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09 December 2014

Dear Sirs

CCP Opinion in relation to LME Clear

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 LME Clear (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 Rules (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.

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- 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-natural person (as defined in the Financial Collateral Arrangements (No.2) Regulations 2003 (the "FCA Regulations")) and who is neither a recognised investment exchange (within the meaning of section 155 of the Companies Act 1989) nor a recognised clearing house.
- 1.4 The opinions contained in Section 3 are not limited to any specific services offered by the Clearing House.
- 1.5 The opinion given in paragraph 3.8 is given only in relation to Securities Collateral comprising securities credited to an Account.

1.6 Definitions

In this opinion, unless otherwise indicated:

- 1.6.1 "**Clearing House Documentation**" means the Membership Agreement, the Rules and the Security Deed;
- 1.6.2 "**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;
- 1.6.3 "**Netting Provision**" means Rules 10.13.3 to 10.13.8;
- 1.6.4 "**Party**" means the Clearing House or the relevant Member and a reference to the "**Parties**" is to both of them;
- 1.6.5 "**Rules**" means the rules and the Procedures (including any Annexes) of the Clearing House in force and published on the Clearing House website as at the date of this opinion;
- 1.6.6 "**Secured Obligations**" has the meaning ascribed to such term in the Security Deed;
- 1.6.7 "**Security Deed**" means, in respect of each Member who provides Collateral to the Clearing House in the form of securities and/or Gold, a Security Document in the form of the security deed set out in Annex 2;
- 1.6.8 "**Statutory Insolvency Set-Off**" has the meaning ascribed to such term in paragraph 4.1.1;

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the following principles of interpretation apply:

- 1.6.9 references to the "**Banking Act**" are to the Banking Act 2009;
- 1.6.10 references to a "**designated system**" are to a designated system within the meaning of and for the purposes of the Settlement Finality Regulations (as defined below);
- 1.6.11 except in paragraphs 2.2, 3.8.2 (in relation to which the qualification set out in paragraph 4.3.5 will additionally apply) and 4.3.5, 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;
- 1.6.12 references to the "**EUIR**" are to the EU Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;
- 1.6.13 a reference to "**FCA Regulations**" is to the Financial Collateral Arrangements (No. 2) Regulations 2003;
- 1.6.14 a reference to a "**financial collateral arrangement**" is to an arrangement defined as such in the FCA Regulations;
- 1.6.15 a reference to "**FSMA**" is to the Financial Services and Markets Act 2000;
- 1.6.16 references to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be);
- 1.6.17 a reference to "**Part VII**" is a reference to Part VII of the Companies Act 1989 together with the Schedule to the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001 (to the extent applicable in the relevant context);
- 1.6.18 a reference to a "**Rule**" is, unless the context otherwise requires, a reference to a rule forming part of the Rules, and a reference to a "**Procedure**" is to a procedure forming part of the Procedures;

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- 1.6.19 a reference to the "**Settlement Finality Regulations**" is to the Financial Markets and Insolvency (Settlement Finality) Regulations 1999; and
- 1.6.20 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 the Contracts and to perform its obligations under the Clearing House Documentation and the 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.
- 2.4 That the Membership Agreement and (where applicable) the Security Deed 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 3.4 to 3.8, 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 10.2).
- 2.6 That the Clearing House is at all material times a recognised central counterparty within the meaning of section 285 of FSMA and for the purposes of Part VII; a designated system within the meaning and for the purposes of the Settlement Finality Regulations; and a UK Clearing House within the meaning and for the purposes of the Banking Act.

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- 2.7 That the Clearing House has (i) the centre of its main interests in the United Kingdom for the purposes of the EUIR and (ii) no "establishment" in any other jurisdiction for the purposes of the EUIR and the Cross-Border Insolvency Regulations 2006.
- 2.8 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Rules, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Clearing House Documentation; and in particular, 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 FSMA.
- 2.10 That 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 That each Party acts in accordance with the terms of the Clearing House Documentation; and that (save in relation to any non-performance leading to the taking of action by a relevant Member under the Netting Provision), each Party performs its obligations under the Clearing House Documentation in accordance with its terms.

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**".

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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; and
- 3.1.2 in relation to schemes of arrangement, section 895 to 901 of the Companies Act 2006,

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, the EUIR would apply to the Clearing House and has direct effect in this jurisdiction.

3.2 Banking Act

- 3.2.1 Instead of or in addition to Insolvency Proceedings, the Clearing House may be subject to a "property transfer instrument" under sections 11 and 12 of the Banking Act if the Bank of England is satisfied that (i) the Clearing House is failing, or likely to fail, to satisfy the recognition requirements and (ii) it is not reasonably likely that other action(s) will be taken by or in respect of the Clearing House which would enable the Clearing House to maintain the critical clearing services it provides while also satisfying the recognition requirements.

For the purposes of the foregoing:

"critical clearing services" has the meaning ascribed to such term in section 7 of the Banking Act, being "central counterparty clearing services the withdrawal of which may, in the Bank of England's opinion, threaten the stability of the financial systems in the United Kingdom"; and

"recognition requirements" has the meaning ascribed to such term in section 7 of the Banking Act, being "the requirements resulting from section 286 of FSMA" (which the Clearing House is required to satisfy on an ongoing basis

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as a condition for maintaining its status as a recognised clearing house within the meaning and for the purposes of FSMA).

3.2.2 In relation to netting, the effects of a partial property transfer, and other powers exercisable in respect of the Clearing House under the Banking Act, are considered at paragraph 4.2 below.

3.3 Recognition of choice of law

The choice of law provisions of Rule 2.12 (*Governing Law and Jurisdiction*), which apply to the Netting Provision, and the choice of law provisions pursuant to the Security Deed and Membership Agreement would be recognised under the laws of this jurisdiction, notwithstanding that the Member may not be incorporated, domiciled or established in this jurisdiction.

3.4 Netting and Set-off: General

3.4.1 The Netting Provision will be enforceable in accordance with its terms so that, upon the occurrence of a LME Clear Default and following the specification by a Member of a Close Out Date:

- (a) all Open Contracts between the Clearing House and the relevant Member would automatically terminate on the Close Out Date and on and from the Close Out Date neither the Clearing House nor the Member would be obliged to perform further Payment Obligations or Delivery Obligations in respect of such Open Contracts (save in respect of the net sums representing the Close Out Amounts as described in paragraph (c) below);
- (b) the relevant Member would calculate in respect of a relevant Account
 - (i) its Aggregate Member Entitlement (comprising the aggregate rights of the Member to receive payment from the Clearing House, whether current, contingent or future, and including, without limitation, rights of the Member to receive amounts payable by the Clearing House in respect of the settlement or performance of Open Contracts, in respect of costs reasonably incurred by the Member in accordance with Rules 10.13.7(a)(1)), and in respect of the return of Cash Collateral (please refer to paragraph 3.6 (*Cash Collateral*) for an analysis of the circumstances in which the relevant obligations of the Clearing House to return Cash Collateral might be expected to arise); and
 - (ii) the

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Aggregate Member Obligation (comprising the aggregate rights of the Clearing House to receive payment from the Member, whether current, contingent or future, and including, without limitation, rights of the Clearing House to amounts payable by the Member in respect of the settlement or performance of Open Contracts); and

- (c) in respect of each Account, the Member would be (i) entitled to receive only a single net positive Close Out Amount; or (ii) obliged to pay only a single net negative Close Out Amount, each such Close Out Amount being the result of a set-off between the Aggregate Member Entitlement and the Aggregate Member Obligation in respect of the relevant Account.

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.

In addition, the Rules do not contain a "walkaway" clause (i.e. a provision which would permit the Member to make a lower payment than the Close Out Amount calculated in respect of the Contracts, together with other losses or gains referable to the Contracts).

- 3.4.2 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 LME Clear Default 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 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

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Regulations). The arrangements for the transfer of Cash Collateral by the Member to the Clearing House in respect of its Margin Requirement constitute the relevant title transfer financial collateral arrangement.

3.4.3 Furthermore, the Netting Provision is triggered by any LME Clear Default, including a LME Clear Default 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 any Insolvency Proceeding in respect of the Clearing House which constitutes a LME Clear Default (in the form of an LME Clear Insolvency Default) would not interfere with the netting in accordance with the Netting Provision of amounts including amounts due in respect of (i) payment obligations in respect of the performance or settlement of Contracts and (ii) the Cash Collateral held by the Clearing House in respect of the Member's Margin Requirement.

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 laws, including Statutory Insolvency Set-Off (please see paragraph 3.4.5 below for further details), whether or not the default arrangements apply to "transfer orders", since these are separately dealt with in Regulations 14(1)(a) and 14(2)(a). Regulation 14(3) provides that "nothing in the following provisions of this Part shall be construed as affecting the generality of the above provisions". The "following provisions" – *inter alia* Regulations 15, 16 and 17 – specify certain provisions of insolvency law which are explicitly disapplied as regards transfer orders. We believe that the effect of Regulation 14(3) is to confirm that these exclusions are not intended to be construed restrictively, and that they do not have the effect of limiting the precedence of "default arrangements" over the general law of insolvency to transfer orders only.

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3.4.4 For the reasons described in paragraph 3.4.2, 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 3.4.3 above, Regulation 14 of the Settlement Finality Regulations would have the effect that the requirement of the Netting Provision to determine a number of Close Out Amounts (including a separate Close Out Amount in respect of each Client Account) will take precedence over insolvency laws. In addition to the netting arrangements provided under the Netting Provision, Rule 2.17 provides for a discretionary right of the Clearing House, which is exercisable at any time, to set off indebtedness due to it by a Member against indebtedness owed to it by that Member. However, the Clearing House is prevented from exercising this right in a manner inconsistent with the arrangements for the segregation of Accounts set out in Rule 4.3. This means that a Close Out Amount determined in respect of a particular Account would not be aggregated with, or set-off against, a Close Out Amount or any other amount arising in respect of any other Account, notwithstanding an exercise by the Clearing House of its rights under Rule 2.17 following the occurrence of a LME Clear Default.

