

MOURANT OZANNES

NETTING ANALYSER LIBRARY

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6 December 2013

Our ref: 8009437/58303989/2

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 Jersey (**this jurisdiction**) in respect of the enforceability and validity of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision contained in a FOA Netting Agreement or a Clearing Agreement.

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

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

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:
 - 1.1.1 Jersey companies (each, a **Jersey Company**) duly incorporated under the Companies (Jersey) Law 1991 (the **Companies Law**);
 - 1.1.2 banks incorporated as Jersey companies under the Companies Law; and
 - 1.1.3 branches established in this jurisdiction of foreign banks.
- 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:

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 Ralner, 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.



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- 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 resident in Jersey who are of full capacity (Schedule 2);
- 1.2.3 Jersey resident trustees (each, a **Jersey Trustee**) of Jersey law governed trusts, including:
 - (a) unit trusts (a **Jersey Unit Trust**) established under the Trusts (Jersey) Law, 1984;
 - (b) charitable trusts; and
 - (c) general trusts, pension funds/schemes and occupational pension schemes
- 1.2.4 generally, in respect of Parties incorporated or formed under the laws of another jurisdiction which are:
 - (a) companies which are entering into Transactions through a branch or branches located in this jurisdiction;
 - (b) banks which are entering into Transactions through 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) insurance companies which are entering into Transactions through 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.

1.3 This opinion extends to any of the following entities:

- 1.3.1 sovereign and/or public sector entities (including sovereign wealth funds, municipalities, public bodies and local authorities);
- 1.3.2 an investment firm or broker-dealer;
- 1.3.3 an insurance company or insurance provider;
- 1.3.4 a fund; or
- 1.3.5 a pension entity

which falls 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 FOA Netting Agreement and the Clearing Agreement when the Netting Agreement and the Clearing Agreement are expressed to be governed by English law.

1.5 This opinion covers all types of Transaction.

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

- 1.6 In this opinion, references to the word **enforceable** and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the enforcement of any contractual rights or the availability of any judicial remedy.
- 1.7 The opinions at paragraph 3.7 in respect of the FOA Set-Off Provisions, paragraph 3.8 with respect to the Clearing Module Set-Off Provisions and paragraph 3.9 with respect to the Addendum Set-Off Provision are given in respect of cash balances credited to an account provided by the Non-Defaulting Party to the Defaulting Party which is located outside this jurisdiction.
- 1.8 The opinion at paragraph 3.10 in respect of the Title Transfer Provisions is given only in respect of Margin consisting of securities located outside this jurisdiction.

1.9 **Definitions**

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

- 1.9.1 **Insolvency Proceedings** means the procedures listed in paragraph 3.1;
- 1.9.2 **Insolvency Representative** means a liquidator or the Viscount (the executive officer of the Royal Court of Jersey who is responsible for administering the procedures listed in paragraph 3.1), administrator, administrative receiver or analogous or equivalent official in this jurisdiction;
- 1.9.3 **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
- 1.9.4 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 any Transaction that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, or by reason of a Mandatory CCP Provision or any Transaction. 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



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2 (Non-material Amendments) of Annex 4 hereto would or would not constitute a material alteration;

- 2.2 that the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws;
- 2.3 that each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement;
- 2.4 that each Party has obtained, complied with the terms of and maintained all 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 and the Transactions in this jurisdiction;
- 2.5 that the FOA Netting Agreement or, as the case may be, the Clearing Agreement and any Transaction thereunder are entered into prior to the formal commencement of any Insolvency Proceedings against either Party;
- 2.6 that no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment;
- 2.7 the FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses;
- 2.8 that the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party;
- 2.9 in relation to the opinions set out at paragraphs 3.8 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;
- 2.10 that each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such Margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system);
- 2.11 that all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each Transfer of Margin pursuant to the Title Transfer Provisions will have been effectively carried out;
- 2.12 that all margin transferred pursuant to the Title Transfer Provision are not and shall not be assets constituted under or governed by Jersey law or situate in Jersey;



