Contracts (whether due to winding-up, administration, receivership, bankruptcy, dissolution or analogous insolvency proceedings).
- 2.6 That the Clearing House is at all material times a recognised clearing house within the meaning of section 285 of the Financial Services and Markets Act 2000 ("FSMA") and for the purposes of Part VII and a designated system within the meaning, and for the purposes, of the Settlement Finality Regulations.
- 2.7 That the Clearing House has the centre of its main interests in this jurisdiction and has no "establishment" in any other jurisdiction, for the purposes of the EUIR (as defined below) and the Cross-Border Insolvency Regulations 2006.
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Clearing Rules, there are not any other agreements, instruments or arrangements between the Parties which modify or

supersede the terms of the Clearing House Documentation; and in particular, there are no provisions in the rules of any relevant designated system (other than the Clearing House itself) which purport to override or are inconsistent with the Netting Provision.

- 2.9 That none of the provisions discussed and opined on in this opinion letter has been disallowed pursuant to section 300A of the FSMA.
- 2.10 The Clearing House Documentation and each of the Contracts accurately reflects the true intentions of the Parties and have been entered into and are carried out by the parties in good faith, for the benefit of each of them respectively, on arm's length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.11 Save in relation to any non-performance leading to the taking of any action by a Member under the Netting Provision, each Party performs its obligations under the Clearing House Documentation in accordance with its terms.
- 2.12 That the Pledged Collateral Addendum and parts of the Clearing Rules that are expressed to be governed by New York law are legally binding and enforceable against both Parties under New York law.
- 2.13 That the security interest purportedly created over Pledged Collateral pursuant to the Pledged Collateral Addendum is effectively created and enforceable and does not constitute the transfer of title or other ownership interest from the Clearing Member to the Clearing House under the governing law of the Pledged Collateral Addendum (being New York law) and at the relevant time no right of use, if any, has been exercised by the Clearing House.

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 opinions.

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which the Clearing House could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are liquidation (including provisional liquidation), administration, receivership, voluntary arrangements and schemes of arrangement.

These procedures are together called "**Insolvency Proceedings**".

The legislation applicable to Insolvency Proceedings is:

- 3.1.1 in relation to all Insolvency Proceedings except schemes of arrangement, the provisions of the Insolvency Act 1986 and the Insolvency Rules 1986;
- 3.1.2 in relation to schemes of arrangement, section 895 to 901 of the Companies Act 2006; and
- 3.1.3 the Cross-Border Insolvency Regulations 2006, including Schedule 1 thereto which sets out the UNCITRAL Model Law,

each as modified up to the date hereof.

In relation to a transfer order or collateral security in connection with a system, or an obligation which arises under the default arrangements of a designated system, the Settlement Finality Regulations will also be applicable. Insofar as the Clearing House Documentation made thereunder constitutes a financial collateral arrangement, the FCA Regulations will also apply.

Furthermore, EU Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the "EUIR") would apply to the Clearing House and has direct effect in this jurisdiction.

3.2 Recognition of choice of law

The choice of English or New York law, as applicable, pursuant to Rules 102(s) and 1608 of the Clearing Rules (or, in relation to CDS Contracts, Rules 102(s) and 1608 of the CDS Rules), the Pledged Collateral Addendum and the Clearing Agreement would be recognised under the laws of this jurisdiction, even if the Member is not incorporated, domiciled or established in this jurisdiction or in the State of New York.

3.3 Netting and Set-off: General

- 3.3.1 The Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, upon the occurrence of a Clearing House Default Event:

- (a) the rights and liabilities of the Member under (i) in the case of an Insolvency of the Clearing House, all Contracts between the Member and the Clearing House or, (ii) in the case of a Failure to Pay, all Contracts of the Contract Category(ies) affected by the Failure to Pay,

would be automatically terminated without need for any further step on the part of any Party; and

- (b) the Member would be (i) entitled to receive only a single net positive amount or (ii) obliged to pay only a single net negative amount in respect of each Termination Amount and comprising the total loss or gain of the Member as a result of the termination of each payment or delivery which would otherwise have been required under each individual Contract, together with other losses or gains referable to the Contracts, as more particularly specified in, and subject to the other provisions of, Rule 906 (*Net Sums Payable*) of the Clearing Rules (or, in relation to CDS Contracts, Rule 906 (*Net Sums Payable*) of the CDS Rules).

Please note that the Clearing Rules require that separate net sums be calculated:

- (a) in respect of each Contract Category (as defined in the Clearing Rules), because separate net sums are to be calculated per Membership Category; and
- (b) in each Contract Category, in respect of each Proprietary Account and each Customer Account, as more particularly explained in paragraph 3.4 below.¹

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 enjoyment of such rights by the Member.

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 Netting Provision.

In the event of a Clearing House Default Event, we are of the opinion that Regulation 12(1) of the FCA Regulations would apply to the Netting Provision where the Member provides Margin by way of outright transfer of title to cash or securities under a Clearing Agreement. Regulation 12(1) of the FCA Regulations provides that a close-out netting provision constituting a

¹ Please refer to Rule 906 (b) of the Clearing Rules (or, in relation to CDS Contracts, Rule 906(b) of the CDS Rules).

term of a financial collateral arrangement, or an arrangement of which a financial collateral arrangement forms part, shall take effect in accordance with its terms, notwithstanding that the collateral-provider or collateral-taker under the arrangement is subject to winding-up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations).

In our view, where the Member provides Margin by way of outright transfer of title to cash or securities under a Clearing Agreement, the Netting Provision would qualify as a close-out netting provision constituting a term of an arrangement of which a financial collateral arrangement forms part under Regulation 12(1) of the FCA Regulations, the relevant "financial collateral arrangement" for these purposes being a "title transfer financial collateral arrangement" in respect of "financial collateral" in the form of "cash" or "book entry securities collateral" (as each such term is defined in the FCA Regulations).

Further, if the Member does not provide Margin by way of outright transfer of title to cash or securities under a Clearing Agreement, the Netting Provision would still qualify as a close-out netting provision constituting a term of an arrangement of which a financial collateral arrangement forms part under Regulation 12(1) of the FCA Regulations where the Clearing House and the Member have entered into a Pledged Collateral Addendum in addition to a Clearing Agreement and the Margin is provided by way of a New York law-governed pledge, to the extent that such pledge constitutes a "security financial collateral arrangement" in respect of "financial collateral" in the form of "cash" or "book entry securities collateral" (as each such term is defined in the FCA Regulations). We express no opinion on whether such pledge would in fact constitute a "security financial collateral arrangement" for this purpose.

3.3.3 Furthermore, the Netting Provision is triggered by any Clearing House Default Event, including a Clearing House Default Event which constitutes or results in a default on a transfer order, and would in our view qualify as "default arrangements" of a designated system. Pursuant to Regulation 14 of the Settlement Finality Regulations: (i) the default arrangements of a designated system shall not be regarded as invalid at law on the ground of inconsistency with the laws (of this jurisdiction) relating to the distribution of assets of a person subject to winding-up or administration; and (ii) the powers of an insolvency officer and of the courts of this jurisdiction under the Insolvency Act 1986 shall not be exercised in such a way as to prevent or interfere with any action taken under the default arrangements of a designated system.

Therefore, the onset of Insolvency Proceedings in respect of the Clearing House would not interfere with the netting in accordance with the Netting Provision of amounts due in respect of (i) payment obligations under Contracts and (ii) redelivery obligations in relation to Collateral provided by the Member to the Clearing House.

Regulations 14(1)(b) and 14(2)(b) of the Settlement Finality Regulations provide that the totality of default arrangements of a designated system take precedence over insolvency law, whether or not the default arrangements apply to "transfer orders", since these are separately dealt with in Regulations 14(1)(a) and 14(2)(a). Regulation 14(3) provides that "nothing in the following provisions of this Part shall be construed as affecting the generality of the above provisions". The "following provisions" – *inter alia* Regulations 15, 16 and 17 – specify certain provisions of insolvency law which are explicitly disapplied as regards transfer orders. We believe that the effect of Regulation 14(3) is to confirm that these exclusions are not intended to be construed restrictively, and that they do not have the effect of limiting the precedence of "default arrangements" over the general law of insolvency to transfer orders only.

3.3.4 The Clearing House Documentation does not contain any provisions expressly allowing a Member to apply a set-off in respect of its positions with, and obligations owed to or by, the Clearing House in the case of the insolvency or, other default of the Clearing House. However, debts (including, without limitation, amounts payable under Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Clearing House to a Clearing Member may be mandatorily set off against mutual debts (including, without limitation, amounts payable under Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Clearing Member to the Clearing House, in a winding-up of the Clearing House, under Rule 4.90 of the Insolvency Rules 1986 ("**Rule 4.90**") or, in an administration of the Clearing House, under Rule 2.85 of the Insolvency Rules 1986 ("**Rule 2.85**") ("**Statutory Insolvency Set-Off**").

Statutory Insolvency Set-Off would not apply in circumstances where Regulation 12(1) of the FCA Regulations and/or Regulation 14 of the Settlement Finality Regulations apply. In this regard, please refer to the qualifications in paragraph 4.1.7 in relation to the circumstances in which Regulation 12(1) of the FCA Regulations may not apply, and paragraphs 4.1.9

to 4.1.11 in relation to the circumstances in which Regulation 14 of the Settlement Finality Regulations may not apply.

3.4 Netting and Set-Off: Proprietary Accounts and Customer Accounts

3.4.1 Where a Member has exercised its rights under the Netting Provision, a Termination Amount payable on any Customer Account of a Member should not be aggregated with or netted against a Termination Amount payable on any other Customer Account or on any Proprietary Account of the Member.

This is because Rule 906(d) of the Clearing Rules (or, in relation to CDS Contracts, Rule 906(d) of the CDS Rules) provides that where a Member has a Proprietary Account and one or more Customer Accounts and there is a Termination Amount payable on each of the Member's Proprietary Account and Customer Accounts, "*each amount so certified shall be treated as a separate obligation which cannot be netted off against another certified amount N in respect of a different account of the Defaulter*" and that each such net amount is treated as a separate Termination Amount. Therefore, Rule 906 (d) (or, in relation to CDS Contracts, Rule 906(d) of the CDS Rules) operates so as to produce several separate Termination Amounts between the Clearing House and the Member, one in respect of Proprietary Accounts, one in respect of each of the Customer Accounts. For the reasons given in paragraph 3.3.3 above, Regulation 14 of the Settlement Finality Regulations would have the effect that the requirement of the Netting Provision to determine two Termination Amounts will take precedence over insolvency laws. Furthermore, Regulation 12(1) of the FCA Regulations provides that close-out netting provisions in relation to financial collateral arrangements take effect in accordance with their terms.

3.4.2 As set out above in paragraph 3.3.4, the Clearing House Documentation does not contain any provisions expressly allowing a Member to set-off Termination Amounts payable on different Customer Accounts or between Proprietary Account and Customer Accounts. However, debts (including, without limitation, amounts payable under Contracts in accordance with their terms including, where applicable, Termination Amounts) owed by the Clearing House to a Clearing Member would be mandatorily set off against mutual debts (including, without limitation, amounts payable under Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Clearing Member to the Clearing House, in a winding-up of the Clearing House, in the event of a Statutory Insolvency Set-Off.