3.4.5 In a case where the Clearing House is in administration or liquidation and a LME Clear Default (in the form of an LME Clear Insolvency Default) has occurred but a Close Out Date has not occurred (whether because the Member has not issued a Close Out Netting Notice or because the Close Out Date specified by the Member is due to occur on a future date), there may be a set-off of amounts due pursuant to one or more Statutory Insolvency Set-Offs.

3.4.6 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

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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 (as noted in paragraphs 3.4.2 and 3.4.3 above). In this regard, please refer to the qualifications in paragraph 4.1.6 in relation to the circumstances in which Regulation 12(1) of the FCA Regulations may not apply, and paragraphs 4.1.7 to 4.1.9 in relation to the circumstances in which Regulation 14 of the Settlement Finality Regulations may not apply.

Furthermore, section 182A of the Companies Act 1989 provides that nothing in the law of insolvency shall enable the setting off against each other of positions and assets recorded in a client account of a recognised central counterparty against positions and assets recorded in any other account at the recognised central counterparty. For these purposes, "recognised central counterparty" has the meaning given to such term in section 285 of FSMA. The effect of this provision in respect of the Clearing House (which, per the assumption at paragraph 2.6, would qualify as a recognised central counterparty) is that in no circumstances will amounts due in respect of a Client Account held by a Member with the Clearing House be set off pursuant to a Statutory Insolvency Set-Off (or any other set-off otherwise provided for under insolvency law) against an amount due in respect of any other Account held by the Member with the Clearing House.

Hence, even in the case where the Clearing House is subject to Insolvency Proceedings but, either the Member has not exercised its right to deliver a Close Out Netting Notice, or such notice has been delivered by the Member to the Clearing House but the associated Close Out Date has not yet occurred, any amounts due in respect of the House Accounts of the Member, on the one hand, and each of the Client Accounts of the Member, on the other hand, would be payable separately.

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.

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3.5.2 This is because the Netting Provision refers throughout to Contracts as defined under the Rules. "Contract" is defined to mean a "binding agreement between the Clearing House and a Member that is formed under and in accordance with Rule 6 and which is to be performed or discharged in accordance with the Rules". The Rules apply generally to all types of Contract cleared by the Clearing House.

3.5.3 The Netting Provision does not differentiate, nor enable the Clearing House or a 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 3.4.4 in relation to the calculation of a separate Close Out Amount in relation to the Contracts recorded in each Client Account should be borne in mind.

3.6 Cash Collateral

3.6.1 Payments made by a Member to the Clearing House under Rule 8 as Cash Collateral in respect of its Margin Requirement constitute the absolute transfer of cash (as is provided for in Rule 8.3.2), so that, in the event of Insolvency Proceedings, 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; or (ii) (where close-out netting did not apply under the Netting Provision and, in the event of liquidation or, if the administrator has issued a notice under Rule 2.95 of the Insolvency Rules 1986, administration) Statutory Insolvency Set-Off (subject to the observations in paragraph 3.4.6 regarding mutuality and the preclusion, under section 182A of the Companies Act 1989, of a set-off of any amounts due in respect of a Client Account of a Member against any amounts due in respect of any other Account of the Member).

3.6.3 A transfer of Cash Collateral made by a Member to the Clearing House would not be treated as subject to a charge pursuant to the Rules. 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 its Margin Requirement, and express words would be required to establish the existence of a charge.

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3.6.4 Payment Obligations determined and payable by a Party in accordance with the Procedures are distinct from the obligation of a Member to transfer Cash Collateral to the Clearing House and from the debt obligation of the Clearing House which arises in respect of each such transfer. However, as described in paragraph 3.4.1, in the event of an occurrence of an LME Clear Default, any such outstanding Payment Obligations would constitute "payments made in settlement or performance of a Contract" for the purposes of Rule 10.13.7(a)(2), and, as such, would also be included in the determination of the relevant Aggregate Member Entitlement or Aggregate Member Obligation (as the case may be) and netted under the Netting Provision.

3.7 Gold Collateral

3.7.1 In addition to the arrangements in respect of Cash Collateral and Securities Collateral, the Clearing House accepts Precious Metals as Collateral (currently restricted to Gold) in respect of Members' Margin Requirements.

3.7.2 Gold Collateral is originally provided by a Member to the Clearing House in the form of unallocated Gold. However, the Clearing House may convert any unallocated Gold received by it from a Member into allocated Gold. Gold Collateral does not qualify as Eligible Collateral unless and until it has been converted by the Clearing House into allocated Gold. In order for the Clearing House to return Gold Collateral to a Member, the relevant allocated Gold would be converted back into unallocated Gold following which it would be credited to such account with London Precious Metals Clearing Limited as the relevant Member directs.

3.7.3 Clause 7 of the Security Deed provides that Gold Collateral is provided to the Clearing House by a Member by way of title transfer, with the result that such Gold Collateral is owned by the Clearing House outright and the Member does not retain any proprietary or other rights in it. Hence, in the event of Insolvency Proceedings in respect of the Clearing House, Gold Collateral held by the Clearing House would be treated as the property of the Clearing House available to its creditors generally, and a Member who has provided Gold Collateral to the Clearing House would rank as an unsecured creditor to the extent of the value of the Gold Collateral (whether in the form of unallocated Gold or allocated Gold) it has so provided.

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3.8 Securities Collateral

- 3.8.1 Any Securities Collateral delivered by a Member to a Clearing House will not be treated as the property of the Clearing House. The arrangements by which such securities are transferred in accordance with the terms of the Security Deed 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 Security Deed, the 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 charge under the Security Deed would fall away and the Member would revert to having beneficial rights in the relevant securities.
- 3.8.2 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 in the relevant Securities Collateral would be those rights which exist under the Security Deed to enforce against the assets in the event of a default by the relevant Member. As a result, the Clearing House holds the Securities 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.
- 3.8.3 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 exercise of the right of the chargee to enforce against the charged asset. However, 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 Securities Collateral and (subject to the duty to account for any

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excess proceeds) apply the proceeds in satisfaction of the Secured Obligations. However, insofar as the security arrangements constituted by the Security Deed constitute a financial collateral arrangement, the right of use conferred by Rule 8.6.3 upon the Clearing House will have effect in accordance with Regulation 16 of the FCA Regulations. 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 Securities Collateral and instead oblige the Clearing House (as a personal, rather than proprietary obligation) to replace the Securities Collateral by transferring equivalent financial collateral in accordance with the FCA Regulations.

3.8.4 We understand that in addition to the Security Deed, the Clearing House may also enter into a Belgian or New York law governed Security Document with certain Members. On the assumption that these documents do not transfer ownership of the relevant Securities Collateral under the *lex situs* and their governing law and create a security interest similar to the one created in respect of Securities Collateral under the Security Deed, the analysis set out in paragraphs 3.8.1 to 3.8.3 will also apply in respect of Securities Collateral provided to the Clearing House under these two foreign law documents.

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, Regulation 12(1) of the FCA Regulations or, to the extent applicable, section 182A of the Companies Act 1989, 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 Rules.

Set-off pursuant to Rule 4.90 or Rule 2.85 ("Statutory Insolvency Set-Off") will result in a net amount payable in respect of amounts relating to mutual obligations between the Parties, subject to the other qualifications set out in this opinion.

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It should be noted that, in relation to the matter of whether or not amounts due in respect of House Accounts and Client Accounts would be considered to be "mutual" for the purposes of Statutory Insolvency Set-Off:

- (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 cannot be set off against) amounts due in respect of House Accounts or Client Accounts which are not subject to the trust; and
- (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 (and therefore cannot be set off against) amounts due in respect of House Accounts, or, possibly, other Client Accounts.

Notwithstanding (a) and (b) 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 Accounts and Client Accounts to achieve the same position that would have arisen in the absence of Statutory Insolvency Set-Off.

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.

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Pursuant to Regulations 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 3.4.3, should include the Netting Provision).

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

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

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

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creditors' voluntary winding-up to cause a meeting of creditors to be summoned for a day not later than the fourteenth day after the day on which there is to be held a shareholders' meeting at which the resolution for voluntary winding-up is to be proposed) or that a petition for the winding-up of the Clearing House was pending; or

- (d) during a winding-up of the Clearing House.

Furthermore, any debt which has been acquired by the Member by assignment or otherwise pursuant to an agreement between the Member and any other person must be excluded from Statutory Insolvency Set-Off, and may not be included in an aggregation pursuant to the Netting 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, it appears that amounts which arise under Contracts may still be included in an aggregation or set-off:

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

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

4.1.4 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

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winding-up order, or the company concerned goes into liquidation or enters administration).

However, under Regulation 14 of the FCA Regulations, Rule 2.86 and Rule 4.91 of the Insolvency Rules 1986 are disapplied in the case of liquidation or administration proceedings in respect of a party to a financial collateral arrangement or a close out netting provision which permits conversion into sterling at a rate other than the "*official exchange rate*" unless the arrangement provides for an unreasonable exchange rate or the collateral taker uses the mechanism provided under the arrangement to impose an unreasonable exchange rate. In light of the opinion (given at paragraph 3.3.2) that the Netting Provision constitutes a "close-out netting provision" for the purposes of the FCA Regulations, Regulation 14 of the FCA Regulations should, in our opinion, apply in the case of a liquidation or an administration of the Clearing House, subject to the observations at paragraph 4.1.6 below.

