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ARTHUR COX

NETTING ANALYSER LIBRARY

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11 December 2013

Dear Sirs,

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

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

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

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

1. TERMS OF REFERENCE AND DEFINITIONS

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

1.1.1 persons which are Irish Companies incorporated under the Irish Companies Acts or foreign companies; and

1.1.2 Banks who are Irish Licensed Banks pursuant to the Central Bank Act, 1971 or Foreign Banks authorised under the Consolidation Directive with Irish Branches.

1.2 This opinion is also given in respect of Parties that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

1.2.1 An Irish Company which is an IIA Entity or a MiFID Entity (*Schedule 1*);

1.2.2 Partnerships within the meaning of the Partnership Act 1890 (*Schedule 2*);

Eugene McCague, Donogh Crowley, John S Walsh, Michael Meghen, William Johnston, Nicholas G Moore, Declan Hayes, David O'Donohoe, Colm Duggan, Carl O'Sullivan, Isabel Foley, John Meade, Conor McDonnell, Patrick McGovern, Grainne Hennessy, Séamus Given, Colin Byrne, Caroline Devlin, Clarán Bolger, Gregory Glynn, David Foley, Stephen Hegarty, Declan Drislane, Sarah Cunniff, Kathleen Garrett, Pádraig Ó Ríordáin, Elizabeth Bothwell, William Day, Andrew Lenny, John Menton, Patrick O'Brien, Orla O'Connor, Brian O'Gorman, Mark Saunders, Mark Barr, John Matson, Deborah Spence, Kevin Murphy, Cormac Kissane, Raymond Hurley, Kevin Langford, Eve Mulconry, Philip Smith, Kenneth Egan, Bryan J Strahan, Conor Hurley, Alex McLean, Glenn Butt, Niav O'Higgins, Fintan Clancy, Rob Corbet, Rachel Farrell, Siobhán Hayes, Pearse Ryan, Ultan Shannon, Dr Thomas B Courtney, Orla Keane, Aaron Boyle, Rachel Hussey, Colin Kavanagh, Kevin Lynch, Garrett Monaghan, Geoff Moore, Fiona McKeever, Chris McLaughlin, Maura McLaughlin, Joanelle O'Cleirigh, Paul Robinson, Richard Willis, Tim Kinney, Deirdre Barrett, Cían Beecher, Ailish Finnerty, Louise Gallagher, Conor O'Dwyer, Jenny Fisher, Robert Cain, Brendan Cooney, Connor Manning, Gary McSharry, Keith Smith, John Donald, Dara Harrington, David Molloy, Stephen Ranalow, Jonathan Sheehan, Brendan Slattery, Gavin Woods, Simon Hannigan, Claire McGrade, Colin Monaghan, Susan O'Reilly, Niamh Quinn, Colin Rooney

Consultants: James O'Dwyer, Daniel F O'Connor, John V O'Dwyer, John Glackin, Dr Mary Redmond, Dr Yvonne Scannell, Dr Robert Clark

1.2.3 An Insurance company being an Irish Company which is authorised as a life assurance undertaking under the European Communities (Life Assurance) Framework Regulations 1994 or authorised as a non-life insurance undertaking under the European Communities (Non-Life Insurance) Framework Regulations 1994 (an "Insurance Company") (*Schedule 3*);

1.2.4 Individuals (*Schedule 4*);

1.2.5 Special fund entities (*Schedule 5*);

1.2.6 Trusts (other than Pension Schemes and Special fund entities) (*Schedule 6*);

1.2.7 Pension Schemes (*Schedule 7*); and

1.2.8 Building Societies incorporated or deemed by section 124(2) to be incorporated under the Building Societies Act 1989 (*Schedule 8*).

1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the Netting Agreement and the Clearing Agreement are expressed to be governed by English law.

1.4 This opinion covers all Transactions:

1.4.1 Where Transactions are governed by Irish law and this Opinion is given in respect of those Transactions which:

(a) Fall within any of paragraphs (A)(i) to (iv), (B), (C) and (D) of the list of Transactions provided in Annex 2 to this Opinion letter; or

(b) Otherwise are futures, options, contracts for differences, swaps, spot or forward contracts of any kind in relation to any commodity, metal, financial instrument (including security), currency, interest rate, index or any combination thereof,

in each case, whether entered into on a recognised investment exchange, any other form of organised market place or multilateral trading facility, or over the counter.

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

1.6 This Opinion is confined to and given in all respects on the basis of the laws of Ireland (including insolvency laws) in force as at the date hereof as currently applied by the Courts and does not consider the impact of any laws (including insolvency laws) other than the laws of Ireland even where under Irish law, any foreign law is applied. We have made no investigations of, and we express no opinion as to, the laws of any other jurisdiction or the effect thereof. In particular, we express no opinion on the laws of the European Union as it affects any jurisdiction other than Ireland.

1.7 We express no opinion, and make no representation or warranty, as to any matter of fact, tax or capacity and authority (corporate, regulatory or otherwise) or in respect of any documents (including without limitation any confirmation relating to a Transaction, which may exist in relation to a Transaction) other than the FOA Netting Provision, the Clearing Module Netting

Provision and the Addendum Netting Provision , the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision and the Title Transfer Provisions insofar as expressly opined on herein. For the purpose of giving this Opinion, we have examined email copies of the FOA Netting Agreement and the Clearing Agreement.

1.8 This Opinion is governed by and is to be construed in accordance with the laws of Ireland as interpreted by the Courts as at the date hereof. This Opinion speaks only as of its date. We assume no obligation to update this Opinion at any time in the future or to advise you of any change in law or change in interpretation of law which may occur after the date of this Opinion.

1.9 No enquiry has been made in respect of applicable rules of, recognised exchanges, systems or clearing houses or any other payment systems where, as far as we are aware, there are no CCPs in Ireland.

1.10 Where Transactions or, as the case may be, Client Transactions are governed by laws other than the laws of this jurisdiction, the opinion in paragraphs 3.3, 3.4 and 3.5 are given in respect of only such of those Transactions and Client Transactions which, under their governing laws, are legal, valid, binding, enforceable and capable of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision respectively.

1.11 This opinion is given in respect of margin which consists of cash or transferable securities only.

1.12 We do not opine on the enforceability of any net obligation resulting from any netting or set off, whether pursuant to the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provisions, the Addendum Set-Off Provisions or otherwise.

1.13 **Definitions**

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

1.13.1 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1;

1.13.2 "**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction;

1.13.3 "**FOA Member**" means a member (excluding associate members) of the Futures and Options Association which subscribes to the Futures and Options Association's Netting Analyser service (and whose terms of subscription give access to this opinion); and

1.13.4 A reference to a "**paragraph**" is to a paragraph of this opinion letter.

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

2. ASSUMPTIONS

We assume:

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

2.2 That the FOA Netting Agreement, or as the case may be, the Clearing Agreement and the Transactions constitute legal, valid and binding obligations of the Parties thereto enforceable in accordance with their respective terms under their governing law and the laws of any relevant jurisdiction other than Ireland insofar as opined on herein.

2.3 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, has been duly and properly executed by both Parties.

2.4 That there is no agreement, instrument or other arrangement between the Parties, that modifies or supersedes the FOA Netting Agreement or the Clearing Agreement.

2.5 That each Party has the full capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

2.6 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction.

2.7 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any Insolvency Proceedings against either Party.

2.8 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.

2.9 The FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

2.10 That the obligations assumed under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are 'mutual' between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other

Party and solely entitled to the benefit of obligations owed to it by the other Party. Reference is made to paragraph 4.16 for further guidance on the question of mutuality.

2.11 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.

2.12 That insofar as any transaction or obligation arising under a Transaction is a "transfer order" under the Settlement Finality Regulations, that there are no provisions in the rules of the system which purport to override or are inconsistent with the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision, and that no decision has been made by the Central Bank under Regulation 5 of the Settlement Finality Regulations that a person should be treated as a participant in a designated system such that the Settlement Finality Regulations do not apply.

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

2.14 The execution, delivery and performance of the FOA Netting Agreement or, as the case may be, the Clearing Agreement (i) does not and will not contravene the laws of any jurisdiction outside Ireland; (ii) does not and will not result in any breach of any agreement, instrument and obligation to which they are a party and (iii) is not and will not be illegal or unenforceable by virtue of the laws of that jurisdiction.

2.15 That under all applicable laws (other than those of Ireland):

2.15.1 the choice of English law as the governing law for the FOA Netting Agreement or, as the case may be, the Clearing Agreement (to the extent that it is expressed to be governed by English law is a valid and binding selection which will be upheld, recognised and given effect by the courts of any relevant jurisdiction; and

2.15.2 the submission of each party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement to the jurisdiction of the courts of England, (to the extent that they are so expressed) is valid and binding and will be upheld, recognised and given effect by the courts of any relevant jurisdiction.

2.16 In relation to the opinions set out at paragraphs 3.8 and 3.9 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.

2.17 That each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).

2.18 That all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each Transfer of Margin pursuant to the Title Transfer Provisions will have been effectively carried out.

2.19 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

2.20 That each Party which receives margin from the other Party pursuant to the Title Transfer Provisions does not treat that margin any in manner which could indicate that the other Party retains any proprietary interest in that Margin.

2.21 That, in respect of any Cleared Transaction Set, there is one CCP only.

2.22 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates, and (b) (i) Banks or a Foreign Bank, and (ii) an IIA Entity or a MiFID Entity as such term is defined in Schedule 1 hereof or (iii) Irish Company, only insofar as and to the extent that they are admitted as a direct participant by the rules of the relevant CCP.

2.23 That any CCP has been duly established under the laws of its jurisdiction and that its constitutive documents have legal effect in accordance with their terms. That no CCP has been established in Ireland.

2.24 That any claims the subject of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision are not claims that become barred under the Statute of Limitations 1957 and other statutes of limitation.

3. OPINION

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

3.1 Insolvency Proceedings

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

1.1.1 Liquidation

The following methods of winding up exist in Ireland:

(a) **Compulsory or by Court order – Section 212 1963 Act**

This method may be initiated by a member, creditor or the company itself on (save in the case of an Irish Insurance Company, where the Central Bank can also present the petition and we refer you to Schedule 3 hereof. The Director of Corporate Enforcement can also petition for the winding up of a company on the grounds set out in the 1990 Act, s12) a variety of grounds including inability to pay debts, just and equitable grounds and oppression grounds. Such a winding up may be solvent or insolvent. The making of a winding up order activates certain provisions of the Irish Companies Acts including those relating to fraudulent dispositions, fraudulent preference of creditors, invalidation of floating charges and disclaimer of onerous property by liquidators.

This procedure is initiated by the presentation of a petition, which is usually listed for hearing by the Court three to four weeks after the date of presentation of the petition. If a winding up order is made on foot of the petition, once made, the winding up is deemed to have commenced on the date of the presentation of the petition and any disposition of company property between the date of presentation of the petition and the making of the winding-up order is void unless the Court orders otherwise.

The jurisdiction of the Court to make a winding up order is discretionary.

(b) **Voluntary winding-up – Sections 251 to 273 1963 Act**

Which divides up into two categories as follows:

(i) members voluntary winding-up - being a solvent winding-up which is initiated by the members of the company; and

(ii) a creditors winding-up - being an insolvent winding up initiated by the members but incorporating the holding of a creditors meeting as part of the winding up procedure. The creditors meeting considers certain matters including the appointment of a replacement liquidator, the raising of issues on a statement of affairs prepared by the directors and the appointment of representatives to a committee inspection if desired.

The commencement of such a winding up activates certain provisions of the Irish Companies Acts including those relating to fraudulent dispositions, fraudulent preference of creditors, invalidation of floating charges and disclaimer of onerous property by liquidators.

Cross-border proceedings

(c) **Debtors with centre of main interests ("COMI") in Ireland**

Debtors with COMI in Ireland which are not regulated or authorised as insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or collective investment undertakings (an "**Insolvency Regulation Party**"), may subject to and in accordance with the Insolvency Regulations (as defined in Annex 5) be subject to court liquidation, creditors voluntary winding up, bankruptcy, arrangements under the control of the court and examination using the above procedures irrespective of where they are incorporated or resident. There is a rebuttable presumption in respect of corporates that a company's COMI is in the place of the company's registered office but in all cases and necessarily in the case of natural persons the COMI should correspond to the place where the debtor conducts the administration of its business or interests on a regular basis and where it is understood to do so by third parties.

(d) **Non Irish COMI debtors with establishment in Ireland**

In addition, subject to and in accordance with the Insolvency Regulation, both compulsory winding-up and creditors' voluntary winding up proceedings (with confirmation of a court), bankruptcy and arrangements under the control of the court, may also be taken in Ireland in relation to an Insolvency

Regulation Party if such Insolvency Regulation Party has its COMI in a Member State (other than Denmark), provided it has an "establishment" in Ireland. In such a case the main insolvency proceedings will open elsewhere and secondary or territorial proceedings can be opened in Ireland. An "establishment" for this purpose means "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods", however, there is little guidance on how it should be interpreted. The effects of such territorial or secondary proceedings taken in Ireland are limited to assets of the debtor situated here.

(e) **Debtors with COMI in a Member State other than Ireland (and Denmark)**

A liquidator (as such term is used in the Insolvency Regulation) appointed by the Court of a Member State (other than Denmark) in which the debtor's COMI is located may exercise in another Member State all the powers conferred on him by the laws of the Member State where he was appointed so long as no other insolvency proceedings have opened in that other Member State. More particularly such a liquidator can enter another Member State and, subject to the laws and procedures of that Member State, repatriate company assets back to the Members State where he was appointed.

Unregistered companies

(f) **Winding up of Unregistered Company in Ireland–Section 345 1963 Act**

Subject to the Insolvency Regulation, the Winding-Up of Insurance Undertakings Regulations and the Winding-Up Regulations, where a company incorporated outside Ireland and which does not otherwise fall to be wound up under any of the above categories (referred to in the relevant legislation as an "unregistered company"), and is expressly stated to include any trustee savings bank certified as such by specified legislation, any partnership whether limited or not, any association and any company with the exception of (a) a company formed and registered under the 1963 Act or an existing company and (b) a partnership, association or company which consists of less than eight members and is not formed outside Ireland) has been carrying on business in Ireland and then ceases to do so, it may be wound up by way of court or compulsory winding up (but not by way of voluntary winding up) as an unregistered company, even if it has been wound up or dissolved under the laws of the country where it was incorporated (Section 345(7) of the 1963 Act). The grounds on which it can be wound up are:

(i) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(ii) if the company is unable to pay its debts; or

(iii) if the Court is of the opinion that it is just and equitable that the company should be wound up.

The Governor and Company of the Bank of Ireland is an unregistered company for the purpose of Section 245 of the 1963 Act and the provisions of the letter opinion addressing unregistered companies are relevant to it.

The Governor and Company of the Bank of Ireland may be wound up under the Irish Companies Acts.

Recognition of Foreign Winding up

(g) **Recognition of Foreign Winding up - Section 250(1) 1963 Act**

It is possible for a winding up order made by a court of a recognised country to be enforced by the Court in the same manner and in all respects as if the order had been made by the Court.

Since the enactment of the Insolvency Regulation the Winding-Up of Insurance Undertakings Regulations and the Winding-Up Regulations this provision is now confined to circumstances where the Insolvency Regulation, the Winding-Up of Insurance Undertakings Regulations and the Winding-Up Regulations do not apply for example applications by liquidators appointed by the courts of non-EU countries or Denmark. Recognition is by way of ministerial order and to date only Great Britain and Northern Ireland are recognised.

Foreign Banks – Irish Companies Acts

A Foreign Bank if it is to be wound up under the Irish Companies Acts in the manner detailed at 3.1.1(a) of the letter opinion above, the general rule is that the existence of assets in Ireland would have to be established. This alone in absence of any other connection with Ireland may not be sufficient for an order to be made. The only Foreign Bank to which this is likely to be of relevance is a Foreign Bank which is not an EEA Credit Institution.

In a case where there was a separate winding-up proceeding in Ireland and there are a number of such branches in the EU then the Winding-Up Regulations provide for cooperation between the relevant authorities in the Member States where the branch is located. If such proceedings occurred in Ireland it is unclear whether they would extend to the assets and liabilities of the Foreign Bank as a whole rather than those of its Irish Branch alone or just to the assets and liabilities of the Irish Branch. We believe it is unlikely to be the former but there does not appear to be any basis for the latter view other than it would be a pragmatic solution that recognises the existence of an Irish regulator.

Acting in aid

(h) **Acting in aid of foreign courts - Section 142 1988 Act /Common law**

The Court may act in aid of any court in the Isle of Man or the Channel Islands at the request of such court in any bankruptcy matter. In such event, the Court will have like jurisdiction and authority as in the case of a bankruptcy originating under its own original jurisdiction.

In addition to this statutory mechanism, acting in aid is a concept widely known in common law jurisdictions and in operation in Ireland whereby, the Court will have jurisdiction to grant an order giving effect to the appointment and powers of a foreign assignee or trustee and generally facilitate such an office-holder in the realisation of assets.

Since the enactment of the Insolvency Regulation, section 142 of the 1988 Act and this common law concept will now be confined to circumstances where the Insolvency Regulation does not apply, for example, applications by personal bankruptcy officials appointed by the courts of non-EU countries or Denmark.

Protection of the Court

(i) **Court Protection – Examinership/Examination – 1990 Act**

(i) Examinership is a court moratorium/protection procedure, which is available under Irish company law. Where a company whose COMI is in Ireland is, or is likely to be, unable to pay its debts an examiner ("**Examiner**") may be appointed on a petition to the Court under the 1990 Act. A company is deemed to be unable to pay its debts if:

(A) it is unable to meet its debts as they fall due;

(B) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities;

(C) failure to pay or secure, to the reasonable satisfaction of a creditor, a debt exceeding €1,270 within 3 weeks of a demand in writing being left at the registered office of the company; or

(D) if execution or other process issued on foot of a judgment in favour of a creditor of the company is returned unsatisfied in whole or in part.

(ii) A petition may be presented by the company, the directors, a creditor including a contingent or prospective creditor or by members of the company holding, at the date of presentation of the petition, not less than one-tenth of the voting share capital of the company (save (i) in the case of an Irish Licensed Bank where only the Central Bank can present the petition and (ii) in the case of an Irish Insurance Company, where only the Minister for Jobs, Enterprise and Innovation can present the petition and we refer you to Schedule 3 hereof). The petition must be accompanied by an independent accountant's report showing, inter alia, the financial position of the company. The test for appointment of an Examiner is that Court must be satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern. As regards companies incorporated or with a COMI in other Member States (other than Denmark) the comments above under the heading "Cross-border proceedings" in relation to the effect of winding up through application of the Insolvency Regulation apply equally to examinership.

(iii) **Examiner's Proposals**

Once appointed, an Examiner must, as soon as practical, formulate proposals for a compromise or scheme of arrangement in relation to the company to which he has been appointed. Typically, a scheme of arrangement will involve the writing down of creditors' claims (both

secured and/or unsecured) and the introduction into the company of new funds. Having prepared his proposals, the examiner must convene meetings of classes of members and creditors to consider his proposals. There is acceptance by a class of creditors when both a majority in number and in value of the class, vote in favour of the proposals.

The proposals must be confirmed by the Court if they are to become effective and the Court can confirm the proposals only if (inter alia):

(A) at least one class of creditors whose interests or claims would be impaired by implementation of the proposals have accepted them;

(B) they are fair and equitable in relation to any class of members or creditors that has not accepted them and whose interests and claims would be impaired by implementation; and

(C) they are not unfairly prejudicial to the interests of any interested party.

Once confirmed by the Court, the proposals become binding on all creditors (whether secured or unsecured) and their rights are accordingly modified.

(iv) **Repudiation of Contracts**

Under Section 20 of the 1990 Act, where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the Court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties. Any person who suffers loss or damage as a result of such repudiation stands as an unsecured creditor for the amount of such loss or damage.

(v) **Effects of Examinership**

The effect of the appointment of an Examiner is to suspend the rights of a secured creditor for the protection period but, save as provided herein, the appointment does not of itself affect the security itself or the rights of the secured creditor.

Section 5 of the 1990 Act provides that for as long as a relevant body is under the protection of the Court under the 1990 Act, no attachment, sequestration, distress or execution shall be put into force against the property or effects of the relevant body except with the consent of the Examiner. The section goes on to provide, amongst other things, that, except with the consent of the Examiner:

(A) where any claim against the relevant body is secured by a charge on the whole or any part of the property, effects or

income of the relevant body, no action may be taken to realise the whole or any part of such security;

(B) no receiver over any part of the property or undertaking of the relevant body shall be appointed; and

(C) no proceedings for the winding up of the relevant body may be commenced or resolution for winding-up passed in relation to that relevant body and no resolution passed shall have any effect.

Pursuant to subsection 5A(1) of the 1990 Act, subject to an order of the Court pursuant to Section 5A(2), no payment may be made by a relevant body during the period of court protection by way of satisfaction or discharge of the whole or a part of a liability incurred by the company before the date upon which the petition for the Examiner's appointment was presented unless the report of the independent accountant accompanying the said petition contains a recommendation that the whole or that part of that liability should be discharged or satisfied. Section 5A(2) provides that the Court may on application being made to it in that behalf by the Examiner or any interested party, authorise the discharge or satisfaction in whole or in part by the company concerned of such a liability if it is satisfied that a failure to discharge or satisfy in whole or in part that liability would considerably reduce the prospects of the relevant body or the whole or any part of its undertaking surviving as a going concern.

Accordingly in any examinership, the company will be precluded from paying over monies to its creditors.

