

England and Wales /
Prudential Regulation / CCP /
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December 2013

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31 December 2013

Dear Sirs

CCP Opinion in relation to LCH.Clearnet Limited

You have asked us to give an opinion in respect of the laws of England and Wales ("**this jurisdiction**") as to the effect of a netting provision and certain collateral arrangements in relation to LCH.Clearnet Limited (the "**Clearing House**") as they apply between the Clearing House and its clearing members (each a "**Member**").

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

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

1. TERMS OF REFERENCE

- 1.1 Except where otherwise defined herein, terms defined in the Rulebook (as defined below) of the Clearing House have the same meaning in this opinion letter.
- 1.2 The opinions given in Section 3 are in respect of a Member's rights and obligations under the Clearing House Documentation (as defined below) as at the date of this opinion. We express no opinion as to any provisions of the Clearing House Documentation other than those on which we expressly opine.
- 1.3 The opinions given in Section 3 are given in relation to the exercise of rights and obligations under the Clearing House Documentation by a Member who is a non-

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

natural person (as defined in the Financial Collateral Arrangements (No.2) Regulations 2003 (the "**FCA Regulations**") but who is neither a recognised investment exchange (within the meaning of section 155 of the Companies Act 1989) nor a recognised clearing house.

- 1.4 The opinions contained in Section 3 are not limited to any specific Service offered by the Clearing House but do not apply to Services offered to FCM Clearing Members in respect of FCM Contracts.

1.5 Definitions

In this opinion, unless otherwise indicated:

- 1.5.1 "**Clearing House Default Event**" means either of the events described in paragraphs (a) and (b) of the Netting Provision (being, broadly, a failure to pay, subject to a 30-day grace period, the commencement by the Clearing House of a procedure seeking or proposing an Insolvency Proceeding or other similar relief with respect to itself, the taking by the Clearing House of corporate action to authorise an Insolvency Proceeding or the commencement by any other person of a procedure which results in liquidation or winding-up of the Clearing House);
- 1.5.2 "**Clearing House Documentation**" means the Clearing Membership Agreement, the Rulebook and the Deed of Charge;
- 1.5.3 "**Client Money Rules**" means the rules set forth in chapters CASS 7 and 7A of the Client Assets Sourcebook of the Financial Conduct Authority's Handbook of Rules and Guidance, as in force at the date of this opinion;
- 1.5.4 "**Deed of Charge**" means a deed of charge entered into between a Clearing Member and the Clearing House in respect of all Non-cash Collateral transferred to the Clearing House by that Clearing Member which is substantially in the form of the Deed of Charge set out in Annex 2 and which contains no material modifications to the wording set out in Clause 2 or, for the purposes of the Opinion at paragraph 3.7.3, Clause 9.2, of that annexed form (for the avoidance of doubt, a change to the numbering of the clause or other provision in which the relevant wording appears in a particular deed of charge would not (in either such case) of itself constitute a "material modification" for these purposes);
- 1.5.5 "**Netting Provision**" means Regulation 39A;

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

- 1.5.6 "**Non-cash Collateral**" means Collateral in the form securities transferred by the Member (as Chargor) under the Deed of Charge to the Clearing House and forming part of the Clearing Member Current Collateral Balance at the relevant time;
- 1.5.7 "**Party**" means the Clearing House or the or the relevant Member and a reference to the "**Parties**" is to both of them;
- 1.5.8 "**Rulebook**" means the Regulations, Default Rules, Settlement Finality Regulations of the Clearing House, Procedures, and such other rules of the Clearing House in force as at the date of this opinion;
- 1.5.9 "**Secured Obligations**" has the meaning ascribed to such term in the Deed of Charge;

the following principles of interpretation apply:

- 1.5.10 references to a "**designated system**" are to a designated system within the meaning of and for the purposes of the Settlement Finality Regulations;
- 1.5.11 except in paragraphs 2.2, 3.7.2 (in relation to which the qualification set out in paragraph 4.2.5 will additionally apply) and 4.2.5, 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. Except in those paragraphs, we do not opine on the availability of any judicial remedy, including in respect of any net obligation resulting from any netting or set-off, whether pursuant to the Netting Provision or otherwise;
- 1.5.12 for the purposes of paragraphs 3.5.2, 3.6.3 and 3.6.4, the term "**exchange contract**" shall have the meaning ascribed to it in the Regulations, which, in broad terms, mean a Contract originally entered into on a recognised investment exchange;
- 1.5.13 a reference to a "**financial collateral arrangement**" is to an arrangement defined as such in the FCA Regulations;
- 1.5.14 a reference to "**FSMA**" is to the Financial Services and Markets Act 2000;
- 1.5.15 a reference to "**Part VII**" is a reference to Part VII of the Companies Act 1989 together with the Schedule to the Financial Services and Markets Act 2000

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

(Recognition Requirements for Investment Exchanges and Clearing Houses)
 Regulations 2001 (to the extent applicable in the relevant context);

- 1.5.16 a reference to a "**Regulation**" is, unless the context otherwise requires, a reference to a Regulation forming part of the General Regulations of the Clearing House;
- 1.5.17 references to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be);
- 1.5.18 a reference to the "**Settlement Finality Regulations**" is to the Financial Markets and Insolvency (Settlement Finality) Regulations 1999;
- 1.5.19 references to the word "**transfer**" and cognate terms are to be interpreted in accordance with paragraph (r) of Regulation 12;
- 1.5.20 a reference to the "**UNCITRAL Model Law**" is to the Model Law on cross-border insolvency as adopted by the United Nations Commission on International Trade Law on 30th May 1997; and
- 1.5.21 a reference to a statutory provision includes a reference to the statutory provision as modified or re-enacted or both from time to time before the date of this opinion and any subordinate legislation made or other thing done under the statutory provision before the date of this opinion.

2. ASSUMPTIONS

We assume the following:

- 2.1 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Clearing House Documentation and Contracts and to perform its obligations under the Clearing House Documentation and Contracts.
- 2.2 That each Party has taken all necessary steps and obtained and maintained all authorisations, approvals, licences and consents necessary to execute, deliver and perform the Clearing House Documentation and the Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Clearing House Documentation and the Contracts in this jurisdiction.
- 2.3 That, except with regards to the provisions discussed and opined on in this opinion letter, the Clearing House Documentation and the Contracts are legal, valid, binding and enforceable against both Parties.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

- 2.4 That the Clearing Membership Agreement and the Deed of Charge have been entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party.
- 2.5 For the purposes of the opinions set out in paragraphs 3.3 to 3.5, that the Member is at all relevant times able and not likely to become unable to meet its obligations in respect of one or more Contracts (whether due to winding-up, administration, receivership, bankruptcy, dissolution or analogous insolvency proceedings or any of the other events specified in Rule 5 of the Default Rules of the Clearing House).
- 2.6 That the Clearing House is at all material times a recognised clearing house within the meaning of section 285 of the Financial Services and Markets Act 2000 ("FSMA") and for the purposes of Part VII and a designated system within the meaning, and for the purposes, of the Settlement Finality Regulations.
- 2.7 That the Clearing House has (i) the centre of its main interests in this jurisdiction for the purposes of the EUIR (as defined below) and the Cross-Border Insolvency Regulations 2006 and (ii) no "establishment" in any other EU Member State for the purposes of the EUIR but an "establishment" in the United States for the purposes of the Cross-Border Insolvency Regulations 2006.
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Rulebook, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing House Documentation; and in particular, that there are no provisions in the rules of any relevant designated system (other than the Clearing House itself) which purport to override or are inconsistent with the Netting Provision.
- 2.9 That none of the provisions discussed and opined on in this opinion letter has been disallowed pursuant to section 300A of the FSMA.
- 2.10 The Clearing House Documentation and each of the Contracts accurately reflect the true intentions of the Parties and have been entered into and are carried out by the Parties in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.11 Save in relation to any non-performance leading to the taking of action by a Member under the Netting Provision, each Party performs its obligations under the Clearing House Documentation in accordance with its terms.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

3. **OPINION**

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

3.1 **Insolvency Proceedings**

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

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

The legislation applicable to Insolvency Proceedings is:

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

each as modified up to the date hereof.

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

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

3.2 **Recognition of choice of law**

The choice of law provisions of Regulation 38 (*Governing Law and Jurisdiction*), which apply to the Netting Provision, and the choice of law provisions pursuant to the Deed of Charge and Clearing Membership Agreement would be recognised under the

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

laws of this jurisdiction, notwithstanding that the Member may not be incorporated, domiciled or established in this jurisdiction.

3.3 Netting and Set-off: General

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

- (a) the Member would be entitled immediately to exercise its rights under the Netting Provision; and
- (b) the Member would be (i) entitled to receive only a single net positive amount or (ii) obliged to pay only a single net negative amount in respect of each Termination Amount and comprising the total loss or gain of the Member as a result of the termination of each payment or delivery which would otherwise have been required to be made under each individual included Contract, the value of the (debt) obligation of the Member to repay the amount of any cash balance in respect of variation margin paid by the Clearing House to the Member by way of Collateral and the value of the (debt) obligation of the Clearing House to repay the amount of any cash balance in respect of initial margin and/or variation margin. Please refer to paragraph 3.6 (*Cash Collateral*) for an analysis of the circumstances in which the relevant obligations of the Clearing House and the Member to repay cash balances in respect of margin might be expected to arise.

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 Member.

3.3.2 We are of this opinion because there is no rule of the laws of this jurisdiction which would, in our view, apply to prohibit the Parties from entering into a contract upon the terms of the Netting Provision.

In the event of a Clearing House Default Event in respect of the Clearing House, we are of the opinion that Regulation 12(1) of the FCA Regulations would apply to the Netting Provision. Regulation 12(1) of the FCA Regulations provides that a close-out netting provision constituting a term of a financial collateral arrangement, or an arrangement of which a financial collateral arrangement forms part, shall take effect in accordance with its

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

terms, notwithstanding that the collateral-provider or collateral-taker under the arrangement is subject to winding-up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations). In our view, the Netting Provision would qualify as a close-out netting provision constituting a term of an arrangement of which a financial collateral arrangement forms part under Regulation 12(1) of the FCA Regulations, the relevant "financial collateral arrangement" for these purposes being a "title transfer financial collateral arrangement" in respect of "financial collateral" in the form of "cash" (as each such term is defined in the FCA Regulations). The arrangements for the transfer of cash Collateral (i) between the Clearing House and the Member in respect of their respective variation margin obligations other than where paragraphs (b) and (c) of Regulation 15 apply (as more fully described in paragraphs 3.6.3 and 3.6.4); and (ii) by the Member to the Clearing House in respect of its initial margin obligations constitute the relevant title transfer financial collateral arrangements.

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

Regulations 14(1)(b) and 14(2)(b) of the Settlement Finality Regulations provide that the totality of default arrangements of a designated system take precedence over insolvency law, whether or not the default arrangements apply to "transfer orders", since these are separately dealt with in Regulations 14(1)(a) and 14(2)(a). Regulation 14(3) provides that "nothing in the following provisions of this Part shall be construed as affecting the generality of the above provisions". The "following provisions" – *inter alia*

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

Regulations 15, 16 and 17 – specify certain provisions of insolvency law which are explicitly disapplied as regards transfer orders. We believe that the effect of Regulation 14(3) is to confirm that these exclusions are not intended to be construed restrictively, and that they do not have the effect of limiting the precedence of "default arrangements" over the general law of insolvency to transfer orders only.