- 4.1.5 In respect of any Contract entered into before the commencement of 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 Close Out 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 Close Out 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.
- 4.1.6 In relation to paragraph 3.4.2 above, Regulation 12(1) of the FCA Regulations may 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;

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- (b) the Member had notice that a meeting of creditors of the Clearing House had been summoned under section 98 of the Insolvency Act 1986 (as to which see paragraph 4.1.3(c) above) or that a petition for the winding-up of the Clearing House was pending; or
- (c) the Member had notice that an application for an administration order was pending, or that a person had given notice of intention to appoint an administrator, in respect of the Clearing House.

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

4.1.7 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 the Netting Provision against the creditor of the Clearing House in respect of claims which existed at the date of the attachment or other process, including the claim which is the subject of the attachment or other process. However, if the attaching creditor has become subject to Statutory Insolvency Set-Off before a Close Out 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 is seeking 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 FCA Regulations and the Settlement Finality Regulations may have effect to override the claim of the attaching creditor.

4.1.8 In relation to our opinions at paragraph 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

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registered with the Clearing House) after the court has made a winding-up or administration order in relation to the Clearing House or the Clearing House has passed a resolution for creditors' voluntary winding-up, unless the transfer order is carried out on the same business day of the designated system as the order or resolution, and the system operator can show it did not have notice of the order or resolution. It seems unlikely that the Clearing House would not have 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.

- 4.1.9 In relation to our opinion at paragraph 3.4.3, 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 3.4.3 may not be available in respect of those Contracts.
- 4.1.10 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

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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 Banking Act

- 4.2.1 The Banking Act contains various provisions which might affect the effectiveness of the Netting Provision. In particular, Part I of the Banking Act provides for various remedies of a failing UK Clearing House, which include the ability of the Bank of England to cause the transfer of securities issued by a UK Clearing House, or property of a UK Clearing House, to another person, by means of a "share transfer instrument" or a "property transfer instrument". Based on the assumption set out at paragraph 2.6, the range of measures available to the Bank of England in respect of a UK Clearing House would be available (in the relevant circumstances) in respect of the Clearing House.
- 4.2.2 Section 75 of the Banking Act gives the Treasury the power to change the law (except the Banking Act itself) for the purpose of enabling the powers granted to the PRA, the FCA, the Treasury and the Bank of England under Part I of the Banking Act to be used effectively. Such changes might affect private law rights and might be used with retrospective effect.
- 4.2.3 Under section 38 of the Banking Act, a property transfer instrument may disapply a right to terminate a contractual arrangement which is exercisable by virtue of the existence or the making of the property transfer instrument. However, rights to terminate based on the existence or occurrence of other circumstances should not be affected.

The termination rights of Members under the Netting Provision depend upon the existence of an LME Clear Default and the subsequent occurrence of a Close Out Date. An LME Clear Default may take the form of either an LME

Clear Payment Default or an LME Clear Insolvency Default, both of which are, essentially, insolvency-based concepts. Rule 10.13.2 specifies that neither the exercise of the stabilisation powers under the Banking Act in respect of the Clearing House nor the occurrence of any event linked to the exercise of such powers would (of itself) constitute the basis for an LME Clear Default. Notably, however, those stabilisation powers (whether for the purposes of a property transfer or a share transfer) are intended to be pre-insolvency measures, implemented by the Bank of England with a view to rescuing from insolvency, and preventing insolvency in respect of, a UK Clearing House or its business.

4.2.4 A property transfer instrument may apply to only part of the Clearing House's assets and liabilities (such a transfer being referred to as a "partial property transfer"). A partial property transfer could, theoretically and absent any restrictions, apply so as to cause the transfer of some, but not all, of the Contracts and/or rights and obligations of the Clearing House arising in respect thereof (including repayment obligations of the Clearing House in respect of Cash Collateral) with the result that the ability of a Member to net the amounts due in respect of certain such obligations against the amounts due in respect of others in accordance with the rights otherwise available to it under the Netting Provision is impaired. In addition, a partial property transfer could, theoretically and absent any restrictions, apply so as to cause a separation of the rights of the Clearing House under the security interests in respect of securities that are constituted by the Security Deed (the "**benefit of security**") entered into by a Member from the relevant liability which is secured (the "**secured liability**").

Following a partial property transfer in respect of the Clearing House, the part of the business of the Clearing House that could not be successfully transferred to a third party would continue to be treated as part of the Clearing House's business and part of its insolvency estate in subsequent Insolvency Proceedings. Hence, close-out netting rights under the Netting Provision would likely only be triggered following the implementation of any relevant resolution measures under the Banking Act and would then only apply to the range of rights and obligations still remaining as property of the Clearing House at that time.

4.2.5 However, in this regard, article 3 of the Banking Act 2009 (Restriction of Partial Property Transfers) (Recognised Central Counterparties) Order 2014

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(the "Safeguards Order") prohibits a partial property transfer which applies to some, but not all, of the "protected rights and liabilities" between a particular person and a UK Clearing House. In the case of a UK Clearing House such as the Clearing House which (despite offering clearing services in respect of various different Eligible Products) has established a single default fund, the relevant protected rights and liabilities would be all of the rights and liabilities between a clearing member and the relevant UK Clearing House recorded in the accounts of that UK Clearing House.

4.2.6 In addition, article 5 of the Safeguards Order would prevent a partial property transfer in respect of the Clearing House from transferring the benefit of security unless the secured liability was also transferred and vice versa.

4.3 General insolvency issues

The provisions of insolvency law have effect subject to contrary statutory rules, such as Regulation 14 of the Settlement Finality Regulations.

4.3.1 Under section 238 of the Insolvency Act 1986, a transaction entered into by a company at any time within a specified period ending with the onset of insolvency of the company (being, in broad terms, the earliest of: the date of the commencement of winding-up; the date on which an administration application is made; the date of filing with the court of a notice of intention to appoint an administrator; or the date of the company entering administration; or, where the court has made a recognition order in respect of a foreign proceeding under the Cross-Border Insolvency Regulations 2006, the date of opening of the foreign proceeding) with a person on terms that provide for the company to receive either no consideration, or a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by it, may be set aside as a transaction at an undervalue, if at the time the transaction is entered into that company was unable to pay its debts or became unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 in consequence of the transaction. In a case where the parties are "connected" within the meaning of 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 3.4 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).

4.3.2 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 4.3.1 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 of 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 3.4 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" (as defined in the Settlement Finality Regulations)".

4.3.3 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

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the loss or damage. Accordingly, we do not consider that the existence of the possibility of a disclaimer (even if theoretically exercisable) would affect the opinions expressed in Section 3. Specifically, as regards the opinions in paragraph 3.8, we do not consider that a disclaimer would operate so as to deprive a Member of the equity of redemption in its Securities Collateral.

4.3.4 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.

4.3.5 The enforceability of the property rights of a Member in Securities Collateral charged to the Clearing House under the Security Deed (as described in paragraph 3.8.2) 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 LME Clear Default. 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 Securities Collateral against the Clearing House; and
- (b) if the Clearing House were to enter into administration or an application were to be presented to the court for the making of an administration order in respect of the Clearing House or notice of intention to appoint an administrator of the Clearing House were to be filed with the court, the leave of the court (or, if an administrator were appointed to the Clearing House, the consent of that administrator) would be required under Paragraph 43 or 44 of Schedule B1 in order for a Member to enforce its property rights in respect of the Securities 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.

4.4 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 owed to the Member beneficially.
- 4.4.2 Section 177 of the Companies Act 1989 applies to property held by a recognised clearing house (including a recognised clearing house which is a recognised central counterparty, such as the Clearing House) as margin in relation to a market contract. 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.

4.5 Qualifications relating to Securities Collateral

- 4.5.1 Insofar as fungible assets posted as Securities 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 Securities 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 Securities Collateral. However, *Goldcorp* may be distinguished on the basis that it concerned

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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 Members in the Securities 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 Securities Collateral may not be returned to the Member. As described at paragraph 4.1.10, 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 Securities Collateral (as Chargor under the Security Deed) 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 Securities Collateral. The Member would therefore be entitled to recover the Securities Collateral in accordance with the terms of the Security Deed, even against the new chargor and/or new chargee.
- 4.5.4 Any security comprised in the Securities Collateral may be subject to corporate actions or other events relating to the issuer of securities comprised in the Securities Collateral which affect the ability to hold or transfer the

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security concerned. We express no view as to the ability of the Member to recover any Securities 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 Securities 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 entities in a register or account maintained by or on behalf of intermediary (as defined in the FCA Regulations); and "relevant account" means the register or account in which entries are made by which book entry securities collateral is transferred or designated so as to be in the possession or under the control of the collateral-taker or a person acting on his behalf. Accordingly, the issue of entitlement to the Securities Collateral may be determined by a system, or systems, of law other than the laws of this jurisdiction.

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

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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.
- 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 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

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.

or varies the right to statutory interest, or purports to confer a contractual right to interest that is not a substantial remedy for late payment of that amount, within the meaning of that Act. We express no opinion as to whether any such provisions in the Clearing House Documentation do in fact constitute a "substantial remedy" in compliance with the conditions set out in section 9 of such Act.

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

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

Clifford Chance LLP hereby consents to members of FIA Europe (other than associate members) and their affiliates which have subscribed to FIA Europe's opinions library and whose terms of subscription give them access to this opinion, (as evidenced by the records maintained by FIA Europe and each a "**subscribing member**") relying on the opinion. This opinion may not, without our prior written consent, be relied upon by or be disclosed to any other person save that it may be disclosed without such consent to:

- (A) the officers, employees, auditors and professional advisers of any addressee or any subscribing member;

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LME Clear / December 2014

(B) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings; and

(C) any competent authority supervising a subscribing member or its affiliates

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 and in preparing this opinion we have not had regard to the interests of any such person.

