

NETTING ANALYSER LIBRARY
Legal collateral opinion –
Non Situs Version

The Futures & Options Association
2nd Floor
36-38 Botolph Lane
London EC3R 8DE

9 January 2013

Our ref: 8003363/55873376/6

Dear Sirs

FOA Collateral Opinion

You have asked us to give an opinion in respect of the laws of Jersey (**this jurisdiction**) in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion letter (each an **Agreement**) or under an Equivalent Agreement (as defined below).

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this opinion letter.

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

1. TERMS OF REFERENCE AND DEFINITIONS

- 1.1 Subject as provided at paragraph 1.2, this opinion is given generally, in respect of Parties which are a Jersey company (a **Jersey Company**) duly incorporated under the Companies (Jersey) Law 1991 (the **Companies Law**).
- 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 where indicated below:
- 1.2.1 a Jersey limited partnership (a **Jersey Limited Partnership**) duly established under the Limited Partnerships (Jersey) Law 1994 whose general partner is a Jersey Company (Schedule 1);
 - 1.2.2 Individuals who are of full capacity (Schedule 2);
 - 1.2.3 Parties acting as trustees of Jersey law governed trusts with Jersey resident trustees (a **Jersey Trustee**), including:
 - (a) unit trusts (a **Jersey Unit Trust**) established under the Trusts (Jersey) Law, 1984;

Mourant Ozannes is a Jersey partnership

Partners: D J Birtwistle, M Chambers, G R P Corbin, E C Devenport, S J V Felton, S M Gould, J Harvey-Hills, R A Hickling, J E Hill, W Lambert, B J Lincoln, J H Rainer, J A Richomme, G A Rigby, J D Rigby, B C Robins, J F Ruane, H E Ruelle, J P Speck, A J R Syvret, M Temple, J C Walker.
Consultants: A R Binnington, T J Herbert, I C James.

- (b) charitable trusts; and
- (c) general trusts, pension funds/schemes/and occupational pension schemes

(Schedule 3);

1.2.4 generally, in respect of Parties incorporated or formed under the laws of another jurisdiction which are:

- (a) a company which has a branch or branches located in this jurisdiction;
- (b) a bank which has a branch or branches located in this jurisdiction, where such branch or each of such branches is licensed in this jurisdiction under the Banking Business (Jersey) Law 1991; or
- (c) an insurance company which has a branch or branches located in this jurisdiction, where such branch or each of such branches is licensed in this jurisdiction under the Insurance Business (Jersey) Law 1996; and

1.2.5 any of the foregoing that are states and sovereign and public entities (including sovereign wealth funds, municipalities, public bodies and local authorities).

1.3 This opinion is given on the basis that:

- 1.3.1 a bank or financial institution;
- 1.3.2 an investment firm or broker-dealer;
- 1.3.3 an insurance company or insurance provider;
- 1.3.4 a fund; or a
- 1.3.5 pension entity

would be comprised within one of the legal forms set out in paragraphs 1.1 and 1.2 above.

1.4 This opinion is given in respect of the Agreement when the Agreement is expressed to be governed by English law or, where expressly envisaged as an election in the relevant FOA Published Form Agreement, the laws of the State of New York.

1.5 No opinion is given in respect of the effect of the provisions of any Agreement governed by laws other than the laws of this jurisdiction.

1.6 This opinion is given in respect of cash and account-held securities which are the subject of the Security Interest Provisions (**Collateral**). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

1.7 In this opinion letter:

- 1.7.1 **Security Interest** means the security interest created pursuant to the Security Interest Provisions;

- 1.7.2 **Equivalent Agreement** means an agreement:
- (a) which is governed by the law of England and Wales;
 - (b) which has broadly similar function to any of the Agreements listed in Annex 1;
 - (c) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and
 - (d) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);

References to the **Agreement** in this letter (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement;

- 1.7.3 a **Non-material Amendment** means an amendment having the effect of one of the amendments set out at Annex 3;