(vi) **Powers of the Examiner**

Section 6 of the 1990 Act confers on the Court broad powers to prevent any receiver or provisional liquidator who has been appointed before the commencement of the examinership from continuing to act as such. Under section 7(5) of the 1990 Act where an Examiner becomes aware of any actual or proposed act, omission, course of conduct, decision or contract by or on behalf of the relevant body or by any person in relation to the income, assets or liabilities of the relevant body which, in his opinion, is or is likely to be to the detriment of the relevant body or certain other persons, he is given broad powers, subject to the right of parties acquiring an interest in good faith for value in such income, assets or liabilities, to take whatever steps are necessary to halt, prevent or rectify the effects of such act, omission, course of conduct, decision or contract. An Examiner's powers under Section 7(5) fall short of enabling him to repudiate a pre-protection contract. The exception to this prohibition on repudiation of pre-protection contracts relates to negative pledge type clauses only

(vii) **Examinership and Foreign Banks**

The 1990 Act applies to companies with their COMI in Ireland. It is possible for any body corporate, which does not have it COMI in an

EU Member State (other than Denmark) and which is liable to be wound up under the Irish Companies Acts (see details above), to have an Examiner appointed to it as a "related" company to a company in respect of which the main examinership proceedings have been commenced. "Related" for this purpose broadly means a subsidiary, a parent or where the businesses have been run so as to be unidentifiable from each other. Any Examiner so appointed shall have the same powers or duties conferred on him in relation to the company the subject of the main examinership proceedings.

Also note that the 1990 Act expressly provides that in presenting a petition in respect of a Regulated Entity (other than an Irish Licensed Bank) if the Central Bank does not present the petition, notice of intention to present a petition must be given to it.

(viii) **Foreign proceedings equivalent to examinership**

Subject to our comments on the Insolvency Regulation and the Winding-up Regulations, as to whether the Courts would recognise foreign proceedings analogous to examinership, this again is a matter of conflicts of law. Section 36 of the 1990 Act contains a provision similar to Section 250 of the 1963 Act, which envisages the Courts giving effect to orders made by a foreign court in such proceedings. No jurisdictions have been recognised for this purpose. Any recognition by a Court of an order made by a foreign court in such proceedings is a matter for is discretion.

(j) **Compromise or Scheme of Arrangement – Section 201 of the 1963 Act**

A compromise or scheme of arrangement between a company and any class of creditors or between the company and any class of members, which is approved of by a majority in number representing three quarters of in value of creditors or members (or class thereof as the case may be), may be sanctioned by the Court such that it is binding on the company, its liquidator and contributories. The process may be initiated by any creditor, member or liquidator applying to the Court to order a meeting of the creditors or members (or class of either) to be summoned as the court directs.

(k) **Receivership**

A receiver (a "**Receiver**") is a person appointed to receive and take control of all or specified parts of the assets of a party (the "**Security Provider**") for the benefit of creditor(s) of the Security Provider (the "**Secured Creditor**"). A Receiver is sometimes appointed as receiver and manager in which case he/she has the power to run the business to which he has been appointed. A Receiver may be appointed by the Court pursuant to statute or the laws of equity or by contract by the Secured Creditor. The latter is the most common method of appointing a Receiver and does not in general require the assistance of the Courts.

The Receiver in such circumstances is appointed by deed of appointment between him/her and the Secured Creditor pursuant to the powers contained in the relevant security document. The powers and duties of a Receiver will depend upon the terms of his appointment, and the relevant security

document. The function of the Receiver usually involves getting in the assets to which he/she is appointed, realising value and applying them as provided in the relevant security document or as otherwise provided by law. In the appropriate case the effect of the appointment of the Receiver is to terminate the powers of the directors in relation to matters within the scope of his/her appointment.

(l) **Part 7 of the Resolution Act**

The terms of Part 7 of the Resolution Act apply in full to authorised credit institutions and Relevant Institutions within the meaning of the Stabilisation Act. This allows for the presentation, advertisement or any other step or publication concerning a person's intention to cause an authorised credit institution to be wound up only where the person has given 10 days written notice to the Central Bank of his or her intention to do so and the Central Bank has confirmed in writing that is has no objection to the person doing so. Only a liquidator approved by the Central Bank may be appointed to an authorised credit institution.

If an authorised credit institution is being wound up voluntarily and the Central Bank has reason to believe that any of the grounds set out in section 77 of the Resolution Act apply, being (i) that in the opinion of the Central Bank the winding-up would be in the public interest; (ii) that the credit institution is or may be unable to meet its obligations to its creditors (iii) failure to comply with certain directions of the Central Bank (iii) revocation of authorisation or licence or that (in the case of the holder of a licence under section 9 of the CBA) that it has ceased to carry on a banking business (iv) the Central Bank has considered that it is in the interest of persons having deposits, then the Central Bank may apply to the Court to have that credit institution would up by the Court.

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

1. the following voluntary procedures are included, "receivership", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager";

3. the following involuntary procedures are included, "compromise", "receivership", and "examinership".

3.2 **Recognition of choice of law**

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

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

and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions.

3.3 **Enforceability of FOA Netting Provision**

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

3.3.1 the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and

3.3.2 the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because:

As a matter of Irish law, either the Netting Act applies to the FOA Netting Provisions or, in the case of a Clearing Agreement (where the Defaulting Party acts as Client) to which the Collateral Regulations apply, the Collateral Regulations apply to the FOA Netting Provisions. Furthermore, we are not aware of any rule of law of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the FOA Netting Provision.

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

No amendments to the FOA Netting Provisions are necessary in order for the opinions expressed in this paragraph 3.3.1 to apply.

3.4 **Enforceability of the Clearing Module Netting Provision**

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

We are of this opinion because:

As a matter of Irish law, either the Netting Act applies to the FOA Netting Provisions or, in the case of a Clearing Agreement (where the Defaulting Party acts as Client) to which the Collateral Regulations apply, the Collateral Regulations apply to the Clearing Module Netting Provision. Furthermore, we are not aware of any rule of law of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the Clearing Module Netting Provision.

As part of our analysis we have considered the provisions of the Clearing Agreement which provide that the Cleared Transaction Set will be treated separately for termination and certain other purposes and that in the case of inconsistency with the Clearing Agreement, the provisions of the Clearing Module prevail for the purposes of the Client Transactions. It is our

view that the Irish courts would consider that the Clearing Module Netting Provision so far as they relate to each Cleared Transaction Set constitute a Netting Agreement for the purposes of the Netting Act. We do not believe the fact that the Clearing Agreement purports to be a single agreement should preclude that, assuming there is nothing under the laws of any other jurisdiction which provides to the contrary.

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

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

Furthermore, in addition to the highlighted words, it is necessary that the words shown as underlined in Part 1 of Annex 4 be treated as Core Provisions in order for the opinions expressed in this paragraph 3.4 to apply.[1]

3.5 **Enforceability of the Addendum Netting Provision**

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

We are of this opinion because:

As a matter of Irish law, either the Netting Act applies to the Addendum Netting Provisions or, in the case of a Clearing Agreement (where the Defaulting Party acts as Client) to which the Collateral Regulations apply, the Collateral Regulations apply to the Addendum Netting Provisions. Furthermore, we are not aware of any rule of law of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the Addendum Netting Provision.

As part of our analysis we have considered the provisions of the Clearing Agreement which provide that the Cleared Transaction Set will be treated separately for termination and certain other purposes and that in the case of inconsistency with the Clearing Agreement, the provisions of the FOA Clearing Addendum prevail for the purposes of the Client Transactions. It is our view that the Irish courts would consider that the Addendum Netting Provision so far as they relate to each Cleared Transaction Set constitute a Netting Agreement for the purposes of the Netting Act. We do not believe the fact that the Clearing Agreement purports to be a single agreement should preclude that, assuming there is nothing under the laws of any other jurisdiction which provides to the contrary.

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

No amendments to the Addendum Netting Provision are necessary in order for the opinions expressed in this paragraph 3.5 to apply.[2]

[1] We would recommend that the totality of Clause 3.1 (Client Transactions) and all of Clause 5 (*Early Termination Following Default*) of the FOA Clearing Module are applied

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

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

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

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

(i) where the FOA Set-Off Provisions include the General Set-Off Clause:

(a) the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Defaulting Party); or

(b) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or

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

We are of this opinion because:

Under Irish law it is possible to contract out of Statutory Set-off (see paragraphs 4.8 to 4.11 below for more details). At paragraphs 4.13 to 4.17 below we set out details of insolvency provisions which are relevant to the exercise of this set off.

The following amendments to the General set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 to apply:

(a) Expressly contract out of Statutory Set-off (as defined in paragraph 4.8 below)

[2] We would recommend that the totality of Clause 3(a) (Client Transactions) and all of Clause 8 (*Early Termination Following Default*) of the ISDA/FOA Clearing Addendum are applied

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

(i) where the FOA Set-Off Provisions includes the General Set-Off Clause:

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

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

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

We are of this opinion because:

Under Irish law it is possible to contract out of Statutory Set-off (see paragraphs 4.8 to 4.11 below for more details). At paragraphs 4.13 to 4.17 below we set out details of insolvency provisions which are relevant to the exercise of this set off.

The following amendments to the General set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.2 to apply.

(a) Expressly contract out of Statutory Set-off (as defined in paragraph 4.8 below)

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

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

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

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

against any Available Termination Amount owed by the Party entitled to receive the cash balance.

We are of this opinion because:

Under Irish law it is possible to contract out of Statutory Set-off (see paragraphs 4.8 to 4.11 below for more details). At paragraphs 4.13 to 4.17 below we set out details of insolvency provisions which are relevant to the exercise of this set off.

The following amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.8.1 to apply:

(a) Expressly contract out of Statutory Set-off (as defined in paragraph 4.8 below)

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

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

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

(a) in the case of a CM Trigger Event, the Client (as defined in the ISDA/FOA Clearing Addendum); or

(b) in the case of a CCP Default, either Party (the "**Electing Party**"),

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

We are of this opinion because:

Under Irish law it is possible to contract out of Statutory Set-off (see paragraphs 4.8 to 4.11 below for more details). At paragraphs 4.13 to 4.17 below we set out details of insolvency provisions which are relevant to the exercise of this set off.

The following amendments to the Addendum Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.9 to apply:

(a) Expressly contract out of Statutory Set-off (as defined in paragraph 4.8 below)

3.10 **Enforceability of the Title Transfer Provisions**

3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.

3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value.

3.10.3 The courts of this jurisdiction would not recharacterise Transfers of Margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest.

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

We are of this opinion because:

To the extent that Irish law is the applicable law in determining whether the Transfers of Margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions should be re-characterised as a security interest, we refer you to the principles of Irish law as enunciated at paragraph 4.20.

Broadly speaking, the *Exfinco* case is authority for the proposition that a transaction structured by the parties as a sale will be upheld as such for the purposes of the registration of company charges provision of the 1963 Act unless either (i) the transaction is, in substance, a mortgage arrangement and not a sale or (ii) the transaction is a sham. With regard to sub-paragraph (i), if one of more provisions of the relevant document is inconsistent with a sale, then the court will look to the provisions of the documents as a whole to determine the substance of the transaction. None of the indicia of a mortgage identified by Romer LJ in *Re George Inglefield* is necessarily inconsistent with a sale. A transaction structured as a sale may be upheld as such notwithstanding the fact that it bears all three of the indicia of a mortgage or charge. With regard to sub-paragraph (ii), the court will find the transaction to be a sham where the documents do not represent the intentions of the parties.

The Collateral Regulations may apply to the Title Transfer Provisions in the event that the requirements of the Collateral Regulations are met and that the Title Transfer Provisions constitute a Title Transfer Arrangement, such that the Title Transfer Arrangement will take effect in accordance with its terms.

Subject to the basis, assumptions and qualifications in this opinion, it is our view that a court in Ireland would honour the terms of the FOA Netting Agreement (with Title Transfer

Provisions) or, as the case may be, a Clearing Agreement with regard to valuation in accordance with its terms where (i) such terms are legal, valid, binding and enforceable under their governing laws (ii) all transfers are made in accordance with the formalities required under all applicable laws including the laws of the lex situs and governing law, and (iii) the rights and obligations set out therein are intended by the relevant parties to operate in accordance with their terms; those terms will determine characterisation.

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

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

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

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

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

3.12 **Single Agreement**

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

3.13 **Automatic Termination**

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

3.14 **Multibranch Parties**

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

Where there is evidence that there is an intention that Transactions entered into through separate branches are, in fact, separate agreements rather than a single agreement (with the relevant FOA Netting Agreement or, as the case may be, the Clearing Agreement), there is a risk that this would undermine the Transactions constituting a single agreement subject to netting across all Transactions and that the Transactions entered into with the branch would be considered under a separate agreement, such that netting occurs across Transactions with the branch only.

3.15 **Insolvency of Foreign Parties**

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

3.16 **Special legal provisions for market contracts**

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

4. QUALIFICATIONS

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

4.1 The description of obligations in this Opinion as "enforceable" refers to the legal character of the obligations assumed by the relevant party under the relevant instrument. It implies no more than the obligations are of a character which the laws of Ireland recognize and will in certain circumstances enforce. In particular, it does not mean or imply that the relevant instrument will be enforced in all circumstances in accordance with its terms or by or against third parties or that any particular remedy will be available. In particular (without limiting the foregoing):

4.1.1 the binding effect and enforceability of the obligations of the Party under the FOA Netting Agreement or, as the case may be, the Clearing Agreement may also be limited as a result of the provisions of the laws of Ireland applicable to contracts held to have become frustrated by events happening after their execution, and any breach of the terms of any document by the party seeking to enforce such document;

4.1.2 enforcement will be subject to, netting, claims and attachment and any other rights of another party to a contract; and

4.1.3 enforcement may be limited by reason of fraud, coercion, duress or undue influence.

4.2 Where any obligations of any person are to be performed in jurisdictions outside Ireland, such obligations may not be enforceable under Irish law to the extent that performance thereof would be illegal under the laws of any such jurisdiction or contrary to public policy under the laws of any such jurisdiction and an Irish court may take into account the law of the place of performance in relation to the manner of performance and to the steps to be taken in the event of defective performance.

4.3 Any provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement which constitutes, or purports to constitute, a restriction on the exercise of any statutory power by any party thereto or any other person may be ineffective.

4.4 No enquiry or diligence has been made into the tax, regulatory position, prospectus, capacity, authority, compliance, status or otherwise of any party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or any CCP or the assets the subject thereof and no opinion is expressed thereon or the implications thereof.

4.5 Where the Netting Act does not apply to a FOA Netting Agreement or, as the case may be, the Clearing Agreement (and we refer you to our comments at paragraph 4.44 below in this regard) no disapplication of the Irish Companies Acts or the Bankruptcy Act, 1988 or laws relating to bankruptcy, insolvency or receivership will be applicable such that the provisions of Irish Companies Acts or the Bankruptcy Act, 1988 or laws relating to bankruptcy, insolvency or receivership will apply in full such that an Agreement could be invalidated or rendered void.

4.6 Under Section 139 of the 1990 Act, if it can be shown, on the application of a liquidator, creditor or contributory of a company which is being wound up, to the satisfaction of the High Court that any property of such company was disposed of (which would include by way of charge, security assignment or mortgage) and the effect of such a disposal was to "perpetrate a fraud" on the company, its creditors or members, the High Court may, if it deems it just and equitable, order any person who appears to have "use, control or possession" of such property or the proceeds of the sale or development thereof to deliver it or pay a sum in respect of it to the liquidator on such terms as the High Court sees fit.

4.7 Section 286 of the 1963 Act provides that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company, which is unable to pay its debts as they become due to any creditor, within six months of the commencement of the winding up of the company with a view to giving such creditor (or any surety or guarantor of the debt due to such creditor) a preference over the other creditors, shall be deemed to be a fraudulent preference of its creditors and be invalid accordingly. A dominant intent on the part of the entity concerned to prefer a creditor over its other creditors is necessary in order for Section 286 to apply. Section 286 is only applicable if at the time of the conveyance, mortgage or other relevant act, the company was unable to pay its debts.

Common Law Set off

4.8 For a Party subject to the provisions of Irish corporate law provision is made for a form of statutory set-off on its winding up.[3] It provides that "where there are mutual credits or debts as between bankrupt and any person claiming as a creditor, one debt may be set-off against the other and only the balance found owing shall be recoverable on one side or the other" ("**Statutory Set-off**"). While there is some Irish case law on the exercise of statutory and contractual set-off in insolvency of Irish companies, there still remains a lack of definitive judicial decisions on many of the key questions.

[3]Section 284(1) of the 1963 Act (as amended) which incorporates by reference the rule applicable on bankruptcy of as contained within paragraph 17 of the First Schedule of the Bankruptcy Act 1988.

4.9 Subject to the preceding comment it is our view that the following is the better interpretation of the points we consider to be key in the present circumstances:

(a) Statutory Set-off on the winding up of the counterparty is not mandatory or self executory[4].

(b) It is possible to contract out of statutory set-off applicable on winding up[5].

(c) Contractual set-off post winding up is not contrary to the public policy principle[6].

(d) The exercise of contractual set-off after the commencement of a winding up has been permitted by the Irish courts.[7] For reference the rationale behind this decision is that the liquidator takes no better title to the property of the company than the company itself had and that means that he takes the assets subject to any pre-existing enforceable right of a third party in or over them. In that case a bond was given by the company, which was guaranteed by a bank. The bank was in turn counter-indemnified by the company on the basis that the bank could debit any account with sums the bank was obliged to pay under the guarantee. The bond and the bank guarantee were demanded before the commencement of the liquidation of the company. The bank after the commencement of the liquidation paid the demand and decided not to claim in the liquidation but rather to exercise its contractual right of set-off. This was upheld by the court. The court expressly held that the timing of the payment and exercise of the right of set-off was irrelevant and pointed that the relevant matter was the fact that the bank account of the company had passed to the liquidator subject to the bank's enforceable right to pay the amount demanded under the bond. It followed that the bank's accrued right to debit took precedence over the liquidators title to the account.

(e) Based on the above decision and relevant principles it is our view that debts or other obligations accelerated or matured on the commencement of a winding up should be capable of being set-off on or post winding up pursuant to a contractual set-off agreement provided that the timing of the exercise of the set off right is in good faith and without unreasonable delay.

4.10 If the effect of the Set-off Provisions were to achieve a broader set-off than could be achieved on the basis of the Statutory Set-off, then it is arguable that Statutory Set-off would not apply to supersede the Set-off Provisions to that extent. While the House of Lords decision in **British Eagle**[8] provides support for the view that contractual set-off is contrary to public policy and the pari passu treatment of creditors on an insolvency, the ***Eurotravel*** case establishes under the laws of Ireland the principle that the courts will give effect to contractual agreements for set-off in a winding up where it would be inequitable not to do so and that such agreements are not contrary to any public policy principle. Once it is established that set-off is an ordinary transaction in the course of business, a "heavy burden" lies on any

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4 Para 17, First Schedule to the Bankruptcy Act 1988

5 *Deering v Hyndham* (1886) L.R. (Ire.) 18 2 B.D. 323

6 Costello in *Glow Heating Limited v Eastern Health Board* [1988] I.R. 110 and *Re Eurotravel Ltd; Dempsey v The Governor and Company of the Bank of Ireland*, Supreme Court, unreported 6 December 1985

7 *Re Eurotravel Ltd; Dempsey v The Governor and Company of the Bank of Ireland*, Supreme Court, unreported 6 December 1985

8 *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390.

party seeking to set it aside.[9] The Court further urged caution on reviewing contractual arrangements with the benefit of hindsight where the agreement(s) were entered into for bona fide commercial reasons at arm's length for commercial benefit.

4.11 It has been suggested by academic commentators [10] that practitioners should not be encouraged to enter into contracting out agreements i.e. agreements providing for a broader set-off on a winding up than that envisaged by Statutory Set-off in advance of judicial reform. Some of these articles acknowledge the need for reform in Ireland is not so great in large part due to the Eurotravel case. Further there are cases which suggest that the set-off which applies on a liquidation is the Statutory Set-off[11]. Also the UK case of ***NatWest Bank v Halesowen Presswork***[12], which is authority for the proposition that it is not possible to contract out of statutory set-off in the UK on a winding up is at odds with the Irish decision of ***Deering v Hyndham***, a decision which appears to permit contracting out of Statutory Set-off.[13]

4.12 It is not necessary that the claims arise out of similar transactions. There is therefore no objection to setting off obligations that are not related.

4.13 Paragraph 4.17 below sets out many relevant provisions of Irish insolvency law which are relevant to the exercise of set-off rights. One to note in particular is that on an examination of a company there is no express prohibition on the exercise of set-off rights in section 5(2) of the CA Act 1990. There is however a prohibition, in Section 5A of this Act, on the discharge of the whole or part of a liability incurred by a company in examination before the presentation of the petition, unless the report of the independent person contains a recommendation that such liability should be discharged. The Irish Courts have not considered the interaction of these two provisions and there is risk that they could be interpreted such that the exercise of a set-off right, which discharges a pre-petition debt is prohibited unless so approved. It may be relevant that Section 5(2) was specifically amended to remove a restriction on exercise of set-off rights. Further it is a rule of interpretation under the laws of Ireland that where a statutory provision is obscure or ambiguous the provision shall be given a construction that reflects the plain intention of the legislature where that can be ascertained as a whole. Applying this rule we believe a Court would permit set-off.