This opinion was prepared by Clifford Chance LLP on the basis of instructions from FIA Europe in the context of the netting requirements of the Basel III capital rules in the EU and US and Clifford Chance LLP has not taken instructions from, and this opinion does not take account of the specific circumstances of, any subscribing member. In preparing this opinion, Clifford Chance LLP had no regard to any other purpose to which this opinion may be put by any subscribing member.

By permitting subscribing members to rely on this opinion as stated above, Clifford Chance LLP accepts responsibility to such subscribing members for the matters specifically opined upon in this opinion in the context stated in the preceding paragraph, but Clifford Chance LLP does not have or assume any client relationship in connection therewith or assume any wider duty to any subscribing member or their affiliates. This opinion has not been prepared in connection with, and is not intended for use in, any specific transaction.

Furthermore this opinion is given on the basis that any limitation on the liability of any other adviser to FIA Europe or any subscribing member, whether or not we are aware of that limitation, will not adversely affect our position in any circumstances.

Yours faithfully

Clifford Chance LLP
Clifford Chance LLP

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Annex 1
Membership Agreement

CLEARING MEMBERSHIP AGREEMENT

This Clearing Membership Agreement (the "Agreement") is made between:

(1) **LME Clear Limited**, incorporated in England and Wales under company number 07611628 whose registered office is at 56 Leadenhall Street, London EC3A 2DX ("LME Clear"); and

(2)

FIRM'S FULL NAME:
FIRM'S COMPANY NUMBER:
FIRM'S PLACE OF INCORPORATION:
ADDRESS:

(the "Firm")

WHEREAS

(A) LME Clear acts as a clearing house in respect of Transactions in accordance with the Rules.

(B) LME Clear has been appointed by the Approved Transaction Platforms specified in the Rules to provide central counterparty and other services in accordance with the terms and conditions of the Rules and certain agreements entered into between LME Clear and any such Approved Transaction Platform.

(C) LME Clear 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 Rules.

(D) The Firm desires to be admitted as a Member of LME Clear and LME Clear, 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 Membership Criteria, agrees to admit the Firm as a Member subject to the terms and conditions of this Agreement.

(E) By entering into this Agreement, LME Clear approves the Firm as a Member to clear certain categories of Contracts that LME Clear agrees the Firm may clear from time to time.

1. INTERPRETATION

Terms defined in the rules and procedures of LME Clear (the "Rules") shall have the same meanings in this Agreement.

2. MEMBERSHIP

2.1 By entering into this Agreement, LME Clear hereby admits the Firm as a Member, and the Firm hereby accepts to become a Member, on the terms and subject to the conditions of



this Agreement and the Rules. The Membership shall commence on the date set out below.

- 2.2 The Firm's Membership shall be as a GCM or an ICM in accordance with the Firm's application for Membership and LME Clear's approval of that application. The Firm may apply to change its Membership as a GCM or an ICM at any time, subject to the Firm meeting the appropriate Membership Criteria and the approval of LME Clear to such a change.
- 2.3 The Firm shall be eligible to clear the type of business (as defined in the Membership Procedure Part B4) in accordance with the Firm's application for Membership and LME Clear's approval of that application. The Firm may apply to change its Membership as to the type of business it is able to clear at any time, subject to the Firm meeting the appropriate Membership Criteria and the approval of LME Clear to such a change.

3. RULES

- 3.1 The Member undertakes to act in accordance with the Rules and shall be bound by all the provisions of the Rules (including as may be amended from time to time in accordance with the provisions of the Rules) and LME Clear shall have all the rights and remedies set out in or contemplated by the Rules (including as so amended).

- 3.2 The Rules shall be part of the terms and conditions of every Contract which the Member may make or have with LME Clear.

4. CLIENTS OF THE FIRM

- 4.1 The Firm undertakes that its terms of business with Clients shall include such terms as are required by the Rules.

- 4.2 Where the Firm is a GCM, the Firm undertakes to verify the identity of its Clients in accordance with the requirements of the EU Money Laundering Directive (2005/60/EC) (as amended from time to time) (the "ML Directive") or the requirements of such local law and regulations which apply to the Firm and which are equivalent to the requirements of the ML Directive and the Firm represents and warrants to LME Clear that in relation to each Client it has carried out such verification in accordance with this clause and has satisfied itself that it is in compliance with the ML Directive or the relevant local law.

- 4.3 The Firm consents to LME Clear relying on the verification of Clients carried out by the Firm in accordance with clause 4.2.

- 4.4 The Firm undertakes to retain:

- (a) a copy of, or references to, the evidence of the Client's identity obtained pursuant to clause 4.2; and
- (b) the supporting records (consisting of the original documents or copies) in respect of a business relationship or occasional transaction (as those terms are defined in the ML Directive) with a Client,

at all times when it is a Member and, if longer, for a period of 5 years from the date on which LME Clear relies on the Firm under clause 4.3 (as notified to the Firm by LME Clear).

- 4.5 The Firm shall make available to LME Clear as soon as reasonably practicable following a request by LME Clear:

- (a) any information about a Client (and any beneficial owner) which the Firm obtained when verifying the identity of the Client in accordance with clause 4.2; and



(b) copies of any identification and verification data and other relevant documents on the identity of the Client (and any beneficial owner) which the Firm obtained when verifying the identity of the Client in accordance with clause 4.2.

5. FEES AND CHARGES

The Firm undertakes to pay to LME Clear the charges provided for in the Rules for clearing and other services rendered to the Firm and all other amounts, including fines, that pursuant to the Rules shall become payable by or be imposed on the Firm.

6. SERVICES PROVIDED BY LME CLEAR

LME Clear undertakes to act in accordance with the Rules (including as may be amended from time to time in accordance with the provisions of the Rules) and to perform its obligations in respect of all Contracts in accordance with the Rules (including as so amended).

7. CLIENT MONEY

LME Clear acknowledges that, as provided for in the Rules, a Client Account (which for the purposes of CASS 7.8.2 of the Financial Conduct Authority's Handbook shall constitute a "client transaction account") will not be combined with any other Account, nor will any right of set-off be exercised by LME Clear against money credited to the Client Account in respect of any sum owed to LME Clear on any other Account.

8. LICENCE

LME Clear grants, and the Firm accepts, a licence to use the RTC Materials on the terms set out in Annex 1 to this Agreement.

9. WARRANTIES AND REPRESENTATIONS

9.1 The Firm hereby warrants and represents to LME Clear that:

- (a) as at the date of this Agreement, it is duly incorporated and validly existing and in good standing under the laws of its country of incorporation with full power and authority and the legal right to enter into this Agreement and to perform its obligations under it;
- (b) as at the date of this Agreement, it has completed all corporate actions required by it to authorise the execution and delivery of, and to exercise its rights and perform its obligations under, this Agreement;
- (c) as at the date of this Agreement, this Agreement is executed by its duly authorised representative and constitutes a legal, valid and binding obligation on it, enforceable against it in accordance with its terms;
- (d) as at the date of this Agreement, all information which has been provided to LME Clear in connection with the Firm's application to become a Member is true, complete and accurate in all material respects and that nothing has been omitted which would, in LME Clear's opinion, be material for LME Clear to know in connection with such application; and
- (e) all information which is provided to LME Clear in relation to the Firm or its Clients at any time during the Firm's Membership (whether or not the information is required to be provided under the Rules) will be true, complete and accurate in all material respects and will be produced to LME Clear as soon as reasonably practicable and in any event within any timeframe required under the Rules.

9.2 The Firm shall notify LME Clear immediately if any of the representations or warranties in clause 9.1 cease to hold true and accurate, as if such representations or warranties were made at the relevant time.

10. LIABILITY

The Firm acknowledges that the liability of LME Clear will be limited as set out in the Rules.

11. TERM

This Agreement commences on the date set out below by LME Clear and shall continue until the Firm ceases to be a Member in accordance with the Rules.

12. CONFLICTS

In the event of any conflict between the Rules and any provisions of this Agreement, the Rules shall prevail.

13. SURVIVAL

Notwithstanding any termination or purported termination of this Agreement or the Firm ceasing to be a Member, the rights and obligations of each of LME Clear and the Firm hereunder shall survive as to all matters and Contracts occurring while this Agreement was in effect and otherwise as provided in the Rules.

14. SEVERABILITY

If a provision of this Agreement is found to be wholly or partly illegal, invalid or unenforceable in any respect then to the extent it is illegal, invalid or unenforceable, that provision will be given no effect and will be treated as though it were not included in this Agreement, but the validity or enforceability of the remaining provisions of this Agreement will not be affected.

15. VARIATION

15.1 Except as provided in clause 15.2, no variation of this Agreement is valid unless it is in writing and it is signed by each of LME Clear and the Firm or their duly authorised representatives. For the avoidance of doubt, this clause does not apply to a variation of the Rules, which may be varied in accordance rule 2.2 of the Rules.

15.2 This Agreement may be varied by LME Clear without the Firm's consent where such variation is necessary in order for LME Clear to comply with any Applicable Law.

16. AGENT FOR SERVICE (ONLY FOR FIRMS INCORPORATED OR FORMED OUTSIDE THE UNITED KINGDOM)

In accordance with rule 2.12.3 of the Rules, the Firm irrevocably appoints:

AGENT'S FULL NAME:
ADDRESS:
FAX NUMBER:

as its agent to receive on its behalf in England service of any process under clause 17 of this Agreement or the Rules. Such service shall be deemed completed on delivery to such agent (whether or not it is forwarded to and received by the Firm) and shall be valid until



such time as LME Clear has received prior written notice that such agent has ceased to act as agent. If for any reason such agent ceases to be able to act as agent or no longer has an address in England or Wales, the Firm shall forthwith appoint a substitute acceptable to LME Clear and deliver to LME Clear the new agent's name and address and fax number within England.