- 1.7.4 **enforcement** means, in the relation to the Security Interest, the act of:
- (i) sale and application of proceeds of the sale of Collateral against monies owed, or
 - (ii) appropriation of the Collateral,

in either case in accordance with the Security Interest Provisions;

- 1.7.5 in other instances other than those referred to at 1.7.4 above, references to the word **enforceable** and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy;

- 1.7.6 terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears;

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

- 1.7.8 certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2;

- 1.7.9 headings in this opinion letter are for ease of reference only and shall not affect its interpretation;

- 1.7.10 **Firm** means a member firm of the Futures and Options Association being referred to as "we" or "us" in an Agreement;

1.7.11 References to **Core Provisions** include Core Provisions that have been modified by Non-Material Amendments; and

1.7.12 **Insolvency Proceedings** means insolvency, bankruptcy or analogous proceedings (where, for the purposes of paragraph 3 of this opinion, the occurrence of such proceedings in respect of the Counterparty falls within the definition of Event of Default under the Agreement).

2. ASSUMPTIONS

We assume the following:

- 2.1 that the Agreements are legally binding and enforceable against both Parties under their governing laws;
- 2.2 that the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest;
- 2.3 that the Security Interest Provisions are effective under the law of the place where the Collateral is located to create an enforceable security interest;
- 2.4 that each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement; to perform its obligations under the Agreement; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement;
- 2.5 that each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction;
- 2.6 that the Agreement has been properly executed by both Parties;
- 2.7 that the Agreement is entered into prior to the commencement of any Insolvency Proceedings in respect of either Party;
- 2.8 the 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;
- 2.9 that the Agreement accurately reflects the true intentions of each Party;
- 2.10 that no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement;
- 2.11 that there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement;
- 2.12 that all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected;

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- 2.13 that there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement;
- 2.14 that any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions shall at all relevant times be located outside this jurisdiction;
- 2.15 that any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions; and
- 2.16 that no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of Equivalent Agreement above would not constitute a material alteration for our purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.

3. **OPINIONS**

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 **Valid Security Interest**

- 3.1.1 To the extent permitted by the Agreement, following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.
- 3.1.2 There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.
- 3.1.3 Following exercise of the Firm's rights under the Security Interest Provisions, the ranking of the Firm's rights to the proceeds of realisation of the Collateral in relation to the interests of the Counterparty and any other person would be a matter to be determined under the law of the place where the Collateral is situated.

3.2 **Further acts**

No further acts, conditions or things would be required by the law of this jurisdiction to be done, fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

4. **QUALIFICATIONS**

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

- 4.1 The Agreement may be unenforceable on the grounds of fraud, misrepresentation, duress or other vitiating factors.
- 4.2 On application of a liquidator (in the course of the insolvent winding-up of a Jersey company) or of the Viscount (in the course of a *désastre*):

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- 4.2.1 if a person has:
- (a) entered into a transaction with a person at an undervalue during the period of 5 years immediately preceding the commencement of the winding-up or the making of the declaration that the property of the person is *en désastre*; or
 - (b) given a preference to a person, during the period of 12 months immediately preceding the commencement of the winding-up or the making of the declaration that the property of the person is *en désastre*; and
- 4.2.2 if at the time of such transaction or preference:
- (a) the person was unable to pay its debts as they fell due or became unable to pay its debts as they fell due as a result of the transaction or preference; or
 - (b) (in certain cases where the person entered into the transaction with or gave the preference to another who was connected or associated with the person) it is not proved that the person was able to pay its debts as they fell due and did not become unable to pay its debts as they fell due as a result of the transaction or preference,

the Jersey courts may make such an order as the court thinks fit for restoring the position to what it would have been if the preference had not been given or if the person had not entered into the transaction.