4.14 In a receivership of a company, the rules of set-off on insolvency set out above in relation to liquidation do not apply unless and until the company goes into liquidation. Pending this, on the commencement of a receivership there is an assignment in equity of any debt owing to the chargeholder/assignee. Set-off is then determined by the rules relating to set-off on assignment. The fundamental rule is that the debtor cannot set-off against the assignee cross claims which have not accrued due before the debtor receives notice of the assignment to the assignee.[14]

4.15 We have been unable to identify any direct Irish precedent on the meaning of "*accrued due*" for this purpose, however there are several UK cases which are of persuasive authority before the Irish courts. On balance having regard to this case law and other texts, we are of the opinion that set off can occur after receivership of one of the parties, provided the debt to be

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[9] McCarthy J. in In the Matter of Citroen Sales (Ireland) Limited [1993] 2 IR 69 at 74

[10] David Capper, 'Contracting out of Insolvency Set-Off, Irish Possibilities' [2000] Insolvency Lawyer

[11] Judge Laffoy in *In the Matter of Money Markets International Stockbrokers Ltd (In Liquidation)*, High Court, unreported 28th July 1999

[12] *National Westminster Bank v Halesowen Presswork & Assemblies Ltd* [1972] AC 785

[13] While English case law is of persuasive authority in Ireland it should be noted that English insolvency legislation has an express provision providing for mandatory self executory set-off on a winding up. No such provisions exists under the laws of Ireland. Therefore in this context English case law may have less standing before an Irish court.

[14] In the case of a floating charge, notice to the debtor must be served on or after crystallisation of the floating charge.

set off (against the debt assigned to the chargeholder/assignee on receivership) is due by the assignor to the debtor before the debtor receives notice of assignment even if such debt is payable after that date.[15] It should be noted that if the debt is not due, for example a termination notice must be served before a claim for damages accrues, set off cannot operate.[16] Some case law and commentary[17] suggests a more limited right of set off. However later cases[18], later UK legislation[19] and Irish legal commentators[20] support our interpretation.

4.16 Statutory Set-off only applies where the amounts being set-off are "mutual" between the parties. In this context, "mutual" means that the parties are each personally and solely liable as regards obligations owing by it to the other party and solely entitled to the benefit of obligations owed to it by the other party. Circumstances in which the requisite mutuality will not be established include, without limitation:

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

(b) where a party is acting as a trustee, in which case sums owed by (or to) the trustee acting in its capacity as trustee of a particular trust are not mutual with sums owed to (or by) it arising from obligations such party incurs in its own interest or in its capacity as trustee of any other trust;

(c) where a party has a joint interest (other than where a party is a partnership organised under the laws of this jurisdiction and then only in relation to the position between the partnership and the other Party), in which case sums owed by (or to) the partnership are not mutual with sums owed to (or by) a partner acting in his or her or its own interest;

(d) where a party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order.

Accordingly, where such mutuality does not exist in respect of any Transactions or, amounts in respect of such Transactions will not be included in any Statutory Set-off.

4.17 **Voidability Provisions**

The following are the principal Voidability Provisions:

4.17.1 Under Section 140 of the 1990 Act on the application of a liquidator, creditor or contributory of a company which is being wound up, the court, if it is satisfied that it is just and equitable to do so, may order that any company that is or has been related to the company being wound up shall pay to the liquidator of that company

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[15] Templeman J in Business Computers Limited v. Anglo African Leasing Ltd [1977] 1 WLR 578 at 585.

[16] Templeman J in Business Computers Limited v. Anglo African Leasing Ltd [1977] 1 WLR 578.

[17] Pinto Leite and Nephews, Ex parte VISCONDE DES OLIVAES [1926] 1 Ch. 221 and Jeffryes v. Agra and Masterman's Bank (1866) L.R. 2Eq. 674 and Derham suggests that legislation is required.

[18] See footnote 16.

[19] The UK Insolvency Amendment Rules 2005, SI 2005/527 at Rule 2.85(3) and (4) *4)* provides that a sum shall be regarded as being due to or from the company for the purposes of paragraph (3) whether-
(a) it is payable at present or in the future;
(b) the obligation by virtue of which it is payable is certain or contingent; or
(c)its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion"

[20] Patrick O Callaghan Set-Off on Insolvency Commercial Law Practitioner – January 1998 Page 20.

an amount equivalent to the whole or part of all or any of the debts provable in the winding up. It has not yet been considered by the Irish Courts whether an order made under this section impacts on mutuality and set-off rights. We are of the view it would not.

4.17.2 Under Section 141 of the 1990 Act provision exists where two or more related companies are being wound up and the court, on the application of the liquidator of any of the companies, is satisfied that it is just and equitable to do so may order, subject to such terms and conditions as it may impose, that the companies be wound up together as if they were one company and specified provisions of the Companies Acts shall apply accordingly. This provision is expressly stated not to affect the rights of any secured parties of any of the companies. It has not yet been considered by the Irish Courts whether an order made under this section impacts on mutuality and set-off rights.

4.17.3 Section 218 of the Companies Act, 1963 provides that where a company is being wound up by the court, any disposition of the property of the company made after the commencement of the winding up is, unless the court orders otherwise, void. In our view contractual set off entered into on arms length commercial terms with commercial benefit should not be considered to come within this, particularly where the obligations of the Parties (being by way of delivery and payment) become immediately due and payable on insolvency.

4.17.4 Section 286 (discussed at paragraph 4.7 of this opinion) and 290 (discussed at paragraph 4.26 of this opinion) of the 1963 Act, and Section 20 (discussed at paragraph 3.1(i)(iv) of this opinion) of the CA Act 1990 and Section 139 (discussed at paragraph 4.6 of this opinion) of the 1990 Act.

4.18 The clauses in the FOA Netting Agreement or, as the case may be, the Clearing Agreement providing for an increased rate of interest payable upon default or late payment may not be binding if construed by an Irish court as a penalty and therefore invalid. Interest on interest may not be recoverable and any increased rate of default interest may be treated as a penalty and therefore invalid.

4.19 A court in Ireland may order the payment of money in a currency other than euro if the creditor is entitled to such other currency under the terms of a relevant agreement. While the rule of law that, when a debtor is wound up or adjudicated bankrupt after a sum expressed in a foreign currency has become due, such sum should be converted into euro at the rate of exchange prevailing on the date it became due has not been varied by a decision of the Irish courts, it is likely that in the event of winding up or bankruptcy of the Party, amounts claimed in a foreign currency would (to the extend properly payable in the winding-up or bankruptcy) be paid, if not in a foreign currency, in the euro equivalent of the amount due in the foreign currency, converted at the rate of exchange on the date of the commencement of such winding-up or bankruptcy.

4.20 As a matter of Irish law there is a risk that transfers of collateral may be re-characterised as creating a security interest. The relevant legal principles on what security is are set out below. It is important that any amendments to the FOA Netting Agreement or, as the case may be, the Clearing Agreements or operationally how the collateral is provided does not take on any of the characteristics of security detailed below.

4.20.1 The principal indicators of what constituted a security interest were set out in the following English cases: Re: George Inglefield [1933] Ch.1, as considered and applied by the Court of Appeal in Welsh Development Agency v. Export Finance Co. Ltd. [1992] BCC 270 (the "***Exfinco case***") and further in Orion Finance

Limited v Crown Financial Management Limited (1996) 2BCLC 78. In Re: George Inglefield Romer J. prescribed three indicia which distinguish a sale transaction from a transaction of mortgage or charge as follows: (i) in a sale transaction the vendor is not entitled to get back the subject matter of the sale by returning to the purchaser the money that has passed between them, whereas in the case of a mortgage or charge the mortgagor is entitled, until he has been foreclosed, to get back the subject matter of the mortgage or charge by returning to the mortgagee the money that has passed between them, (ii) if a mortgagee realises the mortgaged property for a sum that is insufficient to repay him then the mortgagee is entitled to recover from the mortgagor any balance, whereas in a sale and purchase contract the purchaser has to bear any loss suffered on a subsequent sale of the asset by him; and (iii) if a mortgagee realises the subject matter of the mortgage for a sum more than sufficient to repay (together with interest and costs) the money that has passed between him and the mortgagor he has to account to the mortgagor for any surplus, whereas in a sale and purchase contract any profit realised by the purchaser is for the purchaser's account.

4.20.2 The Exfinco case is authority for the proposition that a transaction structured by the parties as a sale will be upheld as such for the purposes of the registration of company charges provision of the 1963 Act unless either: (i) the transaction is, in substance, a mortgage arrangement and not a sale or (ii) the transaction is a sham. With regard to sub-paragraph (i), if one of more provisions of the relevant document is inconsistent with a sale, then the court will look to the provisions of the documents as a whole to determine the substance of the transaction. None of the indicia of a mortgage identified by Romer LJ in Re George Inglefield is necessarily inconsistent with a sale. A transaction structured as a sale may be upheld as such notwithstanding the fact that it bears all three of these indicia. With regard to sub-paragraph (ii), the court will find the transaction to be sham where the documents do not represent the intentions of the parties. Overall, it is our view that the courts of this jurisdiction will give effect to the intention of the parties such that, where the terms of the arrangement are that title to the collateral be transferred from the transferor to the transferee, and that the transferor was to retain no proprietary interest in such collateral but would merely have a contractual right to receive equivalent cash or securities transferred to it by the transferee at some future point in time, such arrangements will not be recharacterised as creating a security interest unless it is demonstrated that the parties are acting in a manner inconsistent with the terms of the arrangement or that the arrangement is otherwise a sham. In this context, the Title Transfer Provisions provide that all right, title and interest in any collateral shall vest in the transferee, and that the parties do not intend to create a security interest over such collateral.

4.20.3 In Ireland, this issue has been considered by the courts although none of the cases have analysed the issue in the same level of detail as the English cases discussed above. In Carroll Group Distributors Limited v G&JF Bourke Limited [1990] 1 IR 481, the High Court considered a retention of title clause and whether it created a charge over goods. Murphy J said that regardless of the labels applied by the parties, it was the substance of the transaction as ascertained from the words of the parties which mattered when considering whether a document constituted a charge or not, and Murphy J specifically approved the characteristics of a mortgage or charge applied by Romer L.J in Re George Inglefield.

4.21 There is a possibility that an Irish court would hold that a judgement on the FOA Netting Agreement or, as the case may be, the Clearing Agreements, whether given in an Irish court or elsewhere, would supersede the relevant agreement or instrument to all intents and

purposes, so that any obligation thereunder which by its terms would survive such judgement might not be held to do so.

4.22 If the Agreements and Transactions governed thereunder are a financial contract, that relates in whole or in part to bank assets prescribed in paragraph 2(a) to (f) of National Asset Management Agency (Designation Of Eligible Bank Assets) Regulations 2009, they may be acquired by National Asset Management Agency or a group entity of the National Asset Management Agency pursuant to the provisions of the National Asset Management Agency Act, 2009 (the "**NAMA Act**").

4.23 Monies held in a bank account of a Party or otherwise owed to it by the other could, notwithstanding any charge or right of netting or set-off over such account or monies being held by the other Party be subject to the provision of Section 1002 of the Taxes Consolidation Act, 1997 which provides inter alia that on receipt of a notice from the Revenue Commissioners that a taxpayer is in arrears in the discharge of any tax, interest or penalty, a person owing money to the taxpayer (such as a bank holding monies of the taxpayer) must pay such monies to the Revenue Commissioner).

4.24 Provisions in the FOA Netting Agreement or, as the case may be, the Clearing Agreement conferring a right of counterclaim or similar right or remedy would not be effective against a liquidator or Official Assignee if the indebtedness in respect of which such rights are exercised has not crystallised (by the indebtedness becoming actual) prior to liquidation and the exercise of such rights against a company in liquidation or a bankrupt in bankruptcy is subject to:

(a) the statutory requirement as to the pari passu treatment of creditors;

(b) the statutory prohibition as to the divestment of assets after the appointment of an official liquidator; and

(c) the statutory prohibition as to the improper transfer of assets,

such rights would also not be available if the person granting such rights has purported to assign or transfer its rights or title or interest in the debt owing to it.

4.25 To the extent that the Insolvency Regulation applies, it provides that main insolvency proceedings (as set out in Annex A to the Insolvency Regulation) may only be opened in the territory where the debtor has its centre of main interests (which we assume to be in Ireland). The courts of any other Member State (other than Denmark) may open "territorial insolvency proceedings", (or, after the opening of main insolvency proceedings, secondary insolvency proceedings) in the event that such debtor possesses an establishment in such Member State. The place of a debtor's COMI (being the jurisdiction in which the Party has its registered office or conducts the administration of his interests) and whether it has an establishment (being any place of operations where a debtor carried out a non-transitory economic activity with human means and goods) as defined in Article 2(h) of the Insolvency Regulation) outside Ireland is a matter of fact and we express no Opinion on this. To the extent that the debtor has its COMI or an establishment outside Ireland, it is possible that main insolvency proceedings, territorial insolvency proceedings or secondary insolvency proceedings may be commenced in a Member State other than Ireland and be subject to the jurisdiction of the courts of such Member State.

4.26 A liquidator of any company may pursuant to Section 290 of the Companies Act 1963 (as amended) and an Official Assignee of any bankrupt may pursuant to Section 56 of the 1988 Act disclaim any onerous property which includes any unprofitable contract and which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or

perform any other onerous act. The decided case law on this section principally relates to leases and environmental licences in respect of which there are on-going obligations and/or burdened by onerous covenants. In our view, subject to the terms of this Opinion, set off under the Set-off Provisions should not be considered to come within this, where set off is exercised on insolvency. We are of this view, amongst other things because termination provisions are included such that the obligations are not ongoing on insolvency but instead constitute isolated and singular acts on the part of the parties thereto.

4.27 In the event that Insolvency Proceedings are brought against a Party in Ireland and certain provisions of foreign law are applied (at paragraph 3.3 we have outlined certain circumstances where the Courts will apply certain provisions of foreign law) we express no opinion on the results that may arise.

4.28 In the event that an Examiner is appointed to a company, no proceedings may be taken against such company to enforce any debt or security during such time as an Examiner is appointed to such company (save with the Examiner's consent). In the event that an arrangement is made under the control of the court, protection may be granted to the debtor and his property from any action or process. We do not believe that this would prevent close-out netting and we refer you to our comments at 4.13.

4.29 If a party to an FOA Netting Agreement or, as the case may be, the Clearing Agreement or to any transfer of, or payment in respect of, such 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 Irish sanctions or sanctions under the Treaty establishing the European Community, as amended, or is otherwise the target of any such sanctions, then obligations to that party under such Agreement or in respect of the relevant transfer or payment may be unenforceable or void.

4.30 We give no opinion on any CCP, its constitution, incorporation or establishment.

4.31 Where an Irish Firm or Irish Clearing Member being (i) an Irish Licensed Bank or a Foreign Bank, and (ii) an IIA Entity or a MiFID Entity as such term is defined in Schedule 1 hereof, is admitted as a participant by the rules of the relevant CCP then such Firm or Clearing Member will be subject to rules of that CCP which we have not reviewed, diligence or had regard to. It is a question of the laws of the jurisdiction of the CCP whether (i) an Irish Licensed Bank or a Foreign Bank , and (ii) an IIA Entity or a MiFID Entity as such term is defined in Schedule 1 hereof, will be so admitted.

4.32 Where a party is a consumer any of the following may apply:

4.32.1 The EC (Unfair Terms in Consumer Contracts) Regulations, 1995: It provides that non-core terms in contracts concluded between a supplier of services and a consumer may be invalidated on grounds of unfairness. A contractual term will be deemed to be unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer taking into account the nature of the services for which the contract was concluded and all circumstances surrounding the conclusion of the contract and all other terms of the contract. "Consumer" for this purpose means a natural person acting for purposes outside his business; and

4.32.2 The Consumer Credit Act, 1995 (the "**CCA**"): It applies to agreements for the provision of credit (defined to include a deferred payment, cash loan or other similar form of financial accommodation) to consumers. The CCA provides basic protections and rights for consumers and has a significant impact on the parties' rights and obligations with regard to the marketing of credit, the content of

contractual documentation, procedural steps upon entering into the contract including cooling off and limitations on rights of enforcement. A breach of the CCA can lead in certain circumstances to, inter alia, restrictions of enforceability and summary prosecution. "Consumer" for this purpose means a natural person acting outside the person's business.

4.33 In any proceedings taken in Ireland for the enforcement of the Agreements, the choice of English Law as the governing law of the Agreements will be recognised by the Irish courts pursuant to Article 3 of the Rome I Regulation (EC) No. 593/2008 of the European Parliament and of the Council 17 June 2008 on the law applicable to contractual obligations (the "**Rome I Regulation**") with respect to matters falling within the scope of the Rome I Regulation. Article 1(2) of the Rome I Regulation sets out matters not governed by the Rome I Regulation. They include, but are not limited to, obligations under negotiable instruments, evidence and procedure, insurance matters and trusts. The choice of law will not, where all the other elements relevant to the situation at the time of the choice are connected with another country, prejudice the application of the laws of that country which cannot be derogated from by agreement. Where all of the elements of the contract are located in a country other than that of the governing law and that country has laws which cannot be contracted out of, the Courts of Ireland will apply those overriding laws. Furthermore, if all other elements relevant to the situation at the time of the choice are connected to one or more Member States, the parties choice of Non-Member State law shall not prejudice the application of provisions of community law, where appropriate, as implemented in the forum, which cannot be derogated from by agreement. It is open to the Irish Court to give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful; mandatory provisions for this purpose stem from Article 3(3) of the Rome I Regulation, which stipulates that the fact that the parties have chosen a foreign law shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of law of that country which cannot be derogated from. In considering whether to give effect to those overriding mandatory provisions regard shall be had to their nature and purpose and to the consequence of their applicability or non-applicability. To the extent that such mandatory rules affect any part of the transaction, an Irish Court is likely to restrict the application of those rules to the relevant part of the transaction and to apply English Law or the laws of the State of New York law, as the case may be, in the remainder. The Irish Courts may however refuse to enforce foreign laws which may be considered repugnant to Irish public policy.

4.34 Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ("**Rome II Regulation**"), which came into force on 11 January 2009, seeks to create a harmonised set of rules within the European Union to govern choice of law in disputes arising from non-contractual obligations. Under Article 4 of the Rome II Regulation the applicable law is that of a country in which the damage occurs irrespective of the country of which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences occur. However, under Article 4 (2) if both parties are habitually resident in the same country at the time at which the damage occurs the law of that country should apply and under Article 4 (3) where the tort/delict is manifestly more closely connected with another country the law of that country should apply. Under Article 14, the parties may agree to submit non contractual obligations to the law of their choice either by (a) an agreement entered into after the event giving rise to the damage occurred or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice of law will not, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than a country whose law has been chosen, prejudice the application of provisions of the law of the country which cannot be derogated from by

agreement. Furthermore, the choice of law of a non-Member State will not, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement. Certain non-contractual obligations are specifically excluded in Article 1 (2) of the Rome II Regulation, such as non-contractual obligations arising out of (i) bills of exchange/negotiable instruments; (ii) family relationships/matrimonial property regimes and (iii) the law of companies relating to its administration and liability of auditors responsible for statutory audits of companies accounts.

4.35 Subject to EU Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**2001 Brussels Regulation**") the submission to the non-exclusive jurisdiction of the courts of England to the extent so submitted will be upheld by the Irish courts. This will not preclude the bringing of proceedings in other courts with jurisdiction according to the general rules set out in the 2001 Brussels Regulation.

4.36 We give no opinion where a Party enters into the FOA Netting Agreement or, as the case may be, the Clearing Agreement other than in its own name.

4.37 It is our view that any discretion granted in the FOA Netting Agreement or, as the case may be, the Clearing Agreement for the exercise of termination rights should be exercised promptly. Where this does not occur, there is a possibility that the courts may consider it adversely when deciding whether to permit the action after material delay. This is the case especially where the discretion is exercised after insolvency of a party and the exercise of the termination rights give rise to netting or set off. This is because permitting the exercise of netting or set of varies the pari passu treatment of creditors which is a fundamental (and statutory) principle on the insolvency of an Irish Company. Also, amongst other things, the court could consider that it evidences lack of bona fides or that the delaying party was delaying so as to augment the amount to be paid to it.

4.38 Agreements with a relevant or authorised credit institution (in relation to which an order under the Stabilisation Act or Resolution Act (the "**Acts**") has been made), may provide for their termination or other consequences in certain circumstances for example, the occurrence of an event of default. Section 61 of the Stabilisation Act and section 100 of the Resolution Act provide that none of the specified consequences will arise by virtue of certain actions including, among others, the enactment of the Acts, the making of any statement by the Minister, the Governor of the Central Bank or the institution in relation to the Acts, and the use of any powers (including the making of an order) under the Acts.

4.39 **Supervisory Restrictions**

A Party incorporated in or with a branch in Ireland may become subject to the following moratorium, suspension or similar proceedings:

(a) Banks

The Central Bank can require a Bank to suspend for a period not in excess of six months (subject to extension by the Court) all or any of the following:

(A) the carrying on of banking business;

(B) the making of payments other than those specifically connected with carrying on banking business;

(C) the acquisitions or disposal of assets or liabilities;

which have not been authorised by the Central Bank (Section 21 of the CBA). These provisions apply to EEA Credit Institutions.

While such a direction is in effect, no winding up proceedings may be commenced or winding-up resolution passed in relation to the Bank, no receiver may be appointed over all or part of its property or undertaking and the property of the Bank may not be attached, sequestered or otherwise distrained except with the prior sanction of the Court

The circumstances in which such a direction may be given include where the Central Bank is of the opinion that:

(i) it is in the public interest to do so

(ii) the Bank:

(A) has become or is likely to become unable to meet its obligations to its creditors;

(B) is not or is unlikely to be in a position to maintain adequate capital resources having regard to the volume and nature of its business;

(C) is failing or has failed to comply with any condition of its licence and the Central Bank is of the opinion that the Bank's stability and soundness are thereby affected;

(D) is conducting business in such a manner as to jeopardise and prejudice the security of deposits taken by it or the rights and interest of the depositors; or

(E) is in common control with one or more other entities (whether regulated or not), which common control, in the opinion of the Central Bank is not in the interest of the depositors of the Bank.