17. GOVERNING LAW AND JURISDICTION

17.1 This Agreement and any non-contractual obligations of any kind arising out of or in relation to this Agreement are governed by and shall be interpreted and construed in accordance with English Law.

17.2 The courts of England shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement. The Firm irrevocably submits to that jurisdiction for the exclusive benefit of LME Clear and waives any objection on the grounds of venue or *forum non conveniens* or any similar grounds.

17.3 Where the Firm is a government body or agency, a state-owned or controlled entity or an entity that is otherwise entitled to benefit from any immunity from suit or equivalent protections customarily or legally available to states or their representative bodies under the law of any jurisdiction it hereby:

- (a) consents generally in accordance with the State Immunity Act 1978 to the issue of any proceedings or to relief being given against it by way of injunction or order for specific performance or for the recovery of any property whatsoever and to its property being subject to any process for the enforcement of any order or judgment or any process effected in the course of or as a result of any action in rem; and
- (b) irrevocably waives and shall not claim any immunity from suits and proceedings and from all forms of execution or attachment (including attachment prior to judgment and attachment in aid of execution) to which it or its property is now or may hereafter become entitled in accordance with the laws of any jurisdiction and declares that such waiver shall be effective to the fullest extent permitted by such laws.

Signature of the Firm	
Printed name of authorised signatory	
Date of signature	

Signature of LME Clear	
Printed name of authorised signatory	
Date of signature	

Date of admission <i>(To be inserted by LME Clear only)</i>	
--	--



ANNEX 1: LICENCE OF RTC MATERIALS

1. In consideration of the Firm complying with the terms of this Agreement, LME Clear hereby grants the Firm a worldwide, non-exclusive and non-transferable licence to use the RTC Materials, but only to the extent necessary for the Firm to use and receive the benefit of the Clearing Systems in respect of:
 - (a) cash and derivatives in underlying commodities traded at the LME;
 - (b) OTC derivatives in underlying commodities which are trade captured and matched through LME's systems; and
 - (c) any other instruments which LME Clear may notify to the Firm as covered by the Licence,

but not in respect of any instruments other than commodity related instruments.
2. The licence set out in this Annex shall terminate with immediate effect if:
 - (a) the Firm ceases to be a Member;
 - (b) LME Clear gives notice to the Firm to this effect where the Firm (i) breaches the terms of this licence, and (ii) fails to rectify such breach within thirty (30) Business Days of being notified of such breach by LME Clear; or
 - (c) LME Clear ceases to have the necessary rights to provide this licence.
3. Notwithstanding this licence, the Firm acknowledges that, as between the parties, any Intellectual Property Rights in the RTC Materials remain the property of LME Clear or its licensors and nothing in this Agreement has the effect of assigning or transferring any title or Intellectual Property Rights in the RTC Materials to the Firm.
4. The Firm shall not:
 - (a) sell, lease, transfer, assign, sub-lease or in any way make the RTC Materials available to any third party without the prior written consent of LME Clear;
 - (b) decompile, disassemble or reverse engineer to procure possession of the source code to the RTC Materials, or use them in a time sharing or service bureau application;
 - (c) download or create copies of the RTC Materials (other than temporary copies created incidentally to its permitted use of the RTC Materials) without the prior written consent of LME Clear;
 - (d) remove, erase or hide from view any copyright, trade mark, confidentiality or other proprietary notice, mark or legend appearing in the RTC Materials; or
 - (e) make any use of the RTC Materials which is not expressly permitted under the terms of the licence set out in this Annex.
5. The RTC Materials constitute confidential information of LME Clear and the Firm shall comply with the obligations imposed on Members under Rule 2.5 in relation to them.

Annex 2

Security Deed

DATED

DATE

2014

INSERT MEMBER NAME
(as chargor)

- and -

LME CLEAR LIMITED
(as chargee)

SECURITY DEED
(ENGLISH LAW)



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THIS DEED is made on DATE 2014

BETWEEN:

(1) INSERT MEMBER NAME, a company incorporated in INSERT JURISDICTION (registered number INSERT NUMBER) whose registered office is at INSERT ADDRESS (the "Member"); and

(2) **LME Clear Limited**, a company incorporated in England and Wales (registered number 7611628) whose registered office is at 56 Leadenhall Street, London, EC3A 2DX ("LME Clear").

WHEREAS:

The Member is or proposes to become a member in the clearing system operated by LME Clear and has agreed to execute this Deed for the purpose of securing its obligations and liabilities to LME Clear under the Member Documentation.

WITNESSES as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Words and phrases defined, and principles of interpretation provided for, in the Rules shall, unless the context otherwise requires or unless otherwise redefined in this Deed, have the same meaning and shall apply (as the case may be) in this Deed.

1.2 In this Deed, except insofar as the context otherwise requires, the following words and phrases shall have the following meanings:

"Approved CSD" means each national or international central securities depository providing means for the central custody, deposit and/or transfer of Securities (or a system for the clearing or settlement of transactions in Securities), which is from time to time approved by LME Clear (pursuant to the Rules) for the holding of Securities provided to LME Clear (or its Custodian) by way of Collateral, including as at the date of this Deed, CREST in London, Euroclear Bank in Brussels, Clearstream in Luxembourg and the Federal Reserve in the US.

"Cash Collateral" means all sums of money from time to time provided by or on behalf of the Member to LME Clear in cash by way of Collateral (pursuant to the Rules), including all interest added to such sums (pursuant to the Rules), or so much of such sums as may be repayable to the Member under the Rules (and the debts represented thereby).

"Charged Property" means the property, assets, rights, receivables and benefits of the Member from time to time comprised in or subject to the Security Interests created by this Deed, including Default Fund Contributions (in a form other than money), Charged Securities and Precious Metal Collateral and, unless the context otherwise requires, references to Charged Property include (with effect from the time of its transfer) any Collateral transferred to the Member together with a Client Account under clause 4.3 and exclude (with effect from the time of its release) any Collateral released under clause 4.4, and also including the Securities or rights to Securities for the time being standing to the credit of the Securities Accounts or any of them, including all Collateral provided in respect of each Client Account of the Member.

"Charged Securities" means all Securities charged or mortgaged to LME Clear under clauses 3.1(a) and (b).

"CREST" means the computer-based system operated by Euroclear UK & Ireland Limited to enable title to units of stock to be evidenced and transferred without written instruction.

"Custodian" means any person appointed from time to time by LME Clear to act as its bank, custodian, global custodian, account operator and/or other intermediary in relation to any Charged Property (including in any Approved CSD), including its branches and affiliates providing custody or similar services to LME Clear and also including any additional or substitute custodian which LME Clear may designate from time to time and any agent, nominee or sub-custodian acting for LME Clear or any such Custodian.

"Deed" means this Deed, including its recitals and schedules, as amended in accordance with its terms from time to time.

"Default Fund Contributions" means all sums of money or other forms of property or assets from time to time provided by or on behalf of the Member to LME Clear by way of contribution to the Default Fund (pursuant to the Rules), including interest added to such sums (pursuant to the Rules), or so much of such sums as may be repayable to the Member under the Rules (and the debts represented thereby).

"Equivalent Charged Property" means:

- (a) in relation to Securities, Securities of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description; and
- (b) in relation to Precious Metal, the crediting of the same amount of Precious Metal to an Unallocated Account in London or New York.

"Financial Collateral Regulations" means the Financial Collateral Arrangements (No 2) Regulations 2003 as amended.

"ISIN" refers to an international securities identification number.

"Loss" includes any loss, liability, damage, cost, claim or expense of any kind or nature, whether direct, indirect, special, consequential or otherwise (including any loss of business, loss of goodwill, loss of profit, and business interruption or other loss).

"LME Clear" includes any transferee or successor (whether immediate or derivative) of LME Clear and any person with which it may merge or be consolidated, whether or not it is the surviving entity.

"LME Clear Member" means, at any time, any person that has been admitted by LME Clear as a Member of LME Clear System pursuant to the Rules and that has not withdrawn or been removed in such capacity.

"LME Clear System" means the clearing house operated by LME Clear and the services provided by it pursuant to the Rules.

"LPMCL" means London Precious Metals Clearing Limited or any successor.

"Membership Agreement" means the agreement for the time being in force between LME Clear and the Member relating to its participation in the LME Clear System, in which amongst other things the Member agrees to be bound by the Rules.

"Pledge Agreements" means the pledge agreement(s) and security agreement(s) made or to be made between the Member and LME Clear pursuant to clause 3.2(a).

"Precious Metal" means gold and any other precious metal(s) which may from time to time be approved by LME Clear as Eligible Collateral.

"Precious Metal Collateral" means amounts of Precious Metal now or in the future provided by the Member to LME Clear by way of Collateral (including, where such Collateral is provided by credit to an Unallocated Account, all rights and entitlements represented by such credit entry), or so much of such amounts as may be returnable to the Member under the Rules.

"powers" means, in relation to LME Clear, its powers, discretions and rights under this Deed or any other document including any Member Documentation or under general law.

"Receivables" means all money receivable by the Member now or in the future under or by virtue of any Charged Property.

"Rules" means the rules and procedures established by LME Clear which are from time to time in force in relation to LME Clear Members, including the Member.

"Security Document" means:

- (a) this Deed;
- (b) any Pledge Agreement;
- (c) any other agreement creating or purporting to create a Security Interest by the Member in favour of LME Clear to secure any Secured Obligation; or
- (d) any other agreement or document designated as such by the Member and LME Clear.