- 3.3.4 In a case where the Clearing House is in administration but a Clearing House Default Event has not occurred or the Clearing House is in administration or liquidation and a Clearing House Default Event has occurred but the Member has not exercised its rights under the Netting Provision, there may be a mandatory Statutory Insolvency Set-Off (as defined in paragraph 4.1.1) of amounts due, regardless of the Service in which the relevant amounts have arisen and regardless of whether the relevant amounts are in respect of the Member's Proprietary Accounts or Client Accounts.

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

In addition, Statutory Insolvency Set-Off would not apply in circumstances where Regulation 12(1) of the FCA Regulations and/or Regulation 14 of the Settlement Finality Regulations apply. In this regard, please refer to the qualifications in paragraph 4.1.7 in relation to the circumstances in which Regulation 12(1) of the FCA Regulations may not apply, and paragraphs 4.1.9 to 4.1.11 in relation to the circumstances in which Regulation 14 of the Settlement Finality Regulations may not apply.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

3.4.1 Where a Member has exercised its rights under the Netting Provision, a Termination Amount payable:

- (a) on any Client Account of a Member should not be aggregated with or netted against a Termination Amount payable on any Proprietary Account of the Member; and
- (b) on any Individual Segregated Account or any Omnibus Net Segregated Account of a Member should not be aggregated with or netted against any other Termination Amount.

However, where a Member has exercised its rights under the Netting Provision, a balance on any Client Account of a Member which is not an Individual Segregated Account or an Omnibus Net Segregated Account would be required to be aggregated with or (as the case may be) netted against the balances on each other such Client Account of that Member.

This is because paragraph (d)(v)(1) of the Netting Provision provides that where a Member has a Proprietary Account and one or more Client Accounts, the "*the Member shall determine...: (A) a separate net amount in respect of gains and losses arising on Contracts registered in each of its client accounts which are Individual Segregated Accounts or Omnibus Net Segregated Accounts and any corresponding cash Collateral balances held by that Member or the Clearing House; (B) a separate net amount in respect of gains and losses arising on all Contracts registered in all of its client accounts which are not Individual Segregated Accounts or Omnibus Net Segregated Accounts and any corresponding cash Collateral balances held by that Member or the Clearing House; and (C) a further separate net amount in respect of gains and losses arising on all Contracts registered in such Member's Proprietary Account (or Proprietary Accounts as combined) and any corresponding cash Collateral balances held by that Member or the Clearing House*" and that each such net amount is treated as a separate Termination Amount. Therefore, paragraph (d)(v) of the Netting Provision operates so as to produce a number of separate Termination Amounts between the Clearing House and the Member, one in respect of Proprietary Accounts, one in respect of all Client Accounts which are not Individual Segregated Accounts or Omnibus Net Segregated Accounts and as many additional Termination Amounts as the number of Individual Segregated Accounts and/or Omnibus Net Segregated Accounts of the relevant Member.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

For the reasons described in paragraph 3.3.2, Regulation 12(1) of the FCA Regulations provides that close-out netting provisions in relation to financial collateral arrangements take effect in accordance with their terms. Furthermore, for the reasons given in paragraph 3.3.3 above, Regulation 14 of the Settlement Finality Regulations would have the effect that the requirement of the Netting Provision to determine a number of Termination Amounts will take precedence over insolvency laws.

- 3.4.2 In a case where the Member has not exercised its rights under the Netting Provision but the Clearing House is subject to Insolvency Proceedings (being a case where no Clearing House Default Event has occurred (whether related to the Insolvency Proceedings or otherwise) or a Clearing House Default Event has occurred but the Member has not exercised its rights under the Netting Provision), any amounts due in respect of a Proprietary Account or a Client Account would be payable separately, provided that, if the Clearing House is in liquidation or administration, there may be a mandatory Statutory Insolvency Set-Off (as defined in paragraph 4.1.1) of such amounts to the extent that they are mutual.
- 3.4.3 With regard to the matter of whether or not amounts due in respect of both Proprietary Accounts and Client Accounts would be considered to be "mutual" for the purposes of Statutory Insolvency Set-Off, please note that:
- (a) where a Member is subject to the Client Money Rules, the effect of section 139 of FSMA and the Client Money Rules is that all amounts due in respect of certain Client Accounts will be held on trust for clients collectively, and such amounts would not be "mutual" with (and therefore could not be set off against) amounts due in respect of Proprietary Accounts or Client Accounts which are not subject to the trust;
 - (b) where a Member is subject to client segregation requirements under the laws of its home jurisdiction, the segregation arrangements may be regarded under the laws of this jurisdiction as making amounts due in respect of a Client Account not mutual with amounts due in respect of Proprietary Accounts, or, possibly, other Client Accounts; and
 - (c) where a Member has assigned in favour of a client its rights to the amounts due in respect of a Client Account (including under a Deed of Assignment in relation to the Clearing House's SwapClear Service),

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

such amounts would not be mutual with amounts due in respect of Proprietary Accounts or other Client Accounts.

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

3.5 Netting and Set-Off: Cross-Product Netting

- 3.5.1 The effect of the Netting Provision is to apply close-out netting to all open Contracts cleared by the Member with the Clearing House.
- 3.5.2 This is because the Netting Provision refers throughout to Contracts as defined under the General Regulations. "Contract" is defined to mean a "contract subject to the Regulations entered into by the Clearing House with a Member for the purposes of or in connection with the provision of clearing services". The General Regulations apply generally to all types of Contract cleared by the Clearing House. Exchange contracts and other Contracts subject to the settlement to market arrangements provided for in Regulation 15 may be included (together with any unsettled amounts in respect of variation margin related to such Contracts) in a close-out netting under the Netting Provision if they have not been settled and, therefore, remain open at the time when the netting occurs.
- 3.5.3 The Netting Provision does not differentiate, nor enable the Clearing House or Member to differentiate, between sub-sets of Contracts for the purposes of the netting arrangements provided for thereunder. In this regard, however, the comments set out in paragraph 3.4.1 in relation to the calculation of a separate Termination Amount in relation to the Contracts recorded in each Individual Segregated Account and Omnibus Net Segregated Account should be borne in mind.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

3.6 Cash Collateral

- 3.6.1 Payments made by a Member to the Clearing House under Regulation 12 and Regulation 43 as cash Collateral in respect of initial margin obligations constitute the absolute transfer of cash (as is provided for in paragraph (r)(i) of Regulation 12), so that, in the event of Insolvency Proceedings relating to the Clearing House, such cash Collateral would be treated as the property of the Clearing House available to its creditors generally.
- 3.6.2 However, the amount of cash so provided would constitute a debt owed by the Clearing House to the Member as principal, and would be subject to (i) close-out netting under the Netting Provision and/or under Regulation 5(i); or (ii) where close-out netting applied under neither the Netting Provision nor Regulation 5(i) and in the event of liquidation or, if the administrator has issued a notice under Rule 2.95 of the Insolvency Rules 1986, administration, Statutory Insolvency Set-Off (as defined in paragraph 4.1.1, and subject to the observations regarding mutuality mentioned in paragraphs 3.3.4 and 3.4.3).
- 3.6.3 Any payment made in accordance with paragraphs (b) and (c) of Regulation 15 would be a payment in settlement rather than a transfer of collateral by a Party in respect of its variation margin obligations. Accordingly, any such payment would not constitute a debt owed by the payee to the payer and, as a consequence, would not be subject to netting under the Netting Provision or form part of a Statutory Insolvency Set-off. Paragraphs (b) and (c) of Regulation 15 do not apply to cash Collateral transferred to by a Member to the Clearing House in respect of initial margin obligations, regardless of the type of Contract or Service in question. Therefore, even in the case of Services for the clearing of exchange contracts (in which circumstances paragraphs (b) and (c) of Regulation 15 would apply) cash Collateral transferred by a Member to the Clearing House in respect of initial margin obligations related to such exchange contracts will constitute a debt of the Clearing House and will be included in the calculation of the Termination Amount (as described in paragraph 3.6.4 below).

In relation to each Service where paragraphs (b) and (c) of Regulation 15 do not apply (which, in our opinion, would include the SwapClear, ForexClear and RepoClear Services but exclude any Services providing for the clearing of exchange contracts), variation margin will instead constitute cash Collateral transferred outright to the collateral taker with no intention to create any form of *in rem* security interest in favour of such Party by (i) the relevant Member

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

to the Clearing House and form part of the Clearing Member Current Collateral Balance or (ii) the Clearing House to the relevant Member and form part of the Clearing House Current Collateral Balance (as applicable). Following the occurrence of Clearing House Default Event and a Termination Date, the cash Collateral will (together in the case of (i) with any cash Collateral held by the Clearing House in respect of the relevant Member's initial margin obligations) be included in the calculation of a Termination Amount in accordance with paragraphs (d)(iv) and (d)(v) of the Netting Provision (as further described in paragraph 3.3.1 of this opinion) or form part of a Statutory Insolvency Set-off.

We have assumed that the view expressed in this paragraph 3.6.3 regarding the Services in respect of which variation margin would be transferred by way of collateralisation (and in respect of which paragraphs (b) and (c) of Regulation 15 would, therefore, not apply), is consistent with the operational processes of the Clearing House related to the relevant Services.

- 3.6.4 A transfer (as described in paragraph (r)(i) of Regulation 12) of cash Collateral made by a Member to the Clearing House or by the Clearing House to a Member would not be treated as subject to a charge pursuant to the General Regulations. This is because there is no rule of the laws of this jurisdiction to the effect that a payment made to another person and credited to an account by them would be subject to a charge, even where the transfer is of cash Collateral in respect of margin obligations, and express words would be required to establish the existence of a charge.

3.7 Non-cash Collateral

- 3.7.1 Any securities delivered by a Member to the Clearing House in respect of initial margin and constituting Non-cash Collateral would not be treated as the property of the Clearing House and would be returnable to the Member, even in the event of Insolvency Proceedings relating to the Clearing House, subject to the Member satisfying its obligations to the Clearing House. The arrangements by which such securities are transferred in accordance with the terms of the Deed of Charge and recorded in accounts with the Clearing House give rise to an arrangement under which the relevant Member is beneficially entitled. Under the terms of the Deed of Charge, each Member charges its interests in favour of the Clearing House but retains an equity of redemption over those interests. Upon the extinction of the Secured Obligations, the

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

charge under the Deed of Charge would fall away and the Member would revert to having beneficial rights in the relevant securities.

3.7.2 This is because Insolvency Proceedings generally recognise property rights existing prior to the onset of insolvency, and as a result, upon an insolvency of the Clearing House, only the assets of the Clearing House would be available to its creditors. A Member who has charged or mortgaged its assets to the Clearing House would have a pre-existing property right (in the form of an equity of redemption) in those assets, and that property right will be enforceable as against the Clearing House (in insolvency) and as against the insolvency practitioner of the Clearing House. Thus, the only claim which those creditors would have on the relevant Non-cash Collateral would be those rights which exist under the Deed of Charge to enforce against the assets in the event of a default by the Member. As a result, the Clearing House holds the Non-cash Collateral in a way that does not give it beneficial ownership of such property and will not result in such property being subject to legally enforceable claims by creditors, or to a court-ordered stay of the return of such property, should it become insolvent, save for any claims arising under prior security arrangements.