- 4.3 On application of a liquidator (in the course of the insolvent winding-up of a Jersey company) or of the Viscount (in the course of a *désastre*), the Jersey courts may set aside, vary or make other orders in relation to an extortionate credit transaction entered into by a person in the period of three years ending with the commencement of the winding-up (if the person is a Jersey company) or the declaration that the property of the person is *en désastre*. For these purposes an extortionate credit transaction is a transaction in which, having regard to the risk accepted by the person providing the credit, the terms of it are such as to require grossly exorbitant payments to be made in respect of the provision of the credit or which otherwise grossly contravenes ordinary principles of fair dealing. Insofar as laws relating to interest limitation or usury are concerned, In *Doorstop Limited v Gillman* [2012] JRC 199 the Royal Court held that although the Code of 1771 (Amendment) (Jersey) Law 1962 removed the cap on interest rates of 5 per cent, it did not affect the laws on usury generally, and the position therefore remains that the charging of interest at customary law must be moderate or reasonable. The Jersey courts, therefore, have power to reduce a contractually agreed rate of interest if they consider that the agreed rate was immoderate and unreasonable, having regard to the circumstances that existed at the time that the loan was made. The fact that a rate of interest has been agreed between the parties is regarded by the Jersey courts as a highly significant factor, but is not necessarily a conclusive consideration. The following factors will also be taken into account: (i) the level of risk for the lender; (ii) the prospect of gain for the borrower; (iii) market rates and practice generally; (iv) the sophistication of the parties to the loan; and (v) the strength of the relative bargaining positions of the parties. Applying the same principles, the Jersey courts may also disallow a claim for contractually agreed interest on a judgment debt and compound interest.

The Royal Court also observed that "inter institutional lending, although theoretically subject to the same legal rules, is very likely to lead to a reluctance on the part of

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the Court to intervene – on the basis that the parties to such lending are sophisticated business people, operating in a regulated world, where market practice will be a good indicator of what is moderate and reasonable".

In *Doorstop* there were two loans. The first was a loan of £390,950. There was a requirement to repay (a) that capital sum, (b) a further £200,000, (c) interest of 12 per cent and (d) penalty interest of 1.5 per cent per month. The court held that the requirement to pay the £200,000 amounted to a return of 51.16 per cent for the use of money for one year. Whilst this was not held to be usurious, the additional 12 per cent and the penalty interest were usurious. The second loan involved a claim for contractual interest of 12 per cent on £41,000. This was upheld. But the penalty interest of 2 per cent per month was held to be excessive. The court substituted a default rate of 8 per cent per annum.

In *Grove v Baker* [2005] JLR 348, the Royal Court upheld a claim for interest on a loan at a rate of 25 per cent. In *Singer v Thomas* [2003] JRC 232, the Royal Court upheld a claim for default interest on a loan at a rate of 30 per cent.

- 4.4 The liquidator (in the course of the insolvent winding-up of a Jersey company) or the Viscount (in the course of a *désastre*) may, within six months of the commencement of the winding-up or the making of the declaration that the property of a person is *en désastre*, disclaim any onerous property of such Jersey company or such person. For these purposes, onerous property is (a) any unprofitable contract and (b) any of the following 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: (i) any movable property, (ii) any contract lease and (iii) any other immovable property if it is situated outside Jersey. The counterparty to any such disclaimed contract or any person sustaining loss or damage in consequence of the operation of a disclaimer would have the right to prove in the winding-up or *désastre* for the amount of its losses incurred as a result thereof.
- 4.5 There is provision in the Companies Law for voluntary arrangements in respect of a company to be agreed by and to be binding on creditors and shareholders of such company. In relation to such arrangements the courts will not sanction the scheme unless efforts were made to notify those creditors or shareholders in accordance with the Companies Law. Such arrangements could affect Security Interest Provisions.
- 4.6 Any provision in the Agreement providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto.
- 4.7 If the effect of proceedings in a forum other than Jersey is to extinguish claims or liabilities under the governing law of those claims or liabilities the Jersey court may recognise the extinguishment of those claims or liabilities.
- 4.8 We express no opinion as to the validity and enforceability of any provisions of the Agreement other than those to which express reference is made in this opinion. We do not express any opinion as to any matters of fact nor as to the effect of the provisions of any Agreement.
- 4.9 The Jersey courts will not apply English or, as the case may be, New York law if:
- (a) it is not pleaded and proved; or

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- (b) the selection of English or, as the case may be, New York law was not *bona fide* and legal; or
- (c) to do so would be contrary to public policy.