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- 2.13 that any cash provided as Margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions;
- 2.14 that no trust is created in respect of Margin by or pursuant to the Title Transfer Provisions under the laws governing the Title Transfer Provisions or the laws applicable where the Margin is located;
- 2.15 that in relation to a Clearing Agreement, a Party incorporated in this jurisdiction will not act as "Firm" (as defined in the FOA Clearing Module) or a "Clearing Firm" (as defined in the ISDA/FOA Clearing Addendum);
- 2.16 in relation to a Multibranch Party, that the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against such Multibranch Party as a matter of the laws of the home jurisdiction where such Multibranch Party is incorporated or established; and
- 2.17 in relation to a Party that is a sovereign or public sector entity, that the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against such Party as a matter of the laws (other than Jersey law) of the relevant sovereign or public sector entity.

3 OPINION

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

3.1 Insolvency Proceedings

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

- (a) the declaring of the property of a party to be *en désastre* pursuant to the Bankruptcy (Désastre) (Jersey) Law 1990 (the **Bankruptcy Law**); or
- (b) the winding up of a party (if a Jersey-incorporated company) pursuant to the Companies Law. Article 166 of the Companies Law provides that the law relating to *désastre* will apply in a creditors' winding up with respect to the rights of creditors, the time and manner of proving debts and setting off debts; or
- (c) a contractual arrangement by a party with all its creditors or, in the case of a party which is a Jersey-incorporated company, a compromise by such party with its creditors pursuant to article 125 of the Companies Law.

3.1.2 Other insolvency procedures do exist in Jersey but in the case of *In the matters of Sparta Investments Limited; Super Seconds Limited; and Mr and Mrs G S Santer* (11 April 1997) JU 67 CA the Court of Appeal in Jersey stated as follows:

"In the ordinary course, where a Court has a discretion to make a declaration treating a debtor's property as being *en désastre*, that course will be preferable to authorising one of the older procedures, unless it is shown to



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be in the interests of justice that the latter should be used. The Court is unlikely to be satisfied of this save in the simplest cases."

The Court of Appeal further noted that the Bankruptcy Law "enables the Court to deal much more comprehensively than the older statutes allowed with the more complex rights of creditors against an insolvent's property which arise from modern commercial practice."

In view of this, whilst the procedures set out in paragraph 3.1.1 do not supersede in point of law other older remedies available to insolvent persons, one of the procedures set out in paragraph 3.1.1 above is more likely to be considered appropriate in relation to a transaction arising from modern commercial practice.

- 3.1.3 The court confirmed its discretion in this regard however, in relation to whether or not to order a *remise de biens* pursuant to the *Loi (1839) sur les remises de bien* in *re Mikhael* [2010] JRC 166A.
- 3.1.4 We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented by the following event:

"any process is commenced by any person which may result in [a *Party*] being declared "bankrupt" within the meaning of Article 8 of the Interpretation (Jersey) Law 1954."

We recommend that the above event is specified as an additional Insolvency Event of Default.

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 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

- 3.3.1 In relation to an FOA Netting Agreement, or in relation to a Clearing Agreement where the Defaulting Party acts as Client, to the extent that such is the effect of the FOA Netting Agreement or, as the case may be, the Clearing Agreement under its governing law, the FOA Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following an Event of Default, including as a result of the opening of any Insolvency Proceedings:
 - (a) the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and



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

3.3.2 We are of this opinion because:

- (a) The Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (the **Netting Law**) provides that, in the absence of fraud or misrepresentation, a close-out netting provision in an agreement is enforceable in accordance with its terms notwithstanding (i) the bankruptcy of a party to the agreement or of any other person; or (ii) the lack of any mutuality of obligation between a party to the agreement and any other person.

- (b) For the purposes of the Netting Law:

- (i) a close-out netting provision is defined as follows:

"close-out netting provision, in respect of an agreement, means so much of the agreement as relates to -

- (a) *there ceasing to be any time allowed for the performance of an obligation specified in the agreement on the occurrence of an event specified in the agreement (including its automatic termination);*
 - (b) *an obligation of the agreement to pay a specified amount but not immediately becoming an obligation to pay an amount determined pursuant to the agreement; or*
 - (c) *any combination of the matters mentioned in paragraphs (a) and (b),*

whether through the operation of netting or otherwise"

- (ii) netting is defined as follows:

"netting, in respect of an agreement, means the conversion, into one net claim or one net obligation, of all claims and obligations arising under the agreement to the effect that only that net claim can be demanded or that net obligation is owed."