"Secured Obligations" means all money and liabilities whatsoever now or in the future (whether before or after the occurrence of a Default Event) due, owing or incurred by the Member to LME Clear (whether solely or jointly, or jointly and severally, with another or others, and whether as principal or surety, and whether actual or contingent, present or future), under or in connection with the Member Documentation and also including (whether before or after any judgment) all interest, costs and other charges whatsoever including (with effect from the time of their transfer) any obligations, money and liabilities due, owing or incurred to LME Clear which are assumed by the Member in respect of any Client Account transferred to the Member under clause 4.3, and excludes (with effect from the time of their release) any obligations, money and liabilities to LME Clear from which the Member is released under clause 4.4.

"Securities" means:

- (a) stocks, shares, debentures, loan stock, notes, bonds, warrants and other investments (as listed in Part II, Schedule 2 of the Financial Services and Markets Act 2000), depositary receipts, government securities or other securities of any description, whether certificated or uncertificated and whether in registered or bearer form, including book entry securities;
- (b) all rights, benefits, money or property of a capital nature now or in the future accruing or offered in respect of the foregoing, including any bonus and any right or benefit arising from consolidation, conversion, exchange, option, preference, redemption, return of capital or in any other way; and

- (c) any interest or right (whether legal or equitable or otherwise) in relation to any of the foregoing which are now or in the future held in an Approved CSD or subject to the rules and practices of an Approved CSD.

"Securities Account" means each and any account in the name of LME Clear held at an Approved CSD or a Custodian in which any Securities Collateral is held, as contemplated by clause 6.1.

"Securities Collateral" means all Securities from time to time provided by the Member to LME Clear by way of Collateral (pursuant to the Rules).

"Security Interest" means:

- (a) any mortgage, charge, pledge, assignment (whether or not expressed to be by way of security), hypothecation, lien, encumbrance or other priority or security interest whatsoever, howsoever created or arising;
- (b) any deferred purchase, title retention, trust, sale-and-repurchase, sale-and-leaseback, hold back or "flawed asset" arrangement or right of set-off; and
- (c) any other agreement or arrangement whatsoever having the same or a similar commercial or economic effect as security,

and any agreement for any of the foregoing.

"Settlement Finality Regulations" means the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 as amended.

"Tax" means:

- (a) all forms of tax, levy, impost, contribution, duty, liability and charge in the nature of taxation and all related withholdings or deductions of any nature (including any value added tax or similar tax); and
- (b) all related fines, penalties, charges and interest.

"this Security" means the Security Interests (including the charges and mortgages) created by this Deed;

"Unallocated Account" means, in relation to a Precious Metal, an account held with a member of the LPMCL system in the name of the account holder recording the amount of such Precious Metal which such member has a contractual obligation to transfer to the account holder (or, in the case of a debit balance, which the account holder has a contractual obligation to transfer to such member).

- 1.3 The provisions of Rule 1.2 (*Interpretation*) shall apply to this Deed as if repeated in full in this Deed with the necessary consequential changes.
- 1.4 In this Deed, references to "book entry securities" means Securities, the title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary; references to "intermediary" have the meaning given to it by regulation 3 of the Financial Collateral Regulations; references to "uncertificated" have the meaning given to it by regulation 3(1) of the Uncertificated Securities Regulations 2001 and "certificated" means a unit of a security which is not uncertificated; and references to "property" includes any interest (legal or equitable) in personal property, tangible or intangible, and any thing in action.
- 1.5 Any reference to this Deed, any Member Documentation or any other document shall be construed as a reference to this Deed, such Member Documentation or such other

document (including their respective schedules) as the same may from time to time be amended, varied, supplemented, novated, replaced or restated and shall include any document which is supplemental to, or is expressed to be collateral to, or is entered into pursuant to or in accordance with the terms of, this Deed or (as the case may be) any Member Documentation or such other document.

1.6 Unless the context requires otherwise, any reference to a clause or a schedule shall be to a clause or schedule of this Deed.

2. COVENANT TO PAY SECURED OBLIGATIONS

2.1 The Member covenants with LME Clear that it will duly and punctually perform pay or discharge each Secured Obligation.

2.2 The Member confirms and agrees that it is liable as principal to LME Clear in respect of all transactions to which the Rules apply, whether (in LME Clear's books of account) such transactions be recorded on House Account or Client Account of the Member or otherwise.

3. CREATION OF SECURITY

3.1 The Member with full title guarantee hereby charges to LME Clear as continuing security for the payment or discharge of the Secured Obligations:

- (a) by way of mortgage, all its rights, title and interest in and to all Securities now or in the future provided as Collateral or Default Fund Contributions by or on behalf of the Member to LME Clear or its Custodian or to the membership account in CREST of LME Clear or such Custodian, including all proceeds of sale of such Securities;
- (b) by way of mortgage, all its rights, title and interest in and to all book entry Securities (to the extent not mortgaged under paragraph (a) above) now or in the future provided as Collateral or Default Fund Contributions by or on behalf of the Member to LME Clear or its Custodian and standing to the credit of an account at an Approved CSD held in the name of LME Clear or such Custodian in relation to such Securities or designated by reference to LME Clear or such Custodian, including all entitlements and debts represented by such credit entries, all rights relating to such accounts and all proceeds of sale of such Securities;
- (c) by way of fixed charge, all rights, benefits, money or property of an income nature now or in the future accruing at any time in respect of the Securities mortgaged under paragraphs (a) and (b) above, including any dividend, distribution or interest;
- (d) by way of fixed charge, all its rights, title and interest to all Precious Metal Collateral now or in the future provided by or on behalf of the Member to LME Clear; and
- (e) by way of floating charge:
 - (i) all its right, title and interest in and to all property deliverable to the Member by or on behalf of LME Clear (pursuant to any Member Documentation) to the extent that such property is not effectively charged by a fixed charge or mortgage contained in this clause 3.1; and
 - (ii) without exception, all its right, title and interest in and to all property deliverable to the Member by or on behalf of LME Clear (pursuant to

any Member Documentation) in so far as such property is for the time being situated in Scotland or otherwise governed by Scots law.

3.2 The Member shall:

(a) forthwith on the execution of this Deed execute and deliver to LME Clear such pledge or security agreements in such form as LME Clear may require if the Member wishes (as may be permitted by the Rules) to provide Collateral or Default Fund Contributions at Approved CSDs outside England and Wales; and

(b) promptly upon being required by LME Clear at any time sign a notice of charge in the form set out in the schedule for delivery on its behalf to any Custodian.

3.3 Without prejudice to the provisions of this Deed (including under clause 10) and any Member Documentation, any Security Interest created in the future in or over any Charged Property by the Member (except in favour of LME Clear) shall be expressed to be subject to this Deed and shall rank in order of priority behind the Security Interests created by any Security Document.

3.4 If the Member ceases to be an LME Clear Member, upon its written request and at its expense after all Secured Obligations have been fully and unconditionally paid or discharged to LME Clear (or, if contingent, have wholly ceased to be capable of arising) and after the Member has become entitled under the Rules to request the release of such security, LME Clear shall release and discharge all Charged Property from the Security Interests created by this Deed and Equivalent Charged Property shall be transferred to the Member.

3.5 It is agreed that the charges and mortgages created by clause 3.1 in relation to "financial collateral" (as defined by the Financial Collateral Regulations) constitute a "security financial collateral arrangement" for the purposes of the Financial Collateral Regulations and a "collateral security charge" for the purposes of the Settlement Finality Regulations.

3.6 LME Clear may, at any time after a Default Event has occurred, by notice in writing to the Member convert the floating charge created by clause 3.1(e) with immediate effect into a fixed charge as regards any property or other assets specified in the notice.

3.7 A floating charge which has crystallised under clause 3.1(e) may, by notice in writing given at any time by LME Clear to the Member, be reconverted into a floating charge in relation to the Charged Property specified in such notice.

4. CLIENT ACCOUNTS

4.1 The charges and mortgages contained in clause 3.1 shall apply to all Charged Property, including all Collateral provided in respect of, or recorded in, any Client Account of the Member.

4.2 All money received or realised under the powers conferred by this Deed shall be applied for the purposes and in the manner determined by LME Clear in accordance with the Rules. If LME Clear maintains in its books of account one or more House Accounts and one or more Client Accounts for the Member, such money shall be allocated and applied by LME Clear in the proportions and subject to the restrictions on the use of Collateral provided on House Account and Client Account applicable under the Rules.

- 4.3 If a Client Account of a Member Transferor and the Collateral provided by it for such Client Account are validly transferred to the Member (as a Member Transferee) in accordance with Rule 10.7 (*Portability of Client Accounts*) of the Rules and Part D (*Porting Procedure*) of the Default Procedures of the Rules, then, immediately upon such transfer taking effect, all present and future obligations, money and liabilities due, owing or incurred to LME Clear under or in connection with such Client Account will be secured by the mortgages and charges contained in clause 3.1 and all present and future Collateral provided in respect of such Client Account shall stand as charged to LME Clear under such mortgages and charges.
- 4.4 If a Client Account of the Member and the Collateral provided by it for such Client Account are validly transferred to a Member Transferee in accordance with Rule 10.7 (*Portability of Client Accounts*) of the Rules and Part D (*Porting Procedure*) of the Default Procedures of the Rules, then, upon such Client Account and Collateral being validly transferred to the Member Transferee and such Collateral becoming validly charged by the Member Transferee to LME Clear on the same terms as applicable under clause 3.1, the obligations, money and liabilities due, owing or incurred to LME Clear in respect of such Client Account shall cease to form part of the Secured Obligations and such Collateral will be released from the mortgages and charges contained in clause 3.1.