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

However, insofar as the security arrangements constituted by the Deed of Charge constitute a financial collateral arrangement, the right of use conferred by Clause 9.2 of each of the forms of Deed of Charge will have effect in accordance with Regulation 16 of the FCA Regulations insofar as it is conferred upon the Clearing House (but not other persons). The effect of the exercise of the right of use by the Clearing House would be to discharge the Member's proprietary rights in relation to the Non-cash Collateral and instead oblige the Clearing House (as a personal, rather than proprietary obligation) to replace the Non-cash Collateral by transferring equivalent financial collateral in accordance with the FCA Regulations.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

3.8 Default Fund Contributions

3.8.1 Under the Default Fund Rules, each Member must deposit and maintain a Contribution (in the form of cash) with the Clearing House in respect of each Service in which the Member participates. The amount of a Contribution for each Service varies from time to time according to the volume of the Member's Contracts, but (subject as follows) cannot exceed any maximum amount of the default fund established by the Clearing House for that service, namely:

- (a) in respect of the Clearing House's Commodities Service, the maximum size of the Commodities Fund Amount is £1.5 billion or such greater amount as may be determined by the Clearing House's risk committee;
- (b) in respect of the Clearing House's Equities Service, the maximum size of the Equities Fund Amount is £150 million or such greater amount as may be determined by the Clearing House's risk committee
- (c) in respect of the Clearing House's Listed Interest Rate Service, the maximum size of the Listed Interest Rate Fund Amount is £500 million or such greater amount as may be determined by the Clearing House's risk committee;
- (d) in respect of the Clearing House's ForexClear Service, there is no maximum size of the ForexClear Fund Amount, its minimum size is USD 70 million, and the ForexClear Fund Amount is the largest of the 30 Combined Loss Values (as defined in the Default Fund Rules) plus 10%;
- (e) in respect of the Clearing House's RepoClear Service, the maximum size of the RepoClear Segregated Fund Amount is EUR 620 million or such greater amount as may be determined by the Clearing House's risk committee; and

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

(f) in respect of the Clearing House's SwapClear Service, the maximum size of the SwapClear Segregated Fund Amount is £5 billion.

3.8.2 The effect of Rules F8, S8, R8, C6, E6 and L6 of the Default Fund Rules is that the Clearing House may, following a default of a Member participating in the Service to which the relevant Rule applies, require a Member to make a further Contribution to the relevant fund up to a sum equal in amount to its Contribution in respect of the relevant fund immediately prior to the relevant default. The effect of each of Rules F9, S9, R9, C8, E8 and L8 of the Default Fund Rules is that the Clearing House may, following a default of a Member participating in the Service to which the relevant Rule applies, require a Member to make additional payments to the Clearing House in order to enable the Clearing House to meet losses incurred in relation to the default. Under Rules F10 and S10 of the Default Fund Rules, the Clearing House may also request Members participating in the ForexClear Service or the SwapClear Service to make additional voluntary payments.

3.8.3 If a Member does not make a further Contribution in accordance with the Default Fund Rules summarised above, the Clearing House may terminate the Member's membership of the Clearing House.

3.8.4 The Clearing House may increase the Commodities Fund Amount, the Equities Fund Amount, the Listed Interest Rate Fund Amount, the SwapClear Fund Cap and the RepoClear Segregated Fund Amount. In the case of any proposed increase of the SwapClear Fund Cap and a proposed increase of the Commodities Fund Amount, the Equities Fund Amount, the Listed Interest Rate Fund Amount, or the RepoClear Segregated Fund Amount which exceeds certain thresholds, the proposed increase must be approved in a ballot of Members obliged to make Contributions to the relevant fund, by a majority representing more than 50% by number and at least 75% of the aggregate Contributions of Members voting in the ballot. If a Member fails to accede to such an increase approved by a ballot, the Clearing House may terminate the Member's membership of the Clearing House. If the Member retires from membership of the Clearing House or resigns from a particular Service, the Member's Contribution is repayable to the Member, subject to the Clearing House's right to utilise the Contribution in relation to any default (whether of the Retiring Member or the Resigning Member itself or of another Member) which arises in relation to the Service to which the Contribution relates at any time prior to when the relevant retirement or resignation is effective.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

4. **QUALIFICATIONS**

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

4.1 **Qualifications relating to Netting and Set-off: General**

- 4.1.1 The aggregation or set-off of amounts representing terminated obligations may, subject to any contrary statutory rule, such as Regulation 14 of the Settlement Finality Regulations or Regulation 12(1) of the FCA Regulations, be implemented, in a winding-up, under Rule 4.90 of the Insolvency Rules 1986 ("**Rule 4.90**") or in an administration, under Rule 2.85 of the Insolvency Rules 1986 ("**Rule 2.85**"), rather than under the specific provisions of the Agreement.

Set-off pursuant to Rule 4.90 or Rule 2.85 ("**Statutory Insolvency Set-Off**") would, in our view, subject to the segregation requirements of section 187 of the Companies Act 1989 (discussed at paragraph 4.1.4) and the regulations made thereunder result in a net amount payable between the Parties in respect of such amounts, subject to the other qualifications set out in this opinion and subject also to the inclusion in any Statutory Insolvency Set-Off of other mutual obligations between the Parties.

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

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

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

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

4.1.3 Statutory Insolvency Set-Off may not apply to amounts which arise under Contracts entered into at certain times, and accordingly an English court might not allow such amounts to be included in an aggregation or set-off pursuant to the Netting Provision or a Statutory Insolvency Set-Off. The times referred to are, so far as relevant, as follows:

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

Furthermore, any debt which has been acquired by the Member by assignment or otherwise pursuant to an agreement between the Member and any other

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

person must be excluded from Statutory Insolvency Set-Off, and may not be included in an aggregation pursuant to the Netting Provision, where such assignment or other agreement was entered into at any of the times mentioned above.

However, since, in our opinion, the Netting Provision constitutes a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, amounts which arise under Contracts entered into at the times mentioned in sub-paragraph (a) and sub-paragraph (c) above may (save where Regulation 12(1) of the FCA Regulations would not apply, as described in paragraph 4.1.7) still be included in an aggregation or set-off unless at the time the relevant financial obligations came into existence the Member was aware, or should have been aware, that winding up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations) had commenced in relation to the Clearing House.

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

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

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

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

However, under Regulation 14 of the FCA Regulations, Rule 2.86 and Rule 4.91 of the Insolvency Rules 1986 are disapplied in the case of liquidation or administration proceedings in respect of a party to financial collateral arrangement or a close out netting provision which permits conversion into sterling at a rate other than the "*official exchange rate*" unless the arrangement provides for an unreasonable exchange rate or the collateral taker uses the mechanism provided under the arrangement to impose an unreasonable exchange rate. In light of the opinion (given at paragraph 3.3.2) that the Netting Provision constitutes a "close-out netting provision" for the purposes of the FCA Regulations, Regulation 14 of the FCA Regulations should, in our opinion, apply in the case of a liquidation or an administration of the Clearing House, subject to the observations at paragraph 4.1.7 below.

- 4.1.6 In respect of any Contract entered into before the commencement of the winding-up in respect of the Clearing House, under which property is to be delivered after the time of such commencement and in respect of which the Clearing House transfers ownership of the property to the Member after the time of such commencement, it may not be possible for the price payable in respect of such property transferred to be included in the relevant Termination Amount. However, if such a Contract is terminated before ownership of the property to be delivered under such Contract is transferred, the gain or loss in respect of the Contract calculated in accordance with the Netting Provision should be capable of being included in the Termination Amount. Any action taken by the liquidator of the Clearing House to recover the price from the Member would not prejudice the effectiveness of the netting pursuant to the Netting Provision of other, valid, obligations.
- 4.1.7 In relation to paragraphs 3.3.1 and 3.4.1 above, Regulation 12(1) of the FCA Regulations does not apply if at the time that (any of) the relevant financial obligations came into existence:
- (a) the Member was aware, or should have been aware, that winding up proceedings or reorganisation measures (as such terms are defined in the FCA Regulations) had commenced in relation to the Clearing House;
 - (b) the Member had notice that a meeting of creditors of the Clearing House had been summoned under section 98 of the Insolvency Act 1986 (as to which see paragraph 4.1.3(c) above) or that a petition for the winding-up of the Clearing House was pending; or

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

- (c) the Member had notice that an application for an administration order was pending, or that a person had given notice of intention to appoint an administrator, in respect of the Clearing House.

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

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

However, after the commencement of a winding-up of the Clearing House any attachment will be ineffective unless the court otherwise orders, and in our view the court would not validate the attachment in order to defeat the rights of the Member under the Netting Provision. Further, the protections available under the Financial Collateral Regulations, the Settlement Finality Regulations and Part VII may have effect to override the claim of the attaching creditor.

- 4.1.9 In relation to our opinions at paragraphs 3.3 and 3.4, and our observations regarding the application of insolvency laws, the provisions of the Settlement Finality Regulations referred to will not apply in relation to any transfer order entered into by the designated system of the Clearing House (which we take to mean registered with the Clearing House) after the court has made a winding-up or administration order in relation to the Clearing House or the Clearing House has passed a resolution for creditors' voluntary winding-up, unless the transfer order is carried out on the same business day of the designated system as the order or resolution, and the system operator can show it did not have

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

notice of the order or resolution. It seems unlikely that the Clearing House would not have such notice of such an order or resolution and, accordingly, we express no view as to whether obligations between the Parties (in respect of Contracts or otherwise) which are, or arise from, transfer orders entered into after the commencement of the relevant Insolvency Proceedings may be included in the termination and liquidation under the Netting Provision, but the exclusion of any such obligation would not affect the enforceability of the Netting Provision in respect of any other obligations entered into before such time.

- 4.1.10 In relation to our opinion at paragraph 3.3.3, there is an argument that amounts due under Contracts which constitute derivatives do not constitute "transfer orders" for the purposes of the Settlement Finality Regulations. A "transfer order" may be either a "payment transfer order" or a "securities transfer order" (as defined in the Settlement Finality Regulations). While a cash sum due to be paid under a Contract ought to constitute, or give rise to, a "payment transfer order", it may be that the entirety of the Contract cannot properly be so regarded. Further, if under the terms of a Contract, title to, or an interest in, a commodity or other thing which is not a "security" (meaning an instrument referred to in section C of Annex I to Directive 2004/39/EC (MiFID)) is transferred, that Contract would not appear to constitute a "transfer order". If those arguments were to prevail, the additional protections provided by the Settlement Finality Regulations which are mentioned in paragraph 3.3.3 may not be available in respect of those Contracts.
- 4.1.11 In addition, there is an argument that, in the case of a central counterparty such as the Clearing House, which clears a number of different products in distinct product-specific clearing services, there would not be one single designated system for the purposes of the Settlement Finality Regulations (being the single centralised cross-product clearing system operated by the central counterparty) but, instead, the system in respect of each product cleared by the central counterparty should be treated as representing a separate designated system. If this were the case, then, notwithstanding our assumption at paragraph 2.7, and notwithstanding that the Bank of England (as the relevant "designating authority" under the Settlement Finality Regulations) has, as at the date of this opinion, indicated on its website that the Clearing House as a whole constitutes a single designated system, it may be that certain Services cleared by the Clearing House constitute or contain a designated system, whilst others do not. A possible consequence of this might be that, for certain Services, and for the Contracts cleared on those Services, the Netting

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

Provision would not constitute "default arrangements" for the purposes of Regulation 14 of the Settlement Finality Regulations and, therefore, that the protections provided for under that statutory rule would not be available in respect of the close-out netting under the Netting Provision of the relevant Contracts and in the relevant Services.

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

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

4.2 General insolvency issues

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

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

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

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

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

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

The matters on which we opine in paragraph 3.3 above are unlikely to be characterised as preferences, but the matters referred to in this paragraph are primarily questions of fact. We would also mention that under Regulation 17 of the Settlement Finality Regulations, no order may be made under section 239 in respect of a transfer order or the provision of "collateral security".