- (c) The Netting Law further provides that, in the absence of fraud or misrepresentation, provisions in an agreement by which the parties to the agreement agree:

- (i) on a system or mechanism to be used to convert a non-financial obligation into a monetary obligation of an equivalent value;
 - (ii) on a system or mechanism to be used to value a non-financial obligation for netting purposes;
 - (iii) on the rate of exchange or the method to be used to establish a rate of exchange to be applied for netting purposes when the sums to be netted are in different currencies;



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(iv) on the method to be used to establish the currency in which payment of a net sum is to be effected; or

(v) that certain transactions or other dealings or a type or class of transactions or dealings carried out pursuant to the agreement are to be treated as a single transaction or dealing for netting purposes;

are enforceable notwithstanding (i) the bankruptcy of a party to the agreement or of any other person; or (ii) the lack of any mutuality of obligation between a party to the agreement and any other person.

(d) The Netting Law also provides, in the absence of fraud or misrepresentation, that:

(i) provisions ancillary to a close-out netting provision; and

(ii) provisions necessary for a close-out netting provision, set-off provision or contractual subordination provision to be implemented in accordance with the other provisions of the agreement,

are enforceable notwithstanding:

(iii) the bankruptcy of a party to the agreement or of any other person; or

(iv) the lack of any mutuality of obligation between a party to the agreement and any other person.

(e) 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.

(f) No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in paragraph 3.3.1 to apply.

3.4 Enforceability of the Clearing Module Netting Provision

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

3.4.2 We are of this opinion because:

(a) The Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (the **Netting Law**) provides that, in the absence of fraud or misrepresentation, a close-out netting provision in an agreement is enforceable in accordance with its terms notwithstanding (i) the bankruptcy of a party to the agreement or of



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any other person; or (ii) the lack of any mutuality of obligation between a party to the agreement and any other person.

(b) For the purposes of the Netting Law:

(i) a close-out netting provision is defined as follows:

"close-out netting provision, in respect of an agreement, means so much of the agreement as relates to –

- (a) *there ceasing to be any time allowed for the performance of an obligation specified in the agreement on the occurrence of an event specified in the agreement (including its automatic termination);*
- (b) *an obligation of the agreement to pay a specified amount but not immediately becoming an obligation to pay an amount determined pursuant to the agreement; or*
- (c) *any combination of the matters mentioned in paragraphs (a) and (b),*

whether through the operation of netting or otherwise"

(ii) netting is defined as follows:

"netting, in respect of an agreement, means the conversion, into one net claim or one net obligation, of all claims and obligations arising under the agreement to the effect that only that net claim can be demanded or that net obligation is owed."

(c) The Netting Law further provides that, in the absence of fraud or misrepresentation, provisions in an agreement by which the parties to the agreement agree:

- (i) on a system or mechanism to be used to convert a non-financial obligation into a monetary obligation of an equivalent value;
- (ii) on a system or mechanism to be used to value a non-financial obligation for netting purposes;
- (iii) on the rate of exchange or the method to be used to establish a rate of exchange to be applied for netting purposes when the sums to be netted are in different currencies;
- (iv) on the method to be used to establish the currency in which payment of a net sum is to be effected; or
- (v) that certain transactions or other dealings or a type or class of transactions or dealings carried out pursuant to the agreement are to be treated as a single transaction or dealing for netting purposes;

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are enforceable notwithstanding (i) the bankruptcy of a party to the agreement or of any other person; or (ii) the lack of any mutuality of obligation between a party to the agreement and any other person.

- (d) The Netting Law also provides, in the absence of fraud or misrepresentation, that:
 - (i) provisions ancillary to a close-out netting provision; and
 - (ii) provisions necessary for a close-out netting provision, set-off provision or contractual subordination provision to be implemented in accordance with the other provisions of the agreement,are enforceable notwithstanding:
 - (iii) the bankruptcy of a party to the agreement or of any other person; or
 - (iv) the lack of any mutuality of obligation between a party to the agreement and any other person.
- (e) 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.
- (f) If the Closing Module Netting Provision is not a close-out netting provision under the Netting Law (in view of the possibility of separate netting sets in relation to each Agreed CCP under a Clearing Agreement), then we are of this opinion because Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.
- (g) No amendments to the Clearing Module Netting Provision are necessary in order for the opinions expressed in paragraph 3.4.1 to apply.