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

How a Jersey court would interpret a governing law clause is a matter of Jersey private international law. Jersey conflicts of law rules substantially follow English common law principles: *Official Solicitor v Clore* (1984) JLR 81 and in *Re Brunei Investment Agency* [2008] JRC 152.

If parties to a contract express the law by which they wish the contract to be governed, we understand that effect will be given under English common law to their choice "provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy": *Vita Food Products Inc v Unus Shipping Co Limited* [1939] AC 277 per Lord Wright. This dictum was followed by the Jersey courts in *Re Nield* 1990 JLR Notes-12b with the further elaboration per Crill DB that "there the learned author of Cheshire says..."That the statement of the claim must be *bona fide* and legal is not free from ambiguity". What he presumably means is that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law and under which the agreement would not be valid."

In addition to the sense given to it by Crill DB in *Re Nield*, it is thought that the word "legal" refers to the case where the choice is prohibited by some applicable statute and the term "*bona fide*" probably means that the choice must be genuine, not capricious and not a mere pretence.

A Jersey Court will not apply a foreign law if and in so far as its application would lead to results contrary to the fundamental principles of Jersey public policy. However, it is by no means the case that an action concerning a transaction governed by a foreign law must necessarily fail because it would have failed on public policy grounds had the governing law been Jersey. For example, it is likely that a Jersey court would consider the fact that the rule against contractual penalties cannot be excluded by a contract subject to English or Jersey law does not mean that this rule will be applied to a contract governed by a foreign legal system (see *Godard v Gray* (1870) LR 6 QB 139, quoted in Volume 2 of Dicey & Morris 11th Edition page 1228). It is accepted that a transaction which is valid by its foreign governing law should not be nullified on the ground of public policy unless its enforcement would offend some moral, social or economic principle so sacrosanct in Jersey eyes as to require its maintenance at all costs and without exception.

Thus, a Jersey court will not enforce a foreign contract (valid by its foreign governing law) obtained by what Jersey law regards as duress, coercion or fraud. It is likely that a Jersey court would have regard to other examples of contracts which have been held void on public policy grounds by the English courts although, on general principles of the conflict of laws, these contracts were governed in each case by a foreign legal system according to which they would have been valid are contracts in restraint of trade, contracts involving trading with the enemy, champertous contracts, the stifling of a criminal prosecution and a corrupt and collusive arrangement for a divorce (see Volume 2 of Dicey & Morris (11th Edition) page 1226 et seq.).

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

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Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

Yours faithfully

A handwritten signature in black ink that reads "Mourant Ozannes". The signature is written in a cursive style with a large, looping initial 'M' and a long, sweeping tail on the 's'.

Mourant Ozannes

SCHEDULE 1 ***Jersey Limited Partnerships***

Subject to the modifications and additions set out in this Schedule 1 (*Jersey Limited Partnerships*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Jersey Limited Partnerships. For the purposes of this Schedule 1 (*Jersey Limited Partnerships*), ***Jersey Limited Partnership*** means a Jersey limited partnership duly established under the Limited Partnerships (Jersey) Law 1994 whose general partner is a Jersey Company.

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

1. ADDITIONAL ASSUMPTIONS

We assume the following:

- 1.1 the general partner of a Jersey Limited Partnership, in its capacity as general partner of the Jersey Limited Partnership, is able to discharge the liabilities of the Jersey Limited Partnership as they fall due out of the assets of the Jersey Limited Partnership without recourse to the assets of that person not contributed to the Jersey Limited Partnership; and
- 1.2 the general partner of the Jersey Limited Partnership is the only general partner of that Jersey Limited Partnership and it has not resigned or been replaced.