3.4.3 With regard to the matter of whether or not amounts due in respect of both Proprietary Accounts and Customer Accounts would be considered to be "mutual" for the purposes of Statutory Insolvency Set-Off, please note that:

- (a) where a Member is subject to the Client Money Rules, the effect of section 139 of FSMA and the Client Money Rules is that all amounts due in respect of certain Customer Accounts will be held on trust for clients collectively, and such amounts would not be "mutual" with (and therefore could not be set off against) amounts due in respect of Proprietary Accounts or Customer Accounts which are not subject to the trust;
- (b) where a Member is subject to client segregation requirements under the laws of its home jurisdiction, the segregation arrangements may be regarded under the laws of this jurisdiction as making amounts due in respect of a Customer Account not mutual with amounts due in respect of Proprietary Accounts, or, possibly, other Customer Accounts; and
- (c) where a Member has created a security interest in favour of a client over amounts due in respect of a Customer Account, such amounts would not be mutual with amounts due in respect of Proprietary Accounts or other Customer Accounts.

Notwithstanding the above, if Statutory Insolvency Set-Off applies to any such amounts, the Member and its own clients would unlikely be left in a worse position than would be the case in the absence of such Statutory Insolvency Set-Off. This is because, as a practical matter, the Member would be able to determine separate mutual amounts equal to amounts which may have been aggregated and set-off under Statutory Insolvency Set-Off. A Member would (under the laws of this jurisdiction) be able to re-allocate amounts as between its own house and customer accounts to achieve the same position that would have arisen in the absence of Statutory Insolvency Set-Off.

3.5 Cash Collateral

3.5.1 Payments of cash made by a Member to the Clearing House as Margin under Part 5 of the Clearing Rules (whether or not such cash Margin is provided with respect to a Pledged Collateral Account as Pledged Collateral) constitute the absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the Clearing House, such cash Margin would be treated as the property of the Clearing House available to its creditors generally.

- 3.5.2 To the extent that any amount of cash so provided is provided by way of title transfer and is treated by the Clearing House as a collateral balance, it would constitute a debt owed by the Clearing House to the Member as principal, and would be subject to (i) close-out netting under the Netting Provision; or (ii) where close-out netting did not apply under the Netting Provision and in the event of liquidation or, if the administrator has issued a notice under Rule 2.85, administration, Statutory Insolvency Set-Off (as defined in paragraph 3.3.4, and subject to the observations regarding mutuality mentioned in that same paragraph and paragraph 3.4.3).
- 3.5.3 To the extent that any amount of cash so provided is applied by the Clearing House as a payment in settlement rather than resulting in a collateral balance in respect of the Member, such payment would not constitute a debt owed by the Clearing House to the Member and, as a consequence, would not be subject to netting under the Netting Provision or form part of a Statutory Insolvency Set-Off.
- 3.5.4 To the extent such cash Margin is provided as Pledged Collateral rather than by way of title transfer, it would constitute a debt owed by the Clearing House to the Member as principal, but would not be subject to close-out netting under the Netting Provision (but would rather be subject to the pledge). Such debt would, nevertheless, be subject to Statutory Insolvency Set-Off in the event of liquidation or, if the administrator has issued a notice under Rule 2.85, administration (again subject to the observations regarding mutuality mentioned in paragraph 3.4.3).

3.6 Non-cash Collateral

- 3.6.1 Any securities constituting Permitted Cover and provided to the Clearing House as Margin under Part 5 of the Clearing Rules (other than Margin provided with respect to a Pledged Collateral Account as Pledged Collateral) would be treated as the property of the Clearing House and would not be returnable to the Member, in the event of Insolvency Proceedings relating to the Clearing House.

This is because such non-cash Margin (other than Pledged Collateral) is transferred to the Clearing House on a title transfer basis pursuant to the Clearing House Documentation and, in particular pursuant to:

- (a) Clause 4.1 of the Clearing Agreement, which provides that "*Transfer shall be by way of... outright transfer of title to Securities*"; and

(b) Clause 4.7 of the Clearing Agreement which provides that "This Clause 4 is intended to create an ownership right in relation to any cash or other property transferred by the [Member] to the Clearing House".

However, the Clearing House will have an obligation to transfer or deliver the amount of equivalent securities (being securities of the same type, nominal value, description and amount or, where any securities have been redeemed or undergone some other change after their transfer or delivery to the Clearing House, the proceeds of such redemption less certain deductions) to the Member. This contractual obligation would be owed by the Clearing House to the Member as principal, and would be subject to (i) close-out netting under the Netting Provision; or (ii) where close-out netting did not apply under the Netting Provision and in the event of liquidation or, if the administrator had issued a notice under Rule 2.85, administration, Statutory Insolvency Set-Off (as defined in paragraph 3.3.4, and subject to the observations regarding mutuality mentioned in that same paragraph and paragraph 3.4.3).

This is because pursuant to Clause 4.4 of the Clearing Agreement, the Clearing House is contractually required to make such delivery to the Member when the Clearing House is under an obligation (for example, pursuant to the Clearing Rules) to re-transfer or re-deliver Securities transferred to it by such Clearing Member as Margin under the Clearing Rules.

3.7 Non-cash Collateral (Pledged Collateral)

On the assumptions set out in paragraphs 2.12 and 2.13, and as far as the laws of this jurisdiction are concerned:

3.7.1 Any securities constituting Pledged Collateral provided by a Member to the Clearing House as Margin under Part 5 of the Clearing Rules with respect to a Pledged Collateral Account would not be treated as the property of the Clearing House and would be returnable to the Member, even in the event of Insolvency Proceedings relating to the Clearing House, subject to the Member satisfying its obligations to the Clearing House.

3.7.2 This is because Insolvency Proceedings generally recognise property rights existing prior to the onset of insolvency, and as a result, upon an insolvency of the Clearing House, only the assets of the Clearing House would be available to its creditors. A Member who has pledged its assets to the Clearing House pursuant to the Pledged Collateral Addendum would have a pre-existing property right in those assets, and that property right will be enforceable as

against the Clearing House (in insolvency) and as against the insolvency practitioner of the Clearing House. Thus, the only claim which those creditors would have on the Pledged Collateral would be those rights which exist under the Pledged Collateral Addendum to enforce against the assets in the event of a default by the Member. As a result, the Clearing House holds the Pledged Collateral in a way that does not give it beneficial ownership of such property and will not result in such property being subject to legally enforceable claims by creditors, or to a court-ordered stay of the return of such property, should it become insolvent, save for any claims arising under prior security arrangements.

3.7.3 There is no general doctrine of English law which would have the effect of converting a grant of security in property subject to a formal security arrangement, such as the Pledged Collateral, into an absolute transfer so as to extinguish the chargor's right to recover the charged property on the extinction of the Secured Obligations (as defined in the Pledged Collateral Addendum) in accordance with the security arrangements other than through the execution of the right of the chargee to enforce against the charged asset.

However, insofar as the security arrangements constituted by the Pledged Collateral Addendum constitute a financial collateral arrangement, the right of use conferred by Clause 2.6 of the Pledged Collateral Addendum will have effect in accordance with Regulation 16 of the FCA Regulations insofar as it is conferred upon the Clearing House (but not other persons). The effect of the exercise of the right of use by the Clearing House would be to discharge the Member's proprietary rights in relation to the Non-cash Collateral and instead oblige the Clearing House (as a personal, rather than proprietary obligation) to replace the Pledged Collateral by transferring equivalent financial collateral in accordance with the FCA Regulations.

Furthermore, if the Member were to default in paying or discharging any of the Secured Obligations, the Clearing House would have the right to sell or otherwise dispose of the Pledged Collateral and (subject to the duty to account for any excess proceeds) apply the proceeds in satisfaction of the Secured Obligations.

4. QUALIFICATIONS

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

4.1 Qualifications relating to Netting and Set-off

4.1.1 The aggregation or set-off of amounts representing terminated obligations may, subject to any contrary statutory rule, such as Regulation 14 of the Settlement Finality Regulations or Regulation 12(1) of the FCA Regulations, be implemented, in a winding-up, under Rule 4.90 or in an administration, under Rule 2.85, rather than under the specific provisions of the Netting Provision.

Statutory Insolvency Set-Off would, in our view, subject to the segregation requirements of section 187 of the Companies Act 1989 (discussed at paragraph 4.1.4) and the regulations made thereunder result in a net amount payable between the Parties in respect of such amounts, subject to the other qualifications set out in this opinion and subject also to the inclusion in any Statutory Insolvency Set-Off of other mutual obligations between the Parties.

In circumstances where a Statutory Insolvency Set-Off is relevant, Statutory Insolvency Set-Off would not apply in respect of amounts which are considered not to be "mutual". For such purposes, "mutual obligations" are those 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, where a party is acting as agent for another person, or is a trustee, or in respect of which a party has a joint interest (other than, for the purposes of this opinion, where a Member is a partnership organised under the laws of this jurisdiction and then only in relation to the position between the Member and the Clearing House) or in respect of which a party's rights or obligations or any interest therein have been assigned, charged, attached or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order (including, without limitation, pursuant to section 111 of FSMA).

In addition, if an amount due between the parties does not constitute a provable debt, Statutory Insolvency Set-Off does not apply to that amount. A debt which is secured is not provable unless the secured party chooses to prove its debt rather than enforce its security. Accordingly, if the Member has provided security for its obligations in respect of Contracts, and such security is not waived, amounts due in respect of those Contracts would fall outside Statutory Insolvency Set-Off to the extent of the security. However, in relation to collateral provided to the Clearing House in respect of the net obligation of the Member to the Clearing House, the restriction on Statutory Insolvency Set-

Off by virtue of the existence of security would apply to a set-off of the net obligation against other sums owing between the Clearing House and the Member, and would not operate so as to undermine the creation of the net obligation.

- 4.1.2 In a winding-up by the courts under the laws of this jurisdiction, any dispositions of the Clearing House's property made after the commencement of winding-up of the Clearing House (which, in this context, means the time of presentation of the petition for winding-up; or, if earlier, the time of passing a resolution for voluntary winding-up; or, if the court makes a winding-up order on hearing an administration application, the making of the order) are void under section 127 of the Insolvency Act 1986 unless the court otherwise orders or the Settlement Finality Regulations or the FCA Regulations prevent its application.

Pursuant to Regulation 14(1)(b) and 14(3) of the Settlement Finality Regulations, the default arrangements of a designated system shall not be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to the distribution of assets of a person on winding up. Accordingly, section 127 of the Insolvency Act 1986 would not apply to invalidate any transfer of cash or other disposition of property insofar as contrary to the default arrangements of the Clearing House (which, as discussed in paragraph 3.3.3, should include the Netting Provision).

Pursuant to Regulation 10(1) of the FCA Regulations, section 127 of the Insolvency Act 1986 does not apply to any property or security interest subject to a disposition or created or otherwise arising under a financial collateral arrangement or to prevent a close-out netting provision (as defined in the FCA Regulations) taking effect in accordance with its terms.