3.5 Enforceability of the Addendum Netting Provision

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

3.5.2 We are of this opinion because:

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- (a) The Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (the **Netting Law**) provides that, in the absence of fraud or misrepresentation, a close-out netting provision in an agreement is enforceable in accordance with its terms notwithstanding (i) the bankruptcy of a party to the agreement or of any other person; or (ii) the lack of any mutuality of obligation between a party to the agreement and any other person.
- (b) For the purposes of the Netting Law:
 - (i) a close-out netting provision is defined as follows:

"close-out netting provision, in respect of an agreement, means so much of the agreement as relates to –

 - (a) *there ceasing to be any time allowed for the performance of an obligation specified in the agreement on the occurrence of an event specified in the agreement (including its automatic termination);*
 - (b) *an obligation of the agreement to pay a specified amount but not immediately becoming an obligation to pay an amount determined pursuant to the agreement; or*
 - (c) *any combination of the matters mentioned in paragraphs (a) and (b),*

whether through the operation of netting or otherwise"
 - (ii) netting is defined as follows:

"netting, in respect of an agreement, means the conversion, into one net claim or one net obligation, of all claims and obligations arising under the agreement to the effect that only that net claim can be demanded or that net obligation is owed."
- (c) The Netting Law further provides that, in the absence of fraud or misrepresentation, provisions in an agreement by which the parties to the agreement agree:
 - (i) *on a system or mechanism to be used to convert a non-financial obligation into a monetary obligation of an equivalent value;*
 - (ii) *on a system or mechanism to be used to value a non-financial obligation for netting purposes;*
 - (iii) *on the rate of exchange or the method to be used to establish a rate of exchange to be applied for netting purposes when the sums to be netted are in different currencies;*
 - (iv) *on the method to be used to establish the currency in which payment of a net sum is to be effected; or*



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(v) that certain transactions or other dealings or a type or class of transactions or dealings carried out pursuant to the agreement are to be treated as a single transaction or dealing for netting purposes;

are enforceable notwithstanding (i) the bankruptcy of a party to the agreement or of any other person; or (ii) the lack of any mutuality of obligation between a party to the agreement and any other person.

(d) The Netting Law also provides, in the absence of fraud or misrepresentation, that:

(i) provisions ancillary to a close-out netting provision; and
(ii) provisions necessary for a close-out netting provision, set-off provision or contractual subordination provision to be implemented in accordance with the other provisions of the agreement,

are enforceable notwithstanding:

(iii) the bankruptcy of a party to the agreement or of any other person; or
(iv) the lack of any mutuality of obligation between a party to the agreement and any other person.

(e) 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.

(f) If the Addendum Netting Provision is not a close-out netting provision under the Netting Law (in view of the possibility of separate netting sets in relation to each Agreed CCP under a Clearing Agreement), then we are of this opinion because Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.

(h) No amendments to the Addendum Netting Provision are necessary in order for the opinions expressed in paragraph 3.5.1 to apply.

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

In relation to a Clearing Agreement, the opinions expressed at paragraph 3.3 above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement. If as a matter of English law, 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,



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acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the FOA Netting Provision will, to the extent inconsistent with the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, be superseded by the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, the Jersey courts would recognize that superseding effect.

We are of this opinion because Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.

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 and to the extent that such is the effect of the FOA Netting Agreement under its governing law, 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 Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.

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No amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 to apply.

3.7.2 In relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision and to the extent that such is the effect of the Clearing Agreement under its governing law, 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 Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.

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

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

3.8.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions is a Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement) and to the extent that such is the effect of the Clearing Agreement under its governing law, 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

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rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:

- (i) 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
- (ii) 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 Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.

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

3.8.2 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision for which the FOA Set-Off Provision (insofar as constituting part of the FOA Netting Agreement) is not a Disapplied Set-Off Provision and to the extent such is the effect of the Clearing Agreement under its governing law, 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 and to the extent such is the effect of the Clearing Agreement under its governing law, 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.