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

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

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

- 4.2.5 The enforceability of the property rights of a Member in Non-cash Collateral charged to the Clearing House under the Deed of Charge (as described in paragraph 3.7.2) may be limited by insolvency, liquidation, administration and other laws of general application relating to or affecting the rights of creditors as such law may be applied in the event of a Clearing House Default Event. In particular:

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

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

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

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

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

However, Regulation 2 of the Cross-Border Insolvency Regulations 2006 provides that the UNCITRAL Model Law shall have the force of law in Great Britain and, under Regulation 4 of Article 1 of the UNCITRAL Model Law, an English court shall not grant any relief or provide any co-operation or coordination under or by virtue of any provisions of the UNCITRAL Model Law if and to the extent that such relief, co-operation or coordination would be

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

4.3 Qualifications relating to Netting and Set-Off: House and Client Accounts

4.3.1 In the event of Insolvency Proceedings relating to the Clearing House, the continued ability of the Member to treat the amounts due to or from the Clearing House in respect of one or more Client Accounts separately from the amount owed to or from the Clearing House in respect of its Proprietary Account may be affected by the operation of Statutory Insolvency Set-Off. Statutory Insolvency Set-Off is (in the absence of any contrary statutory rule, such as Regulation 14 of the Settlement Finality Regulations or Regulation 12(1) of the FCA Regulations) mandatory, and has the effect that all mutual debts, mutual credits, and other mutual dealings must be aggregated and set off so that only a single net balance is payable between the Parties. We refer to paragraph 3.4.3 with regard to whether amounts due in respect of a Member's different Proprietary Accounts and Client Accounts would be considered to be mutual.

4.3.2 If Statutory Insolvency Set-Off applies so as to require that a single net amount is payable in respect of Proprietary Accounts and Client Accounts, it is unlikely that the Member and its own clients would be left in a worse position than in the absence of such Statutory Insolvency Set-Off. In such a case, the Member would be able to re-allocate positions between its own house and client accounts to achieve the same position that would have arisen in the absence of Statutory Insolvency Set-Off (assuming the Member is not prohibited from making such re-allocation in accordance with applicable regulation and accounting standards, in respect of which we express no view).

4.4 Qualifications relating to Cash Collateral

4.4.1 A Member's right against the Clearing House in respect of payments relating to cash collateral may be subject to a trust or security or other interest for the benefit of such Member's own clients, and in such cases may not be freely returnable to the Member beneficially.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

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

4.5 Qualifications relating to Non-cash Collateral

- 4.5.1 Insofar as fungible assets posted as Non-cash Collateral are not held by the Clearing House separately from assets in the absolute beneficial ownership of the Clearing House, there is a risk that the property rights of the Member in the Non-cash Collateral may be lost. It may be asserted, based on the case *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 that failure to segregate is fatal to the continuing property interest of the Member in the Non-cash Collateral. However, *Goldcorp* may be distinguished on the basis that it concerned physical assets (gold bullion) rather than account-held securities and, on the basis of *Hunter v Moss* [1994] 1 WLR 452, a property interest can continue in a mixed pool of account-held securities. In our view *Hunter v Moss* is likely to be followed by the courts of this jurisdiction notwithstanding that it has been academically criticised.
- 4.5.2 If the records maintained by the Clearing House are unclear as to whether securities held by the Clearing House are held for the Clearing House beneficially or for Members, the property rights of the Member in the Non-cash Collateral may be lost.
- 4.5.3 Whether or not there is full and effective segregation of the Clearing House's own assets from those belonging to Members, if there is a shortfall of securities of a given class it is unclear how the remaining securities would be distributed among claimants. In *Barlow Clowes v Vaughan* [1992] 4 All ER 22 a shortfall was shared rateably, but this decision was at first instance and may not be followed. The more traditional approach is to apply the principles of *Clayton's Case* (1816) 1 Mer 572 (property received first is deemed to have been utilised first) and *re Hallett's estate* (1880) 13 Ch D 695 (a trustee's own property is deemed to have been utilised before that of others, i.e. in this case Members). Whichever approach is followed, the full amount of the securities posted as Non-cash Collateral may not be returned to the

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

Member. As described at paragraph 4.1.12, section 900 of the Companies Act 2006 provides that a court order relating to a scheme of arrangement may provide for the transfer to any company of the property of any other company subject to the scheme, and "property" is broadly defined as "property, rights and powers of every description". However, section 900 does not provide for the order to include in the transfer property which does not belong to the company concerned. Thus, although it would be possible for the Clearing House's rights in the Non-cash Collateral (as chargor under the Deed of Charge) to be transferred to a new legal entity under a scheme of arrangement, the order would not have the effect of reducing or extinguishing the Member's interest in the Non-cash Collateral. The Member would therefore be entitled to recover the Non-cash Collateral in accordance with the terms of the Deed of Charge, even against the new chargor and/or new chargee.

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

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

There is appellate court authority (*Macmillan Inc v. Bishopsgate Investment Trust PLC (No.3)* [1996] 1 WLR 387) which can be interpreted as deciding that the place where shares are located is deemed to be the place where the share register is kept or the place where the issuer of the shares is incorporated, notwithstanding that the holder's interest in the shares is evidenced by book entries maintained by an intermediary. While in our view this authority does not exclude the analysis that an entitlement to securities held in book entry form is located where the books are situated, we are not aware of any binding authority which has considered the question of location of such entitlements. Accordingly, to the extent any of the Non-cash Collateral consists of shares and if a court were to conclude that such Non-cash Collateral should be regarded as being located outside this jurisdiction, the issue of enforceability of such Collateral may also be determined by a system, or systems, of law other than the laws of this jurisdiction.

4.6 General Qualifications

- 4.6.1 If the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the courts of this jurisdiction may recognise the extinction of those claims or liabilities. In particular, in relation to any Contract which is governed by a law other than the law of this jurisdiction, such proceedings may affect whether or not that Contract is available for inclusion in any netting or set-off pursuant to the Netting Provision.
- 4.6.2 An exchange contract¹ (which in our view, may include the Clearing House Documentation and certain Contracts) is unenforceable in the United Kingdom if (i) it involves the currency of any member of the International Monetary Fund and (ii) it is contrary to the exchange control regulations of any member of the International Monetary Fund maintained or imposed consistently with the International Monetary Fund Agreement. In our opinion, the Clearing House Documentation is not contrary to any exchange control regulations maintained or imposed by the United Kingdom. Further, there is inconsistent authority on what amounts to an "exchange contract" for these purposes. It is not clear whether the term encompasses any contract which in any way affects a country's exchange resources or only a contract for the exchange of one

¹ "Exchange contract" here has the meaning used in the International Monetary Fund Agreement and related legislation, and is not a reference specifically to on-exchange derivative contracts.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

currency for another, although the better view is probably that the latter (narrow) interpretation is correct.

- 4.6.3 Under English law, interest imposed upon a Party by the Clearing House Documentation might be held to be irrecoverable on the grounds that it is a penalty, or to the extent that it accrues on an unsecured debt after the making of a winding-up order or the passing of a winding-up resolution by the company liable to pay such interest, but the fact that it was held to be irrecoverable would not of itself prejudice the legality or validity of any other provision of the Clearing House Documentation. If the Clearing House Documentation does not provide a contractual remedy for the late payment of any amount payable thereunder that is a substantial remedy within the meaning of the Late Payment of Commercial Debts (Interest) Act 1998, the Party entitled to that amount may have a right to statutory interest (and to payment of certain fixed sums) in respect of that late payment at the rate (and in the amount) from time to time prescribed pursuant to that Act. Any term of the Clearing House Documentation may be void to the extent that it excludes or varies the right to statutory interest, or purports to confer a contractual right to interest that is not a substantial remedy for late payment of that amount, within the meaning of that Act. We express no opinion as to whether any such provisions in the Clearing House Documentation do in fact constitute a "substantial remedy" in compliance with the conditions set out in section 9 of such Act.
- 4.6.4 Where a Party to the Clearing House Documentation is vested with a discretion or may determine a matter in its opinion, that Party may be required to exercise its discretion in good faith, reasonably and for proper purpose, and to form its opinion in good faith and on reasonable grounds. Any provision in the Clearing House Documentation providing that any calculation, determination or certification is to be conclusive and binding may not be effective if such calculation, determination or certification is fraudulent or manifestly incorrect and an English court may regard any calculation, determination or certification as no more than prima facie evidence of the matter calculated, determined or certified.
- 4.6.5 If a party to an agreement is controlled by or otherwise connected with a person (or is itself) resident in, incorporated in or constituted under the laws of a country which is the subject of United Nations, European Community or UK sanctions implemented or effective in the United Kingdom under the United Nations Act 1946, the Emergency Laws (Re-enactments and Repeals)

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Act 1964 or the Anti-terrorism, Crime and Security Act 2001, or under the Treaty establishing the European Community, or is otherwise the target of any such sanctions, then the obligations of the other party to that party under the relevant agreement may be unenforceable or void.

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

This opinion is given for the sole benefit of the Futures and Options Association (the "FOA"). This opinion may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

- (a) such of the FOA's members (excluding associate members) as subscribe to the FOA's opinions library and whose terms of subscription give them access to this opinion (each a "**subscribing member**") and the officers, employees, and professional advisors of such subscribing member;
- (b) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, and professional advisors of such affiliate;
- (c) any competent authority supervising a subscribing member or an affiliate of such subscribing member in connection with their compliance with their obligations under prudential regulation; and
- (d) the officers, employees and professional advisors of the FOA,

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

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

Yours faithfully



Clifford Chance LLP

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Annex 1
Clearing Membership Agreement

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013



CLEARING MEMBERSHIP AGREEMENT

DATED

LCH.CLEARNET LIMITED

and

("the Firm")

Address of the Firm

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

THIS AGREEMENT is made on the date stated above

BETWEEN the Firm and LCH.CLEARNET LIMITED ("the Clearing House"), whose registered office is at Aldgate House, 33 Aldgate High Street, London, EC3N 1EA.

WHEREAS:

- A The Clearing House is experienced in carrying on the business of a clearing house and undertakes with each Clearing Member the performance of contracts registered in its name in accordance with the Rulebook;
- B The Clearing House has been appointed by certain Exchanges to provide central counterparty and other services in accordance with the terms and conditions of the Rulebook and certain agreements entered into between the Clearing House and such Exchanges;
- C The Clearing House also provides central counterparty and other services to participants in certain over-the-counter ("OTC") markets in accordance with the terms of this Agreement and the Rulebook;
- D The Firm desires to be admitted as a Clearing Member of the Clearing House to clear certain categories of Contract agreed by The Clearing House with the Firm and, the Clearing House having determined on the basis inter alia of the information supplied to it by the Firm that the Firm satisfies for the time being the relevant Criteria for Admission, the Clearing House agrees to admit the Firm as a Clearing Member subject to the terms and conditions of this Agreement.