In any case, where the Settlement Finality Regulations and the FCA Regulations do not apply, the effect of Statutory Insolvency Set-Off is such that obligations entered into after compulsory winding-up has commenced in relation to the Clearing House might not be capable of inclusion in the netting under the Netting Provision or a set-off pursuant to a Statutory Insolvency Set-Off, but this would not impair the effectiveness of the Netting Provision or a Statutory Insolvency Set-Off in respect of Contracts entered into before the commencement of such Insolvency Proceedings.

- 4.1.3 Statutory Insolvency Set-Off may not apply to amounts which arise under Contracts entered into at certain times, and accordingly a court of this

jurisdiction might not allow such amounts to be included in an aggregation or set-off pursuant to the Netting Provision or a Statutory Insolvency Set-Off. The times referred to are, so far as relevant, as follows:

- (a) after the Clearing House had entered administration;
- (b) at a time when the Member had notice that an application for an administration order in respect of the Clearing House was pending or that any person had given notice of intention to appoint an administrator in respect of the Clearing House;
- (c) at a time when the Member had notice that a meeting of creditors of the Clearing House had been summoned under section 98 of the Insolvency Act 1986 (which requires a company which goes into creditors' voluntary winding-up to cause a meeting of creditors to be summoned for a day not later than the fourteenth day after the day on which there is to be held a shareholders' meeting at which the resolution for voluntary winding-up is to be proposed) or that a petition for the winding-up of the Clearing House was pending; or
- (d) during a winding-up of the Clearing House.

Furthermore, any debt which has been acquired by the Member by assignment or otherwise pursuant to an agreement between the Member and any other person must be excluded from Statutory Insolvency Set-Off, and may not be included in an aggregation pursuant to the Netting Provisions, where such assignment or other agreement was entered into at any of the times mentioned above.

Notwithstanding the foregoing statements in this paragraph 4.1.3, it appears that sums which are subject to a close-out netting provision (as defined in the FCA Regulations) may still be included in a Statutory Insolvency Set-Off:

- in an administration of the Clearing House, if they became due after the Clearing House entered administration or (if the administration was immediately preceded by a winding-up) during the winding-up; or
- in a winding-up of the Clearing House which was immediately preceded by an administration, if they became due during the administration,

unless at the time the relevant financial obligations came into existence the Member was aware, or should have been aware, that winding-up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations) had commenced in relation to the Clearing House.

4.1.4 Section 187 of the Companies Act 1989 provides that where a person enters into market contracts in more than one capacity, the provisions of Part VII apply as if the contracts entered into in each different capacity were entered into by different persons. By virtue of the Financial Markets and Insolvency Regulations 1991, a Member enters into Contracts in "different capacities" for those purposes where Contracts are entered into on behalf of a client of the Member in respect of whom the Member owes duties to segregate client money under the FCA's rules.

Accordingly, where more than one discrete Termination Amount is required to be calculated under the Netting Provision by virtue of the segregation requirements under section 187 of the Companies Act 1989 and/or any other segregation requirements, we express no opinion as to the effect under the laws of this jurisdiction of any failure by the Clearing House to adopt this course of action.

4.1.5 Liquidation and, where an administrator is authorised to make a distribution, administration procedures under the Insolvency Rules 1986 are conducted in sterling. Rule 2.86 and Rule 4.91 of the Insolvency Rules 1986 provide that, for the purposes of Statutory Insolvency Set-Off, a debt incurred in a currency other than sterling shall be converted into sterling at the "*official exchange-rate*" (which is based on the market rate on the date the court makes the winding-up order, or the company concerned goes into liquidation or enters administration).

However, under Regulation 14 of the FCA Regulations, Rule 2.86 and Rule 4.91 of the Insolvency Rules 1986 are disapplied in the case of liquidation or administration proceedings in respect of a party to a financial collateral arrangement or a close out netting provision which permits conversion into sterling at a rate other than the "*official exchange-rate*" unless the arrangement provides for an unreasonable exchange rate or the collateral-taker uses the mechanism provided under the arrangement to impose an unreasonable exchange rate. In light of the opinion given at paragraph 3.3.2 that the Netting Provision constitutes a "close-out netting provision" for the purposes of the FCA Regulations, Regulation 14 of the FCA regulations should, in our

opinion, apply in the case of a liquidation or an administration of the Clearing House, subject to the observations at paragraph 4.1.7 below.

4.1.6 In respect of any Contract entered into before the commencement of the winding-up in respect of the Clearing House, under which property is to be delivered after the time of such commencement and in respect of which the Clearing House transfers ownership of the property to the Member after the time of such commencement, it may not be possible for the price payable in respect of such property transferred to be included in the relevant Termination Amount. However, if such a Contract is terminated before ownership of the property to be delivered under such Contract is transferred, the gain or loss in respect of the Contract calculated in accordance with the Netting Provision should be capable of being included in the Termination Amount. Any action taken by the liquidator of the Clearing House to recover the price from the Member would not prejudice the effectiveness of the netting pursuant to the Netting Provision of other, valid, obligations.

4.1.7 In relation to paragraphs 3.3.2 and 3.4.1 above, Regulation 12(1) of the FCA Regulations does not apply if at the time that (any of) the relevant financial obligations came into existence:

- (a) the Member was aware, or should have been aware, that winding up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations) had commenced in relation to the Clearing House;
- (b) the Member had notice that a meeting of creditors of the Clearing House had been summoned under section 98 of the Insolvency Act 1986 (as to which see paragraph 4.1.3(c) above) or that a petition for the winding-up of the Clearing House was pending; or
- (c) the Member had notice that an application for an administration order was pending, or that a person had given notice of intention to appoint an administrator, in respect of the Clearing House.

Accordingly, in such circumstances, the protection granted under the FCA Regulations to a close-out netting provision may not be effective.

4.1.8 If any creditor of the Clearing House were to attach, execute, levy execution or otherwise exercise a creditor's process (whether before or after judgment) over or against any claim owing by Member to the Clearing House, then the

Member would be able to exercise its rights under the Netting Provision against the creditor of the Clearing House in respect of claims which existed at the date of the attachment or other process, including the claim which is the subject of the attachment or other process. However, if the attaching creditor has become subject to Statutory Insolvency Set-Off before a Termination Date has occurred, it may be possible for the liquidator or administrator of the attaching creditor to claim the amounts subject to the attachment free of the Member's rights under the Netting Provision. This is because it may be argued that the Member seeks to exercise a set-off right in respect of an amount which is now owed by the Member to the attaching creditor rather than to the Clearing House, and a contractual provision which purports to create a right of set-off between non-mutual claims may not be effective in Statutory Insolvency Set-Off when applied to the attaching creditor.

However, after the commencement of a winding-up in respect of the Clearing House 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 Member under the Netting Provision. Further, the protections available under the FCA Regulations, the Settlement Finality Regulations and Part VII may have effect to override the claim of the attaching creditor.

- 4.1.9 In relation to our opinions at paragraphs 3.3 and 3.4, and our observations regarding the application of insolvency laws, the provisions of the Settlement Finality Regulations referred to will not apply in relation to any transfer order entered into the designated system of the Clearing House (which we take to mean registered with the Clearing House) after the court has made a winding-up or administration order in relation to the Clearing House or the Clearing House has passed a resolution for creditors' voluntary winding-up, unless the transfer order is carried out on the same business day of the designated system as the order or resolution, and the system operator can show it did not have notice of the order or resolution. It seems unlikely that the Clearing House would not have such notice of such an order or resolution and, accordingly, we express no view as to whether obligations between the Parties (in respect of Contracts or otherwise) which are, or arise from, transfer orders entered into after the commencement of the relevant Insolvency Proceedings may be included in the termination and liquidation under the Netting Provision, but the exclusion of any such obligation would not affect the enforceability of the Netting Provision in respect of any other obligations entered into before such time.

4.1.10 In relation to our opinion at paragraph 3.3.3, there is an argument that amounts due under Contracts which constitute derivatives do not constitute "transfer orders" for the purposes of the Settlement Finality Regulations. A "transfer order" may be either a "payment transfer order" or a "securities transfer order" (as defined in the Settlement Finality Regulations). While a cash sum due to be paid under a Contract ought to constitute, or give rise to, a "payment transfer order", it may be that the entirety of the Contract cannot properly be so regarded. Further, if under the terms of a Contract, title to, or an interest in, a commodity or other thing which is not a "security" (meaning an instrument referred to in section C of Annex I to Directive 2004/39/EC (MiFID)) is transferred, that Contract would not appear to constitute a "transfer order". If those arguments were to prevail, the additional protections provided by the Settlement Finality Regulations which are mentioned in paragraph 3.3.3 may not be available in respect of those Contracts.

4.1.11 In addition, there is an argument that, in the case of a central counterparty such as the Clearing House, which clears a number of different products in distinct product-specific clearing services, there would not be one single designated system for the purposes of the Settlement Finality Regulations (being the single centralised cross-product clearing system operated by the central counterparty) but, instead, the system in respect of each product cleared by the central counterparty should be treated as representing a separate designated system. If this were the case, then, notwithstanding our assumption at paragraph 2.6, and notwithstanding that the Bank of England (as the relevant "designating authority" under the Settlement Finality Regulations) has, as at the date of this opinion, indicated on its website² that the Clearing House as a whole constitutes a single designated system, it may be that certain classes of Contract cleared by the Clearing House constitute or contain a designated system, whilst others do not. A possible consequence of this might be that, for certain classes of Contract the Netting Provision would not constitute "default arrangements" for the purposes of Regulation 14 of the Settlement Finality Regulations and, therefore, that the protections provided for under that statutory rule would not be available in respect of the close-out netting under the Netting Provision of the relevant Contracts.

4.1.12 There are provisions in both the Companies Act 2006 and the Insolvency Act 1986 for schemes of arrangement or voluntary arrangements in respect of

² http://www.bankofengland.co.uk/financialstability/Pages/fmis/supervised_sys/systems.aspx.

companies to be agreed by creditors or, in some cases, shareholders of the company. The courts will not sanction a scheme of arrangement under sections 895-901 of the Companies Act 2006 unless reasonable efforts were made to notify those creditors whose rights would be affected by the scheme of the meeting to approve that scheme. In relation to company voluntary arrangements under Part I of the Insolvency Act 1986, a creditor can be bound by the relevant arrangement even if he has not been given notice of the creditors' meeting to approve the arrangement. In the case of either a scheme of arrangement or a company voluntary arrangement, approval at the creditors' meeting of its terms does not require unanimity of the affected creditors, whether or not present at the meeting. Such arrangements could affect both the set-off rights of creditors and the value of claims which the creditors may have against the company, but not their property rights.

If the termination and liquidation provided for in the Netting Provision has been effected before the approval of such an arrangement, any provision of such an arrangement which purports to unwind the application of the Netting Provision would not bind the affected creditor if timely objection to the arrangement is made to the applicable court. An arrangement could, however, affect the value of any resulting net claim.