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We are of this opinion because Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.

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

3.10 Enforceability of the Title Transfer Provisions

- 3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party and to the extent that such is the effect of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, 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 to the extent that such is the effect of the Clearing Agreement, 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 To the extent that such is the effect of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, 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 Jersey courts are, in the absence of vitiating factors including fraud, duress and public policy, reluctant to interfere with the terms of agreements, particularly industry - standard agreements, applying the customary law maxim: *la convention fait la loi des parties*. We are not however aware of any decisions of the Royal Court in relation to these matters which provide any authoritative guidance, and maxims, although useful guides to the likely approach of the Royal Court, are not themselves statements of law.

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



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

We are of this opinion to the extent that the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision are close-out netting provisions under the Netting Law.

To the extent that the FOA Netting Agreement or, as the case may be, the Clearing Agreement and the Transactions are part of a single agreement as a matter of their governing law, we are of the opinion that the Jersey courts would recognize that the FOA Netting Agreement or, as the case may be, the Clearing Agreement and the 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.



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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 opinion above is subject to the following observations and qualifications:-

- 4.1 The FOA Netting Agreement or the Clearing 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*):
 - (i) If a person has:
 - (i) 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
 - (ii) 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
 - (ii) if at the time of such transaction or preference:
 - (i) 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
 - (ii) (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.



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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 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

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to prove in the winding-up or *désastre* for the amount of its losses incurred as a result thereof.

4.5 In relation to the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision, the Bankruptcy Law and the Companies Law contain provisions for set-off in the following terms:

"where there have been mutual credits, mutual debts or other mutual dealings between the debtor and a creditor, an account shall be taken of what is due from the one party to the other as at the date of the declaration in respect of such mutual dealings, and the sum due from one party shall be set-off against any sum due from the other party, and the balance of the account and no more, shall be claimed or paid on either side respectively."

Were a Jersey court to be required to consider the matter in circumstances where the net amount calculated under the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and the Addendum Set-Off Provision was materially different from the net figure that would result from a set-off in accordance with the provisions contained in the Bankruptcy Law and the Companies Law, it is possible that the calculation of the net amount under the FOA Netting Agreement or the Clearing Agreement would be adjusted to conform with the above provisions. There are no provisions whereby proofs of debt in a liquidation in Jersey are mandatorily converted into the currency of Jersey nor any provisions preventing the conversion of a debt in one currency into a debt denominated in another currency. Further, we are not aware of any authority as to whether the court would treat debts in different currencies as being mutual. There is a French authority (which the court can find persuasive) that states the conditions of fungibility and liquidity are not met if a foreign currency is involved but it is dated and related to unusual circumstances and we are not able to express any view as to whether the Jersey court would now be likely to find it persuasive.

4.6 (a) There are provisions in the Companies Law for schemes of arrangement and 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 schemes of arrangement, the courts will not sanction the scheme unless efforts were made to notify those creditors or shareholders in accordance with the Companies Law. In relation to voluntary arrangements under the Companies Law, a creditor can be bound by the arrangement even if it has not been given notice of the creditors' meeting to approve the arrangement. In the case of either a scheme of arrangement or a voluntary arrangement, approval at the creditors' meeting of its terms does not require unanimity of the affected creditors, whether or not present at the meeting.

Such arrangements could affect the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision and Title Transfer Provisions and the value of claims which the creditors may have against the company.

(b) Where the close-out netting provisions procedure is commenced after the scheme of arrangement has become effective, to the extent that the effect of the arrangement is to alter or affect the terms of close-out netting provisions in the FOA Netting Agreement or the Clearing Agreement, as set out in paragraphs 3.3, 3.4 and 3.5 above, Jersey law would make such altered and affected terms enforceable in accordance with their terms.