2. ADDITIONAL QUALIFICATIONS

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

- 2.1 A Jersey Limited Partnership does not have a separate legal personality and acts through its general partner. A declaration of *désastre* may only be made against the property of the general partner of a limited partnership. Subject to certain limited exceptions, no judgment shall be enforced against any property of a limited partnership unless such judgment has been granted against a general partner in his or her capacity as a general partner of that limited partnership.
- 2.2 In relation to a Jersey Limited Partnership whose general partner is a body corporate incorporated outside Jersey, the laws of other jurisdictions (in particular the laws of the place of incorporation and place of business of the general partner) will be relevant to the question of whether or not the Netting Provisions will be effective.
- 2.3 Without written consent or ratification by all the limited partners, a general partner of a Jersey limited partnership has no authority to (a) do an act which makes it impossible to carry on the activities of the partnership, (b) possess partnership property, or dispose of any rights in partnership property, for other than a partnership purpose or (c) admit a person as a general partner or admit a person as a limited partner, unless the right to do so is given in the partnership agreement.

SCHEDULE 2
Individuals

Subject to the modifications and additions set out in this Schedule 2 (*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 2 (*Individuals*), ***Individual*** means a natural person who is of full capacity.

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.

Modifications to Terms of Reference and Definitions

3. **ADDITIONAL QUALIFICATIONS**

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

- 3.1 A term of a contract under which one party deals as a consumer shall, unless the term is fair and reasonable, have no effect for the purpose of enabling the supplier:
- (a) if the supplier is in breach of an obligation under the contract, to exclude or restrict any liability of the supplier to the consumer in respect of the breach; or
 - (b) in respect of an obligation under the contract, to render no performance, or to render a performance substantially different from that which the consumer would reasonably expect from the contract.

For these purposes:

"*contract*" means a contract of sale of goods, a contract for the supply of a service, or a hire-purchase agreement;

"*supplier*" means:

- (a) seller, in the case of a contract of sale of goods;
- (b) supplier, in the case of a contract for the supply of a service;
- (c) supplier, in the case of a hire-purchase agreement.

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SCHEDULE 3 *Jersey Trustees*

Subject to the modifications and additions set out in this Schedule 3 (*Jersey Trustees*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Jersey Trustees. For the purposes of this Schedule 3 (*Jersey Trustees*), **Jersey Trustee** means a person acting as trustee of a Jersey law governed trusts with Jersey resident trustees, including:

- (a) a Jersey law unit trust (a **Jersey Unit Trust**) established under the Trusts (Jersey) Law, 1984 (the **Trusts Law**);
- (b) charitable trusts; and
- (c) general trusts, pension funds/schemes/and occupational 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. **ADDITIONAL ASSUMPTIONS**

We assume the following:

- 1.1 the Jersey Trustee will be able to discharge its liabilities incurred in respect of the relevant trust under the Agreement as they fall due out of the assets of that trust; and
- 1.2 the Jersey Trustee is the only trustee of the relevant trust and it has not resigned or been replaced.

2. **ADDITIONAL QUALIFICATIONS**

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

- 2.1 A trust governed by Jersey law does not have a separate legal personality. A trustee holds legal title to the assets of the trust for the benefit of the beneficiaries. A trust governed by Jersey law acts through its trustee.
- 2.2 It has not been definitively determined by the Jersey courts, but in our view a declaration of *désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990 can only be instituted by or against debtors who are natural or legal persons. A Jersey law trust does not have legal personality and, accordingly, could not be a debtor in a *désastre*. However, a trustee of a Jersey law trust in its personal capacity could be, in which case, pursuant to Article 32 of the Trusts Law, the trustee's creditors would have no claim against the trust property except to the extent that the trustee itself has an interest in the trust property as a beneficiary. If a Jersey trust becomes insolvent (ie where its liabilities exceed its assets or the trustee is unable to discharge the trust's debts as they fall due), and no insolvency procedure could be instituted, it is likely that the trustee would apply to the court for directions as to how the trust property should be distributed (which may include a request for orders in similar terms to the statutory provisions relating to the insolvency of legal persons). This approach has been taken by the Jersey court in the context of an insolvent estate (where an executor could be said to be in an analogous position to a trustee of an insolvent trust). Receivers may, in certain circumstances, be appointed in respect of an insolvent Jersey trust. This is an exceptional remedy granted under the inherent jurisdiction of the court.