NOW IT IS HEREBY AGREED as follows:-

1 Interpretation and Scope of Agreement

1.1 Unless otherwise expressly stated, in this Agreement:

- (a) "Cash Cover" means cover for margin (within the meaning of that term in the "Definitions" section of the Rulebook) provided in the form of a cash deposit with the Clearing House;
- (b) "Clearing Member" means a Person who has been admitted to membership of the Clearing House and whose membership has not terminated;
- (c) "Contract" means a contract or transaction eligible for registration in the Firm's name by the Clearing House in accordance with the Rulebook;
- (d) "Contribution" and "Contribution to the Default Fund" mean the sums of cash deposited by the Firm as cover in respect of the Firm's obligation to indemnify the Clearing House as provided by clause 9 of this Agreement and the Default Fund Rules;
- (e) "Criteria for Admission" means criteria set out in one or more documents published from time to time by the Clearing House, being criteria to be satisfied by an applicant for admission as a Clearing Member in respect of the Designated Contracts which the applicant wishes to clear with the Clearing House;
- (f) "Default Fund" means the fund established under the Default Fund Rules of the Clearing House to which the Clearing Member is required to contribute by virtue of clause 9 of this Agreement;
- (g) "Default Fund Rules" means that part of the Rulebook and Default Rules providing for the establishment and utilisation of the Default Fund but does not include any Procedures referable to any Default Fund Rules;

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

- (h) "Default Notice" means a notice issued by the Clearing House in accordance with the Default Rules in respect of a Clearing Member who is or is likely to become unable to meet its obligations in respect of one or more Contracts;
 - (i) "Default Rules" means that part of the Rulebook having effect in accordance with [repealed] Part IV of the Financial Services and Market Act 2000 (Recognition Requirements for Investment Exchange and Clearing Houses Regulations 2001 to provide for action to be taken in respect of a Clearing Member subject to a Default Notice;
 - (j) "Designated Contract" has the meaning given to it in clause 2.1;
 - (k) "Exchange" means an organisation responsible for administering a market with which the Clearing House has an agreement for the provision of central counterparty and other services to Clearing Members;
 - (l) "Exchange Contract" means any contract which an Exchange has adopted and authorised Exchange Members to trade in under its Exchange Rules and in respect of which the Clearing House has agreed to provide central counterparty and other services;
 - (m) "Exchange Member" means any person (by whatever name called) being a member of, or participant in, a Market pursuant to Exchange Rules;
 - (n) "Exchange Rules" means any of the regulations, rules and administrative procedures or contractual arrangements for the time being and from time to time governing the operation of a Market administered by an Exchange and includes, without prejudice to the generality of the foregoing, any regulations made by the directors of an Exchange or by any committee established under the Rules, and, save where the context otherwise requires, includes Exchange Contracts, and the Rulebook;
 - (o) "Rulebook" means the Clearing House's General Regulations, Default Rules, Default Fund Rules, Settlement Finality Regulations and Procedures and such other rules of the Clearing House as published and amended from time to time;
 - (p) "Market" means a futures, options, forward, stock or other market, administered by an Exchange, or an OTC market, in respect of which the Clearing House has agreed with such Exchange or, in respect of an OTC market, with one or more participants in that market, to provide central counterparty and related services on the terms of the Rulebook and in the case of an Exchange, pursuant to the terms of any agreement entered into with the Exchange;
 - (q) "Person" includes any firm, company, corporation, body, association or partnership (whether or not having separate legal personality) or any combination of the foregoing;
 - (r) "Procedures" means that part of the Rulebook by that name;
 - (s) "Registered Contract" means a contract registered in the Firm's name by the Clearing House in accordance with the Rulebook;
- 1.2. (a) References to "the parties" are references to the parties hereto, and "party" shall be construed accordingly;
- (b) References herein to a clause are to a clause hereof and clause headings are for ease of reference only;
- (c) Unless the context otherwise requires, words (including defined terms) denoting the singular shall include the plural and vice versa;

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

- (d) References to writing include typing, printing, lithography, photography, facsimile transmission and other modes of representing or reproducing words in a visible form; and
 - (e) References herein to statutes, statutory instruments, the Rulebook, or provisions thereof are to those statutes, statutory instruments, Rulebook or provisions thereof as amended, modified or replaced from time to time.
- 1.3 This Agreement, the terms of any other agreement to which the Clearing House and the Clearing Member are party which relates to the provision of central counterparty and other services by the Clearing House, the terms of, and applicable to, each and every Registered Contract, the Rulebook and all amendments to any of the foregoing shall together constitute a single agreement between the Clearing House and the Clearing Member and both parties acknowledge that all Registered Contracts are entered into in reliance upon the fact that all such items constitute a single agreement between the parties.
- 1.4 A person who is not a party to this Agreement shall have no rights under or in respect of this Agreement.
2. Clearing Membership
- 2.1 The Firm is hereby admitted as a Clearing Member on the terms set out in this Agreement. The Firm shall be eligible to clear such categories of Contract (each a "Designated Contract") as the Clearing House shall from time to time notify to the Firm.
- 2.2 The Firm warrants that the information supplied by the Firm to the Clearing House in connection with the enquiry conducted by the Clearing House to determine whether the Firm satisfies for the time being the Criteria for Admission was and is at the date of this Agreement true and accurate in all material respects.
- 2.3 The Firm will ensure that it will at all times satisfy the Criteria for Admission. If at any time it has reason to believe that it no longer satisfies or may cease to satisfy any of such criteria the Firm shall immediately notify the Clearing House of the circumstances.
- 2.4 The Firm shall give written notice forthwith to the Clearing House of the occurrence of any of the following of which it is aware:-
- (a) the presentation of a petition or passing of any resolution for the bankruptcy or winding-up of, or for an administration order in respect of, the Firm or of a subsidiary or holding company of the Firm;
 - (b) the appointment of a receiver, administrative receiver, administrator or trustee of the estate of the Firm;
 - (c) the making of a composition or arrangement with creditors of the Firm or any order or proposal in connection therewith;
 - (d) where the Firm is a partnership, an application to dissolve the partnership, the presentation of a petition to wind up the partnership, or any other event which has the effect of dissolving the partnership;
 - (e) where the Firm is a registered company, the dissolution of the Firm or the striking-off of the Firm's name from the register of companies;
 - (f) any step analogous to those mentioned in paragraphs (a) to (e) of this clause 2.4 is taken in respect of such persons as are referred to in those respective paragraphs in any jurisdiction;
 - (g) the granting, withdrawal or refusal of an application for, or the revocation of any licence or authorisation to carry on investment, banking or insurance business in any country;

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

- (h) the granting, withdrawal or refusal of an application for, or the revocation of, a license or authorisation by the Financial Services Authority or membership of any self-regulating organisation, recognised or overseas investment exchange or clearing house (other than the Clearing House) under the Financial Services and Markets Act 2000 or any other body or authority which exercises a regulatory or supervisory function under the laws of the United Kingdom or any other state;
 - (i) the appointment of inspectors by a statutory or other regulatory authority to investigate the affairs of the Firm (other than an inspection of a purely routine and regular nature);
 - (j) the imposition of any disciplinary measures or sanctions (or similar measures) on the Firm in relation to its investment or other business by any Exchange, regulatory or supervisory authority;
 - (k) the entering of any judgment against the Firm under Section 150 of the Financial Services and Markets Act 2000;
 - (l) the conviction of the Firm for any offence under legislation relating to banking or other financial services, building societies, companies, credit unions, consumer credit, friendly societies, insolvency, insurance and industrial and provident societies or for any offence involving fraud or other dishonesty;
 - (m) the conviction of the Firm, or any subsidiary or holding company of the Firm for any offence relating to money laundering, or the entering of judgment or the making of any order against the Firm in any civil action or matter relating to money laundering;
 - (n) any enforcement proceedings taken or order made in connection with any judgement (other than an arbitration award or judgement in respect of the same) against the Firm; and
 - (o) any arrangement entered into by the Firm with any other Clearing Member relating to the provision of central counterparty and associated services by the Clearing House of Contracts or transactions entered into by the Firm after the effective date of termination of this Agreement.
- 2.5 The Firm shall give written notice forthwith to the Clearing House of any person becoming or ceasing to be a director of or a partner in the Firm or of the occurrence of any of the following in relation to a director of or a partner in the Firm, if aware of the same:-
- (a) the occurrence of any event specified in clause 2.4 (insofar as it is capable of materially affecting him), or
 - (b) any disqualification order under the Company Directors Disqualification Act 1986 or equivalent order in overseas jurisdictions.
- 2.6 The Firm shall give written notice forthwith to the Clearing House of any change in its name, the address of its principal place of business, registered office or UK office.
- 2.7 The Firm shall give written notice to the Clearing House forthwith upon its becoming aware that any person is to become or cease to be, or has become or ceased to be, a controller of the Firm, and shall in relation to any person becoming a controller of the Firm state:-
- (a) the controller's name, principal business and address;
 - (b) the date of the change or proposed change.

In this clause and in clause 2.9 "controller" means a person entitled to exercise or control the exercise of 20 per cent or more of the voting power in the Firm.

England and Wales /
 Prudential Regulation / CCP /
 LCH.Clearnet Limited /
 December 2013

- 2.8 The Firm shall give written notice forthwith to the Clearing House of any change in its business which affects the Firm's ability to perform its obligations under this Agreement.
- 2.9 Where the Clearing House receives notification pursuant to any of clauses 2.3 to 2.8, or the Clearing House reasonably suspects that the Firm may no longer satisfy some or all of the Criteria for Admission or the criteria for clearing a Designated Contract, the Clearing House shall be entitled in its absolute discretion to call for information of whatsoever nature in order to determine whether the Firm continues to satisfy the Criteria for Admission or the criteria for clearing a Designated Contract. Without prejudice to the foregoing, the Clearing House may at any time call for information relating to the affairs (including the ownership) of any controller of the Firm or any person who is to become a controller of the Firm. The Firm shall forthwith on demand supply to the Clearing House information called for under this clause and shall ensure that such information is true and accurate in all respects.
- 2.10 The Firm undertakes to abide by the Rulebook and undertakes at all times to comply with other provisions of Exchange Rules so far as they apply to the Firm.
- 2.11 The Firm undertakes that at all times, to the extent the Firm is required under any applicable law to be authorised, licensed or approved in relation to activities undertaken by it, it shall be so authorised, licensed or approved.
- 2.12 The Firm agrees that in respect of any Contract for which central counterparty services are to be provided to the Firm by the Clearing House in accordance with the Rulebook, including, but not limited to, any contract made by the Firm under Exchange Rules on the floor of a Market (or through a Market's automated trading system) or otherwise, whether with a member of that Market or with a client or with any other person, and including any Contract entered into in an OTC market, the Firm shall contract as principal and not as agent.
- 2.13 The Firm shall furnish financial information to the Clearing House in accordance with the requirements of the Rulebook or such other requirements as the Clearing House may from time to time prescribe.
- 2.14 The Firm undertakes that, in its terms of business with its clients (being clients in respect of whom the Firm is subject to any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money):
- (a) where it is subject to Exchange Rules, it will at all times include a stipulation that contracts made under Exchange Rules with or for them shall be subject to Exchange Rules (including the Rulebook); and
 - (b) that money of such clients in the possession of the Clearing House may be dealt with by the Clearing House in accordance with the Rulebook without exception.
- 2.15 Without prejudice to clause 2.14 the Firm undertakes that its dealings with all its clients or counterparties shall be arranged so as to comply with the requirement that the Firm deals with the Clearing House as principal, and that all sums deposited with the Clearing House by way of Cash Cover (including the Firm's Contribution to the Default Fund) shall be deposited unencumbered and by the Firm acting as sole principal and as legal and beneficial owner.
- 2.16 The Firm undertakes not to assign, charge or subject to any other form of security, whether purporting to rank in priority over, *pari passu* with or subsequent to the rights of the Clearing House, any Cash Cover provided to the Clearing House, including its entitlement to repayment of its Contribution to the Default Fund or any part of it. Any purported charge, assignment or encumbrance (whether by way of security or otherwise) of Cash Cover provided to the Clearing House shall be void. The Firm shall not otherwise encumber (or seek to encumber) any Cash Cover provided to the Clearing House.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

3 Remuneration

- 3.1 The Clearing House shall be entitled to charge the Firm such fees, charges, levies and other dues, on such events, and calculated in accordance with such scales and methods, as are for the time prescribed by the Clearing House and, where relevant, for Exchange Contracts, after consultation with the relevant Exchange.
- 3.2 The Clearing House shall give the Firm not less than fourteen days' notice of any increase in such fees, charges, levies or other dues.