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- (c) There is no authority as to whether the Court would refuse to sanction a scheme of arrangement approved by the requisite majorities on the basis that it would affect the close-out netting arrangements under the Agreement. There is no authority as to the effect of a scheme of arrangement if the procedure for close-out netting as specified in the FOA Netting Agreement or the Clearing Agreement had commenced before but not been completed before the Act of Court sanctioning the scheme becomes effective.
- (d) Whilst the Netting Law provides that a close-out netting provision (as defined in paragraph 3.3.2(b)(i)) is enforceable in accordance with its terms, there is also no authority as to how the Court would regard, in respects other than enforceability, the implementation of close-out netting provisions completed between (a) the Court's sanctioning of a scheme of arrangement and (b) the delivery for registration of the Act of Court sanctioning the scheme in circumstances where such implementation of the close-out netting provisions causes the underlying financial assumptions on which the scheme of arrangement has been based to change.
- (e) If the close-out netting under the FOA Netting Agreement or the Clearing Agreement is completed as a close-out netting provision for the purposes of the Netting Law and in accordance with the terms of such FOA Netting Agreement or Clearing Agreement (a matter of English law) before the Act of Court sanctioning a scheme of arrangement becomes effective (upon its delivery for registration to the registrar of companies in Jersey) the Court would be required by the Netting Law to enforce the close-out netting provisions in accordance with their terms.

4.7 Any provision in the FOA Netting Agreement or a Clearing Agreement providing that any calculation or certification is to be conclusive and binding will not be effective if such calculation or certification is fraudulent, incorrect, unreasonable, arbitrary or shown not to have been given or made in good faith and will not necessarily prevent judicial enquiry into the merits of any claim by any party thereto.

4.8 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.

4.9 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 FOA Netting Agreement or Clearing Agreement.

4.10 With respect to our opinion in paragraph 3.14, we would note that the Jersey Branch of a foreign Party would not be capable of being subject to a creditors' winding up under the Companies Law since such Jersey Branch is not a Jersey Company. In addition, for the purposes of a declaration of désastre the Jersey courts cannot treat a Jersey Branch of a foreign Party as a separate legal entity from the foreign Party existing under the laws of that foreign Party's home jurisdiction. In theory, the property of the Jersey Branch could be made subject to a declaration of désastre under the Bankruptcy Law. However, we consider it would very unlikely that the Royal Court would declare a désastre in relation to the foreign Party, even if the Jersey Branch of such foreign Party became insolvent, and we would expect the Royal Court to defer to the courts of the home jurisdiction of the foreign Party.

We would further note that in certain circumstances where insolvency proceedings in respect of a Multibranch Party have commenced in its home jurisdiction under Article 49(1) of the Jersey Bankruptcy Law, the Royal Court may assist the courts of

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prescribed countries and territories in all matters relating to the insolvency of any person to the extent that the Jersey court thinks fit. These prescribed jurisdictions include the United Kingdom. Further, in doing so, the Royal Court may have regard to the UNCITRAL model law, even though the model law has not been (and is unlikely to be) implemented as a separate law in Jersey. In the case In re Estates and General Developments Ltd (in liquidation) [2013] JRC 027, concerning an English debtor company, owning Jersey immovable property, which was in liquidation in England, fixed charge receivers appointed by a foreign secured creditor were able to use Article 49 of the Jersey Bankruptcy Law as a gateway to obtain recognition of their appointment and the authority to manage and sell Jersey immovable property, notwithstanding that the appointment of fixed charge receivers is a contractual (rather than court insolvency) appointment, and there is no such concept in Jersey law.

If the request comes from a non-prescribed country, then common law and principles of comity will be considered by the Royal Court by virtue of its inherent jurisdiction. If insolvency proceedings are afoot in another jurisdiction in relation to the company, the nature and extent of the cooperation from Jersey is likely to depend on the nature of the requesting country's insolvency regime. If the requesting country adheres to principles of territoriality, as opposed to universality, and, for instance, ring-fences assets for local creditors, full cooperation is highly unlikely. If, however, the jurisdiction applies similar fundamental principles to those applied in Jersey, the Royal Court's approach is more likely to be similar to the position where prescribed countries are involved.

In the case of both statutory and non-statutory requests for assistance, it should not be assumed that the UNCITRAL provisions will automatically be followed. That is a matter for the discretion of the Royal Court. It would also be wrong to assume for European countries that the position will be in accordance with EU insolvency legislation. Jersey does not form part of the European Community for the purposes of implementation of its directions. Accordingly, EU insolvency legislation does not apply as a matter of Jersey domestic law and the automatic test of centre of main interests does not apply as a result.