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- 2.3 Any claims against the Jersey Trustee under the Agreement may extend only to the assets of the relevant trust even though a law other than Jersey law is the governing law of the Agreement. This may apply whether proceedings are brought directly in the Jersey courts or where a judgment obtained outside Jersey is sought to be enforced in the Jersey courts. Pursuant to Article 32 of the Trusts Law, where a trustee is a party to any transaction or matter affecting a trust, if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property.
- 2.4 If the execution and/or performance of the Agreement was to be held to be a breach of trust by the Jersey Trustee its obligations thereunder may not be enforceable and any trust assets alienated in breach of trust could be traced into the hands of a third party other than a *bona fide* purchaser for value without notice of the breach of trust, or a person deriving title through such person.
- 2.5 Any provisions in the Agreement which constitute an improper restriction on the future exercise of any of the powers of the Jersey Trustee under the relevant trust instrument may not be enforceable.



**ANNEX 1
FORM OF FOA AGREEMENTS**

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the **Professional Client Agreement 2007**)
2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the **Professional Client Agreement 2009**)
3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the **Professional Client Agreement 2011**)
4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the **Retail Client Agreement 2007**)
5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the **Retail Client Agreement 2009**)
6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the **Retail Client Agreement 2011**)
7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the **Eligible Counterparty Agreement 2007**)
8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the **Eligible Counterparty Agreement 2009**)
9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the **Eligible Counterparty Agreement 2011**)

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the **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).

Each of the Agreements listed in this Annex 1 may be deemed to include 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.

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The **Eligible Counterparty Agreements** means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).
2. The **Professional Client Agreements** means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).
3. The **Retail Client Agreements** means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).
4. An **Equivalent 2011 Agreement without Core Rehypothecation Clause** means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.
5. **Core Provisions** means:
 - (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and
 - (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.
6. **Rehypothecation Clause** means:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (**Rehypothecation**);
 - (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (**Rehypothecation**);
 - (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (**Rehypothecation**); and
 - (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
7. **Security Interest Provisions** means:
 - (a) the **Security Interest Clause**, being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (**Security interest**);

- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (**Security interest**);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (**Security interest**);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (**Security interest**);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (**Security interest**);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (**Security interest**);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (**Security interest**);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (**Security interest**);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (**Security interest**); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (b) the **Power to Charge Clause**, being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (**Power to charge**);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (**Power to charge**);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (**Power to charge**);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (**Power to charge**);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (**Power to charge**);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (**Power to charge**);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (**Power to charge**);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (**Power to charge**);

- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (**Power to charge**); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (c) 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**); and
 - (x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (d) the **Power of Appropriation Clause**, being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (**Power of appropriation**);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (**Power of appropriation**);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (**Power of appropriation**);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (**Power of appropriation**);

- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (**Power of appropriation**);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (**Power of appropriation**);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (**Power of appropriation**);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (**Power of appropriation**);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (**Power of appropriation**); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (e) the **Lien Clause**, being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (**General lien**);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (**General lien**);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (**Lien**);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (**General lien**);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (**General lien**);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (**Lien**);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (**General lien**);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (**General lien**);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (**Lien**); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and

- (f) the **Client Money Additional Security Clause**, being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (**Additional security**) at module F Option 4 (where incorporated into such Agreement);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (**Additional security**) at module F Option 1 (where incorporated into such Agreement);
 - (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); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).

8. **Two Way Clauses** means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011.

ANNEX 3 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") 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 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. 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), such change 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, such change may be expressed to apply to one only of the Parties.
4. 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.
5. 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.
6. 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.
7. 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).
8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.