4 Facilities Provided by the Clearing House

4.1 Provision of Central Counterparty Services

- (a) Details of all Contracts to be registered by the Clearing House in the name of the Firm and in respect of which central counterparty services are to be provided shall be provided to the Clearing House in accordance with the Rulebook and any other agreement entered into between the Clearing House and the Firm.
- (b) Provided that a Contract meets the criteria for registration of that Contract in the name of the Firm and is a Designated Contract, and subject to the Rulebook, the Clearing House shall enter into a Registered Contract with the Firm in respect thereof. Each such Contract shall be registered in accordance with the Rulebook and the Clearing House shall perform its obligations in respect of all Registered Contracts in accordance with this Agreement and the Rulebook.

4.2 Maintenance of Records

The Clearing House agrees that for a period of six years after termination of a Registered Contract it shall maintain records thereof. The Clearing House may make a reasonable charge to the Firm for the production of any such records more than three months after registration.

4.3 Information

The Clearing House will provide to the Firm such information at such times as is provided for by the Rulebook.

4.4 Accounts

The Clearing House agrees to establish and maintain one or more accounts for the Firm in accordance with the Rulebook. Accounts will be opened and kept by the Clearing House in such manner as will not prevent the Firm from complying with requirements of any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money and the rules of such regulatory organisation as the Firm may be subject to in respect of their cleared business.

5 Default

In the event of the Firm appearing to the Clearing House to be unable, or to be likely to become unable, to meet any obligation in respect of one or more Registered Contracts, or failing to observe any other financial or contractual obligation under the Rulebook, the Clearing House shall be entitled to take all or any of the steps set out in that regard in the Rulebook, including (but not limited to) the liquidation of all or any of the Registered Contracts.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

6 Disclosure of Information

The Firm agrees that the Clearing House shall have authority to disclose any information of whatsoever nature concerning the Firm to such persons as is provided for by the Rulebook.

7 Partnership

If the Firm is a partnership, the liability of each partner in the Firm hereunder and under any Registered Contract shall be joint and several and, notwithstanding an event which would by operation of law give rise to the dissolution of the partnership, or entitle a partner to seek an order to dissolve the partnership, including, but not limited to, the event of the death, bankruptcy, winding-up or dissolution of any such partner, the respective obligations of the Clearing House and all other partners shall remain in full force and effect. If the Firm is a partnership, the Firm undertakes that if any new partner joins the Firm, the Firm shall procure that such new partner becomes jointly and severally liable alongside existing partners in respect of obligations of the Firm to the Clearing House outstanding at the date of such new partner's accession to the Firm.

8 Term

8.1 Subject to clause 8.3 either party (provided, in the case of the Firm, that the Clearing House has not issued a Default Notice in respect of the Firm) may terminate this Agreement by giving to the other party notice in writing, such notice to specify the effective date of termination ("the termination date") which shall be a business day not less than three months after the date of the notice, and this Agreement shall, subject to clause 8.2(b), terminate on the termination date. By the close of business on the termination date the Firm shall ensure that all Registered Contracts in the Firm's name have been closed-out or transferred so that there are no open Registered Contracts to which the firm is party at the end of the termination date.

8.2 If, under clause 8.1, the Firm has not closed out or transferred all Registered Contracts by the set termination date the Clearing House shall, at its sole discretion, be entitled to:

- (a) liquidate any such Registered Contracts in accordance with the Rulebook; and
- (b) require that the Firm remains a member of the Clearing House until such time as there are no Registered Contracts in existence to which the Firm is a party and the effective date of termination of this Agreement shall be postponed until such time.

8.3 If the Firm is in breach of or in default under any term of this Agreement or the Rulebook, or if the Clearing House has issued a Default Notice in respect of the Firm, or if the Clearing House reasonably determines that the Firm no longer satisfies the Criteria for Admission as a Clearing Member, the Clearing House may in its absolute discretion terminate this Agreement in writing either summarily or by notice as follows.

Any termination by notice under this clause 8.3 may take effect (subject as follows) on the expiry of 30 days or such longer period as may be specified in the notice. A notice given by the Clearing House under this clause may at the Clearing House's discretion allow the Firm a specified period in which to remedy the breach or default or to satisfy the Criteria for Admission as the case may be, and may specify what is to be done to that end, and may provide that if the same is done to the satisfaction of the Clearing House within that period the termination of this Agreement shall not take effect; and if this Agreement has terminated after the Clearing House has allowed the Firm such a period for remedy or satisfaction, the Clearing House shall then notify the Firm of the fact of termination. The Clearing House may, if the Clearing House has issued a Default Notice in respect of the Firm immediately, and in any other case after the effective date of termination, take such other action as it deems expedient in its absolute discretion to protect itself or any other Clearing Member including, without limitation, the liquidation of Registered Contracts but without prejudice to its own rights in respect of such contracts.

8.4 Upon the termination of this Agreement for whatever reason the Firm shall unless otherwise agreed cease to be a Clearing Member.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

9 Default Fund

- 9.1 In this clause the terms "Contribution", "Excess Losses", "Exchange Fund Amount", "RepoClear Fund Amount", "SwapClear Fund Amount", "EquityClear Fund Amount", "Specified Exchange", "Fund Amount" and "Quarter Day" bear the meanings ascribed to them in the Default Fund Rules.
- 9.2 The Firm, as primary obligor and not surety, hereby indemnifies the Clearing House in respect of Excess Losses, and undertakes to deposit cash with the Clearing House as collateral for its obligations in respect of such indemnity, in accordance in each case with the Default Fund Rules.
- 9.3 The Firm shall, in accordance with the Default Fund Rules, continue to be liable to indemnify the Clearing House in respect of Excess Losses arising upon any default occurring before the effective date of termination of this Agreement. Subject thereto, the indemnity hereby given shall cease to have effect on the effective date of termination of this Agreement, unless a Default Notice is issued by the Clearing House in respect of the Firm, in which case the indemnity hereby given shall cease to have effect after the date three months after the date of issue of such Default Notice.
- 9.4 Notwithstanding General Regulation 34, no proposal for any major amendment to the Default Fund Rules (a "proposal") shall be capable of coming into effect unless first approved in a ballot of Clearing Members. The following provisions shall apply to the ballot
- (a) the Clearing House shall send details of the proposal to all Clearing Members together with an explanatory statement and a voting paper, specifying a closing date by which completed voting papers are to be received by the Clearing House;
 - (b) the procedure for the conduct of the ballot (including without limitation the closing date and the method for despatch and return of voting papers) shall be determined by the Clearing House in its sole discretion; and
 - (c) the proposal shall be treated as approved only if the votes in favour of the proposal represent more than 50% by number and at least 75% of the aggregate Contributions (as calculated at the Quarter Day immediately preceding the date of despatch of the proposal) of those Clearing Members voting in the ballot. A proposal approved in such manner shall in any event take effect only in relation to the Firm if the Firm thereafter expressly accedes to it in writing.
- 9.5 For the purposes of clause 9.4, an amendment shall be regarded as "major" if it is:-
- (a) for any increase in the Exchange Fund Amount to a sum exceeding £310,000,000 or for any increase in the RepoClear Fund Amount to a sum exceeding £105,000,000 or for any increase to the EquityClear Fund Amount to a sum exceeding £100,000,000 or for any increase in the SwapClear Fund Amount to a sum exceeding £125,000,000 or, in each case, such greater sum as may have been approved by ballot under clause 9.4;
 - (b) for any change in the nature of liabilities for which the Firm's indemnity is given by virtue of clause 9.2, including any direction to extend the scope of such indemnity to any part of an Excess Loss arising from a Contract on the Rules of an Exchange other than a Specified Exchange; or
 - (c) any other amendment which, in the opinion of the Board of Directors of LCH.Clearnet Limited, would represent a significant change in the commitments of the Clearing Members or a significant section of the Clearing Members.
- 9.6 Where the Fund Amount has been reduced following application by the Clearing House of part or all of any Contribution, the Fund Amount may be increased subject to the provisions of the Default Fund Rules and clause 9.5; provided that where the Board of LCH.Clearnet Limited considers that the increase proposed is significant, the increase shall not be capable of coming into effect unless first approved in a ballot of Clearing Members held in the manner prescribed by clause 9.4. An increase approved by such a ballot shall in any event take effect only in relation to the Firm if the Firm expressly accedes to it in writing.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

9.7 For the avoidance of doubt the Clearing House shall be at liberty to terminate the Firm's Clearing Membership under clause 8.1 of this Agreement if the Firm fails to accede to a proposal for amendment to the Default Fund Rules approved as provided in clause 9.4 or an increase in the Fund Amount following application of part or all of a Contribution which either the Board of LCH.Clearnet Limited does not consider to be significant or has been approved in like manner.

9.8 Save as provided expressly by the Default Fund Rules, the Firm shall not be entitled to exercise any right of subrogation in respect of any sum applied in satisfaction of its obligations to the Clearing House under this clause 9.

10 Force Majeure

Neither party shall be liable for any failure in performance of this Agreement if such failure arises out of causes beyond its control. Such causes may include, but are not limited to, acts of God or the public enemy, acts of civil or military authority, fire, flood, labour dispute (but excluding strikes, lock-outs and labour disputes involving the employees of the party intending to rely on this clause or its sub-contractors), unavailability or restriction of computer or data processing facilities or of energy supplies, communications systems failure, failure of a common depository, clearing system or settlement system, riot or war.

11 The Rulebook

Subject to the provisions of clause 9.4 relating to General Regulation 34 and amendment of the Default Fund Rules, in the event of conflict between the Rulebook and the provisions of this Agreement the Rulebook shall prevail.

12 Notices

12.1 Any notice or communication to be made under or in connection with this Agreement shall be made in writing addressed to the party to whom such notice or communication is to be given; save that a notice or communication of an urgent nature shall be given or made orally and as soon as reasonably practicable thereafter confirmed in writing in conformity hereto. A notice may be delivered personally or sent by post to the address of that party stated in this Agreement, or to such other address as may have been notified by that party in accordance herewith.

12.2 Where a notice is sent by the Clearing House by post it shall be deemed delivered 24 hours after being deposited in the post first-class postage prepaid in an envelope addressed to the party to whom it is to be given in conformity to clause 12.1, or in the case of international mail, on the fourth business day thereafter. In all other cases notices shall be deemed delivered when actually received.

13 Law

13.1 This Agreement shall be governed by and construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to hear and determine any action or dispute which may arise herefrom. The Clearing House and the Firm each irrevocably submits to such jurisdiction and to waive any objection which it might otherwise have to such courts being a convenient and appropriate forum.

13.2 The Firm irrevocably waives, with respect to itself and its revenues and assets all immunity on the grounds of sovereignty or other similar grounds from suit, jurisdiction of any court, relief by way of injunction, order for specific performance or for recovery of property, attachment of its assets (whether before or after judgement) and execution or enforcement of any judgement to which it or its revenues or assets might otherwise be entitled in any proceedings in the courts of any jurisdiction and irrevocably agrees that it will not claim any such immunity in any proceedings.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

14 Service of Process

Without prejudice to any other mode of service, and subject to its right to change its agent for the purposes of this Clause on 30 days' written notice to the Clearing House, the Firm (other than where it is incorporated in England and Wales or otherwise has an office in England and Wales) appoints, as its agent for service of process relating to any proceedings before the courts of England and Wales in connection with the Firm the person in London as notified to the Clearing House in writing with the application for admission.

IN WITNESS whereof the parties hereto have caused this Agreement to be signed by their duly authorised representatives the day and year first before written.