Provisions similar to the above apply where the bank licence has been revoked (Section 11 of the CBA).

Investor Compensation

Provisions similar to those described above apply to certain investment business firms (including a Bank), pursuant to Section 27 of the ICA and Section 28 of the ICA for failure to comply with certain provisions of the ICA.

(b) **Stabilisation Legislation**

The Credit Institutions (Stabilisation) Act 2010 (the "**Stabilisation Act**") came into force on 21 December 2010. It was the first step in the legislative framework for the restructuring and stabilisation of the Irish banking system as set out in the National Recovery Plan 2011-2014 and agreed in the joint European Union / International Monetary Fund Programme of Financial

Support for Ireland. The Stabilisation Act applies to Relevant Institutions (as defined in Annex A hereto). The application period of the Stabilisation Act was due to end on 31 December 2012 unless otherwise extended; that period was extended to 31 December 2014 (by resolutions of both Houses of the Oireachtas in December 2012 following a motion by the Minister for Finance). The Stabilisation Act introduced the following concepts:

(i) **Direction Orders**

The Minister may propose a direction order to Court ordering the Relevant Institution to take or refrain from taking any action (an undefined term) but including the disposal of an asset or liability.

(ii) **Special Management Orders**

The Minister may propose a special management order to the Court where in his opinion, a special manager should be appointed to the Relevant Institution. The statutory functions of the Special Manager include the taking over of the management of the business and carrying on that business as a going concern with a view to preserving and restoring the financial position of the Relevant Institution and the power to acquire and dispose of any asset or liability and the taking of all such steps, as thought necessary, to remedy the matters which led to the making of the special management order.

The effect of the appointment of a special manager includes that: (i) all functions ordinarily vesting in the directors will vest in the special manager; and (ii) no proceedings for the winding up of the Relevant Institution can be commenced without the prior consent of the Minister.

(iii) **Transfer Orders**

The Minister may propose a transfer order in respect of the assets or liabilities of a Relevant Institution.

(iv) **Subordinated Liabilities Orders**

The Minister may propose a subordinated liabilities order in respect of a Relevant Institution to provide for any of a number of matters in respect of certain subordinated liabilities of the relevant institution. The specified matters may include modifying rights to interest and the repayment of principal, events of default, timing of obligations, etc. and may facilitate a debt for equity swap.

The Minister has a general power (pursuant to the Stabilisation Act) to impose terms and conditions when providing financial support which any other provider of financial support would be entitled to impose. This would, inter alia, enable the Minister to suspend for a specified period (not exceeding 6 months) a specified activity.

In the case of each of the aforementioned orders, the Court, when hearing an application by the Minister in accordance with the relevant provisions of the Stabilisation Act, shall, if satisfied that the relevant requirements of the Stabilisation Act have been complied with and that the opinion of the

Minister under that section was reasonable and was not vitiated by any error of law, make an order in the terms of the proposed order.

In addition, it is possible for the process mandated by the order to be made with the "intention of preserving or restoring the financial position" of a Credit Institution and as such to be classified as a "*reorganisation measure*" for the purpose of the Winding Up Regulations. Pursuant to the Winding-Up Directive, a reorganisation measure imposed by the Irish courts must be recognised in other EU Member States and will apply to branches of a Relevant Institution in other EU Member States.

The Resolution Act came into effect on 28 October 2011 and aims to provide a regime for dealing with failing credit institutions. The Resolution Act does apply to all authorised credit institutions in Ireland once the temporary emergency regime under the Stabilisation Act expires (and otherwise to all credit institutions not covered by the Stabilisation Act) from 1 January 2013 (the Stabilisation Act continues to apply to those credit institutions that have received financial support from the Irish government until the end of 2014 unless extended).

Like the Stabilisation Act, if certain pre-conditions are met and if it is considered necessary, the Central Bank is able to make an application to the High Court seeking a transfer order in respect of a failing institution and/or impose a special management regime on that failing institution. The Central Bank is empowered to present a petition to the High Court for the winding up of a failing credit institution in certain circumstances and further, no person is allowed to petition to wind up a credit institution without giving the Central Bank notice and receiving the approval of the Central Bank. It is provided that the Irish Companies Acts will apply to the winding up of an authorised credit institution under this legislation, subject to certain modifications.

Section 65 of the Stabilisation Act and section 104 of the Resolution Act respectively provide that nothing in such legislation shall affect the operation of the Netting Act, the Collateral Regulations or Regulation 30 of the Winding Up Regulations in relation to an agreement (which we take to cover the FOA Netting Agreement or, as the case may be, the Clearing Agreement) to which a Relevant Institution or authorised credit institution or any of its subsidiaries is a party

(c) **NAMA**

The NAMA Act came into effect on 21 December 2009. The following is relevant to this Opinion, insofar as it is relevant to a Relevant Party that is a "participating institution" within the meaning of the NAMA Act. A "participating institution" means a credit institution that has been designated by the Minister for Finance under section 67 of the NAMA Act, including any subsidiary of such credit institution that has not been excluded under that section.

Some of the principal purposes of the NAMA Act are to establish the National Asset Management Agency (***NAMA***) and provide a mechanism for the acquisition by NAMA or a NAMA group entity (each a ***NAMA Entity***), of certain assets from participating institutions and the holding, managing and realisation by the NAMA Entities of those assets and certain other related functions. The assets that may be acquired by the NAMA Entities ("**Eligible**

Bank Assets") comprise such assets of a participating institution as may from time to time be prescribed by regulation by the Minister pursuant to, and in accordance with the provisions of, section 69 of the NAMA Act (after undertaking the consultation referenced in that subsection).

Eligible Bank Assets may, therefore, depending on the terms of any relevant ministerial regulations, comprise the entire, or any, interest of a "participating institution" in any Agreement or Transaction to which that "participating institution" is party. Specific obligations or liabilities relating to an eligible bank asset may be excluded from the acquisition.

Financial contracts between a "participating institution" and either a credit institution or a financial institution within the meaning of the Central Bank Act 1997 are excluded from the ambit of the Eligible Bank Assets.

Section 217 of the NAMA Act provides that nothing in the NAMA Act affects the operation of the Netting Act, the Collateral Regulations or the Winding-Up Regulations in relation to an agreement to which a participating institution is party.

(d) **Central Bank (Supervision and Enforcement) Act 2013**

Section 45 of the Central Bank (Supervision and Enforcement) Act 2013 (which came into force on 1 August 2013) contains similar provision to those described above in respect of regulated financial service providers. In particular, Section 45 confers a right on the Central Bank to direct a regulated financial service provider:

(a) to suspend, for such period not exceeding 12 months as is specified in the direction, any one or more of the following:

(i) the provision of any financial service, or description of financial service, specified in the direction;

(ii) the making of payments to which subparagraph (i) does not relate or any such payments or description of such payments specified in the direction;

(iii) the acquisition or disposal of any assets or liabilities, or description of assets or liabilities, specified in the direction;

(iv) entering into transactions or agreements, or description of transactions or agreements, specified in the direction, or entering into them except in specified circumstances or to a specified extent;

(v) soliciting business from persons of a class specified in the direction;

(vi) carrying on business in a manner specified in the direction or otherwise than in a manner so specified;

(b) to dispose of, on terms specified in the direction, assets or liabilities so specified, or a part or parts of its business so specified, within such period as may be so specified;

(c) to raise and maintain such capital or other financial resources as may be specified in the direction;

(d) to make such modifications to its systems and controls as may be specified in the direction;

(e) to make such modifications to its business practices and dealings with third parties as may be specified in the direction;

(f) to comply with the condition or requirement referred to in subsection (2)(c);

(g) to notify third parties of any such actions within paragraphs (a) to (f) as may be specified in the direction.

A direction of this nature may be made where the Central Bank is satisfied that the regulated financial service provider:

(a) has become or is likely to become unable to meet its obligations to its creditors or its customers;

(b) is not maintaining or is unlikely to be in a position to maintain adequate capital or other financial resources having regard to the volume and nature of its business;

(c) has failed to comply with, is failing to comply with or is likely to fail to comply with any condition or requirement imposed by, or by virtue of, financial services legislation;

(d) is conducting business in such a manner as to jeopardise or prejudice—

(i) monies, securities or other investment instruments or other property held by or controlled by it on behalf of customers, or

(ii) the rights and interests of customers;

(e) that there may be grounds for revoking or not renewing the Bank's authorisation.

4.40 The provisions described in at 4.39 above regarding Banks are silent on whether there exist any rights of the Central Bank to give directions in relation to provisions such as the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision. It does not appear to us that the exercise by a Party of its rights under the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision should come within the powers of the Central Bank to give directions nor should it come within matters which are expressly restricted by the relevant legislation.

There are other provisions in the relevant legislation which might be argued to include the exercise of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision but on balance we are of the view that they do not apply.

4.41 Where any Party which is incorporated under the Irish Companies Acts, by entering into the FOA Netting Agreement or, as the case may be, the Clearing Agreement or any Transaction or performing its obligations thereunder:

4.41.1 provides financial assistance for the purpose of or in connection with a purchase or subscription of its shares or those of its holding company this is prohibited by Section 60 of the 1963 Act and any transaction is breach thereof shall be voidable at the instance of the company against any person (whether a party to the transaction or not) who had notice of the facts which constitute such breach;

4.41.2 contravenes Section 31 of the 1990 Act, which relates to prohibition on loans and other transactions with directors and connected persons, Any transaction in breach thereof shall be voidable at the instance of the company is not relevant.

4.42 Certain opinions and qualifications in this opinion letter are expressed to apply only where the FOA Netting Agreement or, as the case may be, Clearing Agreement forms part of a financial collateral arrangement pursuant to the Collateral Regulations. The FOA Netting Agreement or, as the case may be, Clearing Agreement form part of a financial collateral arrangement where:

4.42.1 in the case of an FOA Netting Agreement with an FOA Set-off Provision or, as the case may be, Clearing Agreement with an FOA Set-off Provision, a Clearing Module Set-Off Provision or an Addendum Set-Off Provision, the Firm receives cash from the Counterparty as margin or collateral and such cash is credited to an account on the books of the Firm in this jurisdiction; or

4.42.2 the FOA Netting Agreement or, as the case may be, Clearing Agreement includes the Title Transfer Provisions and Transfers of margin are only made in accordance with those provisions.

We express no opinion as to whether or not an FOA Netting Agreement or, as the case may be, Clearing Agreement would or would not form part of a financial collateral arrangement in circumstances other than those listed at (4.42.1) and (4.42.2) above.

4.43 In relation to paragraphs 3.3, 3.4 and 3.5 above, the Netting Act and the Collateral Regulations will apply to the FOA Netting Provisions, the Clearing Module Netting Provision and the Addendum Netting Provision in the manner set out at 4.43.1 – 4.43.7 below. Where a Party is a Bank it is necessary to have regard to the comments at 4.44.9 below in relation to the Winding-up Regulations. Where a Party is subject to the Insolvency Regulations it is necessary to have regard to the comments at 4.44.8 below in relation to the Insolvency Regulations. Where a Party is an Irish Insurance Company, it is necessary to have regard to the contents of Schedule 3. Finally, where a Party is a Regulated Entity (other than a Bank) it is necessary to have regard to the comments at Schedule 1 below in this regard. If Irish law applies and neither the Netting Act nor the Collateral Regulations apply then regard should be had to the common law set-off principles which are set out at 4.8 – 4.15 (inclusive) above.

Netting Act

4.43.1 The Netting Act provides for the disapplication (the "**Disapplication**") of any rule of law regarding bankruptcy, insolvency or receivership or in the Irish Companies Acts or the Bankruptcy Act, 1988 to the enforceability of provisions relating to netting as contained within a netting agreement. It expressly recognises provisions

relating to netting in a netting agreement are legally enforceable against a party to the netting agreement notwithstanding the aforesaid provisions and, where applicable, against a guarantor or security provider. We have disregarded guarantors and security providers on the basis that they do not appear relevant on the instructions provided. If relevant please note the Netting Act contains provisions which may be of benefit, subject to them applying to the particular case.

4.43.2 The Disapplication referred to above is not absolute and is subject to a carve out for certain matters detailed at 4.43.4 below.

4.43.3 "**Netting**" for this purpose means the termination of Financial Contracts, the determination of the termination values of those contracts and the set-off of the termination values so determined so as to arrive at a net amount due by one party to the other where each such determination and set-off is effected in the terms of a netting agreement between those parties. The definition of "**Financial Contract**" for this purpose is set out in Annex 6. "**Netting Agreement**" for this purpose means an agreement between two parties only in relation to present or future Financial Contracts between them which provide, inter alia, for the termination of those contacts for the time being in existence, the determination of the termination values of those contracts and the set-off of the termination values so determined so as to arrive at a net amount due. Where the legal effect of FOA Netting Provisions as a matter of English law being the governing law, is to provide for the above which appears to be the case (though as a matter of non-Irish law we are not competent to opine on it), then these provisions should constitute a Netting Agreement for the purposes of the Netting Act.

4.43.4 The Disapplication provided for in the Netting Act does not apply in circumstances where any enactment or rule of law would prevent the enforceability of the netting set-off, enforcement and realisation, within the meaning of section 4(1) of the Netting Act in respect of the FOA Netting Agreement or, as the case may be the Clearing Agreement and/or any Transaction on the ground of fraud or misrepresentations or any similar grounds and in particular by reason of the following:

(i) section 286 of the Companies Act 1963 (fraudulent preference);

(ii) section 139 of the Companies Act 1990 (power of a Court to order the return of assets which have been improperly transferred);

(iii) Section 57 of the 1988 Act (fraudulent preference) does not apply to any of the Transactions;

(iv) Section 58 of the 1988 Act (avoidance of certain transactions) does not apply to any of the Transactions; and

(v) Section 59 of the 1988 Act (power of a court to render certain settlements of property void as against the Official Assignee) does not apply to any of the Transactions.

Further the Disapplication will not apply to permit the enforceability of an agreement between the Parties for netting, set-off, enforcement and realisation, within the meaning of section 4(1) of the Netting Act, under the FOA Netting Provisions or, as the case may be the Clearing Agreement and the Transactions if any provision of such agreement would make such netting, set-off, enforcement and

realisation void whether because of fraud or misrepresentation or any similar ground.

4.43.5 As indicated above the benefits of the Netting Act only apply to Financial Contracts. We are of the opinion that the Transactions set out in Annex 2 (other than paragraph (A)(v)) and securities lending and securities borrowing contracts are "Financial Contracts" for the purposes of the Netting Act, save for Transactions relating to financial instruments or securities, and indices referable to financial instruments or securities (except in each case for equities and bonds).

4.43.6 Therefore, we are of the view that the provisions of the Netting Act which provide for the Disapplication will apply to the FOA Netting Provisions in the following circumstances:

(a) Where each Transaction entered into under the FOA Netting Provision is a Financial Contract;

(b) That the FOA Netting Provision constitute a "Netting Agreement" for the purposes of the Netting Act; and

(c) Upon the basis, assumptions and qualifications in this Opinion and having regard to the comments below regarding the Collateral Regulations, the Winding-up Regulations, the Winding-Up of Insurance Undertakings Regulations the Insolvency Regulations and Regulated Entities.

Collateral Regulations

4.43.7 The Collateral Regulations may apply to the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision in the event that the requirements of the Collateral Regulations as summarised below are met and that the Agreements constitute either a Title Transfer Arrangement or Security Arrangement (collectively a "**Collateral Arrangement**").

Where the Collateral Regulations apply there is an express statutory recognition that a close-out netting provision has effect in accordance with its terms irrespective of whether:

(a) winding-up proceedings or reorganisation measures have been commenced, or are continuing, in relation to the collateral provider or collateral taker concerned; or

(b) rights arising in respect of the relevant financial collateral purport to have been assigned or attached as a result of judicial or other process or any other disposition.

"**Close-out Netting Provision**" for this purpose means:

(a) a provision of a Collateral Arrangement, or of an arrangement of which a Collateral Arrangement forms part; or

(b) an enactment or rule of law

as a result of which, on the occurrence of an enforcement event, either or both of the following apply (whether through the operation of netting or set-off or otherwise):

(i) the obligations of the parties:

(A) are accelerated so as to be immediately due and are expressed as an obligation to pay an amount representing the current value of the obligations; or

(B) are terminated and replaced by an obligation to pay such an amount: and

(ii) an account is taken of what is due from each party to the other in respect of those obligations and the party from which the larger amount is due is required to pay to the other party a net amount equal to the balance of the account.

"**winding up proceedings**" for this purpose appears to include voluntary and court winding up procedures as described above.

"**reorganisation measure**" for this purpose appears to include the examinership/examination procedure as described above

The requirements which must be satisfied include:

(a) all collateral provided pursuant to a Collateral Arrangement of which the Agreement or Transactions form part comprises prescribed forms of financial collateral (broadly cash or Financial Instruments);

(b) under the Security Arrangement financial collateral is delivered, transferred, held, registered or otherwise designated so as to be under the control[21] of the collateral taker or a person acting on its behalf and is provided to secure or otherwise cover the performance of obligations that give a right to a cash settlement or the delivery of Financial Instruments, or both;

(c) there must be evidence in writing of the provision of the collateral and all transactions (including any payment or delivery) under the Collateral Arrangement of which the FOA Netting Agreement or, as the case may be, a Clearing Agreement or Transactions form part, which must identify the financial collateral concerned. For this purpose, it is sufficient to prove:

(i) the financial collateral that consists of Financial Instruments, title to which is evidence by entries in a register or account kept by or on behalf of an intermediary, has been credited to or forms a credit in the register or account (which may be kept by the collateral taker or someone on its behalf);

(ii) the cash collateral has been credited to, or forms part of, a designated account.

[21] The level and type of control which is required is not defined in the Collateral Regulations. There is a carve out in the Collateral Regulations which states that a right under a financial collateral arrangement to substitute or withdraw excess financial collateral in favour of the collateral provider does not prejudice the financial collateral that is provided to the collateral taker under the Collateral Regulations. Neither the Irish nor European courts have had to consider the meaning of the control test. The Chancery Division decision of Gray v G-T-P Group Ltd, Re F2G Realisations Limited (in Liquidation) [2010] EWHC 1772 (Ch) would however be of persuasive value. It is likely however that where the collateral is posted to accounts maintained outside of this jurisdiction that 'possession' and 'control' will be determined pursuant to the law of the lex situs jurisdiction.

(d) Each of the Parties to a Collateral Arrangement must be a Qualifying Party.

Regulation 14 of the Collateral Regulations completes insolvency protection by ensuring the recognition of the validity of arrangements entered into up to, and including, the day that insolvency proceedings are commenced. This works to prevent the courts from invalidating, declaring void or reversing a Collateral Arrangements entered into on the brink of insolvency. However, where a Collateral Arrangement or a relevant financial obligation has been provided, on the day on which, but after the moment on which, the winding-up proceedings or reorganisation measures are commenced, the arrangement will only be binding on third parties provided that the collateral taker can proved that it was not aware, and had no reason to believe, that the proceedings or measures had commenced.

Insolvency Regulations

4.43.8 We have described above some of the effects of the Insolvency Regulations. It should be noted that in addition they contain the following provisions:

(a) that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets belonging to the debtor which are situated in another Member State at the time of the opening of the proceedings;

(b) the opening of insolvency proceedings shall not affect the right of creditors to demand set off of their claims against claims of the debtor, where such a set off is permitted by the law applicable to the insolvent debtors claim subject to this not precluding any actions for voidness, voidability or unenforceability; and

(c) without prejudice to (a) above, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market. However this does not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under such law.

Winding-Up Regulations

4.43.9 The Winding-Up Regulations implement the Winding-Up Directive in Ireland and establish for credit institutions to which it applies the general principle, except as expressly provided to the contrary, that Reorganisation Measures, which in Ireland include examinership, and Winding up Proceedings are to be commenced under Irish law in respect of an Irish Licensed Bank (including any branch of that entity in other Member States). Further where such a measure or proceeding is imposed by the competent authority of another Member State, where the credit institution is authorised, then the measure/proceeding is to be recognised without further formality in Ireland in respect of the credit institution (including any branch of the institution in Ireland) as soon as it takes effect under the laws of that other Member State.

The Winding-up Regulations also expressly provides for the effect of a Reorganisation Measure or Winding-Up Proceedings on certain contracts and include express provision that a netting agreement to which a credit institution (which term includes an Irish Licensed Bank and a Foreign Bank) is a party is to be

governed solely by the law of contract that governs such an agreement (Regulation 30 of the Winding-Up Regulations).

We detail below a number of areas where there is a lack of clarity in the wording of this provision. Subject to these and the basis, assumptions and qualifications herein we are of the view that

(A) The FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision are likely to be considered to fall within "Netting Agreement" for this purpose;

(B) The Courts would interpret Regulation 30 of the Winding-up Regulations such that the governing law of the Netting Agreement will apply in determining the contractual terms of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision and the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision regardless of whether a Reorganisation Measure has been imposed or an Insolvency Proceeding has been commenced, subject to our comments below on laws of the jurisdiction of the governing law (being English law) relating to voidance, voidability or unenforceability for fraud or similar reasons; and

(C) As regards the application by the Court of Irish laws relating to voidance, voidability or unenforceability for fraud or similar reasons, in general they are reluctant to disapply them. There are conflicting provisions in the Winding-Up Regulations on this including Regulations 12 and 37. Regulation 37 provides for a disapplication of the Voidability Provisions in circumstances where the person benefitting from the act proves in the winding up or reorganisation proceedings that (a) the act is subject to the laws of another jurisdiction and (b) the law does not allow any means of challenging the proceedings. Based on the application of this provision it is likely that, in the case of a FOA Netting Agreement or, as the case may be, the Clearing Agreement governed by English law and provided that such law does not allow any means of challenging them, such provisions would be disapplied.