5. ADDITIONAL OR SUBSTITUTED SECURITIES

- 5.1 If at any time the Member deposits or transfers any further or other Securities with or to LME Clear or its Custodian or to an account of LME Clear or its Custodian (in any Approved CSD or otherwise) in substitution for or in addition to the Charged Securities, such Securities will immediately become part of the Charged Securities for all purposes of this Deed and will be subject to the charges, mortgages and other provisions contained in this Deed.
- 5.2 All further or new Securities (whether by way of bonus, rights, conversion, merger, reconstruction or otherwise) which may be issued in respect of any Charged Securities shall be deposited with LME Clear or its Custodian or transferred to it or credited to the Securities Account applicable to such Securities (or as it may direct) and will immediately become part of the Charged Securities for all purposes of this Deed and will be subject to the charges, mortgages and other provisions contained in this Deed.

6. HOLDING OF CHARGED SECURITIES

- 6.1 The Member shall transfer all Securities provided by it as Collateral or Default Fund Contributions (pursuant to the Rules) with full title guarantee to the Securities Accounts applicable to the relevant Securities and ISINs.
- 6.2 The Member shall, on demand by LME Clear, reimburse LME Clear for all reasonable charges (including commission charged on transfers of Charged Securities) and expenses incurred by LME Clear in connection with the opening, maintenance and operation of the Securities Accounts. Where a Securities Account is used for holding Securities provided by the Member and other LME Clear Members, LME Clear shall allocate such charges and expenses between them on such basis as it may determine and the Member shall reimburse its allocated proportion of such charges and expenses to LME Clear.

7. COLLATERAL IN THE FORM OF PRECIOUS METAL

- 7.1 The Member acknowledges that it has no proprietary interest in Precious Metal Collateral provided by it to LME Clear under the Rules and agrees that, during the

term of this Deed, such Precious Metal Collateral shall be repayable or returnable to the Member only at the times and in the amounts applicable under the Rules.

7.2 Where Precious Metal is provided by the Member to LME Clear as an entitlement (including unallocated Precious Metal on an Unallocated Account), LME Clear may freely use and apply the amount so provided to it in acquiring actual Precious Metal (including allocated Precious Metal) which LME Clear shall hold as legal and beneficial owner (free of any rights or interest of the Member or any third party).

8. TITLE DOCUMENTS AND VOTING RIGHTS

8.1 Except as otherwise expressly agreed in writing by LME Clear, the Member shall:

- (a) deposit with LME Clear (or as it may direct), and LME Clear shall be entitled to retain during the term of this Deed, all certificates relating to certificated Charged Securities and any other deeds and documents of title relating to Charged Property; and
- (b) execute and deliver to LME Clear such documents and transfers and give such instructions and perform such other acts as LME Clear may require at any time to constitute or perfect an equitable or legal mortgage or pledge over Charged Property deposited with or provided by the Member to LME Clear as Collateral.

8.2 If any Charged Securities carry voting rights, then, unless and until this Security becomes enforceable or LME Clear otherwise directs in any case:

- (a) such voting rights shall continue to be exercised by the Member for so long as it remains the registered owner of the relevant Charged Securities; and
- (b) if the relevant Charged Securities are registered in the name of LME Clear or its Custodian, such voting shall be exercised in accordance with the instructions in writing from time to time received from the Member and (in the absence of any such written instructions) the registered holder shall refrain from exercising any such rights,

provided that upon this Security becoming enforceable, or if LME Clear otherwise directs, all of the foregoing rights of the Member shall automatically cease, and LME Clear alone shall be entitled to exercise all such voting rights in lieu of the Member.

9. COLLECTION OF RECEIVABLES

9.1 All dividends, interest and other income derived from Charged Securities shall be credited initially to such cash account of LME Clear or its Custodian as LME Clear shall decide, and shall thereafter be transferred to an Account of the Member as LME Clear shall decide, including such an Account so that the transferred credit balance forms part of the Cash Collateral for all purposes of the Rules.

9.2 The Member shall collect and realise any other Receivables and pay to such account with such bank as LME Clear may direct all money which it may receive in respect of such Receivables forthwith on receipt. Each such account shall be operated by the relevant bank solely on the instructions of LME Clear.

9.3 If the Member receives any money in respect of a Receivable, it shall hold such money upon trust for LME Clear.

10. NEGATIVE PLEDGE AND OTHER RESTRICTIONS

The Member shall not, without the prior written consent of LME Clear:

- (a) other than in favour of LME Clear, create, or agree or attempt to create, or permit to subsist, any Security Interest or any trust over any Charged Property, any Receivables or any money payable to the Member by or on behalf of LME Clear (pursuant to any Member Documentation), or permit any lien (other than a lien arising by operation of law in the ordinary course of the Member's business or, if applicable, a lien arising in favour of the operator of an Approved CSD) to arise or subsist over any Charged Property, any Receivables or any such money;
- (b) sell, transfer or otherwise dispose of any Charged Property, any Receivables or any such money, or any of its right, title or interest therein;
- (c) withdraw, or attempt to withdraw, any Charged Property from any account with a Custodian, except if and insofar as expressly permitted by LME Clear; or
- (d) consent to any Charged Securities being consolidated, sub-divided or converted or any rights attaching to them being varied, or to any uncertificated Charged Securities being converted into certificated Charged Securities (or vice versa).

11. REPRESENTATIONS AND WARRANTIES

11.1 The Member represents and warrants to LME Clear that:

- (a) the Member has the corporate power, and has taken all necessary action, to execute and perform this Deed;
- (b) this Deed constitutes legal, valid and binding obligations enforceable against the Member and creates the Security Interests expressed to be created by this Deed;
- (c) this Deed creates a valid, first-priority security interest in all present and future Charged Property, subject to no other Security Interest whatsoever (save any Security Interest in favour of LME Clear)
- (d) all Securities are or will (at the time of their becoming part of the Charged Securities) be fully paid up;
- (e) the Member has obtained all authorisations of any governmental or regulatory body required in connection with execution and performance of this Deed and such authorisations are in full force and effect;
- (f) the execution and performance of this Deed has not, and will not, violate any law, ordinance, charter, by-law or rule applicable to the Member or any agreement by which it is bound or by which any of its property or other assets are affected;
- (g) the Member is acting as principal in entering into this Deed and performing its obligations under it;
- (h) all Charged Property (other than Precious Metal) comprises "financial collateral" within the meaning of regulation 3 of the Financial Collateral Regulations;

- (i) at the time of transfer of any Charged Property to LME Clear or its Custodian, the Member was the sole lawful owner of, and was entitled to the entire benefit interest in, such Charged Property or, as the case may be, will have full right and authority to make each such transfer and, upon such transfer being effected, all right, title and interest in and to such Charged Property shall stand charged or mortgaged to LME Clear with full title guarantee on the terms of any Security Document, and in particular free of any interest of any kind including Security Interest of any third party;
- (j) the Member has, and will continue to keep, in force with each of its Clients an agreement under which the Member is expressly entitled, with respect to any property or other assets from time to time held by the Member or delivered to the Member by or for the account of any such Client, to charge, mortgage or pledge (as owner) such property or assets in favour of LME Clear (free of any right, title or interest in favour of such Client) to secure the discharge of the Secured Obligations;
- (k) neither the Member nor any Client of the Member or other person is or will be in breach of any trust or other fiduciary duty as result of the charging, mortgaging or pledging, or authorising the charging, mortgaging or pledging of any Charged Property under any Security Document; and
- (l) all Charged Property is free from any restriction on transfer (except for the restrictions contained in this Deed) and the Member shall ensure that, as far as the Member is able, all Charged Property will at all times remain free from any restriction on transfer (except for the restrictions contained in this Deed).

11.2 The representations and warranties stated in clause 11.1 shall be made on the date on this Deed and deemed to be repeated by the Member on each day on which any Charged Property is transferred or otherwise provided by or on behalf of the Member to LME Clear or its Custodian.

12. PAYMENT OF CALLS AND EXPENSES

The Member shall promptly pay all calls, fees, charges, fines, rents, storage fees, lease payments, costs, expenses and other amounts of any kind which may become due in respect of any Charged Property or any actual, or allocated, Precious Metal converted from entitlements to, or unallocated, Precious Metal provided by the Member as Charged Property. If the Member defaults in doing so, LME Clear shall be entitled to pay them and the Member shall reimburse LME Clear on demand in relation to any such payment made by LME Clear, and in any event the amount of any such payment made by LME Clear shall be added to and form part of the Secured Obligations.

13. CONTINUING SECURITY

This Deed shall be a continuing security for LME Clear, notwithstanding any intermediate payments or settlements of accounts or other matters whatever and shall be in addition to and shall not prejudice or be prejudiced by any right of set-off, combination, lien, pledge or other rights exercisable by LME Clear against the Member or any security, guaranteee, indemnity and/or negotiable instrument now or in the future held by LME Clear.

14. ENFORCEABILITY

14.1 This Security will become immediately enforceable if:

- (a) a Default Event occurs in respect of the Member; and/or

- (b) the provisions for allocation of an excess loss under Rule 10 (*Default waterfall and allocation of any excess loss of the Rules*) come into operation, where and to the extent that such provisions in force from time to time permit an application of Default Fund Contributions towards the discharge of such excess loss,

provided that the total amount recoverable from the Member under any Security Document shall not exceed (in the case of Rule 10 (*Default waterfall and allocation of any excess loss of the Rules*) coming into operation under paragraph (b) above) the amount of loss allocated to the Member under such Rule. The taking of enforcement action by LME Clear on or after the occurrence of any event referred to in paragraphs (a) or (b) above shall not preclude LME Clear from taking further enforcement action on the occurrence of any other such event or events.