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for LCH.CLEARNET LIMITED

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

(Signature)

(Print Name and Title)

for LCH.CLEARNET LIMITED

LCH.CLEARNET LIMITED

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England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Annex 2

Deed of Charge

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 15
October 2010

A company incorporated in England and Wales executing the document pursuant to Section 44
of the Companies Act 2006 without the use of a seal.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

CHARGE BY CLEARING MEMBER

CHARGE SECURING OWN OBLIGATIONS

Date of Execution: _____

Date of Delivery:
(to be completed by LCH.Clearnet Limited) _____

Name and Address of Chargor:

Clearing Membership Agreement Date: _____

Chargor's Account (House/Client):

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

THIS CHARGE made on the date above-stated BETWEEN THE ABOVE-NAMED CHARGOR ("the Chargor") and LCH.CLEARNET LIMITED ("the Clearing House")

WITNESSES as follows :

1. The Secured Obligations

- (1) The Chargor shall on demand pay to the Clearing House all monies (including settlement costs, interest and other charges) which now are or at any time hereafter may be or become due or owing by the Chargor to the Clearing House on the account identified above (or, but only if no account is identified, on all accounts of the Chargor with the Clearing House) and discharge all other liabilities of the Chargor (whether actual or contingent, now existing or hereafter incurred) to the Clearing House on the said account (or, if no account is identified, on all accounts of the Chargor with the Clearing House) pursuant to the above-stated Clearing Membership Agreement between the Chargor and the Clearing House (as from time to time amended, varied or supplemented) and the Clearing House Rulebook referred to therein (the Clearing Membership Agreement and the Rulebook as from time to time amended, renewed or supplemented being hereinafter referred to as "the Agreement").
- (2) In the event of the Clearing House making such demand the Chargor shall pay interest accruing from the date of demand on the monies so demanded and on the amount of other liabilities at the rate provided for in the Agreement or, in the event of no such rate having been agreed, at a rate determined by the Clearing House (the rate so agreed or determined to apply after as well as before any judgment), such interest to be paid upon demand of the Clearing House in accordance with its usual practice and to be compounded with rests in the event of its not being duly and punctually paid.
- (3) The monies, other liabilities, interest and other charges referred to in paragraph (1) of this clause, the interest referred to in paragraph (2) of this clause and all other monies and liabilities payable or to be discharged by the Chargor under or pursuant to any of the following clauses hereof are hereinafter collectively referred to as "the Secured Obligations".

2. Charge

- (1) The Chargor acting in due capacity (as defined in paragraph (2) below) (and to the intent that the security so constituted shall be a security in favour of the Clearing House extending to all beneficial interests in the assets hereby charged and to any proceeds of sale or other realisation thereof or of any part thereof including any redemption monies paid or payable in respect thereof) hereby assigns, charges and pledges by way of first fixed security and by way of continuing security to the Clearing House, until discharged by the Clearing

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

House, for the payment to the Clearing House and the discharge of all the Secured Obligations, the Charged Property (as defined in paragraph (2) below) and grants a first security interest therein to the Clearing House.

(2) In this Charge:

"acting in due capacity" in relation to the Chargor means that each of the dispositions of property hereby effected by the Chargor is made with full title guarantee subject to any postponed lien in favour of an Authorised Bank (as contemplated in Clause 4(c));

"Authorised Bank" means a bank for the time being authorised for the purposes of this Charge by the Clearing House or any nominee company or trust company which is a subsidiary of such a bank;

"the Charged Property" means at any time:

- (i) all Specified Securities which are for the time being held by, or by any clearance system on behalf of, for the account of, to the order of or under the control or direction of the Clearing House;
- (ii) all Specified Securities which are for the time being held by, or by any clearance system on behalf of, for the account of or to the order of or under the control or direction of an Authorised Bank, for the account of the Clearing House; and
- (iii) subject to Clause 3(2) below, all rights, benefits and proceeds attaching to or arising from or in respect of any Specified Securities referred to in (i) or (ii) above;

"clearance system" shall be construed as a reference to any system from time to time used or constituted for the clearing, collective safe custody or central deposit of securities, and any depository for any of the foregoing;

"Clearing Membership Agreement" means in relation to the Chargor the "Clearing Membership Agreement" between the Chargor and the Clearing House;

"Procedures" means the one or more documents containing the working practices and administrative requirements of the Clearing House for the purposes of implementing the Clearing House Rulebook from time to time in force, or procedures for application for and regulation of clearing membership of the Clearing House;

"Quality Requirements" means such requirements as to the rate, maturity,

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

size, incidence or other qualities of securities from time to time forming the Charged Property as the Clearing House may specify in its Procedures or from time to time notify to the Chargor in writing;

"securities" shall be construed as a reference to bonds, debentures, notes, stock, shares, bills, certificates of deposit and other securities and instruments and all monies, rights or property which may at any time accrue or be offered (whether by way of bonus, redemption, preference, option or otherwise) in respect of any of the foregoing (and without limitation, shall include any of the foregoing not constituted, evidenced or represented by a certificate or other document but by any entry in the books or other records of the issuer, a trustee or other fiduciary thereof, or a clearance system); and

"Specified Securities" means the securities details of which are from time to time agreed in writing between the Chargor and the Clearing House by reference to this Charge (as recorded in the schedule hereto as from time to time amended).

3. Accretions

- (1) Subject to paragraph (2), all monies forming part of the Charged Property shall, unless otherwise agreed between the Clearing House and the Chargor, be paid to and retained by the Clearing House, and any such monies which may be received by the Chargor shall pending such payment be held in trust for the Clearing House. The Clearing House shall be entitled at any time to apply such monies in or towards the reduction or discharge of the Secured Obligations or any of them.
- (2) No income arising from the Charged Property, whether by way of dividend or interest or other annual payment, shall form part of the Charged Property.

4. Preservation of Charged Property

Until the security hereby constituted shall have been discharged:

- (a) the Chargor shall ensure, so far as the Chargor is able, that all of the Charged Property is and at all times remains free from any restriction on transfer;
- (b) the Chargor shall pay all payments due in respect of any part of the Charged Property, and in any case of default by the Chargor in this respect the Clearing House may if it thinks fit make any such payments on behalf of the Chargor in which event any sums so paid shall be reimbursed on demand by the Chargor to the Clearing House and shall until reimbursed bear interest in accordance with Clause 1(2) above; and

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

- (c) where the Chargor maintains an account with an Authorised Bank, the Chargor shall procure that the Authorised Bank shall promptly acknowledge in writing (in form and substance satisfactory to the Clearing House) to the Clearing House, and shall not withdraw such acknowledgement, that any general or other lien claimed by the Authorised Bank over all or any Specified Securities shall be postponed to and rank in all respects behind the security constituted by this Charge.

5. Further Assurance

- (1) In the case of any part of the Charged Property situated in the United States of America, it is acknowledged and agreed by the Chargor that this Charge shall also constitute a security agreement for the purpose of creating a security interest in the Charged Property under applicable provisions of the Uniform Commercial Code or other applicable laws or regulations of the United States of America or any political subdivision thereof. In furtherance of the foregoing and without limiting the generality of Clause 2 above, in order to secure the payment, performance and observance of the Secured Obligations, the Chargor hereby grants to the Clearing House a continuing security interest in, right of setoff against, and an assignment to the Clearing House of all of the Chargor's Charged Property located in the United States of America and all rights thereto, in each case whether now owned or existing or hereafter acquired or arising and regardless of where located and which shall include, without limitation, all of the Chargor's interests in any deposit accounts, investment property and securities entitlements (as such terms are defined in the Uniform Commercial Code of the applicable jurisdiction within the United States of America; the "UCC"), together with all Proceeds (as defined in the UCC) and products of all or any of the property described above.
- (2) The Chargor undertakes promptly to execute and do (at the cost and expense of the Chargor) all such deeds, documents, acts and things as may be necessary or desirable in order for the Clearing House to enjoy a fully perfected security interest in the whole of the Charged Property, including without limitation the deposit of the Charged Property with an Authorised Bank and the perfection of pledges or transfers under such laws, of whatever nation or territory, as may govern the pledging or transfer of the Charged Property or part thereof or other mode of perfection of this Charge and the security interest expressed to be created hereby. Without limiting the foregoing, the Chargor agrees with and covenants to the Clearing House that with respect to all Charged Property located in the United States of America consisting of investment property, money, instruments, securities, securities entitlements, deposit accounts and other financial assets (as defined in the UCC), shall be held, maintained or deposited, as applicable, in a securities account or a deposit account (as defined in the UCC) in the name of the Clearing House (such that the Clearing House shall become the entitlement holder thereof, as defined in

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

the UCC), or, if permitted by the Procedures, may be maintained and held in the Chargor's name at an Authorised Bank which shall have executed and delivered to the Clearing House an agreement whereby such Authorised Bank agrees that it will comply with entitlement orders of the Clearing House without further consent by the Chargor.

6. Warranties and Undertakings

The Chargor hereby represents and warrants to the Clearing House and undertakes that:

- (i) the Chargor (or some person for whom the Chargor is trustee or agent and from whom the Chargor holds and will at all times hold all requisite authorities) is and will at all times during the subsistence of the security and security interest hereby constituted, be the sole and lawful owner of, and be entitled to the entire beneficial interest in, the Specified Securities free from mortgages or charges (other than this Charge and any charge in favour of the Chargor) or other encumbrances and no other person (save as aforesaid) has any rights or interests therein;
- (ii) the Chargor has not (nor has any person for whom the Chargor is trustee or agent) sold or agreed to sell or otherwise disposed of or agreed to dispose of, and will not at any time during the subsistence of the security hereby constituted sell or agree to sell or otherwise dispose of or agree to dispose of, the benefit of all or any rights, titles and interest in and to the Charged Property or any part thereof;
- (iii) the Chargor has and will at all material times have the necessary power to enable the Chargor to enter into and perform the obligations expressed to be assumed by the Chargor under this Charge;
- (iv) this Charge constitutes a legal, valid, binding and enforceable obligation of the Chargor and is a security over, and confers a first security interest in, the Charged Property and every part thereof effective in accordance with its terms;
- (v) all necessary authorisations to enable or entitle the Chargor to enter into this Charge have been obtained and are in full force and effect and will remain in such force and effect at all times during the subsistence of the security hereby constituted;
- (vi) the execution of this Charge does not violate any agreement to which the Chargor is a party or breach any obligation to which the Chargor is subject;
- (vii) it has been and shall at all times remain expressly agreed between the Chargor and each of the Chargor's clients or other persons who are for the time being

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

(or would be, but for the provisions of this Charge) entitled to the entire beneficial interest in all or any parts of the Charged Property that, in relation to any assets from time to time held by the Chargor or delivered to the Chargor for the account of any such client or other person which at any time form part of the Charged Property, the Chargor may, free of any adverse interest of any such client or other person therein, charge or otherwise constitute security over such assets in favour of the Clearing House on such terms as the Clearing House may from time to time prescribe and, in particular but without limitation, on terms that the Clearing House may enforce and retain such charge or other security in satisfaction of or pending discharge of all or any obligations of the Chargor to the Clearing House; and

- (viii) in no case is the Chargor or the Chargor's client or other person who is for the time being the lawful owner of or person entitled to the entire beneficial interest in any part of the Charged Property, nor will the Chargor, client or other such person be, in breach of any trust or other fiduciary duty in placing or authorising the placing of any securities (or rights, benefits or proceeds forming part of the Charged Property) under this Charge;

and

- (ix) the Chargor undertakes to abide by the Procedures as in effect from time to time.