(ii) The following are some of the areas where there is a lack of clarity in the drafting of Regulation 30 and there is no judicial guidance on the points:

(A) "**Netting Agreement**" for this purpose is not defined in the Winding-up Regulations and as far as we are aware has only been defined once by the legislature in Ireland in the Netting Act as set out above. The FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision appear to satisfy this definition. Whilst this is our view it is not certain that this statutory definition will be accepted by a Court as the definition for the purposes of

construing "Netting Agreement" as referred to in the Winding-up Regulations. Therefore our opinion cannot be definitive on the point; and

(B) the reference to "**Law of Contract**"[22] is unclear as to what jurisdiction's laws are intended to apply in particular it is not clear whether the requirement of the netting agreement be governed by the specified law requires solely the contractual terms to be governed by that law or whether this includes the enforceability taking account of or regardless of whether a Reorganisation Measure has been imposed or Winding-Up Proceedings commenced.

There are very few decisions of the Courts that offer any direct guidance on the matters covered by this opinion. Accordingly, our conclusions are opinions based on such case law (including decisions of English courts, which are of persuasive authority only in Ireland) as we have considered relevant and on general principles of law.

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

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

Yours faithfully,

Arthur Cox

[22] As such term is used in Regulation 30 of the Winding Up Regulations.

SCHEDULE 1
Investment firms / broker dealers

Subject to the modifications and additions set out in this Schedule 1 (*Investment firms / broker dealers*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are investment firms / broker dealers. For the purposes of this Schedule 1 (*Investment firms / broker dealers*), the terms "investment firm" or "broker dealer" when used herein means a company incorporated under the Irish Companies Acts that either holds an authorisation pursuant to the IIA (an "**IIA Entity**"), or, holds an authorisation as an investment firm pursuant to the MiFID Regulations (a "**MiFID Entity**").

Except where the context otherwise requires:

1. references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules);
2. references to "*section*" are to sections of this Schedule;
3. "**Client Asset Requirements**" those requirements imposed by the Central Bank of Ireland on investment firms who hold client assets (as defined in the Client Asset Requirements of the Central Bank) pursuant to Regulation 79 of the MiFID Regulations and on investment business firms authorised to hold client assets (terms defined therein) pursuant to Section 52 of the IIA;
4. the "**IIA**" means the Investment Intermediaries Act, 1995;
5. "**Irish Companies Acts**" means Companies Acts 1963 to 2005 and Parts 2 and 3 of the Investment Funds, Companies and Miscellaneous Provisions Act 2006, the Companies (Amendment) Act 2009, the Companies (Miscellaneous Provisions) Act 2009 and the Companies (Amendment) Act 2012, all enactments which are to be read as one with, or construed or read together as one with, the Companies Acts and every statutory modification and re-enactment thereof for the time being in force;
6. "**MiFID**" means Directive 2004/39/EC of the European Parliament and of the Council of 21st April 2004 on markets in financial instruments as amended by Directive 2006/31/EC of 5th April 2006 and Directive 2006/73/EC of 10th August 2006 as regards organisational requirements and operating conditions for investment firms and defined terms for Directive 2004/39/EC; and
7. "**MiFID Regulations**" means the European Communities (Markets in Financial Instruments) Regulations 2007 (as amended).

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

"*"**Insolvency Proceedings**" means the procedures listed in section 2.1 of Schedule 1 (Investment firms / broker dealers).*

2. MODIFICATIONS TO OPINIONS

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

2.1 **Insolvency Proceedings:** *Investment firms / broker dealers*

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

2.1.1 those insolvency proceedings set out in the opinion letter as they apply to Irish Companies such that this Schedule 1 (*Investment firms / broker dealers*) shall be read as if such provisions were set out, mutatis mutandis, in full herein;

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

1. the following voluntary procedures are included, "receivership", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager";

3. the following involuntary procedures are included, "compromise", "receivership" and "examinership".

3. **ADDITIONAL QUALIFICATIONS**

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

3.1.1 An IIA Entity may be required pursuant to client money requirements made under Section 52 of the IIA to procure the agreement of the other Party not to set off any amount due from him to the IIA Entity in respect of Transactions made by the IIA Entity for any of its clients whose monies are required to be treated as client monies against any amount due from the IIA Entity. This requirement was maintained by the MiFID Regulations and subsists by virtue of Regulation 79(3) thereof; together with the requirements set down in section 52 of the IIA these form the subject of the Client Asset Requirements.

Supervisory Restrictions

A Party incorporated in or with a branch in Ireland may become subject to the following moratorium, suspension or similar proceedings:

3.1.2 **IIA Entity**

Provisions similar to those described in this opinion letter (Section 21 of the CBA) apply to IIA Entitles (Section 21 of the IIA and Section 22 in respect of a winding up application to Court) and to such entitles whose authorisation has been revoked or who were previously authorised (Section 16 of the IIA).

3.1.3 **MiFID Entity**

Provisions similar to those described in this opinion letter (Section 21 of the CBA) apply to MiFID Entities (Regulation 148 MiFID Regulations and Regulation 150 in respect of a winding up application to Court) and to such entities whose authorisation has been revoked (Regulation 21 MiFID regulations).

3.1.4 Investor Compensation

Provisions similar to those described above apply to certain investment business firms (including an IIA Entity), pursuant to Section 27 of the ICA and Section 28 of the ICA for failure to comply with certain provisions of the ICA.

SCHEDULE 2
Partnerships

Subject to the modifications and additions set out in this Schedule 2 (*Partnerships*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are partnerships. For the purposes of this Schedule 2 (*Partnerships*), "**Partnership**" means a partnership within the meaning of the Partnership Act, 1890 (as amended) (the "**1890 Act**").

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

""*Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 2 (Partnerships)*".

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1.1 that there are no minor partners in the Partnership;

2.1.2 that all partners being individuals are alive and of sound mind and have not been made a ward of court at the time of entry into, and throughout the duration of the Agreements;

2.1.3 that the Partnership is not illegal and remains valid and subsisting during the life of the FOA Netting Agreement or, as the case may be, the Clearing Agreement;

2.1.4 that where the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into with a Partnership during the life of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, the Partnership will remain unchanged;

2.1.5 that the entry into of the FOA Netting Agreement or, as the case may be, the Clearing Agreements and any Transactions by the partners will not breach or be inconsistent with the terms of the partnership agreement and that all partners are capable of performing their part of the partnership agreement; and

2.1.6 that the entry into of the FOA Netting Agreement or, as the case may be, the Clearing Agreements and any Transactions by the partners is an act within the ordinary course of business of the Partnership in accordance with the 1890 Act and does not prejudicially effect the carrying on of the business of the Partnership.

3. MODIFICATIONS TO OPINIONS

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

3.1 Insolvency Proceedings: Partnerships

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Partnership could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

3.1.1 those insolvency proceedings set out in the opinion letter as they apply to Irish Companies such that this Schedule 2 (*Partnerships*) shall be read as if such provisions were set out, mutatis mutandis, in full herein and apply to the insolvency of a corporate partner;

3.1.2 those insolvency proceedings set out in Schedule 4 (*Individuals*) of this opinion letter as they apply to individuals such that this Schedule 2 (*Partnerships*) shall be read as if such provisions were set out, mutatis mutandis, in full herein and apply to the bankruptcy of a partner who is an individual;

3.1.3 1890 Act: bankruptcy of the firm

(a) Every Partnership may be wound up by means of an application to court by a partner seeking a decree of dissolution (section 35 1890 Act). Where a Partnership is unable to pay its debts a partner may seek a court dissolution under Section 35 of the 1890 Act on the grounds that the business of the Partnership can only be carried on at a loss (s35(e)) or on the grounds that it is just and equitable (s35(f)). Such a winding up will usually be compulsory in the sense that not all the partners will wish to have the firm wound up. Unlike the position of creditors of companies under the Irish Companies Acts, a creditor of a Partnership has no standing to seek the winding up of a Partnership under the 1890 Act however, both the Stock Exchange Act 1995 and the IIA give the Central Bank of Ireland the right to apply to court for the dissolution of certain types of Partnership.

3.1.4 Irish Companies Acts

(a) As referred to in this letter opinion under section 344 – 345 of the Irish Companies Acts, a Partnership of eight or more partners may be wound up as an unregistered company. This form of winding up permits a petition to wind up by a creditor of the firm.

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

1. the following voluntary procedures are included, "receivership", "adjudication", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager" and "Official Assignee";

3. the following involuntary procedures are included, "compromise", "adjudication", dissolution, "receivership" and "examinership"; and

4. the words "or commits an act of bankruptcy" are inserted after the words "or is bankrupt or insolvent" where such wording so appears.

4. ADDITIONAL QUALIFICATIONS

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

4.1.1 a Partnership will be automatically dissolved on the bankruptcy of a partner, unless the partners have agreed otherwise (section 33(1), 1890 Act). The 1890 Act fails to legislate for the consequences of insolvency of a corporate partner and it is typically the case that the effects of same are documented in detail in the partnership agreement. The additional qualifications set out in Schedule 4 in respect of Individuals shall apply in respect of an individual;

4.1.2 a Partnership is not a separate legal entity but an aggregate of its members. As a matter of Irish law a contract which is entered into with a Partnership will be a contract with the firm, as from time to time constituted. A partner is an agent of the firm and his other partners for the purposes of the business of the partners;

4.1.3 under the Netting Act, in order to satisfy the definition of a "netting agreement", Transactions would be required, *inter alia,* to be between two parties only. If a Partnership was counterparty to a Transaction, we consider that the relevant Transaction could nevertheless constitute an agreement between two parties only. Our view in this regard is based on Section 1A(2)(a) of the Netting Act, which provides that "party" includes:

> "*any number of persons who share a single, identical interest in the agreement referred to subsequently in this definition if there is no differentiation in the rights and obligations of each of them in that agreement*"

Provided that the rights and obligations of the partners were identical and not subject to any differentiation, and that the other requirements of the Netting Act were satisfied, such an agreement would be capable of constituting a "netting agreement" for the purposes of the Netting Act.

SCHEDULE 3
Insurance Company

Subject to the modifications and additions set out in this Schedule 3 (*Insurance Company*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Companies. For the purposes of this Schedule 3 (*Insurance Company*), "**Insurance Company**" means a company incorporated under the Irish Companies Acts and authorised as a life assurance undertaking under the European Communities (Life Assurance) Framework Regulations 1994 or authorised as a non-life insurance undertaking under the European Communities (Non-Life Insurance) Framework Regulations 1994.

Except where the context otherwise requires:

1. references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules);
2. references to "*sections*" are to sections of this Schedule;
3. "**Insolvency Regulation**" means Council Regulation (EC) No. 1346/2000 of 29th May 2000 on insolvency proceedings;
4. "**Life Regulations**" means the European Communities (Life Assurance) Framework Regulations 1994;
5. "**Non-Life Regulations**" means the European Communities (Non-Life Insurance) Framework Regulations 1994; and
6. "**Winding-Up of Insurance Undertakings Regulations**" means the European Communities (Reorganisation and Winding-up of Insurance Undertakings) Regulations 2003 (S.I No. 168 of 2003).

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

""*Insolvency Proceedings" for the purposes of this Schedule 3 means the procedures listed in section 3.1 of Schedule 3 (Insurance Company)*"".

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1.1 That in respect of an Insurance Company, participation in an FOA Netting Agreement or, as the case may be, the Clearing Agreement and any Transaction is a permissible activity under the Insurance Company's conditions of authorisation, approved investment policy and investment mandate and all other binding rules, regulations, and codes of conduct issued by the Central Bank.

2.1.2 That insofar as an Irish Insurance Company is concerned, the assets which are subject to the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision and Title Transfer Provisions in the FOA Netting Agreement or, as the case may be, the Clearing Agreement are "free assets" of the Insurance Company (i.e. they do not form part of the Irish Insurance Company's regulatory capital).

3. MODIFICATIONS TO OPINIONS

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

3.1 Insolvency Proceedings: Insurance Company

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is Insurance Company could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

3.1.1 those insolvency proceedings set out in the opinion letter as they apply to Irish Companies (i.e. "the Insolvency Proceedings" as defined in paragraph 1.16 of the opinion letter) such that this Schedule 3 (*Insurance Company*) shall be read as if such provisions were set out, mutatis mutandis, in full herein and apply to the insolvency of an Insurance Company. Notwithstanding the foregoing, the opinions given in respect of the Insolvency Regulation at 3.3.10 of our letter opinion shall not apply to Irish Insurance Companies;

3.1.2 **Court Protection – Administration – Insurance (No. 2) Act 1983**

(a) Administration is a Court sanctioned procedure which is available to the Central Bank under Irish insurance legislation in respect of an Insurance Company in distress. On the application of the Central Bank, the Court can appoint an Administrator to an Insurance Company where the Court considers that:

(i) the manner in which the business of the Insurance Company is being or has been conducted has failed to make adequate provision for its debts, including contingent and prospective liabilities, or

(ii) the business of the Insurance Company is being or has been so conducted as to jeopardise the rights and interests of persons arising under policies issued by the insurer, or

(iii) the Insurance Company has become unable to comply with its statutory obligations in a material respect; and

(iv) that the making of such order for administration and the appointment of an Administrator would assist in the maintenance, in the public interest, of the proper and orderly regulation and conduct of insurance business or reinsurance business.

Any Administrator so appointed shall take over the management of the business of the Insurance Company and carry on that business as a going concern with a view to placing the Insurance Company on a sound commercial and financial footing. The Administrator shall have all such powers as may be necessary or incidental to his functions including the sole authority over and direction of all officers and employees of the insurer.

The appointment of an Administrator has the following effect:

(i) the Administrator shall have power to sell the property of the Insurance Company (i.e. the power to dispose of all and any part of

the business, undertaking or assets of an Insurance Company) and all statutory provisions shall apply to him as if he were a liquidator appointed by the Court, and

(ii) the Court shall have all the powers that it would in the event that it had made a winding-up order and appointed a liquidator in respect of the Insurance Company concerned, and

(iii) the Court shall have all the functions that it would have in the event that a petition had been presented for the winding-up of the Insurance Company.

(c) For as long as the appointment of the Administrator shall continue the following provisions, amongst others, shall have effect:

(i) no winding-up proceedings or resolution may be commenced or passed without the prior sanction of the Court;

(ii) no receiver over any part of the property of the Insurance Company may be appointed without the prior sanction of the Court;

(iii) no attachment, sequestration, distress or execution shall be put in force against the property or effects of the insurer without the prior sanction of the Court;

(iv) all the functions of the directors or any committee of management of the Insurance Company shall be performable only by the Administrator and all the powers of the Insurance Company exercisable by general meeting shall be exercisable only by the Administrator subject to the sanction of the Court.

If the Court so declares the Administrator shall not be bound or shall be bound only to the extent or in the manner specified in the declaration by any rule, regulation or other provision of the Insurance Company concerned (whether contained in the memorandum and articles of association of the Insurance Company or in any other document relating to the constitution of the Insurance Company or in any agreement or in any other document whatsoever) restricting or defining the classes or categories of persons to whom the Insurance Company may issue policies or the terms upon which it may issue policies.

3.1.3 **Winding-Up of Insurance Undertaking Regulations:**

The terms of the Winding-Up of Insurance Undertakings Regulations will apply to any insolvency proceeding or reorganisation measure to which the Insurance Company is subject. Regulation 9(1) of the Winding-Up of Insurance Undertaking Regulations provides that "*insurance claims shall, with respect to assets representing the technical reserves of an Insurance Company, take absolute precedence over other claims of the Insurance Company.*"

Pursuant to Regulation 10(1), where an asset representing the technical reserves of an Irish Insurance Company is subject to a right in rem in favour of a creditor or third party, a reservation of title in favour of a creditor or third party, or a demand by a creditor for the set-off of his or her claim against the claim of the Insurance Company, such rights or reservations shall be disregarded if the Insurance Company is being

wound up. There are certain exceptions to these rules and those are set out in paragraph 3.2.1 below.

3.1.4 **Power to issue Directions in case of doubtful solvency:**

The Central Bank may issue directions requiring an Insurance Company to refrain from taking on new business or making new investments of a particular type, to maintain assets at a level equal to its liabilities in respect of business carried on in Ireland, to realise investments of a particular class or description or such further measures as may be required. The circumstances in which the Central Bank can issue such directions include the doubtful solvency of the Insurance Company, or where the Insurance Company has failed to comply with its statutory obligations or made inadequate reinsurance arrangements. Failure to comply with a direction can result in suspension or revocation of the Insurance Company's licence. The Central Bank may also issue directions pursuant to other legislative powers where the Insurance Company has failed to maintain the required minimum solvency amount, failed to comply with the requirements for technical provisions, policyholder interests are prejudiced etc. The Central Bank may also issue directions restricting or prohibiting the Insurance Company from freely disposing of its assets.

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

1. the following voluntary procedures are included, "receivership", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager"; and

3. the following involuntary procedures are included, "compromise", "receivership", "examinership" and "administration".

3.2 **Enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision**

3.2.1 Winding-Up of Insurance Undertakings Regulations

As well as the provisions set out at 3.1.3 above, the Winding-Up of Insurance Undertakings Regulations also contain the following provisions regarding the opening of insolvency proceedings (and therefore, the effect of Regulation 10(1) of the regulations):

(a) the opening of insolvency proceedings shall not affect the right of creditors to demand the set off of their claims against claims of the Insurance Company where such a set off is permitted by the law applicable to the Insurance Company's claim. However, notwithstanding that, the effects of insolvency proceedings on the rights and obligations of the parties to a regulated market shall be governed solely by the law of the Member State applicable to that market; and

(b) that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets belonging to the Insurance Company which are situated in another Member State at the time of the opening of the proceedings;

(c) the opening of insolvency proceedings against an Insurance Company purchasing an asset shall not affect the seller's rights based on reservation of title where at the time of the commencement of such proceedings the asset is situated in a Member State other than the State in which such measures or proceedings were commenced. Furthermore, the opening of winding-up proceedings against an Insurance Company selling an asset, after delivery of that asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where, at the time of the commencement of such proceedings, the asset sold is situated within the territory of a Member State other than the State in which such proceedings were commenced.

In all the foregoing cases, these exceptions do not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under such law.

In circumstances where the relevant asset under the FOA Netting Agreement or, as the case may be, the Clearing Agreement which are the subject of the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision, forms part of the technical reserves of the Irish Insurance Company, Regulation 10(1) of the Winding-Up of Insurance Companies Regulations must be considered. If it applies, it has the effect (subject to the possible application of the statutory exception at 3.2.1(a) above), of defeating the effect of any FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision to the extent such provision affects an asset representing the technical reserves of the Insurance Company.

On balance, in our view, the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision under the FOA Netting Agreement or, as the case may be, the Clearing Agreement would be enforceable in such circumstances, notwithstanding the content of Regulation 10(1) set out above. We take this view for a number of reasons, including the fact that the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision are an integral component of the asset comprised by the FOA Netting Agreement or, as the case may be, the Clearing Agreement and the agreed mechanism for determining payments made in consequence of the Netting Provisions are included in the Agreement. However, the set-off rights which are defeated in Regulation 10(1) in the Winding-Up of Insurance Undertakings Regulations refer to a creditor's "*right to demand*" a set-off of a claim. There is no requirement to "*demand the set-off of a claim*" under a FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision. The FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision constitute a pre-determined contractual mechanism within the FOA Netting Agreement or, as the case may be, the Clearing Agreement. Therefore, we are of the view that it is unaffected by the provisions of the Winding-Up of Insurance Undertakings Regulations.

Furthermore, the Winding-Up of Insurance Undertakings Regulations does not specifically refer to "netting" of amounts and there is EU legislative precedent which suggests that the legislature views "netting" as separate and distinct from "set-off" as referred to in the Winding-Up of Insurance Undertaking Regulations (e.g. the provisions of Directive 2001/24/EC on the Reorganisation and Winding-Up of Credit Institutions).

SCHEDULE 4
Individuals

Subject to the modifications and additions set out in this Schedule 4 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Individuals. For the purposes of this Schedule 4 (*Individuals*), an "individual" means a natural person.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

""*Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 4 (Individuals), where governed by Irish law*".

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1.1 That any Party being a party as described in Schedule 4 is alive, of sound mind and has not been made a ward of court at the time of entry into, and throughout the duration of the Agreements.

3. MODIFICATIONS TO OPINIONS

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

3.1 Insolvency Proceedings: Individuals

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an individual could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

3.1.1 Bankruptcy

The formal insolvency procedure applicable under Irish law to natural persons is bankruptcy.

Irish bankruptcy laws apply to any natural person being a debtor who has (i) his COMI in Ireland (ii) his domicile in Ireland, (iii) is ordinarily resident in Ireland within one year of the petition, (iv) has had a dwelling house, place of business or (v) has carried on a business in Ireland and commits an act of bankruptcy as defined in the Bankruptcy Act, 1998 (the "**1988 Act**") and Annex A to this Schedule 4.

Insofar as a debtor of any other Member State (other than Denmark) is concerned, the Irish courts, may open and recognise bankruptcy proceedings in accordance with the procedures set out in paragraphs 3.1.1(c), (d) and (e)

inclusive in this letter-opinion and in respect of proceedings in all other countries, in accordance with paragraph 3.1.1(h) of this letter-opinion above in respect of Irish Companies.