- 4.1.13 With regard to whether amounts would be considered to be "mutual" for the purposes of Statutory Insolvency Set-Off, Client Money Rules made in accordance with Directive 2004/39/EC on markets in financial instruments may have the effect that amounts due in respect of certain Customer Accounts may not be "mutual" with amounts due in respect of Proprietary Accounts or other Customer Accounts; and if a Member has created a charge in favour of a client over amounts due from the Clearing House, such amounts would not be mutual with other amounts due in respect of Proprietary Accounts or other Customer Accounts.
- 4.1.14 If an obligation which is owed by a Party is a contingent obligation, Rule 4.86 or Rule 2.81 of the Insolvency Rules 1986 will operate to allow the liquidator or administrator to value that obligation. The valued amount would be included in the Statutory Insolvency Set-Off notwithstanding that the amount so included may differ from the other Party's assessment of the value of that obligation. A right of appeal to the court is available against the liquidator's or administrator's valuation.

- 4.1.15 Under the Clearing Rules, the Clearing House is responsible for the calculation of the Termination Amount(s) due under the Netting Provision in relation to each Contract Category and each Customer Account(s) and/or Proprietary Account, even where the close-out netting effected under the Netting Provision is due to a default of the Clearing House. We express no opinion in relation to the calculation of the Termination Amount(s) by the Clearing House following its own default, and in particular its enforceability or timeliness.
- 4.1.16 Under Rules 110(b) and 110(c) of the Clearing Rules (or, in relation to CDS Contracts, Rules 110(b) and 110(c) of the CDS Rules), the time fixed by the Clearing Rules for making transfers, deposits or payments may be extended by the Clearing House whenever in its discretion it considers that such extension is necessary or in the best interests of the Clearing House. Any such extension may continue in effect after the event or events giving rise thereto. If such extension contemplated by the Clearing House is for any length of time longer than 3 Business Days after such transfer, deposit, payment or performance is due, it must be approved by an affirmative vote of the Board at a quorate meeting. We express no opinion in relation to the ability of the Clearing Member to give notice of a Failure to Pay to the Clearing House and trigger the Netting Provision if the Clearing House implements Rules 110(b) and 110(c) of the Clearing Rules (or, in relation to CDS Contracts, Rules 110(b) and 110(c) of the CDS Rules).
- 4.1.17 Moreover, in relation to our opinion at paragraph 3.3, if under its governing law a Transaction is not capable of being terminated and liquidated, we do not express a view as to whether such Transaction will be included in any net sum produced in accordance with the provisions of the Netting Provision.

4.2 General insolvency issues

In this paragraph 4.2 we have discussed certain provisions of insolvency law which may be relevant and are understood to be of common interest. The provisions of insolvency law have effect subject to contrary statutory rules, such as Regulation 14 of the Settlement Finality Regulations.

- 4.2.1 Under section 238 of the Insolvency Act 1986, a transaction entered into by a company at any time within a specified period ending with the onset of insolvency of the company (being, in broad terms, the earliest of: the date of the commencement of winding-up; the date on which an administration application is made; the date of filing with the court of a notice of intention to

appoint an administrator; or the date of the company entering administration; or, where the court has made a recognition order in respect of a foreign proceeding under the Cross-Border Insolvency Regulations 2006, the date of opening of the foreign proceeding) with a person on terms that provide for the company to receive either no consideration, or 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 it, may be set aside as a transaction at an undervalue, if at the time the transaction is entered into that company was unable to pay its debts or became unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 in consequence of the transaction. In a case where the Parties are "connected" within the meaning in section 249 of the Insolvency Act 1986, a presumption of inability to pay debts will apply. A court would not set aside such a transaction if it were satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business and that at the time it did so there were reasonable grounds for the belief that it would benefit the company. Transactions entered into on arm's length terms and at the then prevailing market rates are unlikely to constitute transactions at an undervalue.

The matters on which we opine in paragraph 3.3 above are unlikely to be characterised as transactions at an undervalue, but the matters referred to in this paragraph are primarily questions of fact. We would also mention that under Regulation 17 of the Settlement Finality Regulations, no order may be made under section 238 of the Insolvency Act 1986 in respect of a transfer order or the provision of "collateral security" (as defined in the Settlement Finality Regulations).

4.2.2 Under section 239 of the Insolvency Act 1986 anything done or suffered to be done by a company within a specified period ending with the onset of insolvency (as defined in paragraph 4.2.1 above) of that company may be set aside as a preference. The thing done or suffered will be liable to be set aside if at the time it was done or suffered that company was unable to pay its debts or became unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 in consequence of the thing done or suffered and that thing has the effect of putting any person in a better position, in the event of that company going into insolvent liquidation, than that person would have been in if the thing had not been done or suffered. However, the court would not make such an order if it was 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. In a case where the Parties are "connected" within the meaning

in section 249 of the Insolvency Act 1986, a presumption that the desire to put the other Party in a better position will apply.

The matters on which we opine in paragraph 3.3 above are unlikely to be characterised as preferences, but the matters referred to in this paragraph are primarily questions of fact. We would also mention that under Regulation 17 of the Settlement Finality Regulations, no order may be made under section 238 of the Insolvency Act 1986 in respect of a transfer order or the provision of "collateral security".

4.2.3 Under section 178 of the Insolvency Act 1986 a liquidator of a company being wound up may by notice disclaim any "onerous property", including any unprofitable contract.

However, any person sustaining loss or damage in consequence of the operation of a disclaimer is deemed a creditor of the company to the extent of the loss or damage. Accordingly, we do not consider that the existence of the possibility of disclaimer (even if theoretically exercisable) would affect the opinions expressed in paragraph 3. Specifically, as regards the opinions in paragraph 3.7, we do not consider that a disclaimer would operate so as to deprive a Member of the equity of redemption in its non-cash Pledged Collateral.

4.2.4 Under section 186 of the Insolvency Act 1986 a person entitled to the benefit or subject to the burden of a contract with a company in liquidation may apply for an order rescinding the contract, on such terms as to payment by or to either party of damages for non-performance or otherwise as the court thinks just.

4.2.5 The enforceability of the property rights of a Member in non-cash Margin pledged to the Clearing House under the Pledged Collateral Addendum (as described in paragraph 3.7) may be limited by insolvency, liquidation, administration and other laws of general application relating to or affecting the rights of creditors as such law may be applied in the event of a Clearing House Default Event. In particular:

(a) if a winding-up order was made in respect of, or a provisional liquidator was appointed to, the Clearing House, the leave of the court would be required under section 130 of the Insolvency Act 1986 in order for a Member to enforce its property rights in respect of the non-cash Margin against the Clearing House; and

- (b) if the Clearing House were to enter into administration or an application were to be presented to the court for the making of an administration order in respect of the Clearing House or notice of intention to appoint an administrator of the Clearing House were to be filed with the court, the leave of the court (or, if an administrator were appointed to the Clearing House, the consent of that administrator) would be required under Paragraph 43 or 44 of Schedule B1 in order for a Member to enforce its property rights in respect of the non-cash Margin against the Clearing House.

Furthermore, obligations of the Clearing House may not be enforced in all circumstances. In particular:

- (a) the power of a court of this jurisdiction to order specific performance of an obligation or other equitable remedy is discretionary and, accordingly, a court of this jurisdiction might make an award of damages where specific performance of an obligation or other equitable remedy is sought;
- (b) claims may become barred under the Limitation Acts or under equitable principles relating to delay, or may be or become subject to a defence of set-off or counterclaim; and
- (c) in some circumstances a court of this jurisdiction may, and in certain circumstances it must, terminate or suspend proceedings commenced before it, or decline to restrain proceedings commenced in another court, notwithstanding the provisions of the Clearing House Documentation providing that the courts of this jurisdiction have jurisdiction in relation thereto.

4.2.6 Under the Cross-Border Insolvency Regulations 2006, a court may recognise a foreign insolvency proceeding, and in consequence of such recognition may limit the application of English insolvency law, or apply certain of the provisions of English insolvency law at times, or in circumstances, where they would not otherwise be available.

However, Regulation 2 of the Cross-Border Insolvency Regulations 2006 provides that the UNCITRAL Model Law shall have the force of law in Great Britain and, under Regulation 4 of Article 1 of the UNCITRAL Model Law, a court of this jurisdiction shall not grant any relief or provide any co-operation or coordination under or by virtue of any provisions of the UNCITRAL Model

Law if and to the extent that such relief, co-operation or coordination would be prohibited under Part 3 of the Settlement Finality Regulations (which includes Regulation 14 of the Settlement Finality Regulations) or Part 3 of the FCA Regulations (which includes Regulations 10 and 12 of the FCA Regulations). Hence, the conclusions set out in this opinion as to the effect of the Netting Provision and the relevant collateral arrangements should not be undermined as a consequence of the recognition of a foreign insolvency proceeding under the Cross-Border Insolvency Regulations 2006.

4.3 Qualifications relating to Netting and Set-Off: Proprietary and Customer Accounts

- 4.3.1 In the event of Insolvency Proceedings relating to the Clearing House, the continued ability of the Member to treat the amounts due to or from the Clearing House in respect of one or more Customer Accounts separately from the amount owed to or from the Clearing House in respect of its Proprietary Account may be affected by the operation of Statutory Insolvency Set-Off. Statutory Insolvency Set-Off is (in the absence of any contrary statutory rule, such as Regulation 14 of the Settlement Finality Regulations or Regulation 12(1) of the FCA Regulations) mandatory, and has the effect that all mutual debts, mutual credits, and other mutual dealings must be aggregated and set off so that only a single net balance is payable between the Parties. We refer to paragraph 3.4.3 with regard to whether amounts due in respect of a Member's different Proprietary Accounts and Customer Accounts would be considered to be mutual.
- 4.3.2 If Statutory Insolvency Set-Off applies so as to require that a single net amount is payable in respect of the Member's Proprietary Account and Customer Accounts, it is unlikely that the Member and its own clients would be left in a worse position than in the absence of such Statutory Insolvency Set-Off. In such a case, the Member would be able to re-allocate positions between its own house and client accounts to achieve the same position that would have arisen in the absence of Statutory Insolvency Set-Off (assuming the Member is not prohibited from making such re-allocation in accordance with applicable regulation and accounting standards, in respect of which we express no view).

4.4 Qualifications relating to Cash Collateral

- 4.4.1 A Member's right against the Clearing House in respect of payments relating to cash Margin may be subject to a trust or security or other interest for the

benefit of such Member's own clients, and in such cases may not be freely returnable to the Member beneficially.

4.4.2 Section 177 of the Companies Act 1989 applies to property held by a recognised clearing house as margin in relation to a market contract or as default fund contribution. Where a UK recognised clearing house applies such property in accordance with its rules, section 177 permits the clearing house to do so notwithstanding any prior equitable interest or right, or any right or remedy arising from a breach of fiduciary duty, unless the clearing house had notice of the interest, right or breach of duty at the time the property was provided as margin or as default fund contribution.