7. Negative Pledge

- (1) The Chargor hereby undertakes with the Clearing House that at no time during the subsistence of the security hereby constituted will the Chargor, otherwise than:

- (i) in favour of the Clearing House; or
- (ii) with the prior written consent of the Clearing House and in accordance with and subject to any conditions which the Clearing House may attach to such consent,

create, grant, extend or permit to subsist any mortgage or other fixed security or any floating charge or other security interest on, over or in the Charged Property or any part thereof. The foregoing prohibition shall apply not only to mortgages, other fixed securities, floating charges and security interests which rank or purport to rank in point of security in priority to the security hereby constituted but also to any mortgages, securities, floating charges or security interests which rank or purport to rank *pari passu* therewith or thereafter.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

- (2) Paragraph (1) above does not, during the subsistence of the security hereby constituted, operate to prevent the Chargor from:
- (i) continuing to hold a security interest in the Charged Property previously created in favour of the Chargor; or
 - (ii) creating a security interest in the Charged Property in favour of the Chargor;

provided always that in either case the interest in favour of the Chargor shall rank after this Charge.

8. Power of Sale

- (1) If the Chargor shall make default in paying or discharging any of the Secured Obligations on demand or if any default of any kind shall occur under any provisions of this Charge or of the Agreement or any other agreement or contract giving rise to any of the Secured Obligations, or if any securities for the time being forming part of the Charged Property fail to conform to the Quality Requirements, the Clearing House shall have and be entitled without prior notice to the Chargor to exercise the power to sell or otherwise dispose of, for any consideration (whether payable immediately or by instalments) as the Clearing House shall think fit, the whole or any part of the Charged Property and may (without prejudice to any right which it may have under any other provision hereof) treat such part of the Charged Property as consists of money as if it were the proceeds of such a sale or other disposal. The Clearing House shall be entitled to apply the proceeds of such sale or other disposal in paying the costs of such sale or other disposal and (subject to the rights or claims of any person entitled in priority to the Clearing House) in or towards the discharge of the Secured Obligations, the balance (if any) to be paid to the Chargor or other persons entitled thereto. Such power of sale or other disposal shall operate as a variation and extension of the statutory power of sale under section 101 of the Law of Property Act 1925.
- (2) The restriction contained in section 103 of the Law of Property Act 1925 on the exercise of the statutory power of sale shall not apply to any exercise by the Clearing House of its power of sale or other disposal which shall arise, as shall the statutory power under the said section 101 of appointing a receiver of the Charged Property or the income thereof, immediately upon any such default by the Chargor as is referred to in paragraph (1) of this clause. In favour of a purchaser a certificate in writing by an officer or agent of the Clearing House that either or both of such powers has arisen and is exercisable shall be conclusive evidence of that fact.
- (3) Upon any such default or failure as aforesaid the Clearing House shall also

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

have with respect to any part of the Charged Property situated in the United States of America all of the rights and remedies of a secured party under the Uniform Commercial Code or any other applicable law of the United States of America or any political subdivision thereof and all rights provided herein or in any other applicable security, loan or other agreement, all of which rights and remedies shall to the full extent permitted by law be cumulative.

9. Rights Attaching to the Charged Property

- (1) The Chargor shall not permit or agree to any variation of the rights attaching to or conferred by the Charged Property or any part thereof without the prior consent of the Clearing House in writing.
- (2) The Clearing House and its nominees may at the Clearing House's discretion (in the name of the Chargor or otherwise whether before or after any demand for payment hereunder and without any consent or authority on the part of the Chargor) exercise in respect of any securities which form part of the Charged Property the powers and rights conferred on or exercisable by the bearer or holder thereof.

10. Power of Attorney

The Chargor hereby irrevocably appoints the Clearing House to be the Chargor's attorney and in the Chargor's name and on the Chargor's behalf and as the act and deed of the Chargor to sign, seal, execute, deliver, perfect and do all deeds, instruments, mortgages, acts and things as may be, or as the Clearing House may consider to be, requisite for carrying out any obligation imposed on the Chargor under Clause 5 above, or for enabling the Clearing House to exercise its power of sale or other disposal referred to in Clause 8 above or for carrying any such sale or other disposal made under such power into effect, or exercising any of the rights and powers referred to in Clause 9 above, including without limitation the appointment of any person as a proxy of the Chargor. The Chargor hereby undertakes to ratify and confirm all things done and documents executed by the Clearing House in the exercise of the power of attorney conferred by this Clause.

11. Consolidation of Securities

Subsection (1) of section 93 of the Law of Property Act 1925 shall not apply to this Charge.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

12. Effectiveness of Security

- (1) This Charge shall be in addition to and shall be independent of every other security which the Clearing House may at any time hold for any of the Secured Obligations. No prior security held by the Clearing House over the whole or any part of the Charged Property shall merge in the security hereby constituted.
- (2) This Charge shall remain in full force and effect as a continuing security unless and until the Clearing House discharges it.
- (3) Nothing contained in this Charge is intended to, or shall operate so as to, prejudice or affect any bill, note, guarantee, mortgage, pledge, charge or other security of any kind whatsoever which the Clearing House may have for the Secured Obligations of any of them or any right, remedy or privilege of the Clearing House thereunder.

13. Remedies, Time or Indulgence

- (1) The rights, powers and remedies provided by this Charge are cumulative and are not, nor are they to be construed as, exclusive of any right of set-off or other rights, powers and remedies provided by law.
- (2) No failure on the part of the Clearing House to exercise, or delay on its part in exercising, any of the rights, powers and remedies provided by this Charge or by law (collectively "the Clearing House's Rights") shall operate as a waiver thereof, nor shall any single or partial waiver of any of the Clearing House's Rights preclude any further or other exercise of that or any other of the Clearing House's Rights.
- (3) The Clearing House may in its discretion grant time or other indulgence or make any other arrangement, variation or release with any person not party hereto (irrespective of whether such person is liable with the Chargor) in respect of the Secured Obligations or in any way affecting or concerning them or any of them or in respect of any security for the Secured Obligations or any of them, without in any such case prejudicing, affecting or impairing the security hereby constituted, or any of the Clearing House's Rights or the exercise of the same, or any indebtedness or other liability of the Chargor to the Clearing House.

14. Accounts

- (1) If the Clearing House shall at any time receive notice of any subsequent mortgage, assignment, charge or other interest affecting the whole or any part of the Charged Property the Clearing House may open a new account or accounts for the Chargor in its books. If the Clearing House does not do so, then (unless the Clearing House gives express written notice to the contrary to

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

the Chargor) as from the time of receipt of such notice by the Clearing House, all payments made by the Chargor to the Clearing House shall in the absence of any express appropriation by the Chargor to the contrary be treated as having been credited to a new account of the Chargor and not as having been applied in reduction of the Secured Obligations at the time when the Clearing House received the notice.

- (2) All monies received, recovered or realised by the Clearing House under this Charge (including the proceeds of any conversion of currency) may in the discretion of the Clearing House be credited to any suspense or impersonal account and may be held in such account for so long as the Clearing House shall think fit (with interest accruing thereon at such rate, if any, as the Clearing House may deem fit) pending their application from time to time (as the Clearing House shall be entitled to do in its discretion) in or towards the discharge of any of the Secured Obligations.
- (3) In case more than one account of the Chargor in the books of the Clearing House shall be identified in this Charge for the purpose of Clause 1(1) above, or in case the Clearing House shall have more than one account for the Chargor in its books but no account is identified for the purpose of Clause 1(1), the Clearing House may at any time after making any demand for payment or other discharge of any of the Secured Obligations or after the Clearing House shall have received notice of any subsequent charge or other interest affecting all or any part of the Charged Property, and without prior notice in that behalf, forthwith (so far as may be allowed by the Agreement) transfer all or any part of any balance standing to the credit of any such account to any other such account which may be in debit.

15. Currency

- (1) For the purpose of or pending the discharge of any of the Secured Obligations the Clearing House may convert any monies received, recovered or realised or subject to application by the Clearing House under this Charge (including the proceeds of any previous conversion under this Clause) from their existing currency of denomination into such other currency of denomination as the Clearing House may think fit, and any such conversion shall be effected at such commercial spot selling rate of exchange then prevailing for such other currency against the existing currency as the Clearing House may in its discretion determine.
- (2) References herein to any currency extend to any funds of that currency and for the avoidance of doubt funds of one currency may be converted into different funds of the same currency.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

16. Costs, Charges and Expenses

All costs, charges and expenses of the Clearing House incurred in the exercise of any of the Clearing House's Rights, or in connection with the execution of or otherwise in relation to this Charge or in connection with the perfection or enforcement of all security hereby constituted or any other security held by the Clearing House for the Secured Obligations or any guarantee to the Clearing House in respect thereof shall be reimbursed to the Clearing House by the Chargor on demand on a full indemnity basis together with interest from the date of the same having been incurred to the date of payment at the rate referred to in Clause 1(2) above.

17. Law and Jurisdiction

This Charge shall be governed by and construed in accordance with English law, and the Chargor hereby irrevocably submits to the non-exclusive jurisdiction of the English courts; provided that with respect to issues arising as a result of the provisions of Clause 5(1) above or the use of this Charge as a security agreement as provided therein, this Charge shall be governed by and construed in accordance with applicable laws and regulations of the United States of America or any political subdivision thereof.

18. Provisions Severable

Each of the provisions contained in this Charge shall be severable and distinct from one another and if at any time any one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of each of the remaining provisions of this Charge shall not in any way be affected, prejudiced or impaired thereby.

19. Notices

- (1) Any notice or demand requiring to be served on the Chargor by the Clearing House hereunder may be served on any of the officers of the Chargor personally, or by letter addressed to the Chargor or to any of its officers and left at its registered office or any one of its principal places of business, or by posting the same by letter addressed in any such manner as aforesaid to such registered office or any such principal place of business.
- (2) Any notice or demand sent by post in accordance with paragraph (1) of this Clause shall be deemed to have been served on the Chargor at 10 a.m. Greenwich Mean Time on the business day next following the date of posting. In proving such service by post it shall be sufficient to show that the letter containing the notice or demand was properly addressed and posted and such proof of service shall be effective notwithstanding that the letter was in fact not delivered or was returned undelivered.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

20. The Clearing House's Discretions

Any liberty or power which may be exercised or any determination which may be made hereunder by the Clearing House may be exercised or made in the absolute and unfettered discretion of the Clearing House which shall not be under any obligation to give reasons therefor.

21. Interpretation

- (1) Any reference herein to any statute or to any provisions of any statute shall be construed as a reference to any statutory modification or re-enactment thereof and to any regulations or orders made thereunder and from time to time in force.
- (2) Section 61 of the Law of Property Act 1925 shall apply to the construction of this Charge.
- (3) The clause headings shall not affect the construction hereof.

EXECUTED and DELIVERED as a DEED on the date first above stated.

By:-

.....
Signature of Director

.....
Name of Director

.....
Signature of Director/Secretary

.....
Name of Director/Secretary

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

The SCHEDULE

Specified Securities
(Clause 2(2))

The Specified Securities shall be those securities from time to time agreed between the Clearing House and the Chargor, and identified in writing as such on each occasion by the Chargor in the form so prescribed from time to time for that purpose by the Clearing House. Each such document shall form part of this Schedule. This Schedule may, therefore, comprise several pages, which may be unattached to this page.

England and Wales /
Prudential Regulation / CCP /
LCH.Clearnet Limited /
December 2013

Version 14
April 2005

Dated 2011

AMBRIAN COMMODITIES LIMITED

and

LCH.CLEARNET LIMITED

**CHARGE BY CLEARING MEMBER
SECURING OWN OBLIGATIONS**