Bankruptcy - Adjudication – Sections 14 and 15 1988 Act

The Irish bankruptcy procedure may be initiated by a creditor or the debtor himself following the commission of an "act of bankruptcy". By far the most common act of bankruptcy on which a bankruptcy petition might be brought is the failure by the debtor to pay a creditor having been served with a bankruptcy summons. The debtor need not be insolvent and may be adjudicated a bankrupt as a consequence either of inability or unwillingness to discharge his debts. The making of an adjudication order activates certain provisions of the 1988 Act including those relating to fraudulent and voluntary conveyances and disclaimer of onerous property by the Official Assignee.

The adjudication procedure is initiated by the presentation of a petition, which is usually listed for hearing by the Court three to four weeks after the date of presentation of the petition. Where the Court is satisfied that certain requirements have been complied with, it shall by order, adjudicate the debtor bankrupt. Where the petition is presented by the debtor the Court will, on proof that he is unable to meet his engagements with his creditors and that his available estate is sufficient to raise €1,900, by order, adjudicate the debtor bankrupt.

The procedure can last for up to 12 years. When Part 4 of the Personal Insolvency Act 2012 (as amended by the Courts and Civil Law (Miscellaneous Provisions) Act, 2013) is commenced, certain charges will be made to the 1988 Act as follows:

(i) a creditor must be owed more than €20,000 to petition;

(ii) a debtor may only petition if his debts exceed his assets by at least €20,000 and he has made reasonable efforts to reach appropriate arrangements with his creditors by making a proposal in relation to a debt settlement arrangement or a personal insolvency arrangement to them;

(iii) in the case of either type of petition, the court must consider whether the matter could be more appropriately dealt with by way of debt settlement arrangement or a personal insolvency arrangement;

(iv) the automatic discharge period will be reduced from 12 years to 3 years (unless the court upholds a creditor's objections to such discharge); and

(v) persons adjudicated bankrupt more than 3 years earlier will be discharged after 6 months (subject to creditor objections).

3.1.2 **Arrangements under control - Part IV 1988 Act**

Analogous to the comments set out above on examinership is the mechanism of arrangements under the control of the court in respect of debtors being natural persons. In this case, a debtor unable to meet his engagements with his

creditors and wishing to place the state of his affairs before them with a view to making a proposal for the composition of his debts, under the control of the court, may present a petition to the court setting out the reasons for his inability to pay his debts and requesting that his person and property be protected until further order from any action or other process. Note however that secured creditors are not affected by such an order for Court protection nor are they bound by any scheme which might be brought forward pursuant to the arrangement, unless they waive their security.

The petition is made by way of standard form and supported by affidavit of the debtor setting forth the particulars of his assets of every kind and description, and where they are, together with estimated value of such assets and amount of liabilities.

The Court on hearing the petition may by order grant such protection and renew the same from time to time as it thinks fit and the debtor will be immune from any action or process for the duration of the protection.

Effect of the order

Where the order for protection is granted, the debtor cannot without the prior sanction of the Court pledge, part with or dispose of his property or any part thereof save in the ordinary course of trade or business, and this applies so long as the order is in force. The order acts to protect the debtor from execution against his assets, even where there is an execution order in the hands of the sheriff or county registrar.

Proposal for creditors

On the granting of an order for protection the court will direct that the arranging debtor call a preliminary meeting of his creditors to present a statement of assets and liabilities and direct that a private sitting be held before the Court to consider the proposal. Where three-fifths in number and value of the creditors voting at the private sitting accept the proposal, or any modification thereof, it shall be deemed to be accepted by the creditors subject to the approval of the Court. If approved by the Court it will be binding on the debtor and all persons who are creditors at the date of the petition and who had notice of the sitting. The proposal must be to pay a composition on all the debtor's unsecured debts and engagement or on such portion of his partly secured debts as is not covered by security or in such other forms as may be acceptable to his creditors. Preferential creditors must be discharged in full. The proposal may provide for the vesting of all or part of the arranging debtors' property in the Official Assignee either as security for the order or for the purposes of having the property realised and distributed by the Official Assignee in accordance with the terms of the approval.

Where the proposal of the debtor is carried into effect the Court will, on the report of the Official Assignee and in the absence of fraud, grant to the arranging debtor a certificate under the seal of the court which operates as a discharge to the debtor from the claims of creditor who received notice of the arrangement.

The Court may however adjudicate a petitioning debtor bankrupt where he does not comply with a number of requirements set out in Part IV of the 1988

Act, for example, where it appears that the debtor does not wish to make a bona fide arrangement with all his creditors.

3.1.3 **Composition after Bankruptcy – Section 38 of the 1988 Act**

A bankrupt may apply to the Court for a stay on the realisation of his estate to enable an offer of composition to be made by him to his creditors. A date will be fixed by the court for a meeting at which the creditors will vote on the offer. A Court will not ordinarily refuse approval of an offer accepted by three-fifths in number and value of the creditors unless it views the offer as unreasonable. Once the Personal Insolvency Act 2012 is commenced, a creditor whose debt is less than €500 will not be allowed to vote at such a meeting (previously, the figure was €130). Court approval will render the composition binding on the creditors. Where the composition fails the bankruptcy will proceed after the expiry of the term of the stay on realisation or earlier if the court removes the stay.

Statutory Deed of Arrangement – Deeds of Arrangement Act 1887

Where creditors of a bankrupt would not be inclined to accept a composition they have an option whereby they may require that the property of the debtor be assigned to a trustee for realisation and distribution. This arrangement occurs outside the control of the Court. This process will ordinarily be used where the number of creditors is small, and where each of the creditors can rely on all of their number joining in the deed as, a conveyance or assignment of all or substantially all of the debtor's property to a trustee for the benefit of creditors generally will constitute an act of bankruptcy and as such may found a petition for adjudication by a creditor who has not assented to or joined in the deed. The deed must be filed in the Central Office of the High Court within 7 days of execution, failure to do so will render the deed void.

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

1. the following voluntary procedures are included, "receivership", "adjudication" and "compromise";

2. the following appointee is included in the definition of Custodian "receiver and manager" and "Official Assignee";

3. the following involuntary procedures are included, "compromise", "adjudication" and "receivership";

4. the words "or commits an act of bankruptcy" are inserted after the words "or is bankrupt or insolvent" where such wording so appears.

4. ADDITIONAL QUALIFICATIONS

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

4.1.1 Section 57 of the 1988 Act provides for the avoidance of fraudulent preferences. Section 57 states, inter alia, that every conveyance or transfer of property or charge thereon, every payment made, every obligation incurred by an individual unable to pay his debts as they become due from his own money in favour of any creditor, with

a view to giving such creditor a preference over other creditors, shall if the person making the payment, conveyance, transfer, etc. is adjudicated bankrupt within one year[23] of the date of payment, conveyance, transfer etc. be deemed fraudulent and void as against the Official Assignee in Bankruptcy. Where a transaction is set aside pursuant to Section 57 of the 1988 Act, the Court will normally order the return of the property transferred, and the preferred creditor will rank *pari passu* with other unsecured creditors in the distribution of assets. The onus of proof is on the Official Assignee, who must establish that the dominant motive of the debtor was to prefer.

4.1.2 Section 58 of the Act provides that where a debtor commits an act of bankruptcy within one year[24] prior to being adjudicated bankrupt, and thereafter sells any of his property at a price which the Court believes to be below value, or enters into a transaction which would substantially reduce the sum available for distribution to creditors, such a transaction will be void against the Official Assignee. The onus will be on the person benefitting from the transfer to prove that the transaction was bona fide entered into and the other party had not at the time of the transaction notice of any prior act of bankruptcy committed by the bankrupt.

4.1.3 Section 59 of the Act provides that any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall be void as against the Official Assignee if the settler is adjudicated bankrupt within two years[25] after the date of the settlement and, if the settler is adjudicated bankrupt within five years after the date of settlement, the settlement shall be void as against the Official Assignee unless the parties claiming under the settlement prove that the settler was, at the time of making the settlement, able to pay all of his debts without the aid of property comprised in the settlement and that interest of the settler in such property passed to the trustee of such settlement on the execution thereof.

[23] Please note that once Part 4 of the Personal Insolvency Act 2012 is fully commenced, this period will be extended to three years

[24] Please note that once Part 4 of the Personal Insolvency Act 2012 is fully commenced, this period will be extended to three years

[25] Please note that once Part 4 of the Personal Insolvency Act 2012 is fully commenced, this period will be extended to three years

ANNEX A

"act of bankruptcy"

(1) An individual (natural person) (in the 1998 Act called a "debtor") commits an act of bankruptcy in each of the following cases—

(*a*) if in the State or elsewhere he makes a conveyance or assignment of all or substantially all of his property to a trustee or trustees for the benefit of his creditors generally;

(*b*) if in the State or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;

(*c*) if in the State or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudicated bankrupt;

(*d*) if with intent to defeat or delay his creditors he leaves the State or being out of the State remains out of the State or departs from his dwelling-house or otherwise absents himself or evades his creditors;

(*e*) if he files in the Court a declaration of insolvency;

(*f*) if execution against him has been levied by the seizure of his goods under an order of any court or if a return of no goods has been made by the sheriff or county registrar whether by endorsement on the order or otherwise;

(*g*) if the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor.

"**Official Assignee**" means the official assignee in bankruptcy for the time being and his successors as and when appointed, or, where appropriate, the trustee in bankruptcy;

"**1988 Act**" means the Bankruptcy Act 1988;

NB – when section 143 of the Personal Insolvency Act 2012 is fully commenced, the following will be inserted in the definition of "**act of bankruptcy**":

(ca) the individual has been subject as a debtor to a debt settlement arrangement which has been terminated under section 83 of the Personal Insolvency Act 2012;

(cb) the individual has been subject as a debtor to a debt settlement arrangement which under section 84 of the Personal Insolvency Act 2012 is deemed to have failed;

(cc) the individual has been subject as a debtor to a personal insolvency arrangement which has been terminated under section 122 of the Personal Insolvency Act 2012;

(cd) the individual has been subject as a debtor to a personal insolvency arrangement which under section 123 of the Personal Insolvency Act 2012 is deemed to have failed.

SCHEDULE 5
Special fund entities

Subject to the modifications and additions set out in this Schedule 5 (*Special fund entities*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Special fund entities. For the purposes of this Schedule 5 (*Special fund entities*), "Special fund entities" means (i) an investment company incorporated under the Irish Companies Acts and authorised by the Central Bank under Part XIII of the 1990 Act or the UCITS Regulations; (ii) a unit trust duly formed, and authorised by the Central Bank, under the Unit Trusts Act or the UCITS Regulations; (iii) a common contractual fund duly formed, and authorised by the Central Bank, under the Investment Funds, Companies and Miscellaneous Provisions Act 2005 or the UCITS Regulations; (iv) an investment limited partnership duly formed, and authorised by the Central Bank, under the Investment Limited Partnerships Act, 1994; or (v) an Unregulated Trust.

Except where the context otherwise requires:

1. references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules);

2. references to "*sections*" are to sections of this Schedule;

3. "**CCF**" means either (i) a common contractual fund duly formed, and authorised by the Central Bank, under the Investment Funds, Companies and Miscellaneous Provisions Act, 2005, or (ii) a common contractual fund duly formed, and authorised by the Central Bank, under the UCITS Regulations;

4. "**Central Bank**" means the Central Bank of Ireland;

5. "**Constitutive Documents**" means the constitutional documentation establishing the Special fund entity and regulating its operation including without prejudice to the generality of the foregoing its certificate of incorporation, memorandum and articles of association, prospectus, trust deed, deed of constitution, partnership agreement, custodian agreement, management agreement, investment management agreement, and any other relevant service provider agreement, any authorisations and consents from the Central Bank and any other relevant regulator and includes all such documentation which is applicable to the Special fund entity and the corporate trustee or otherwise relevant to the Special fund entity;

6. "**Investment Company**" means either (i) an investment company incorporated under the Irish Companies Acts and authorised by the Central Bank under Part XIII of the 1990 Act, or (ii) an investment company incorporated under the Irish Companies Acts and authorised by the Central Bank under the UCITS Regulations;

7. "**ILP**" means investment limited partnership duly formed and authorised by the Central Bank under the Investment Limited Partnerships Act, 1994;

8. "**UCITS Regulations**" means the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, as amended;

9. "**Unit Trust**" means a unit trust authorised by the Central Bank under the Unit Trusts Act or the UCITS Regulations;

10. "**Unit Trusts Act**" means the Unit Trusts Act, 1990;

11. "**Non-corporate Special fund entity**" means a CCF, an ILP, a Unit Trust or an Unregulated Trust;

12. **"Unregulated Trust"** means a trust established by a trust deed as an express trust, which is not regulated by the Central Bank; and

13. "**1990 Act**" means the Companies Act, 1990.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 5 (Special fund entities)".

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1.1 that the FOA Netting Agreement or, as the case may be, the Clearing Agreement has been duly and properly executed by both Parties provided that in the case of a Non-corporate Special fund entity it has been executed by the Special fund entity's trustee/custodian, general partner, manager and/or investment manager (as applicable) in accordance with its Constitutive Documents, with, in the case of sub-funds of an umbrella fund, appropriate segregation of liability wording;

2.1.2 that the Investment Company, if an umbrella fund authorised before 30 June 2005, has adopted segregated liability between sub-funds; and

2.1.3 that during the life of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, any trustee/custodian, general partner, manager and/or investment manager (as applicable) which executes the Agreement in respect of a Non-corporate Special fund entity will remain unchanged.

3. MODIFICATIONS TO OPINIONS

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

3.1 Insolvency Proceedings: Special fund entities

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Special fund entity could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

3.1.1 Investment Company

(a) those insolvency proceedings set out in the opinion letter as they apply to Irish Companies such that this Schedule 5 (*Special fund entities*), shall be read as if such provisions were set out, mutatis mutandis, in full herein and shall apply as appropriate to the insolvency of an Investment Company.

3.1.2 Unit Trust

(a) the provisions governing the winding-up of a Unit Trust will be set out in the trust deed constituting the Unit Trust.

(b) Unit Trusts have trustees which are regulated by the Central Bank. The assets of the Unit Trust are held on a segregated basis by the trustee and in the event of the insolvency of the trustee should be ring-fenced. The distribution of assets of a Unit Trust occurs in accordance with the provisions of the trust deed constituting the Unit Trust. These usually provide for the payment of trust assets pro rata to unitholders after discharge of the payment of the liabilities of the Unit Trust (including any trustee liens over the assets of the trust). In the event of security having been granted over the assets of the Unit Trust, this will be dealt with in accordance with the terms of the security document creating the security. Usually the secured creditor should rank ahead of the ordinary unsecured creditors of the Unit Trust, with the costs of the realisation by the secured creditor usually being paid before the secured creditors claim but after any trustee lien. In the case of a deficiency of trust assets, subject to the terms of the trust deed, the trustee will be liable for any loss arising from its negligence, fraud, bad faith, wilful default or recklessness (which is the standard typically provided for in a non-UCITS trust deed) in the performance of its duties in the case of a Unit Trust authorised under the Unit Trusts Act, and for any loss arising from its unjustifiable failure to perform or its improper performance of its duties in the case of a Unit Trust authorised under the UCITS Regulations.

3.1.3 ILP

(a) an ILP is wound up by the general partners in accordance with the provisions of the partnership agreement unless the Irish courts otherwise order on the application of a partner or creditor in accordance with Section 38 of the Investment Limited Partnerships Act 1994.

(b) Section 38(3) of the Investment Limited Partnerships Act, 1994 provides that Part X of the Companies Act, 1963 (i.e., the provisions governing the winding-up of unregistered companies; see paragraph 3.1.1 (f) of the opinion letter) shall, with certain modifications, apply to the winding-up of an ILP by the court as it would to an unregistered company irrespective of the number of partners.

3.1.4 CCF

(a) the provisions governing the winding-up of a CCF will be set out in the deed of constitution constituting the CCF.

(b) CCFs have custodians which are regulated by the Central Bank. The assets of the CCF are held on a segregated basis by the custodian and in the event of the insolvency of the custodian should be ring-fenced. The distribution of assets of a CCF occurs in accordance with the provisions of the deed of constitution constituting the CCF. These usually provide for the payment of fund assets pro rata to unitholders after discharge of the payment of the liabilities of the CCF (including any custodian liens over the assets of the fund). In the event of security having been granted by the CCF, this will be dealt with in accordance with the terms of the security document creating the

security. Usually the secured creditor should rank ahead of the ordinary unsecured creditors of the CCF, with the costs of the realisation by the secured creditor usually being paid before the secured creditors claim but after any custodian lien.

3.1.5 Unregulated Trust

(a) Unregulated Trusts have corporate trustees and detailed in our opinion at 3.1 as it applies to Irish Companies are the insolvency procedures which apply to corporate trustees with the corporate structures detailed therein. These rules are relevant to the distribution of the assets of the trustee and not the trust assets themselves. A liquidator of a trustee apparently has the power to conduct a trusteeship and as a practical matter may distribute trust assets to avoid the need to appoint a new trustee. The distribution of trust assets in the case of an Unregulated Trust occurs in accordance with the provisions of the trust deed constituting the Unit Trust. These usually provide for the payment of trust assets pro rata to beneficiaries after discharge of the payment of the liabilities of the trust. In the event of security having been granted by the Unit Trust, this will be dealt with in accordance with the terms of the security document creating the security. Usually the secured creditor should rank ahead of the ordinary unsecured creditors of the trust, with the costs of the realisation by the secured creditor usually being paid before the secured creditors claim. In the case of a deficiency of trust assets the trustee can have personal liability for the deficit subject to any limited recourse provisions of the trust deed or under the contract where the liability was incurred.

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

1. the following voluntary procedures are included, "receivership", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager";

3. the following involuntary procedures are included, "compromise", "receivership" and "examinership"

4. ADDITIONAL QUALIFICATIONS

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

4.1.1 As a trust will typically be wound up in accordance with the provisions of the trust deed, and an ILP will typically be wound up in accordance with the provisions of the partnership agreement and a CCF will typically be wound up in accordance with the provisions of the deed of constitution, same will need to be reviewed on a case by case basis to ensure that the events specified in the Insolvency Events of Default Clause adequately capture the winding up mechanic.

4.1.2 It should be noted that the requirement in the Netting Act for two parties envisages that each is a person constituting one of the parties to the agreement.

4.1.3 A Unit Trust is constituted by a trust deed entered into by a management company and a trustee, but beneficial ownership of the trust remains with the Unit Trust's

unitholders. A Unit Trust does not have separate legal personality and contracts in relation to the trust or a particular sub-fund are entered into by the trustee and / or the management company in respect of the trust or a particular sub-fund of the trust.

4.1.4 Similarly, a CCF is constituted by a deed of constitution entered into by the management company and the custodian, but beneficial ownership of the CCF's assets remains with the unitholders and each unitholder in the CCF is entitled to an undivided co-ownership interest as a tenant in common with the other unitholders in the assets of the CCF. A CCF is an unincorporated body and therefore does not have legal personality. Contracts in relation to the CCF or a particular sub-fund are entered into by the custodian and/ or management company on behalf of the CCF or a particular sub-fund of the CCF.

4.1.5 An ILP does not have separate legal personality and contracts in relation to the ILP are entered into by the general partner or by the custodian on behalf of the ILP.

4.1.6 Segregation of liability between sub-funds of a Unit Trust or a CCF constituted as an umbrella fund (ILPs cannot be established as umbrella funds) is provided for in the trust deed or deed of constitution respectively, and is typically also agreed as a matter of contract in agreements entered into by the management company or trustee/custodian on behalf of the Unit Trust or CCF respectively.

4.1.7 There is no express recognition of the fact that Non-corporate Special fund entities act through other legal persons in the Netting Act. Notwithstanding this we are of the view that the Unit Trust, CCF or ILP acting through its custodian/trustee, management company or general partner as a party to the Transaction should constitute a party for the purposes of the Netting Act.

4.1.8 An entity which holds an authorisation under the UCITS Regulations may not invest directly in commodities or in financial derivative instruments on commodities but it may gain exposure to commodities by investing in commodities financial indices which comply with the requirements of the Central Bank or through financial derivative instruments on such indices.

4.1.9 Under the Netting Act, in order to satisfy the definition of a "netting agreement", the FOA Netting Agreement or, as the case may be, Clearing Agreement would be required, *inter alia*, to be between two parties only. In respect of an entity listed at 3.1.1 – 3.1.5 above where there may be multiple parties (for example, custodian/trustee and management company) contracting for and on behalf of the Special fund entity as counterparty to a FOA Netting Agreement or, as the case may be, Clearing Agreement, we consider that the relevant Agreement could nevertheless constitute an agreement between two parties only. Our view in this regard is based on Section 1A(2)(a) of the Netting Act, which provides that "party" includes:

> "*any number of persons who share a single, identical interest in the agreement referred to subsequently in this definition if there is no differentiation in the rights and obligations of each of them in that agreement*"

Provided that the rights and obligations of the partners were identical and not subject to any differentiation, and that the other requirements of the Netting Act were satisfied, such an agreement would be capable of constituting a "netting agreement" for the purposes of the Netting Act. There is no decided case-law on this point.

4.1.10 Pursuant to Regulation 131 of the UCITS Regulations, the Central Bank has the power to give a direction in writing to the management company, investment company or trustee requiring it to wind-up an Investment Company, a Unit Trust or a CCF, irrespective of whether the Special fund entity is authorised under the UCITS Regulations or the relevant non-UCITS legislations (i.e., the 1990 Act, the Unit Trusts Act, or the Investment Funds, Companies and Miscellaneous Provisions Act, 2005) where the Central Bank is of the opinion that:

(a) it is in the public interest;

(b) it is in the interests of the orderly and proper regulation of the Special fund entity;

(c) any of the requirements for authorising the Special fund entity are no longer satisfied; or

(d) the management company, investment company or trustee of such Special fund entity:

(i) has become or is likely to become unable to meet its obligations to its creditors;

(ii) has contravened any provision of the UCITS Regulations, or has failed to comply with any condition or requirement imposed under the UCITS Regulations by the Central Bank, or in purported compliance with any such provision, has provided the Central Bank with information that it knows to be false, inaccurate or misleading;

(iii) is not maintaining adequate capital resources having regard to the volume and nature of its business; or

(iv) no longer complies with the capital or other financial requirements imposed by the Central Bank from time to time.