4.5 Qualifications relating to non-cash Pledged Collateral

4.5.1 Insofar as non-cash fungible assets posted as Pledged Collateral are not held by the Clearing House separately from assets in the absolute beneficial ownership of the Clearing House, there is a risk that the property rights of the Member in the non-cash Pledged Collateral may be lost. It may be asserted, based on the case *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 that failure to segregate is fatal to the continuing property interest of the Member in the non-cash Pledged Collateral. However, *Goldcorp* may be distinguished on the basis that it concerned physical assets (gold bullion) rather than account-held securities, and on the basis of *Hunter v Moss* [1994] 1 WLR 452 a property interest can continue in a mixed pool of account-held securities. In our view *Hunter v Moss* is likely to be followed by the courts of this jurisdiction notwithstanding that it has been academically criticised.

4.5.2 If the records maintained by the Clearing House are unclear as to whether securities held by the Clearing House are held for the Clearing House beneficially or for Members, the property rights of the Member in the non-cash Pledged Collateral may be lost.

4.5.3 Whether or not there is full and effective segregation of the Clearing House's own assets from those belonging to Members, if there is a shortfall of securities of a given class it is unclear how the remaining securities would be distributed among claimants. In *Barlow Clowes v Vaughan* [1992] 4 All ER 22 a shortfall was shared rateably, but this decision was at first instance and may not be followed. The more traditional approach is to apply the principles of *Clayton's Case* (1816) 1 Mer 572 (property received first is deemed to have been utilised first) and *re Hallett's estate* (1880) 13 Ch D 695 (a trustee's own

property is deemed to have been utilised before that of others, i.e. in this case Members).

- 4.5.4 Any security comprised in the non-cash Pledged Collateral may be subject to corporate actions or other events relating to the issuer of securities comprised in the non-cash Pledged Collateral which affect the ability to hold or transfer the security concerned. We express no view as to the ability of the Member to recover any Pledged Collateral which is subject to such actions or events while in the possession or control of the Clearing House.
- 4.5.5 If an asset which constitutes non-cash Pledged Collateral is situated outside England, the courts of this jurisdiction may take into account the law of the place where the asset or right is legally situated and the governing law of the asset (despite the choice of New York law as the governing law). In relation to a financial collateral arrangement, Regulation 19 of the FCA Regulations provides that certain questions, including any question relating to the proprietary effects of "book entry securities collateral" provided under a financial collateral arrangement shall be governed by the domestic law of the country in which the "relevant account" is maintained. For these purposes, "book entry securities collateral" means financial collateral subject to a financial collateral arrangement which consists of financial instruments, title to which is evidenced by entities in a register or account maintained by or on behalf of intermediary (as defined in the FCA Regulations); and "relevant account" means the register or account in which entries are made by which book entry securities collateral is transferred or designated so as to be in the possession or under the control of the collateral-taker or a person acting on his behalf. Accordingly, the issue of entitlement to the non-cash Pledged Collateral may be determined by a system, or systems, of law other than the laws of this jurisdiction.

There is appellate court authority (*Macmillan Inc v. Bishopsgate Investment Trust PLC (No.3)* [1996] 1 WLR 387) which can be interpreted as deciding that the place where shares are located is deemed to be the place where the share register is kept or the place where the issuer of the shares is incorporated, notwithstanding that the holder's interest in the shares is evidenced by book entries maintained by an intermediary. While in our view this authority does not exclude the analysis that an entitlement to securities held in book entry form is located where the books are situated, we are not aware of any binding authority which has considered the question of location of such entitlements. Accordingly, to the extent any of the non-cash Pledged

Collateral consists of shares and if a court were to conclude that such non-cash Pledged Collateral should be regarded as being located outside this jurisdiction, the issue of enforceability of such non-cash Pledged Collateral may be determined by a system, or systems, of law other than the laws of this jurisdiction.

4.6 General Qualifications

- 4.6.1 If the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the courts of this jurisdiction may recognise the extinction of those claims or liabilities. In particular, in relation to any Contract which is governed by a law other than the law of this jurisdiction, such proceedings may affect whether or not that Contract is available for inclusion in any netting or set-off pursuant to the Netting Provision.
- 4.6.2 An exchange contract³ (which in our view, may include the Clearing House Documentation and certain Contracts) is unenforceable in the United Kingdom if (i) it involves the currency of any member of the International Monetary Fund and (ii) it is contrary to the exchange control regulations of any member of the International Monetary Fund maintained or imposed consistently with the International Monetary Fund Agreement. In our opinion the Clearing House Documentation is not contrary to any exchange control regulations maintained or imposed by the United Kingdom. Further, there is inconsistent authority on what amounts to an "exchange contract" for these purposes. It is not clear whether the term encompasses any contract which in any way affects a country's exchange resources or only a contract for the exchange of one currency for another, although the better view is probably that the latter (narrow) interpretation is correct.
- 4.6.3 Under English law, interest imposed upon a Party by the Clearing House Documentation might be held to be irrecoverable on the grounds that it is a penalty, or to the extent that it accrues on an unsecured debt after the making of a winding-up order or the passing of a winding-up resolution by the company liable to pay such interest, but the fact that it was held to be irrecoverable would not of itself prejudice the legality or validity of any other provision of the Clearing House Documentation. If the Clearing House

³ "Exchange contract" here has the meaning used in the International Monetary Fund Agreement and related legislation, and is not a reference specifically to on-exchange derivative contracts.

Documentation does not provide a contractual remedy for the late payment of any amount payable thereunder that is a substantial remedy within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998, the Party entitled to that amount may have a right to statutory interest (and to payment of certain fixed sums) in respect of that late payment at the rate (and in the amount) from time to time prescribed pursuant to that Act. Any term of the Clearing House Documentation may be void to the extent that it excludes or varies the right to statutory interest, or purports to confer a contractual right to interest that is not a substantial remedy for late payment of that amount, within the meaning of that Act. We express no opinion as to whether any such provisions in the Clearing House Documentation do in fact constitute a "substantial remedy" in compliance with the conditions set out in section 9 of such Act.

- 4.6.4 Where a Party to the Clearing House Documentation is vested with a discretion or may determine a matter in its opinion, that Party may be required to exercise its discretion in good faith, reasonably and for proper purpose, and to form its opinion in good faith and on reasonable grounds. Any provision in the Clearing House Documentation providing that any calculation, determination or certification is to be conclusive and binding may not be effective if such calculation, determination or certification is fraudulent or manifestly incorrect and an English court may regard any calculation, determination or certification as no more than *prima facie* evidence of the matter calculated, determined or certified.
- 4.6.5 If a party to an agreement is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Community or UK sanctions implemented or effective in the United Kingdom under the United Nations Act 1946, the Emergency Laws (Re-enactments and Repeals) Act 1964 or the Anti-terrorism, Crime and Security Act 2001, or under the Treaty establishing the European Community, or is otherwise the target of any such sanctions, then the obligations of the other party to that party under the relevant agreement may be unenforceable or void.

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 (the "FOA"). 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) such of the FOA's members (excluding associate members) as subscribe to the FOA's opinions library and whose terms of subscription give them access to this opinion (each a "**subscribing member**") and the officers, employees, and professional advisors of such subscribing member;
- (b) 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, and professional advisors of such affiliate;
- (c) any competent authority supervising a subscribing member or an affiliate of such subscribing member in connection with their compliance with their obligations under prudential regulation;
- (d) the auditors of a subscribing member or an affiliate of a subscribing member solely as an evidential matter in support of their evaluation of such subscribing member's or such affiliate's compliance with prudential reporting requirements under Regulation (EU) No 575/2013; and
- (e) the officers, employees and professional advisors of the FOA,

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.

We accept responsibility to the FOA 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 FOA'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 FOA's members or their affiliates.

Yours faithfully,



Clifford Chance LLP

Annex 1

Clearing Agreement

ice CLEAR

Date:

ICE CLEAR

- and -

CLEARING MEMBERSHIP AGREEMENT

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CLEARING MEMBERSHIP AGREEMENT

This agreement ("Agreement") dated , is entered into as a deed by and between whose registered office is at (the "Company"), organised and existing under the laws of England and Wales, and ICE Clear Europe Limited (the "Clearing House"), incorporated under the laws of England and Wales, with its registered office at International House, 1 St Katharine's Way, London E1W 1UY.

PURPOSE OF THE AGREEMENT

- A. The Clearing House carries on the business of a clearing house and acts as central counterparty and clearer in relation to certain contracts ("Contracts") that are traded on or subject to the rules of specified exchanges or markets (each such exchange or market, a "Market") which have appointed the Clearing House for such purpose.
- B. The Clearing House performs such functions in accordance with the Rules (as defined below) and separate agreements entered into between the Clearing House and relevant Markets.
- C. The Company desires to become a member of the Clearing House.
- D. If and as from the time that the Clearing House admits the Company to membership as a Clearing Member, the Company shall be subject to the terms and conditions of this Agreement.

I. INTERPRETATION

I.1 In this Agreement, the following expressions shall have the following meanings:

- (i) The term "Collateral" means property of any description (including, without limitation cash or any investment as defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, as amended), any substitutions for and proceeds of property and any amounts delivered and transferred to the Clearing House by the Company pursuant to the Rules by way of or as Permitted Cover, Original Margin, Guaranty Fund Contribution or otherwise as security for any past, present or future obligation or liability.
- (ii) The term "Dispute" means any dispute, difference, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, in relation to, or in connection with, this Agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement.
- (iii) The term "Eligible Persons" means members or participants of a Market to whom the Company provides clearing services in relation to Contracts to which the Company is party from time to time, which as at the date hereof are listed in the Schedule.
- (iv) The term "Nominated Account(s)" means the account or accounts of the Company at an Approved Financial Institution from which the Approved Financial Institution credits or withdraws funds in accordance with instructions from the Clearing House in relation to the Company's positions, payments and Contracts arising from its business at the Clearing House.

(v) The term "Rules" means the rules of the Clearing House, together with the procedures made thereunder, as interpreted in accordance with guidance and circulars of the Clearing House.

(vi) The term "Third Party Authority Form" means a form executed by the Company in favour of an Approved Financial Institution giving authority to the Clearing House to provide instructions in relation to the Nominated Account(s), in the form and subject to such terms and conditions as are required from time to time by the Approved Financial Institution and the Clearing House.

1.2 Unless the context clearly requires otherwise, all other capitalised terms used but not defined herein have the meaning given to such terms in the Rules.

1.3 The headings in this Agreement are for convenience only and shall not affect the interpretation of this Agreement.

1.4 Any words or terms in singular form shall, where the context permits, include the plural and vice versa.

1.5 Any words or terms in the masculine gender shall include the feminine gender and, where the context permits or requires, such references and references to any person include any individual, partnership, firm, body corporate or incorporate, association, trust, unincorporated organisation or other entity whether or not a natural person.

1.6 A reference to any statutory provision shall be construed as a reference to such provision as modified, amended or re-enacted from time to time and to any subordinate legislation made under such provision and shall include references to any repealed statutory provision which has been so re-enacted (whether with or without modification).

1.7 A reference to a Clause or Schedule, unless the context otherwise requires, is a reference to a clause of or a schedule to this Agreement.