4.11 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
- (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.

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".



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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.).

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



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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.



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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.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.10.1 is deemed deleted and replaced with the following:

*"Insolvency Proceedings" in relation to an Individual means the declaring of the property of that Individual to be en désastre pursuant to the Bankruptcy (Désastre) (Jersey) Law 1990 (the **Bankruptcy Law**)*

1.1 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 the declaring of the property of that Individual to be en désastre pursuant to the Bankruptcy Law.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented by the following event:

"any process is commenced by any person which may result in [a Party] being declared "bankrupt" within the meaning of Article 8 of the Interpretation (Jersey) Law 1954."

We recommend that the above event is specified as an additional Insolvency Event of Default.

2. ADDITIONAL QUALIFICATIONS

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

2.1 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.

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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:

- 1.2 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
- 1.3 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



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in respect of an insolvent Jersey trust. This is an exceptional remedy granted under the inherent jurisdiction of the court.

- 2.3 Any claims against a Jersey Trustee under the FOA Netting Agreement or, as the case may be, a Clearing 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 FOA Netting Agreement or, as the case may be, a Clearing 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 FOA Netting Agreement or, as the case may be, a Clearing 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 FOA Netting Agreement or, as the case may be, a Clearing 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.

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ANNEX 1 FORMS OF FOA NETTING AGREEMENTS

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



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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**)



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

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



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ANNEX 2 List of Transactions

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

- (A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
 - (i) a contract made on an exchange or pursuant to the rules of an exchange;
 - (ii) a contract subject to the rules of an exchange; or
 - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,
in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
 - (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
 - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC, 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.

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ANNEX 3 DEFINITIONS RELATING TO THE AGREEMENTS

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

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

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

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

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

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

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

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

"Clearing Agreement" means an agreement:

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

"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):



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- (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"



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

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

"FOA Clearing Module" means the FOA Client Cleared Derivatives Module as first published on 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.



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"**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
- (g) 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**);



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- (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.

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"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).



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

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

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

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

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

"Rehypothecation Clause" means:

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

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

"Non-Cash Security Interest Provisions" means:

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

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

(b) the "Power of Sale Clause", being:

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (**Power of sale**);
- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (**Power of sale**);
- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (**Power of sale**);
- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (**Power of sale**);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (**Power of sale**);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (**Power of sale**);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (**Power of sale**);
- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (**Power of sale**);
- (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.

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"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



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(b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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



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ANNEX 4

PART 1 CORE PROVISIONS

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

1. FOA Netting Provision:

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

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

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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

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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

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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:

(i) 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

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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)];

- (ii) 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;
- (iii) 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]);
- (iv) 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

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[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

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"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

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the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

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



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PART 2 NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B", using synonyms, changing the order of the words) provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
2. Any change to a provision or provisions for the purposes of correct cross-referencing or by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the agreement provided in each case that the plain English sense and legal effect both of each such provision and of the agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
3. A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes effect.
4. Any change to the scope of the agreement clarifying that certain transactions (e.g., OTC derivatives governed by an ISDA Master Agreement) shall not be transactions or contracts for purposes of the agreement.
5. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), where such addition may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, and such addition may be expressed to apply to one only of the Parties.
6. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the agreement, Transactions, or both, is endangered.
7. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.
8. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.
9. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).
10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur

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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:
 - (a) more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
 - (b) more than one FOA Clearing Module or Clearing Module Netting Provision
 - (c) one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision
 - (d) provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.
 - (e) Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision



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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.

19. 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).
20. 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).
21. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.
22. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.



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PART 3 SECURITY INTEREST PROVISIONS

1. Security Interest Clause:

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

2. Power of Sale Clause:

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

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

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ANNEX 5

1. Necessary amendments

For the purposes of paragraph 3.1.4 and paragraph 1.1 of Schedule 2 (Individuals) the events specified in the Insolvency Events of Default Clause should be supplemented by the following event:

"any process is commenced by any person which may result in [a *Party*] being declared "bankrupt" within the meaning of Article 8 of the Interpretation (Jersey) Law 1954."