4.1.11 Similarly, pursuant to Section 33 of the Investment Limited Partnerships Act, 1994, the Central Bank has the power to give a direction to wind-up an ILP.

4.1.12 Pursuant to Regulation 49 of the European Union (Alternative Investment Fund Managers) Regulations 2013, the Central Bank has the power to give certain directions to any Special fund entity which is an alternative investment fund ("**AIF**") under the European Union (Alternative Investment Fund Managers) Regulations 2013. These directions include:

(a) to suspend, for such period not exceeding 12 months as is specified in the direction, any one or more of the following: (i) the provision of any financial service, or description of financial service, specified in the direction; (ii) the making of payments to which clause (i) does not relate or any such payments or description of such payments specified in the direction; (iii) the acquisition or disposal of any assets or liabilities, or description of assets or liabilities, specified in the direction; (iv) entering into transactions or agreements, or description of transactions or agreements, specified in the direction, or entering into them except in specified circumstances or to a specified extent; (v) soliciting business from persons of a class specified in the direction; (vi) carrying on business in a manner specified in the direction or otherwise than in a manner so specified;

(b) to dispose of, on terms specified in the direction, assets or liabilities so specified, or a part or parts of its business so specified, within such period as may be so specified;

(c) to raise and maintain such capital or other financial resources as may be specified in the direction;

(d) to make such modifications to its systems and controls as may be specified in the direction;

(e) to make such modifications to its business practices and dealings with third parties as may be specified in the direction;

(f) to comply with the condition or requirement imposed under the European Union (Alternative Investment Fund Managers) Regulations 2013;

Where a direction is given under Regulation 49 in respect of a Specified fund entity which is considered an AIF so provides:

(a) no relevant proceedings[26] may be commenced or continued, and

(b) no assets of the regulated financial service provider or related undertaking may be attached, sequestered or otherwise distrained,

except with the prior approval of the High Court in Ireland while the direction remains to be complied with.

[26] "Relevant proceedings" means (a) proceedings relating to the winding-up or dissolution of the AIF; (b) receivership or bankruptcy proceedings of which the AIF, or (c) any other proceedings under which an assignee or other person becomes responsible for the affairs of the AIF pending the ceasing to carry on business

SCHEDULE 6
Trusts

Subject to the modifications and additions set out in this Schedule 6 (*Trusts*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Trusts. For the purposes of this Schedule 6 (*Trusts*), "Trust" means a trust established under principles of Irish law and excludes unit trusts which are dealt with in Schedule 5 (*Special fund entities*) and also excludes Pension Schemes which are dealt with in Schedule 7 (*Pension Schemes*).

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

""*Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 6 (Trusts)*".

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1.1 That the Trust has been validly created and constituted as a matter of Irish law pursuant to the terms of a trust deed.

2.1.2 That during the life of the FOA Netting Agreement or, as the case may be, Clearing Agreement, any trustee will remain unchanged in respect of a Party which is a trust or trustee.

3. MODIFICATIONS TO OPINIONS

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

3.1 Insolvency Proceedings: Trusts

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Trust could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

3.1.1 A trust will typically be wound up in accordance with the provisions of the instruments constituting the trust (the "**Trust Deed**") and same will need to be reviewed on a case by case basis.

3.1.2 Where a Trust has a corporate trustee the procedures listed in section 3.1 as they apply to Irish Companies are the insolvency procedures which apply to corporate trustees with the corporate structures detailed therein. These rules are relevant to the distribution of the assets of the trustee and not the trust assets themselves. A liquidator of a trustee apparently has the power to conduct a trusteeship and as a practical matter may distribute trust assets to avoid the need to appoint a new trustee. The distribution of trust assets in the case of an Unregulated Trust occurs in accordance with the provisions of the trust deed constituting the Unit Trust. These

usually provide for the payment of trust assets pro rata to beneficiaries after discharge of the payment of the liabilities of the trust. In the case of a deficiency of trust assets the trustee can have personal liability for the deficit subject to any limited recourse provisions of the Trust Deed or under the contract where the liability was incurred.

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

1. the following voluntary procedures are included, "receivership", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager";

3. the following involuntary procedures are included, "compromise", "receivership" and "examinership".

4. ADDITIONAL QUALIFICATIONS

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

4.1.1 A trust does not have legal personality and cannot enter into contractual arrangements in its own right. Transactions are concluded by its trustees or trustee (the "**Trustee**"), being persons who and/or an entity that holds the legal title to the assets of the trust pursuant to the Trust Deed.

4.1.2 As a Trust will typically be wound up in accordance with the provisions of the Trust Deed, the Trust Deed will need to be reviewed on a case by case basis to ensure that the events specified in the Insolvency Events of Default Clause adequately capture the winding up mechanic.

4.1.3 The Trustee may only act in accordance with the powers conferred on the Trustee by statute and under the Trust Deed. The principal legislation for this purpose is the Trustee Act 1893, as amended (the "**Trustee Act**"), The Trustee Act confers a number of basic powers on Trustees. However, it is the Trust Deed that will generally determine the precise ambit of the Trustee's powers, especially as regards the transaction of financial arrangements (the Trust Deed should specifically provide the Trustee with express power to enter into such transactions). The provisions of the Trust Deed will be subject to such limitations as are imposed by other applicable law in a given case.

4.1.4 **Multiple Trustees**

Under the Netting Act, in order to satisfy the definition of a "netting agreement", FOA Netting Agreement or, as the case may be, Clearing Agreement would be required, *inter alia*, to be between two parties only. In respect of a Trust where there are multiple Trustees contracting for and on behalf of the Trust as counterparty to an Agreement, we consider that the relevant Agreement could nevertheless constitute an agreement between two parties only. Our view in this regard is based on Section 1A(2)(a) of the Netting Act, which provides that "party" includes:

> "*any number of persons who share a single, identical interest in the agreement referred to subsequently in this definition if there is no*

differentiation in the rights and obligations of each of them in that agreement"

Provided that the rights and obligations of the partners were identical and not subject to any differentiation, and that the other requirements of the Netting Act were satisfied, such an agreement would be capable of constituting a "netting agreement" for the purposes of the Netting Act. There is no decided case-law on this point.

SCHEDULE 7
Pension Schemes

Subject to the modifications and additions set out in this Schedule 7 (*Pension Schemes*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Pension Schemes. For the purposes of this Schedule 7 (*Pension Schemes*), "Pension Scheme" means a Revenue[27] exempt approved occupational pension fund established under Irish law as a trust.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

"*"Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule 7 (Pension Schemes".*

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: Pension Scheme

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Pension Scheme could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

2.1.1 a Pension Scheme will be established as a trust under Irish law. Pension schemes established as trusts are outside the scope of insolvency legislation. The pension equivalent to insolvency would be a winding-up in deficit. The Pension Scheme does not have legal personality and where there is a deficiency of trust assets, the trustees can have personal liability for the deficit. Trustees, however, are generally protected by exoneration and indemnity provisions both under the governing deeds and under some limited statutory protections provided the trustee has acted honestly, reasonably and in good faith. Where a trust has a corporate trustee the procedures listed in section 3.1 of this opinion letter as they apply to Irish Companies are the insolvency procedures which apply to corporate trustees with the corporate structures detailed therein.

2.1.2 while the provisions of the Pensions Act 1990, as amended (the "**Pensions Act**") provide for priorities on the winding up of a Pension Scheme (section 48) the terms of the trust deed and rules will set out the primary triggers effect and mechanisms (to the extent that these are not inconsistent with those set out in the Pensions Act) for the winding up of a Pension Scheme and these will need to reviewed on a case by case basis.

[27] The Office of the Revenue Commissioners

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

1. the following voluntary procedures are included, "receivership", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager";

3. the following involuntary procedures are included, "compromise", "receivership", "examinership" and "a direction requiring the suspension of business, the making of payments or the acquisition or disposal of assets".

3. ADDITIONAL QUALIFICATIONS

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

3.1.1 A Pension Scheme is a trust and, as such, does not have legal personality and cannot enter into contractual arrangements in its own right. Transactions in respect of a Pension Scheme are concluded by its trustees or trustee (the "**Trustee**"), being persons who and/or an entity that holds the legal title to the assets of the Pension Scheme pursuant to the instruments constituting the trust and rules related to it (the "**Trust Deed**").

3.1.2 The Trustee may only act in respect of the Pension Scheme in accordance with the powers conferred on the Trustee by statute and under the Trust Deed. The principal legislation for this purpose is the Trustee Act 1893, as amended (the "**Trustee Act**"), the Pensions Act and the Taxes Consolidation Act 1997 (as amended). The Trustee Act confers a number of basic powers on Trustees. However, it is the Trust Deed that will generally determine the precise ambit of the Trustee's powers, especially as regards the transaction of financial arrangements (the Trust Deed should specifically provide the Trustee with express power to enter into such transactions). The provisions of the Trust Deed will be subject to such limitations as are imposed by other applicable law, in particular the Pensions Act and the Occupational Pension Schemes (Investment) Regulations 2006 to 2010 (the "**Pension Investment Regulations**").

3.1.3 As a trust will typically be wound up in accordance with the provisions of the Trust Deed (and subject to the provisions of the Pensions Act), (and having regard to our comments at 2.1 above in respect of Pension Schemes established as a trust under Irish law) same will need to be reviewed on a case by case basis to ensure that the events specified in the Insolvency Events of Default Clause adequately capture the winding up mechanism.

3.1.4 **Legislative and regulatory restrictions**

Section 59(1)(b) of the Pensions Act imposes a duty on the Trustee of a Pension Scheme to provide for the proper investment of the Pension Scheme's resources in accordance with the Pension Investment Regulations and, subject to those Regulations, in accordance with the rules of the Pension Scheme. The Pension Investment Regulations impose a number of limitations on the discretion of the Trustee regarding the categories of investments available to it.

Articles 6(3) and (4) provide that the assets of the Pension Scheme must be invested in a manner designed to ensure the security, quality, liquidity and profitability of the portfolio as a whole so far as is appropriate having regard to the nature and duration of the expected liabilities of the Pension Scheme. Assets must be invested predominantly on regulated markets and investment in assets which are not admitted to trading on a regulated market must, in any event, be kept to a prudent level. Article 6(5) provides that the assets of a Pension Scheme must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a whole. Investments in assets issued by the same issuer or by issuers belonging to the same group must not expose the Pension Scheme to excessive risk concentration.

Section 61(B) of the Pensions Act and article 4 of the Occupational Pension Schemes (Investment) Regulations 2006 impose restrictions on borrowings by trustees of occupational pension schemes other than by one member arrangements – they may not borrow save for liquidity purposes and only on a temporary basis.

3.1.5 Multiple Trustees

Under the Netting Act, in order to satisfy the definition of a "netting agreement", the FOA Netting Agreement or, as the case may be, Clearing Agreement would be required, *inter alia*, to be between two parties only. In respect of a Pension Scheme where there are multiple Trustees contracting for and on behalf of the Pension Scheme as counterparty to a FOA Netting Agreement or, as the case may be, Clearing Agreement, we consider that the relevant FOA Netting Agreement or, as the case may be, Clearing Agreement could nevertheless constitute an agreement between two parties only. Our view in this regard is based on Section 1A(2)(a) of the Netting Act, which provides that "party" includes:

> "*any number of persons who share a single, identical interest in the agreement referred to subsequently in this definition if there is no differentiation in the rights and obligations of each of them in that agreement*"

Provided that the rights and obligations of the partners were identical and not subject to any differentiation, and that the other requirements of the Netting Act were satisfied, such an agreement would be capable of constituting a "netting agreement" for the purposes of the Netting Act. There is no decided case-law on this point.

SCHEDULE 8
Building Societies

Subject to the modifications and additions set out in this Schedule 8 (*Building Societies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Building Societies.

For the purposes of this Schedule 8 (*Building Societies*), "**Building Society**" means a Building Society incorporated or registered or deemed such (pursuant to section 124(2)) under the Building Society Acts. "**Building Society Acts**" means the Building Societies Acts 1989 (the "**BSA**") to 2006. The "**1989 Act**" means the Building Societies Act 1989.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.16.1 is deemed deleted and replaced with the following:

""*Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule 8 (Building Societies)*".

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: Building Societies

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Building Society could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as set out for Irish Companies in this opinion letter where a Building Society may only be wound up in accordance with section 109(1) of the BSA which provides that:

> "*Subject to this section, a building society may be would up in accordance with the Companies Acts and accordingly those Acts shall, subject to any necessary modifications, apply as if the society were a company limited by shares.*"

A Building Society may not be wound up as an unregistered company for the purposes of section 345 of the 1963 Act.

Part 7 of the Resolution Act

Building Societies will fall under the ambit of the Resolution Act and the Stabilisation Act and any comments made in our letter opinion in respect thereof shall apply as if set out in full herein.

The terms of Part 7 of the Resolution Act apply in full to authorised credit institutions and Relevant Institutions within the meaning of the Stabilisation Act. This allows for the presentation, advertisement or any other step or publication concerning a person's intention to cause an authorised credit institution to be wound up only where the person has given 10 days written notice to the Central Bank of his or her intention to do so and the Central Bank has

confirmed in writing that is has no objection to the person doing so. Only a liquidator approved by the Central Bank may be appointed to an authorised credit institution.

If an authorised credit institution is being wound up voluntarily and the Central Bank has reason to believe that any of the grounds set out in section 77 of the Resolution Act apply, being (i) that in the opinion of the Central Bank the winding-up would be in the public interest; (ii) that the credit institution is or may be unable to meet its obligations to its creditors (iii) failure to comply with certain directions of the Central Bank (iii) revocation of authorisation or licence or that (in the case of the holder of a licence under section 9 of the CBA) that it has ceased to carry on a banking business (iv) the Central Banks considered that it is in the interest of persons having deposits, then the Central Bank may apply to the Court to have that credit institution would up by the Court.

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

1. the following voluntary procedures are included, "receivership", "compromise" and "examinership";

2. the following appointee is included in the definition of Custodian "receiver and manager";

3. the following involuntary procedures are included, "compromise", "receivership" and "examinership".

3. ADDITIONAL QUALIFICATIONS

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

3.1.1 ICS Building Society is currently the only registered Building Society in Ireland. The Stabilisation Act (as detailed in full in this letter opinion hereof) applies to ICS Building Society.

Supervisory Restrictions

A Party incorporated in or with a branch in Ireland may become subject to the following moratorium, suspension or similar proceedings:

3.1.2 Section 40BSA

Similar provisions to Section 21 CBA (as set out in this opinion letter) apply, pursuant to Section 40 BSA, to a Building Society. Where the Central Bank of Ireland (the "**Central Bank**") is satisfied that one of a number of circumstances has occurred in relation to s Building Society, it may give a written decision to it to suspend for such period, not exceeding six months (if confirmed by the High Court the relevant period can be extended for up to twelve months), as shall be specified in the direction, all or any of the following:

(a) the carrying on of the ordinary business of the Building Society;

(b) the making of payments to which subparagraph (a) does not relate;

(c) the acquisition or disposal of other assets or liabilities,

which have not been authorised by the Central Bank.

The circumstances in which a direction may be given include where the Central Bank is of the opinion that:

(i) it is expedient in the public interest or in order to protect the funds of shareholders or depositors;

(ii) the Building Society:

(A) has not made use of the authorisation granted to it by the Central Bank pursuant to the 1989 Act within 12 months of the date on which it has been granted;

(B) has ceased to engage in the business of a building society for more than 6 months;

(C) has ceased to pursue as one of its objects the making of housing loans within the meaning of the 1989 Act;

(D) has, or is likely to, become unable to meet its obligations to its creditors and shareholders or suspends payments lawfully due by it;

(E) has failed to send to the Central Bank copies of its annual accounts as required by the 1989 Act;

(F) has failed to comply with a condition attached to its authorisation or to an approval to exercise a power under the 1989 Act;

(G) has failed to comply with a requirement of the 1989 Act or a requirement condition of, or notice from, the Central Bank in the exercise of its powers under the 1989 Act;

(H) has been convicted on indictment of any offence under any provision of the 1989 Act or an offence involving fraud, dishonesty or breach of trust;

(I) no longer possesses, is not maintaining, or is unlikely to be in a position to maintain, adequate capital resources and, in particular, no longer provides security for the funds entrusted to it;

(J) obtained its authorisation through false statements or any other irregular means; or

(K) since the Building Society's authorisation was granted or deemed granted, the circumstances relevant to the grant have changed and are such that, if an application for authorisation were made in the changed circumstances, it would be refused.

While a direction under Section 40 of the 1989 Act is in force, no winding up proceedings may be commenced or resolution for winding-up passed in relation to the

Building Society, no receiver over its property (or any part of its property) or its undertaking may be appointed and the property of the Building Society may not be attached, sequestered or otherwise distrained except with the prior sanction of the High Court.

The provisions described are silent on whether there exist any rights of the Central Bank to give directions in relation to provisions such as the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision. It does not appear to us that the exercise by a Party of its rights under the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision should come within the powers of the Central Bank to give directions nor should it come within matters which are expressly restricted by the relevant legislation.

ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

1. Master Netting Agreement - One-Way (1997 version) (the "**One-Way Master Netting Agreement 1997**")

2. Master Netting Agreement - Two-Way (1997 version) (the "**Two-Way Master Netting Agreement 1997**")

3. Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Long-Form One-Way Clauses 2007**")

4. Short Form Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Short-Form One-Way Clauses 2007**")

5. Short Form Default, Netting and Termination Module (One-Way Netting) (2009 version) (the "**Short-Form One-Way Clauses 2009**")

6. Short Form Default, Netting and Termination Module (One-Way Netting) (2011 version) (the "**Short-Form One-Way Clauses 2011**")

7. Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Long-Form Two-Way Clauses 2007**")

8. Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Long-Form Two-Way Clauses 2009**")

9. Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Long-Form Two-Way Clauses 2011**")

10. Short Form Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Short-Form Two-Way Clauses 2007**")

11. Short Form Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Short-Form Two-Way Clauses 2009**")

12. Short Form Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Short-Form Two-Way Clauses 2011**")

13. Professional Client Agreement (2007 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2007**")

14. Professional Client Agreement (2009 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2009**")

15. Professional Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2011**")

16. Professional Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2007**")

17. Professional Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting

Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2009**")

18. Professional Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2011**")

19. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2007**")

20. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2009**")

21. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2011**")

22. Retail Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2007**")

23. Retail Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2009**")

24. Retail Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2011**")

25. Eligible Counterparty Agreement (2007 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2007**")

26. Eligible Counterparty Agreement (2009 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2009**")

27. Eligible Counterparty Agreement (2011 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2011**")

28. Eligible Counterparty Agreement (2007 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2007**")

29. Eligible Counterparty Agreement (2009 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2009**")

30. Eligible Counterparty Agreement (2011 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2011**")

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

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

ANNEX 2
List of Transactions

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

(A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:

(i) a contract made on an exchange or pursuant to the rules of an exchange;

(ii) a contract subject to the rules of an exchange; or

(iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,

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

(iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or

(v) any other Transaction which the parties agree to be a Transaction;

(B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;

(C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;

(D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.

(E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC[28], including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

[28] Non-EU counsel should discuss with Clifford Chance if clarification is needed.

ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

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

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

(a) Clause 8(b) (*Clearing Member Events*), 8(c) (CCP Default) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

(a) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 8 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

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

(a) on the terms of the FOA Netting Agreement when used (i) in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or (ii) in conjunction with a Clearing Module Netting Provision and/or an Addendum Netting Provision and with or without a Clearing Module Set-Off Provision and/or an Addendum Set-Off Provision;

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

(c) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.

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

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

(a) Clause 5.2 (*Firm Events*), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

(a) Clause 5.5 (*Set-Off*) of the FOA Clearing Module; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

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

(a) for the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*) and 3.6 (*Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;

(b) for the purposes of paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value";

(c) for the purposes of paragraph 3.5 (*Enforceability of the Addendum Netting Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value";

(d) for the purposes of paragraph 3.7.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;

(e) for the purposes of paragraph 3.7.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;

(f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;

(g) for the purposes of paragraph 3.8.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provision;

(h) for the purposes of paragraph 3.9 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;

(i) for the purposes of paragraph 3.10.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and

(j) for the purposes of paragraphs 3.10.3 and 3.10.4, the Title Transfer Provisions;

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

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

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

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

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

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

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

(a) on the terms of the forms specified in Annex 1 to this opinion letter or which has broadly similar function to any of them, when not used in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum and/or a Clearing Module Netting Provision and/or an Addendum Netting Provision;

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

(c) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provision, and with or without the Title Transfer Provisions, with no Adverse Amendments.