2. **OBLIGATIONS OF THE COMPANY**

2.1 As from the Admission Date, the Company agrees with the Clearing House to:

- (i) observe, comply with and be bound by the Rules (as amended in accordance with the Rules from time to time) as a Clearing Member as if the Rules were set out herein;
- (ii) be subject to and bound by all of the provisions and requirements of the Rules in relation to payments, title, rights, obligations, liabilities, property (whether tangible or intangible) and Collateral including any transfers, assignments and dispositions required thereunder;
- (iii) be subject to and bound by all representations, warranties, agreements and acknowledgements that arise pursuant to the Rules from time to time;
- (iv) be subject to and bound by all Contracts that arise pursuant to the Rules from time to time and to all rights, obligations and liabilities pursuant to such Contracts;
- (v) be subject to any requirement imposed as a result of a request, decision, determination, direction, sanction, requirement, award or discretion that the Clearing House is entitled to make, exercise or impose pursuant to the Rules;

- (vi) be responsible for the actions and omissions of its Representatives as set out in the Rules;
- (vii) if an Event of Default is declared in respect of it, be bound by the Rules as a Defaulter; and
- (viii) submit to the jurisdiction and be bound by any decision, determination, direction, sanction, requirement or award of any Disciplinary Panel, Appeals Panel, Summary Proceedings Committee, arbitral tribunal, Court or other body appointed or formed pursuant to the Rules or that has jurisdiction over any matter in accordance with the Rules.

3. CLEARING FOR ELIGIBLE PERSONS

- 3.1 The Company, if permitted to do so under Applicable Laws, may provide clearing services to its Eligible Persons, which at the date of this Agreement are the persons listed in the Schedule.
- 3.2 The Company shall ensure that written agreements are at all times in place with all Eligible Persons (if any) in respect of which it acts as a Clearing Member from time to time pursuant to which each such Eligible Person agrees that: (i) the Company acts as principal at all times in all its Contracts with the Clearing House; and (ii) the Eligible Person shall have no claim of any nature against the Clearing House, whether in tort, contract, restitution, in respect of any Contract, pursuant to the Rules, pursuant to this Agreement or otherwise, save for any liability which by law may not be excluded.
- 3.3 The Company shall be obliged to ensure that the Clearing House and the relevant Market are in possession at all times of an accurate, current and complete list of Eligible Persons. If the Company proposes to begin or cease to provide clearing services for a particular Eligible Person, it shall update its list of Eligible Persons by notice in writing to the Clearing House and the relevant Market before 14.00 on the Business Day prior to the Business Day on which it proposes to begin or cease providing such clearing services. No termination or cancellation of clearing services for an Eligible Person shall affect the Company's obligations under this Agreement or pursuant to the Rules in respect of Contracts arising prior to the effective date and time of such termination or cancellation.
- 3.4 The Company acknowledges and agrees that the Clearing House does not have any obligations to Persons other than Clearing Members pursuant to its Rules, any Contracts or this Agreement. Contractual and other provision for any consequences for Eligible Persons or counterparties of the Company (other than the Clearing House) of any Contract arising, existing or being settled or subject to delivery between the Clearing House and the Company (including, without limitation, effective and enforceable arrangements for any corresponding contract to a Contract with any third party and Transferor/Transferee arrangements) shall be the sole responsibility of the Company.
- 3.5 The Company shall be responsible for all acts and omissions of each of its Eligible Persons and their Representatives to the same extent that it is responsible for the acts and omissions of itself and its Representatives, both under this Agreement and pursuant to the Rules.

4. COLLATERAL

- 4.1 Collateral shall be provided to the Clearing House by the Company at the times and in the manner specified in the Rules. Transfer shall be by way of: (i) outright transfer of cash or, as the case may be, title to securities, to or to the order of the Clearing House; or (ii) delivery of

a letter of credit acceptable to the Clearing House issued in favour of the Clearing House by an Approved Financial Institution.

- 4.2 Transfers or deliveries in respect of Collateral shall be reflected in such accounts of the Company at the Clearing House (including, in the case of Margin, in the Company's Proprietary Account or Customer Account with the Clearing House) as may be specified from time to time by the Clearing House.
- 4.3 The Company will transfer or deliver Collateral of such amount and within such time limits as are required in accordance with the Rules from time to time.
- 4.4 Where the Clearing House has any obligation to re-transfer or re-deliver to the Company any cash or securities which have been previously transferred or delivered to the Clearing House by the Company, the obligation of the Clearing House will be to transfer or deliver the amount of cash or equivalent securities (being securities of the same type, nominal value, description and amount; or, where any securities have been redeemed or undergone some other change after their transfer or delivery to the Clearing House, the proceeds of such redemption, less any deduction or withholding for or an account of tax required by Applicable Laws, or the securities so changed shall be equivalent securities for these purposes) and accordingly, the Clearing House shall have the right to deal with any amounts or securities transferred or delivered to it as referred to in this Clause 4 in any manner. Where Collateral includes a letter of credit which is to be varied, the Company will arrange for the substitution of another letter of credit complying with the requirements of this Clause 4 or the Clearing House may, in its discretion, agree with the Company and the letter of credit issuer a variation in the amount of the relevant letter of credit.
- 4.5 In relation only to cash Collateral held by the Clearing House, the Clearing House will transfer to the Company an amount in respect of interest on the net amount of Collateral to the Company's account from time to time at the rate determined by the Clearing House from time to time, less any deduction or withholding for or an account of tax required by Applicable Laws.
- 4.6 Each of the Clearing House and the Company represents to the other (which representation shall be deemed to be repeated as of each date on which it transfers, re-transfers, delivers or re-delivers any amounts or securities to the other as referred to in this Clause 4) that it is the sole owner of or otherwise has the right to transfer all such amounts or securities to the other party, free and clear of any Encumbrances of the transferor or of any third Person (other than a lien routinely imposed on all securities in a relevant settlement system or central securities depository, not being the Clearing House, and, in the case of the Clearing House, any deduction or withholding for or an account of tax required by Applicable Laws). All right, title and interest in and to any amounts or securities transferred, re-transferred, delivered or re-delivered as referred to in this Clause 4 shall vest in the recipient free and clear of any rights or Encumbrances of the transferor or of any third Person accordingly.
- 4.7 This Clause 4 is intended to create an ownership right in relation to any cash or other property transferred by the Company to the Clearing House pursuant to this Clause 4. Nothing in this Clause 4 is intended to create or does create in favour of the Clearing House or any other person any Encumbrance in relation to any cash or other property transferred by the Company to the Clearing House pursuant to this Clause 4.
- 4.8 The Company acknowledges that the Clearing House may attribute a value to any item of Permitted Cover which is less than the face or market value thereof (the discount from face or market value being known as a "haircut") and that the Clearing House may, from time to time, change the way in which it values Permitted Cover or the extent to which the value it attributes to items of Permitted Cover is less than the face or market value thereof and that

this may affect the Company's obligations to transfer or deliver amounts or securities or letters of credit for the purposes of this Clause 4.

4.9 The Company and the Clearing House agree that the provisions of this Clause 4 and the provisions of the Rules relating to the procedures to be followed on the occurrence of an Event of Default are intended to fall within the scope of the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226) and that the provisions of those regulations may accordingly be applied.

5. POWER OF ATTORNEY, PAYMENTS AND CLIENT MONEY RULES

5.1 As security for the obligations of the Company to the Clearing House under this Agreement and the Rules, the Clearing House shall be appointed as the Company's lawful attorney and agent, pursuant to which appointment, upon any Event of Default affecting the Company, the Clearing House may take such action as it in its discretion determines in the Company's or the Clearing House's name for the purposes of executing any document or instrument in order to liquidate any and all Contracts to which the Company is a party and discharging any of the rights, obligations or liabilities of the Company in such a manner as the Clearing House may at its discretion determine. The Company shall ratify and confirm all acts or things the Clearing House does or purports to do pursuant to this power.

5.2 The Company shall be required at all times to have in place a duly executed Third Party Authority Form in respect of each Approved Financial Institution used by the Company and in respect of each of its Nominated Account(s). As security for the obligations of the Company to the Clearing House under this Agreement and the Rules, the Clearing House shall be appointed as the Company's lawful attorney and agent, pursuant to which appointment the Clearing House may take any action as it in its discretion determines in the Company's or the Clearing House's name in connection with the Company's Nominated Account(s). Such power of attorney and agency shall include the power to give instructions to Approved Financial Institutions to receive balance and transaction information, including without limitation account statements and transaction advices, from the Approved Financial Institutions in relation to the Nominated Account(s) at any time using any method of communication, including but not limited to, the Payment Bank's electronic client access systems, writing, facsimile transmission, telephone and SWIFT, using codes specified in the Third Party Authority Form. The Company agrees and acknowledges that the Approved Financial Institutions will act upon any instructions received from the Clearing House in relation to the Nominated Account(s), notwithstanding that such instructions may result in an overdraft on (any of) the Nominated Account(s), without any further reference to or authority from the Company. The Company represents, warrants and acknowledges that instructions given by the Clearing House in relation to the Nominated Account(s) shall be deemed to be, and may be treated by any Approved Financial Institution as, instructions given on behalf of the Company. No Third Party Authority Form may be revoked or countermanded by the Company unless and until it has established a replacement Nominated Account at another Approved Financial Institution with the prior written consent of the Clearing House and provided a Third Party Authority Form to the Clearing House that applies in respect of such replacement Nominated Account.

5.3 This Clause 5.3 applies only if the Company requests a Customer Account in respect of Customers whose assets the Company is required under Applicable Laws to segregate from its own assets. The Clearing House acknowledges that the Company is under an obligation to keep certain client money separate from the Company's own money, placing client money in a client bank account. The Company shall be entitled to instruct the Clearing House as to whether any transaction or Collateral is in respect of the Customer Account or the Proprietary Account. The Clearing House hereby acknowledges that the Customer Account is not to be combined with the Proprietary Account, nor is any right of set-off to be exercised by the

Clearing House against money credited to the Customer Account in respect of any sum owed to the Clearing House in relation to the Proprietary Account.

6. TERM

6.1 This Agreement shall automatically terminate only upon: (i) the Company's membership of the Clearing House having been terminated; (ii) all of the obligations of the Company pursuant to the Rules and this Agreement having been satisfied or discharged; (iii) all Collateral provided by the Company having been applied or returned; (iv) all Complaints and Dispute Proceedings affecting the Company being terminated; and (v) any Default Proceedings against the Company having been fully completed. This Agreement shall not otherwise be terminable by either party. The requirements of the Rules and procedures thereunder for the termination of the Company's membership of the Clearing House shall apply.

7. REPRESENTATIONS AND WARRANTIES

7.1 The Company represents and warrants that:

- (i) neither the execution nor performance of this Agreement or the Rules by or on behalf of the Company or the Clearing House will breach or conflict with any provision of the memorandum of incorporation, articles of association, by-laws, partnership agreement, limited liability company agreement or any other organisational document of the Company, or with any agreement or Applicable Law which is binding upon or affects the Company;
- (ii) the Company and signatories to this Agreement each have full power and all necessary authority to execute this Agreement and perform any act that may be required pursuant to this Agreement and the Rules;
- (iii) the Company is duly organised and validly existing under Applicable Laws of the jurisdiction of its incorporation and is in good standing under such Applicable Laws; and
- (iv) after having had the opportunity to ask questions and receive answers from the Clearing House regarding the Rules and the operation of the Clearing House, it has received all the information it considers necessary and appropriate for deciding whether to become a Clearing Member and has consulted its own independent advisers, or otherwise satisfied itself concerning, without limitation, the tax, legal and other considerations relevant to membership of the Clearing House.

7.2 The Company acknowledges that the Clearing House will not review or be responsible for reviewing any provision of the Company's memorandum of incorporation, articles of association, by-laws, partnership agreement, limited liability company agreement or any other organisational document of the Company, any agreement to which the Company is a party or any Applicable Law which is binding upon or affects the Company with a view to determining the authority of the Company to become a Clearing Member; and that, as a result, the Clearing House relies upon the assumed authority of the signatories to this Agreement.

8. ARBITRATION

8.1 Any Dispute between the Clearing House and the Company shall be referred to and finally settled by arbitration under the Arbitration Rules of the London Court of International Arbitration ("LCIA"), which LCIA Rules are deemed to be incorporated herein. In the event

of a conflict between any provision of the LCIA Rules and this Clause 8, this Clause 8 shall prevail.

- 8.2 The seat of arbitration will be London, England and the language of the arbitration proceedings shall be English.
- 8.3 No arbitral proceedings may be instigated where arbitral proceedings could have been instigated in the first instance under the procedures set out in the ICE Futures Europe Rules or in the second instance under the procedures set out in the Rules (with arbitration under the ICE Futures Europe Rules and Rules taking priority at all times).
- 8.4 The Tribunal will comprise three arbitrators appointed by the LCIA Court. The LCIA Court shall nominate one of the arbitrators to act as the chairman of the Tribunal. The members of the Tribunal will be persons considered by the LCIA Court in its discretion to have experience with respect to the subject matter of the Dispute. Tribunal members shall not be current or former employees or directors of any Clearing Member that is a party to the arbitration, current or former employees of the Clearing House or any person or persons with a material interest or conflict of interest in the outcome of the Dispute.
- 8.5 The parties agree that any other Clearing Member may be joined as an additional party to an arbitration under this Clause 8 and that arbitrations under this Clause 8 may be consolidated into a single arbitration with other arbitrations involving any other Clearing Members and the Company in the same way and subject to the same conditions as an additional party may be joined to an arbitration pursuant to the Rules. In case of such joinder, the Tribunal shall make a single, final award determining all Disputes between the relevant parties in those proceedings. The Company and the Clearing House shall be deemed irrevocably to have waived any right to challenge any award or order of the Tribunal by reason of the fact that it arises from a joined arbitration.
- 8.6 The commencement of any arbitral proceedings shall be without prejudice to and shall not limit in any way the right of the Clearing House to instigate any procedure under the Rules, including without limitation in relation to any Event of Default or any investigation, sanction or disciplinary proceedings.
- 8.7 The award of the Tribunal will be final and binding on the Clearing House and the Company from the day it is made. Judgment upon the award may be entered or the award enforced through any other procedure in any court of competent jurisdiction. The Company and the Clearing House shall each execute any such award and, to the extent permitted by law, irrevocably shall be deemed to have waived the making of any appeal or other means of recourse that might be open to them.

9. MISCELLANEOUS
- 9.1 The Company may not assign, transfer, deal or create any interest whatsoever in any of its rights or obligations under this Agreement or the Rules, whether in whole or in part, or purport to do any of the same, without the prior written consent of the Clearing House. Any assignee or transferee of the Company must be a Clearing Member. Any such assignment or transfer shall be subject to completion of an orderly transfer of all Contracts of the Company to such transferee or assignee. This Agreement shall bind, and enure to the benefit of, the parties and their authorised successors and assignees.
- 9.2 A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 or otherwise to enforce any term of this Agreement.

9.3 Any waiver of any right or consent under this Agreement is only effective if it is in writing and signed by the waiving or consenting party, and applies only in the circumstances for which it is given and shall not prevent the party who is giving it from subsequently relying on the relevant provision. No delay or failure to exercise any right under this Agreement shall operate as a waiver. No single or partial exercise of any right under this Agreement shall prevent any further exercise of the same or any other right under this Agreement.

9.4 This Agreement, together with its Schedules and the Rules, constitutes the whole agreement between the parties with respect to its subject matter and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter of this Agreement. The Company warrants to the Clearing House that, in entering into this Agreement and becoming bound by the Rules, it does not rely on any statement, representation, assurance or warranty of the Clearing House or any other Person (whether a party to this Agreement or not) other than as expressly set out in this Agreement. The Company agrees and undertakes to the Clearing House that its only rights and remedies available arising out of or in connection with this Agreement and the Rules or their subject matters shall be solely for breach of contract, in accordance with the provisions of this agreement and the Rules. Nothing in this Agreement shall limit or exclude any liability for fraud, death, personal injury or any other liability which by law cannot be excluded.

9.5 The provisions of the Rules relating to the giving of notices and Force Majeure Events from time to time shall apply to this Agreement and the parties' conduct hereunder in the same way as such provisions apply to the Rules.

9.6 Interest shall be charged to the Company on any unpaid but due amount from the date on which the amount becomes due and payable until the date of payment at 1% above the rate per annum which is the cost (without proof or evidence of any actual cost) to the Clearing House if it were to fund or itself funded the relevant amount, compounded daily.

9.7 The Company hereby waives any right enjoyed presently or hereafter to claim sovereign immunity from suit or sovereign immunity from enforcement for itself or any of its assets to the fullest extent permitted under the laws of England and Wales in any jurisdiction whatsoever in which the Company enjoys or will enjoy immunity, or in which immunity may be asserted. Such waiver shall apply in respect of any immunity from:

- (i) any proceedings commenced pursuant to this Agreement;
- (ii) any judicial, administrative or other proceedings to aid an arbitration commenced pursuant to Clause 8 of this Agreement; and
- (iii) any effort to confirm, enforce, or execute any decision, settlement, award, judgment, service of process, execution order or attachment (including pre-judgment attachment) that results from any judicial or administrative proceedings commenced pursuant to this Agreement.

9.8 The rights and obligations of the Company under this Agreement are of a commercial and not a governmental nature.

9.9 The Company shall not raise or in any way whatsoever assert a defence of sovereign immunity in relation to any claim or enforcement proceedings arising from a dispute under this Agreement.

9.10 Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties. Except as provided in Clauses 5.1 and 5.2, nothing in this Agreement is intended to, or shall be deemed to, constitute any party the agent or

principal of another party, nor authorise any party to make or enter into any commitments for or on behalf of any other party.

- 9.11 If any provision of this Agreement (or part of any provision) is found by any Court or other Governmental Authority to be invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed not to form part of this Agreement, and the validity and enforceability of the other provisions of this Agreement shall not be affected.
- 9.12 This Agreement shall be governed by and construed in accordance with English law.
- 9.13 This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall be an original, but all of the counterparts together shall constitute the same document.

Signed as a deed by ICE CLEAR EUROPE LIMITED acting by:

By _____ (Signature)

(Print Name)
Director

By: _____ (Signature)

(Print Name)
Director / Secretary

Executed as a Deed by _____ under Common Seal

The Common Seal of _____
as hereunto _____
affixed to this Deed in the presence of: _____

Authorised

..... Authorised Counter Signatory

SCHEDULE
ELIGIBLE PERSONS

Eligible Person	Market (ICE Futures Europe/ ICE OTC)	ICE Interface "Webice"	Clearing Member Interface	Direct Access Interface	Independent Software Vendor Interface
	✓	✓			
	✓	✓			
	✓	✓			

Annex 2

Pledged Collateral Addendum

PLEDGED COLLATERAL ADDENDUM TO CLEARING MEMBERSHIP AGREEMENT

This Pledged Collateral Addendum to the Clearing Membership Agreement (this “**Addendum**”) is entered into as of _____ by and between _____ whose registered office is at: _____

Insert Registered Company Name

Insert Registered Address

organised and existing under the laws of _____ Insert jurisdiction _____ and ICE Clear Europe Limited (the “**Clearing House**”), incorporated under the laws of England and Wales, with its registered office at Milton Gate, 60 Chiswell Street, London, EC1Y 4SA.

1. SCOPE AND INTERPRETATION

This Addendum shall supplement and form a part of the Clearing Membership Agreement as in effect from time to time between the Company and the Clearing House (the “**Clearing Membership Agreement**”). In the event of any inconsistency or conflict between this Addendum and the Clearing Membership Agreement, this Addendum will govern and prevail. Capitalized terms used but not defined herein shall have the meanings specified in the Clearing Membership Agreement.

2. PLEDGED COLLATERAL

- 2.1 This Clause 2 shall apply only to Collateral provided or to be provided by the Company in respect of an account designated by the Clearing House as a Pledged Collateral Account. Such Collateral will be treated as “Pledged Collateral” under the Rules. Clause 4 of the Clearing Membership Agreement shall not apply to Pledged Collateral.
- 2.2 The Company hereby grants to the Clearing House a continuing first priority lien and security interest in and right of set-off against all of the Company’s right, title and interest, wherever located and whether now owned or existing or hereafter acquired or arising, in, to and under all Pledged Collateral, including without limitation (i) all securities, investment property, security entitlements, financial assets, cash, money, instruments, general intangibles, goods, accounts, chattel paper, documents, commodity contracts, commodities, precious metals, emission allowances, letter-of-credit rights, supporting obligations and other assets or property delivered or transferred by or on behalf of the Company to the Clearing House and (ii) all cash and non-cash proceeds of any of the foregoing, as security for the obligations of the Company to the Clearing House under the Clearing Membership Agreement, Contracts and the Rules (provided that Pledged Collateral provided in respect of a Customer Account shall only secure obligations of the Company to the Clearing House in respect of that Customer Account and positions registered therein) (such obligations, the “**Secured Obligations**”). Upon the withdrawal of Pledged Collateral by the Company or the return of such Pledged Collateral to the Company by the Clearing House as provided hereunder and under the

Rules, the security interest and lien granted hereunder on such Pledged Collateral will be released immediately without any requirement for further action by either party.