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

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

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

(a) in relation to the terms of the Long Form One-Way Clauses 2007 and the Long Form Two-Way Clauses, Clause 2.2 (***Liquidation Date***), Clause 2.4 (***Calculation of Liquidation Amount***) and Clause 2.5 (***Payer***);

(b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (***Liquidation Date***), Clause 2.3 (***Calculation of Liquidation Amount***) and Clause 2.4 (***Payer***);

(c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;

(d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (***Liquidation Date***), Clause 10.3 (***Calculation of Liquidation Amount***) and Clause 10.4 (***Payer***);

(e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***);

(f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***); or

(d) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

"**FOA Set-off Provisions**" means:

(a) the "**General Set-off Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (***Set-off***);

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (***Set-off***);

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (***Set-off***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (***Set-off***);

(vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);

(viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***); or

(ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or

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

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (***Set-off on default***);

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (***Set-off upon default or termination***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (***Set-off on default***),

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (***Set-off upon default or termination***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (***Set-off on default***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (***Set-off upon default or termination***); or

(vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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

(ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);

(iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);

(iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);

(v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or

(vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and

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

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

(ii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);

(iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or

(iv) any modified version of such clauses provided that it includes at least those parts of paragraph 4(b) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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

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

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

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

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

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

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

"**Rehypothecation Clause**" means:

(e) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);

(f) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);

(g) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); or

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

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

"**Non-Cash Security Interest Provisions**" means:

(a) the "**Non-Cash Security Interest Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (***Security interest***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (***Security interest***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (***Security interest***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (***Security interest***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (***Security interest***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (***Security interest***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (***Security interest***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (***Security interest***);

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

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

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

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (***Power of sale***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (***Power of sale***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (***Power of sale***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (***Power of sale***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (***Power of sale***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (***Power of sale***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (***Power of sale***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (***Power of sale***);

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

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"**Client Money Additional Security Clause**" means:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement); or

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

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

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

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

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

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

ANNEX 4

PART 1
CORE PROVISIONS

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

1. **FOA Netting Provision:**

a) "**Liquidation date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, then the other party (the "**Non-Defaulting Party**") may, by notice to the party in default (the "**Defaulting Party**"), specify a date (the "**Liquidation Date**") for the termination and liquidation of Netting Transactions in accordance with this clause.

b) **Calculation of Liquidation Amount:** Upon the occurrence of a Liquidation Date:

i. neither party shall be obliged to make any further payments or deliveries under any Netting Transactions which would, but for this clause, have fallen due for performance on or after the Liquidation Date and such obligations shall be satisfied by settlement (whether by payment, set-off or otherwise) of the Liquidation Amount;

ii. the Non-Defaulting Party shall as soon as reasonably practicable determine (discounting if appropriate), in respect of each Netting Transaction referred to in paragraph (a), the total cost, loss or, as the case may be, gain, in each case expressed in the Base Currency specified by the Non-Defaulting Party as such in the Individually Agreed Terms Schedule as a result of the termination, pursuant to this Agreement, of each payment or delivery which would otherwise have been required to be made under such Netting Transaction; and

iii. the Non-Defaulting Party shall treat each such cost or loss to it as a positive amount and each such gain by it as a negative amount and aggregate all such amounts to produce a single, net positive or negative amount, denominated in the Non-Defaulting Party's Base Currency (the "**Liquidation Amount**").

c) **Payer:** If the Liquidation Amount is a positive amount, the Defaulting Party shall pay it to the Non-Defaulting Party and if it is a negative amount, the Non-Defaulting Party shall pay it to the Defaulting Party. The Non-Defaulting Party shall notify the Defaulting Party of the Liquidation Amount, and by which Party it is payable, immediately after the calculation of such amount."

2. **General Set-Off Clause:**

"**Set-off:** Without prejudice to any other rights to which we may be entitled, we may at any time and without notice to you set off any amount (whether actual or contingent, present or future) owed by you to us against any amount (whether actual or contingent, present or future)

owed by us to you. For these purposes, we may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained."

3. **Margin Cash Set-Off Clause:**

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

4. **Insolvency Events of Default Clause:**

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

"The following shall constitute Events of Default:

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

ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief with respect to itself or to its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a trustee, receiver, liquidator, conservator, administrator, custodian, examiner or other similar official (each a "**Custodian**") of it or any substantial part of its assets, or takes any corporate action to authorise any of the foregoing;

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

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

"The following shall constitute Events of Default:

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

ii. you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or

other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)."

5. Title Transfer Provisions:

a) "**Default:** If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date *will* be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "**Default Margin Amount**" means the amount, calculated in the Base Currency of the aggregate value as at the relevant Liquidation Date (as determined by us) of the Transferred Margin.

b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

6. Clearing Module Netting Provision / Addendum Netting Provision:

a) [Firm Trigger Event/CM Trigger Event]

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

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

(b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;

(c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the

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

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

b) CCP Default

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

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];

2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate

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

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

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

c) Hierarchy of Events

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

Or

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

Or

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

d) Definitions

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

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

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

(a) is attributable to such Client Transactions;

(b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and

(c) is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

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

7. Clearing Module Set-Off Provision

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

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

8. Addendum Set-Off Provision

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

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

(A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;

(B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and

(C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that has previously been reduced in part by set-off pursuant to this Section 8(e).

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

PART 2
NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B", using synonyms, changing the order of the words) provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

2. Any change to a provision or provisions for the purposes of correct cross-referencing or by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the agreement provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

3. A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes effect.

4. Any change to the scope of the agreement clarifying that certain transactions (e.g., OTC derivatives governed by an ISDA Master Agreement) shall not be transactions or contracts for purposes of the agreement.

5. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), where such addition may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, and such addition may be expressed to apply to one only of the Parties.[29]

6. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the agreement, Transactions, or both, is endangered.29

7. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.29

8. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.

9. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).29

10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several

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[29] Counsel to delete and if any such provisions would alter agreement so as to prevent opinion from applying.

specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.

11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.

13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.

14. Any change to the FOA Set-Off Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the scope of the provision where a Party acts as agent, (iv) the use of currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.

15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.

16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.

17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).

18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:

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

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

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with

equivalent effect to, clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.

20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in an FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).

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

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

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

PART 3
SECURITY INTEREST PROVISIONS

1. Security Interest Clause:

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

2. Power of Sale Clause:

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

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

ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

1. Desirable amendments

(a) For the purposes of paragraph 3.7, 3.8 and 3.9 of our opinion insofar as a Party subject to the provisions of the Irish Companies Acts or the Bankruptcy Act is concerned:

"*The provisions of Section 284(1) of the 1963 Act (as amended) which incorporates by reference the rule applicable on bankruptcy as contained within paragraph 17 of the First Schedule of the Bankruptcy Act 1988 shall not apply to this Agreement.*"

ANNEX 6

DEFINITIONS

"**authorised credit institution**" for the purposes of the Resolution Act means, an Irish Licensed Bank, a building society or a credit union;

"**Banking Regulations**" means the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992;

"**Banks**" means collectively Parties who are Irish Licensed Banks or Foreign Banks with Irish Branches and in the singular "**Bank**";

"**Central Bank**" means the Central Bank of Ireland;

"**Cleared Transaction Set**" means (i) all Client Transactions in respect of which the related Firm/CCP Transactions are cleared through the same Agreed CCP Service or (ii) all Client Transactions in respect of which the related CM/CCP Transactions are cleared through the same Agreed CCP Service.

"**Collateral Arrangement**" means collectively a Title Transfer Arrangement or Security Agreement;

"**Collateral Directive**" means Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements;

"**Collateral Regulations**" means the European Communities (Financial Collateral Arrangements) Regulations 2010 (S.I. No. 626 of 2010), (as amended by the European Communities (Financial Collateral Arrangements) (Amendment) (No. 2) Regulations, 2011 (S.I. No. 318 of 2011) which implement the Collateral Directive in Ireland;

"**collateral security**" means all realisable assets of any kind (including without limitation, financial collateral referred to in Article 1(4)(a) of the Collateral Directive provided under a pledge, a repurchase or similar agreement or otherwise, for the purpose of securing rights and obligations that may arise in connection with a designated system or provided to a central bank and includes money provided under a pledge for that purpose;

"**COMI**" shall have the meaning ascribed to it at paragraph 3.1.2(c);

"**Consolidation Directive**" means directive 2006/48/EC of the European Parliament and the council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast);

"**Credit Institution**", for the purposes of the Stabilisation Act and the Resolution Act means, any person authorised in the State to accept deposits or other repayable funds from the public and to grant credit on its own account;

"**Courts**" means the courts of Ireland and the **Court** shall be construed accordingly;

"**EEA Credit Institution**" means a credit institution that is incorporated or established in a Member State other than Ireland and that:

(a) holds an authorisation for the purposes of the Consolidation Directive and applicable law in the Member State in which it is incorporated or established; and

(b) has duly exercised its right to provide activities referred to in paragraph 1 of Annex 1 of the Consolidation Directive by establishing a branch in Ireland in accordance with the Consolidation Directive, the Banking Regulations and the laws which implement the Consolidation Directive in the Member State in which it is incorporated or established;

"**entity**" is defined for the purposes of a Financial Contract as including:

(a) a natural or legal person, including a state or any international organisation duly established;

(b) any subdivision or authenticating authority of a state or international organisation, and

(c) an unincorporated body of persons";

"**EU**" means the European Union or the European communities, as applicable;

"**financial collateral**" means cash, financial instruments or credit claims provided under a financial collateral arrangement, but does not include shares in a company whose exclusive purpose is—

(a) to own means of production that are essential for the collateral provider's business, or
(b) to own real property;

"**Financial Contracts**" means one or more contracts consisting of one or more or a combination of the following:

(a) interest-rate contracts which are one or more of:

(i) single-currency interest rate swaps;

(ii) basis swaps;

(iii) forward-rate agreements;

(iv) interest-rate futures;

(v) interest-rate options;

(vi) other contracts of a similar nature to those specified in any of subparagraphs (i) to (v), and

(vii) contracts which are combinations of contracts referred to in subparagraphs (i) to (vi).

(b) foreign-exchange contracts which are one or more of:

(i) cross-currency interest-rate swaps;

(ii) spot foreign exchange contracts;

(iii) forward foreign-exchange contracts;

(iv) currency futures;

(v) currency options;

(vi) other contracts of a similar nature to those specified in any of subparagraphs (i) to (v), and

(vii) contracts which are combinations of contracts referred to in subparagraphs (i) to (vi);

(c) contracts relating to, or which concern indices relating to, one or more of equities, bonds, gold, precious metals other than gold, and commodities other than precious metals, or a combination of them, which consist of one or more of—

(i) swaps,

(ii) spot contracts,

(iii) forward contracts,

(iv) futures,

(v) options,

(vi) other contracts of a similar nature to those specified in any of subparagraphs (i) to (v), and

(vii) contracts which are combinations of contracts referred to in subparagraphs (i) to (vi);

(d) securities lending and securities borrowing contracts;

(e) sale and repurchase agreements, including reverse repurchase agreements, in relation to securities;

(f) buy and sell back agreements in relation to either or both securities and equities;

(g) in relation to equities,

(i) equities lending and equities borrowing contracts, and

(ii) sale and repurchase agreements, including reverse repurchase agreements;

(h) in relation to commodities,

(i) commodity lending and commodity borrowing contracts, and

(ii) sale and repurchase agreements, including reverse repurchase agreements;

(i) contracts for either or both the assumption of and laying off of credit risk—

(i) on loans, debt securities or other assets, or

(ii) in relation to an entity,

or other contracts of a similar nature;

(j) any derivatives not otherwise encompassed by paragraphs (a) to (i) or paragraphs (k) to (o) concerning a reference item or index, whether cash-settled or physically settled, including—

(i) swaps,

(ii) spot contracts,

(iii) forwards,

(iv) futures,

(v) options, and

(vi) contracts for difference;

(k) title transfer collateral arrangements;

(l) any net amount due under a netting agreement or a master netting agreement;

(m) agreements to buy or sell, clear or settle transactions in, or act as a depository for, any—

(i) financial asset, including, without limitation, any security (including any equity), currency, obligation evidencing debt (including a loan or deposit) and any negotiable or transferable instrument and any intangible asset, or

(ii) commodity (including precious metal), energy or energy source;

(n) contracts contained in points 4 to 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments;

(o) any contract included by virtue of section 2 under the Netting Act;

(p) contracts designated by regulations made under section 3 of the Netting Act.

the following contracts have been designated as "financial contracts" for the purposes of the Netting Act by the Netting of Financial Contracts Act, 1995 (Designation of Financial Contracts) Regulations, 2000:

(a) buy and sell back agreements in relation to either or both securities and equities;

(b) in relation to equities:

(i) equities lending and equities borrowing contracts; and

(ii) sale and repurchase agreements, including reverse repurchase agreements.

(c) contracts for either or both the assumption of and laying off of credit risk:

(i) on loans, debt securities or other assets;

(ii) in relation to an entity;

or other contracts of a similar nature

(d) contracts which are a combination of contracts specified at either or both:

(i) paragraph (a), (b) (c) or (d) of the definition of Financial Contracts in section 1 of the Netting Act, and

paragraph (a), (b), or (c) above.

"**Financial Instruments**" means:

(a) shares in companies;
(b) securities equivalent to shares in companies;
(c) bonds or other forms of debt instruments if these are negotiable on the capital market;
(d) any other securities (other than instruments referred to in subparagraphs (a) to (c)) that are normally dealt in and give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange, or
(e) any other securities (other than instruments referred to in subparagraphs (a) to (c) and instruments of payment) that give rise to a cash settlement;
(f) units in collective investments undertakings;
(g) money market instruments; or
(h) claims relating to, or rights in or in respect of, shares, securities, bonds, instruments of a kind referred to in paragraphs (a) to (g),
but excluding shares in a company whose exclusive purpose is:
(i) to own means of production that are essential for the collateral provider's business, or
(ii) to own real property;

"**Foreign Bank**" means a Party that is a company or body corporate incorporated or organised outside Ireland and which is either an Irish Licensed Bank or an EEA Credit Institution;

"**ICA**" means the Investor Compensation Act, 1998;

"**IIA**" means the Investment Intermediaries Act, 1995;

"**Insolvency Regulation**" means Council Regulation (EC) No. 1346/2000 of 29th May 2000 on insolvency proceedings;

"**Ireland**" means Ireland exclusive of Northern Ireland;

"**Irish Branch**" means a branch registered in Ireland under section 352 of the 1963 Companies Act and pass ported under the recast Consolidation Directive;

"**Irish Licensed Bank**" means a Party which is the holder of a licence granted under Section 9 of the Central Bank Act 1971 (the "**CBA**");

"**Member State**" means a member state of the EU;

"**Netting Act**" means the Netting of Financial Contracts Act 1995 (as amended);

"**Parties**" means in respect of any Agreement, the parties to that Agreement and "**Party**" means either of them insofar as opined on herein;

"**Qualifying Party**" means:

(a) a public authority being a local government body and a public sector body of a Member State that is charged with responsibility for, or is involved in, the management of public debt and a public sector body of a Member State that is authorised to hold accounts for customers (excluding a publicly guaranteed undertaking unless it is covered by paragraphs (b) to (f) below);

(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund or the European Investment Bank;

(c) a supervised financial institution;

(d) a central counterparty, settlement agent or clearing house, or any similar entity that is operating in the futures, options or derivatives markets in a way not covered by Settlement Finality Directive provided the entity is regulated under the law of the State or of another country; or

(e) a person (other than a natural person) who acts as a trustee, or in a representative capacity, on behalf of:

(i) any one or more persons of whom at least one is a bondholder or the holder of any form of securitised debt; or

(ii) any authority, bank or institution or other entity referred to in paragraphs (a) to (d);

(f) any other person or group (other than a natural person), but only if the other party to the arrangement is an authority, bank, institution or other entity of a kind specified in any of paragraphs (a) to (e).

"**Regulated Entities**" means collectively IIA Entities, MiFID Entities and Banks (as such terms are defined herein) and any one a "**Regulated Entity**";

"**Relevant Institution**" for the purpose of the Stabilisation Act, means

(*a*) a body—

(i) that has its registered office in the State,

(ii) that is, or was on the date on which this Act came into operation, a bank licensed under section 9 of the Central Bank Act 1971, and

(iii) to which financial support has been given or is to be given by the Minister,

(*b*) a body that has its chief office in the State and is, or was on the date on which this Act came into operation, a building society within the meaning of the Building Societies Act 1989,

(*c*) a body that has its chief office in the State and is, or was on the date on which this Act came into operation, a credit union within the meaning of the Credit Union Act 1997,

(*d*) a person or body prescribed under *section 3*,

(*e*) a subsidiary of a person or body referred to in any of paragraphs (a) to (d), and

(f) a holding company of a person or body referred to in any of paragraphs (a) to (d).

"**Reorganisation measure**", for the purpose of the Winding up Regulations in relation to a credit institution, means a measure that is intended to preserve or restore the financial position, but that could affect the rights of third parties existing before the measure is imposed in respect of the institution, and includes any measure that contemplates the possibility of:

(a) payments being suspended by the institution, or

(b) enforcement measures being suspended in relation to the institution, or

(c) claims against the institution being reduced,

and, in particular, includes any of the following:

(i) a scheme of arrangement under Section 201 or the 1963 Act;

(ii) the appointment of an examiner under section 2 of the 1990 Act;

(iii) a court order made under section 3A of the 1990 Act placing the institutions under the protection of the court for a period pending the submission of an independent accountant's report;

(iv) a direction given to the institution under section 21 of the CBA, section 26 of the Trustee Savings Bank Act 1989 or section 40 of the Building Societies Act 1989 to suspend:

(I) carrying on banking business;

(II) making payments to which the carrying on of banking business does not relate, or

(III) acquiring or disposing of other assets or liabilities, except with the authorisation of the Central Bank.

(v) a direction under section 20 or 21 of the Assets Covered Securities Act 2001 prohibiting the institution from carrying on a specified activity except with the permission of the Central Bank and Financial Services Authority of Ireland;

(vi) a subordinated liabilities order (within the meaning given by the Stabilisation Act);

(vii) a direction order, special management order or transfer order (within the respective meanings given by the Stabilisation Act) that contains a

declaration that it or part of it is made with the intention of preserving or restoring the financial position of the relevant institution;

(viii) a requirement imposed by the Minister pursuant to section 50 of the Stabilisation Act that is expressed as being made with the intention of preserving or restoring the financial position of a relevant institution;

(ix) an order under section 33(1) of the Central Bank Act 1971 (No. 24 of 1971) that is expressed as set out in section 33(4) of that Act; or

(xi) a direction given by the Bank under Part 7 of the Central Bank (Supervision and Enforcement) Act 2013 that contains a declaration that it or part of it is made with the intention of preserving or restoring the financial position of a credit institution, where the direction is capable of affecting the rights of third parties existing before the direction comes into effect.

"**Resolution Act**" means the Central Bank and Credit Institutions (Resolution) Act, 2011.

"**Security Arrangement**" means an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker but only of the full ownership of the collateral remains with the collateral provider after the security right is established;

"**Settlement Finality Regulations**" means the European Communities (Settlement Finality) Regulations 2010 (S.I. No. 624 of 2010);

"**Stabilisation Act**" means the Credit Institutions (Stabilisation) Act 2010;

"**State**" shall mean Ireland unless the context suggests otherwise;

"**supervised financial institution**" means a financial institution that is subject to prudential supervision by a regulatory authority established by or under a law of a state, and includes (but is not limited to) the following:

(*a*) a credit institution (as defined in Article 4(1) of the Recast Credit Institutions Directive, but including the institutions listed in Article 2 of that Directive);

(*b*) an investment firm (as defined in Article 4.1(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004);

(*c*) a financial institution (as defined in Article 4(5) of the Recast Credit Institutions Directive);

(*d*) an insurance undertaking (as defined in Article 1(a) of Council Directive 92/49/EEC of 18 June 1992);

(*e*) an assurance undertaking (as defined in Article 1(1)(a) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002);

(*f*) a management company (as defined in Article 1a(2) of Council Directive 85/611/EEC of 20 December 1985[6]);

(*g*) an undertaking for collective investment in transferable securities (UCITS) as defined in Article 1(2) of Council Directive 85/611/EEC of 20 December 1985;".

"**Title Transfer Arrangement**" means an arrangement (including a repurchase agreement) under which a collateral provider transfers full ownership of financial collateral (broadly being cash or Financial Instruments) to a collateral taker in order to secure or otherwise cover the performance of obligations that give right to cash settlement or the delivery of Financial Instruments, or both;

"**Winding-Up Directive**" means Directive 2001/24/EC of the European Parliament and of the council of 4 April 2001 on the reorganisation and winding up of credit institutions;

"**Winding-up Proceedings**" means for the purpose of the Winding up Regulations:

(a) in relation to authorised credit institutions, means collective proceedings commenced and monitored by or before an administrative or judicial authority of the State for the purposes of realising assets under the supervision of that authority, and includes any such proceedings that are terminated by a composition of creditors or other similar arrangement, and, in particular, includes:

(i) a winding-up order made under section 213 of the 1963 Act; and

(ii) the appointment of a provisional liquidator under section 226 of the 1963 Act, and

(iii) the appointment of a liquidator under section 225 of the 1963 Act, and

(iv) the passing of a resolution for a voluntary winding-up under section 251 of the 1963 Act;

(v) the appointment of a liquidator in a creditors' voluntary winding up under section 267 of the 1963 Act; and

(vi) an arrangement under the control of the Court that involves the vesting of all or part of the property of the institution in the Official Assignee for realisation and distribution, and

(b) in relation to a credit institution authorised in another Member State, means collective proceedings commenced and monitored by or before an administrative or judicial authority of the other State for the purposes of realising assets under the supervision of that authority, and includes any such proceedings that are terminated by a composition of creditors or other similar arrangement.

"**Winding up Regulations**" means the European Communities (Reorganisation and Winding-Up of Credit Institutions) Regulations 2011, (S.I. No. 48 of 2011) as amended.
"**1963 Act**" means the Companies Act 1963;

"**1988 Act**" means the Bankruptcy Act 1988;

"**1990 Act**" means the Companies Act 1990;

"**1990 Amendment Act**" means the Companies (Amendment) Act 1990; and

"**1999 Act**" means the Companies Amendment (No 2) Act 1999.