- 2.3 Pledged Collateral shall be reflected in and/or credited to such accounts of the Company at the Clearing House as may be specified from time to time by the Clearing House.
- 2.4 The Company will transfer Pledged Collateral of such amounts, in such forms and within such time limits as are required in accordance with the Rules from time to time.
- 2.5 Where the Clearing House has any obligation under the Rules to return to the Company any items of Pledged Collateral consisting of fungible securities, cash or other financial assets, the Company agrees that it will accept securities, cash or other financial assets of the same issuer, type, nominal value, maturity, description and amount (as applicable) as those securities, cash or financial assets initially delivered or transferred by the Company to the Clearing House (or where any such Pledged Collateral has been redeemed or undergone some other change after their transfer or delivery to the Clearing House, equivalent proceeds of such redemption or the assets resulting from such change), in each case less any deduction or withholding for or on account of any tax permitted under the Rules.
- 2.6 With respect to any Pledged Collateral credited to the Proprietary Account of the Company, the Clearing House will have the right to sell, pledge, rehypothecate, assign, invest, use or otherwise dispose of or use in its business such Pledged Collateral, free from any claim or right of any nature whatsoever of the Company, including any equity or right of redemption by the Company, subject to any requirements of the Rules. With respect to any Pledged Collateral credited to a Customer Account of the Company, the Clearing House will only have the right to use or apply such Pledged Collateral as permitted by the Rules and Applicable Law.
- 2.7 The Company hereby represents and warrants to the Clearing House (which representation shall be deemed to be repeated as of each date on which it delivers or transfers any Pledged Collateral to the Clearing House) that it is the sole owner of or otherwise has the right to deliver or transfer to the Clearing House the Pledged Collateral subject to the foregoing lien and security interest, free and clear of any other Encumbrance, and agrees not to create or permit to exist any such Encumbrance.
- 2.8 The Company agrees to take any action reasonably requested by the Clearing House (and to procure that any third party takes any action reasonably requested by the Clearing House) that may be necessary or desirable for the Clearing House to create, preserve, perfect or validate the foregoing lien, security interest and right of setoff or to enable the Clearing House to exercise or enforce its rights with respect thereto, including without limitation by making any filings of financing statements, security registrations or similar filings or registrations under Applicable Law. Without limiting the foregoing, the Company hereby authorizes the Clearing House to file financing statements, security registrations or similar filings or registrations under Applicable Law with respect to the Pledged Collateral hereunder from time to time in any applicable filing office.

2.9 The Company acknowledges that the Clearing House may attribute a value to any item of Pledged Collateral that is Permitted Cover which is less than the face or market value thereof (the discount from face or market value being known as a "haircut") and that the Clearing House may, from time to time, change the way in which it values Permitted Cover or the extent to which the value it attributes to items of Permitted Cover is less than the face or market value thereof and that this may affect the Company's obligations to deliver or transfer Pledged Collateral for the purposes of this Clause 2.

2.10 Upon the occurrence of an Event of Default with respect to the Company, the Clearing House may exercise all rights and remedies of a secured party under Applicable Law, in addition to the rights and remedies otherwise set forth in the Rules and otherwise available to it. Without limiting the foregoing, but subject to the Rules and Applicable Law, the Clearing House may, without being required to give any notice (except as required under Applicable Law), sell or otherwise apply any Pledged Collateral delivered or transferred to, or otherwise under the control of, the Clearing House to satisfy the Company's obligations (provided that Pledged Collateral credited to a Customer Account may only be applied to the Company's obligations in respect of such account as provided in the Rules). Upon any such sale, the Clearing House shall have the right to deliver, assign and transfer to the purchaser thereof the Pledged Collateral so sold. Each purchaser at any such sale shall hold the Pledged Collateral so sold to it absolutely and free from any claim or right of whatsoever kind, including any equity or right of redemption of the Company which may be waived, and the Company, to the extent permitted by Applicable Law, hereby specifically waives all rights of redemption, stay or appraisal which it has or may have under any law now existing or hereafter adopted. The commencement of any arbitral proceedings under Clause 8 of the Clearing Membership Agreement shall be without prejudice to and shall not limit in any way the right of the Clearing House to exercise its rights and remedies under this Clause 2.10.

2.11 To the extent that the Pledged Collateral constitutes "financial collateral," the Company agrees and acknowledges that the security interest created by this Addendum and the obligations of the Company under this Addendum constitute a "security financial collateral arrangement" (in each case for the purpose of and as defined in the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003 No. 3226) or any applicable legislation implementing Directive 2002/47/EC in any European member state). The Clearing House will have the right, after the security interest has become enforceable, to appropriate all or any part of that financial collateral in or towards the satisfaction of the Secured Obligations. Where any Pledged Collateral that is financial collateral is appropriated pursuant to the foregoing sentence, the value of the financial collateral will be such amount as the Clearing House reasonably determines in accordance with the Rules, and the Clearing House will give credit for the proportion of the value of the financial collateral appropriated to its use in the manner provided in this Addendum and the Rules.

3. GOVERNING LAW AND JURISDICTION

3.1 Solely as between the Company and the Clearing House, the provisions of this Addendum and, solely to the extent relevant to interpreting such provisions, relevant

definitions and interpretative provisions in the Clearing Membership Agreement and the Rules (such provisions, together or separately “**Pledged Collateral Matters**”) shall be governed by and construed in accordance with the laws of the State of New York and, as applicable, the federal law of the United States of America.

- 3.2 For the avoidance of doubt, Clause 3.1 is an exception to Clause 9.12 of the Clearing Membership Agreement which provides that the Clearing Membership Agreement shall be governed by and construed in accordance with the laws of England and Wales. For the avoidance of doubt and notwithstanding Clause 3.1, all of the provisions of the Clearing Membership Agreement other than the provisions of this Addendum are governed by and shall be construed in accordance with the laws of England and Wales and shall in no circumstances constitute a Pledged Collateral Matter.
- 3.3 Where a dispute between the Company and the Clearing House relates to one or more Pledged Collateral Matters, notwithstanding the provisions of Clause 8 of the Clearing Membership Agreement, solely the allegations or claims relating to the Pledged Collateral Matters in such dispute shall be heard and determined exclusively in any New York federal court sitting in the Borough of Manhattan of the City of New York, provided, however, that if such federal court does not have jurisdiction over such allegations or claims, such allegations or claims shall be heard and determined exclusively in any New York state court sitting in the Borough of Manhattan of the City of New York (such Courts, together, “**New York Courts**”). Consistent with the preceding sentence, the Company and the Clearing House each hereby:
 - (i) submits to the exclusive jurisdiction of the New York Courts solely in respect of allegations or claims relating to Pledged Collateral Matters; and
 - (ii) agrees that service of process will be validly effected by sending notice in accordance with Clause 9.5 of the Clearing Membership Agreement.
- 3.4 All allegations or claims under the Clearing Membership Agreement other than those over which the New York Courts have exclusive jurisdiction pursuant to Clause 3.3 shall be finally and exclusively determined by way of arbitration pursuant to Clause 8 of the Clearing Membership Agreement. It is expressly recognized that for Disputes between the Company and the Clearing House containing both allegations or claims over which the New York Courts have exclusive jurisdiction pursuant to Clause 3.3 and other allegations or claims, it may be necessary to have both New York Court proceedings and arbitral proceedings. The submission of a party to the jurisdiction of a New York Court and/or the taking of a step by a party in proceedings before a New York Court, where in any such instance the New York Court has exclusive jurisdiction pursuant to Clause 3.3, does not amount to a waiver by that party of its right to commence or participate in arbitral proceedings in accordance with Clause 8 of the Clearing Membership Agreement. The submission of a party to arbitration under Clause 8 of the Clearing Membership Agreement or in respect of any Dispute does not amount to a waiver by that party of its right to have allegations or claims in relation to which the New York Courts have exclusive jurisdiction pursuant to Clause 3.3 heard in the New York Courts.

- 3.5 Nothing in this Clause 3 precludes the Clearing House from bringing an action to enforce a judgment from any New York Court or award of any arbitral tribunal in any court of competent jurisdiction.
- 3.6 THE COMPANY AND THE CLEARING HOUSE HEREBY EACH IRREVOCABLY WAIVES TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY DISPUTE ARISING OUT OF, UNDER OR IN CONNECTION WITH THE CLEARING MEMBERSHIP AGREEMENT OR THIS ADDENDUM. EACH CLEARING MEMBER AND THE CLEARING HOUSE HEREBY:
 - (I) CERTIFIES THAT NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF ANY SUCH DISPUTE, SEEK TO ENFORCE THE FOREGOING WAIVER; AND
 - (II) ACKNOWLEDGES THAT IT HAS BEEN INDUCED TO ENTER INTO THE CLEARING MEMBERSHIP AND THIS ADDENDUM AND ALL OTHER TRANSACTIONS CONTEMPLATED THEREBY, AS APPLICABLE, BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS CLAUSE 3.6.

4. MISCELLANEOUS

- 4.1 This Addendum may be executed in any number of counterparts, each of which when executed and delivered shall be an original, but all of the counterparts together shall constitute the same document.
- 4.2 The Clearing House will have the right from time to time, by Circular or other notice to all Clearing Members, to amend, modify or supplement the terms of this Addendum in the same way that Rules may be amended, and the Company by virtue of continuing to act as a Clearing Member under the Rules shall be deemed to consent and agree to any such amendment, modification or supplement.

IN WITNESS WHEREOF, the parties have executed and delivered this Addendum as of the date first written above.

Insert company name

By: _____
Name:
Title:

By: _____
Name:
Title:

ICE CLEAR EUROPE LIMITED

By: _____
Name:
Title:

By: _____
Name:
Title:

Schedule to Pledged Collateral Addendum

This Schedule to the Pledged Collateral Addendum will apply only to a Clearing Member that has executed a Pledged Collateral Addendum and will supplement and form a part of the Clearing Membership Agreement. In the event of any inconsistency or conflict between this Schedule and the Clearing Membership Agreement, this Schedule will govern and prevail. Capitalized terms used but not defined herein shall have the meanings specified in the Clearing Membership Agreement.

1. CUSTOMER ACCOUNTS

1.1 This paragraph 1.1 shall apply in lieu of Clause 5.3 of the Clearing Membership Agreement. The Clearing House shall maintain one or more Customer Accounts in respect of FCM Customers of the Company as set forth in the Rules. The Clearing House acknowledges that the Company is under an obligation under Applicable Law to keep customer property separate from the Company's property. The Company shall instruct the Clearing House as to whether any transaction or Collateral (including any Pledged Collateral) is in respect of a particular Customer Account, the Proprietary Account, a Guaranty Fund or for other purposes. Without limiting the provisions of the Rules, the Clearing House hereby acknowledges that any Customer Account is not to be combined with the Proprietary Account, any assets in a Customer Account shall not be applied in respect of any sum owed to the Clearing House in respect of the Proprietary Account or any other Customer Account and no right of set-off is to be exercised by the Clearing House against money or property credited to a Customer Account in respect of any sum owed to the Clearing House in respect of the Proprietary Account or any other Customer Account.

2. MISCELLANEOUS

- 2.1 Clause 4 of the Clearing Membership Agreement does not apply in respect of Pledged Collateral.
- 2.2 Clauses 8 and 9.12 of the Clearing Membership Agreement are subject to Clause 3 of the Pledged Collateral Addendum and are disapplied to the extent provided for in Clause 3 of the Pledged Collateral Addendum.
- 2.3 Notwithstanding the first sentence of Clause 9.4 of the Clearing Membership Agreement, the Clearing Membership Agreement, as modified by the Pledged Collateral Addendum to the Clearing Membership Agreement and together with its Schedules (including this Schedule) and the Rules, constitutes the whole agreement between the parties with respect to its subject matter and supersedes any previous arrangement, understanding or agreement between them relating to its subject matter.