- 14.2 If and whenever this Security becomes enforceable, LME Clear or its Custodian may exercise its powers under this Deed in relation to all such part of the Charged Property in such manner and at such time or times as it thinks fit (including by appropriation of any Charged Property to LME Clear itself or by sale to any other Member or third party).

15. **POWERS EXERCISABLE BY LME CLEAR**

- 15.1 The statutory powers of sale and of appointing a receiver shall be exercisable without the restrictions contained in Section 103 (*Regulation of exercise of power of sale*) and Section 109 (*Appointment, powers, remuneration and duties of receiver*) of the Law of Property Act 1925 and, in addition to such statutory powers and its powers under any Member Documentation, LME Clear (or a Custodian acting on its behalf) shall be entitled at its absolute discretion without notice to the Member:
 - (a) to sell or procure the sale of full title to or any interest in the Charged Property and to do so for such consideration (whether payable immediately or by instalments) and on such terms as LME Clear may think fit, and also to grant any option to purchase any interest in the Charged Property;
 - (b) send such messages and instructions (electronically or in writing) with respect to the Charged Property as LME Clear may think fit, including messages and instructions for the transfer of all or any Charged Securities to such account or accounts as LME Clear may choose or for the sale of all or any of such Charged Securities through an Approved CSD or otherwise or for the recertification of all or any of such Charged Securities;
 - (c) to apply or transfer as LME Clear thinks fit all or part of any money or interest subject to this Security at any time or times (whether on or before or after the expiry of any fixed or minimum period for which such money may have been deposited) in or towards satisfaction of all or such part of the Secured Obligations as LME Clear may determine;
 - (d) to execute and deliver such documents and give such instructions as may be required to give effect to this Deed, including instructions for the withdrawal of any Charged Property held by any person and/or for the use of any money or interest subject to this Security to purchase any currency or currencies required to effect such application;
 - (e) to transfer or procure the transfer of the whole or any part of the Charged Property into one or more accounts in the name of LME Clear or a person nominated by LME Clear and, in connection with the exercise of any of its rights or powers, to transfer any interest in the Charged Property into the name of LME Clear or any such nominee of LME Clear; and/or

(f) with a view to, or in connection with, the sale of the Charged Property, to enter into any transaction or arrangement which LME Clear may, in its absolute discretion, consider appropriate.

15.2 The powers contained in clause 15.1(a) to (f) shall be exercisable by LME Clear at any time or times in accordance with clause 14.1 without the necessity for any Default Event having occurred first or any other condition having been fulfilled first.

15.3 LME Clear may appoint any person as its agent for the purpose of selling or otherwise disposing of any Charged Property at any time after this Security becomes enforceable on such terms as LME Clear thinks fit.

15.4 LME Clear may place and keep for such time as it may think prudent any money received, recovered or realised under or by virtue of this Deed on a separate or suspense account to the credit of LME Clear, without any intermediate obligation on its part to apply the same or any part of it in or towards the discharge of the Secured Obligations.

15.5 This Security is in addition to, and shall neither be merged in, nor in any way exclude or prejudice, any other Security Interest, right or remedy available to LME Clear now or in the future.

15.6 The restriction contained in section 103 of the Law of Property Act 1925 (*Regulation of exercise of power of sale*) shall not apply to any exercise by LME Clear of its power of sale or other disposal which shall arise immediately in any of the circumstances referred to in clause 14.1, as shall the statutory power under section 101 of that Act of appointing a receiver of the Charged Property or its income.

15.7 Section 93 of the Law of Property Act 1925 (*Restriction on consolidated mortgages*) shall not apply in relation to any of the charges contained in this Deed.

16. **RIGHT OF APPROPRIATION**

16.1 LME Clear may, when or at any time after this Security becomes enforceable, by notice in writing to the Member appropriate with immediate effect any Charged Property comprising financial collateral (within the meaning of the Financial Collateral Regulations) and apply it in or towards the discharge of the Secured Obligations in such manner as LME Clear may determine, whether such Charged Property is held by LME Clear, its Custodian or otherwise.

16.2 The value of any Charged Property appropriated under clause 16.1 shall be the sale price for that Charged Property at the time of appropriation, as determined after appropriation by LME Clear on the basis of the sale price(s) obtained from an applicable generally recognised source selected by LME Clear (converted, where necessary for such valuation, into US dollars or such other currency on the basis set out in the Rules).

16.3 LME Clear will account to the Member for any amount by which the value of the appropriated Charged Property exceeds the Secured Obligations then due or the Member shall pay to LME Clear any amount by which the value of the appropriated Charged Property is less than the Secured Obligations then due.

16.4 The Member agrees that (a) all Charged Property referred to in clause 16.1 has been delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of LME Clear or a person acting on its behalf, and (b) the method of valuing Charged Property under clause 16.2 is commercially reasonable.

17. RIGHT OF USE

17.1 LME Clear may, at any time (whether before or after this Security becomes enforceable), use and/or dispose of all or any Charged Property comprising financial collateral (within the meaning of the Financial Collateral Regulations) as if LME Clear were the owner of it, including the power to assign, charge, pledge or otherwise grant a Security Interest in all or any such Charged Property in favour of any third party as if LME Clear were the owner of it for any purpose permitted by the Rules.

17.2 If LME Clear exercises such a right of use, it will replace the original financial collateral by transferring equivalent financial collateral (within the meaning of the Financial Collateral Regulations) on or before the due date for final payment of the Secured Obligations or, if LME Clear thinks fit, it may set off the value of the equivalent financial collateral against or apply it in discharge of the relevant Secured Obligations in accordance with the terms of this Deed.

17.3 The equivalent financial collateral which is transferred in discharge of an obligation as described in clause 17.2 shall be subject to the same terms of this Deed as applicable to the original financial collateral and shall be treated as having been provided under this Deed at the same time as the original financial collateral was first provided.

17.4 If LME Clear has an outstanding obligation to replace the original financial collateral with equivalent financial collateral when a Default Event occurs, LME Clear may exercise the close-out netting provisions applicable under the Rules in relation to that obligation.

18. FURTHER ASSURANCE

The Member shall on demand at any time and from time to time by LME Clear in writing execute and deliver to LME Clear at the cost of the Member and in such form as LME Clear may require:

- (a) a legal assignment or other fixed security over all or any Receivables;
- (b) where any Charged Property is situated outside England and Wales or where title to it is evidenced by entries in a register or account maintained by or on behalf of an intermediary outside England and Wales, such charge, mortgage, pledge or other fixed security under the law of the place where the Charged Property is situated as LME Clear may require; and/or
- (c) such other documents as LME Clear may in its discretion think fit further to secure the payment of the Secured Obligations or to perfect this Security, or to vest title to any Charged Property in itself or its Custodian or any purchaser.

19. INDEMNITY

The Member shall on demand at any time and from time to time indemnify LME Clear fully against all Loss which LME Clear or any Custodian acting for LME Clear may incur in consequence of anything done or purported to be done by or on behalf of LME Clear or such Custodian under or in connection with this Deed or in exercise of any rights or powers conferred on LME Clear or such Custodian by this Deed, except if and insofar as any such Loss results from LME Clear's or such Custodian's own fraud, gross negligence or wilful default.

20. INTEREST ON OVERDUE AMOUNTS

Any overdue amount due under this Deed or secured by this Security shall carry interest at the rate and in accordance with the terms applicable under paragraph 4.5 of Part G (*Interest, fees and charges*) of the Clearing Procedure of the Rules (or any replacement or other provision of the Rules which deals with default interest payable by a Member for late payments).

21. CURRENCY INDEMNITY

If, for any reason, any amount payable to LME Clear by the Member under this Deed is paid or recovered in a currency other than that in which it is required to be paid, then, to the extent that the payment to LME Clear falls short of the amount payable in the contractual currency, the Member shall indemnify LME Clear on demand for such shortfall on the terms applicable under Rule 2.15.3 (*Currency conversion*) of the Rules.

22. PROTECTION OF THIRD PARTIES

22.1 No Custodian or purchaser from, or other person dealing with, LME Clear shall be concerned to enquire whether any of the powers it has exercised or purported to exercise has arisen or become exercisable, or whether the Secured Obligations remain outstanding, or whether any event or cause has happened to authorise LME Clear to act or as to the propriety or validity of the exercise or purported exercise of any such power, and the title of a purchaser and the position of a Custodian or such a person shall not be affected by any of those matters.

22.2 The receipt of LME Clear shall be an absolute and conclusive discharge to a purchaser and shall relieve him of any obligation to see to the application of any money paid to or by the direction of LME Clear.

23. PROTECTION OF LME CLEAR

23.1 LME Clear shall not be liable to the Member for:

- (a) any failure to obtain payment of any sums (whether of an income or capital nature or otherwise) due or becoming due in respect of any Charged Securities;
- (b) any failure to pay any call or instalment which may become payable on or to accept any offer relating to any Charged Securities;
- (c) any failure to notify the Member of any of such matters; or
- (d) any Loss which arises out of the exercise or the attempted or purported exercise of, or the failure to exercise, any of LME Clear's powers, except if and insofar as such Loss results from its own fraud, gross negligence or wilful default.

23.2 Without prejudice to the generality of clause 23.1, entry into possession of Charged Property or the sending or receiving of instructions to or from any Approved CSD on behalf of the Member with respect to any Charged Property shall not render LME Clear liable to account as mortgagee in possession or otherwise for any sum not actually received by it. If and whenever LME Clear enters into possession of any Charged Property, it shall be entitled at any time at its discretion to go out of possession or to cease so to act.

23.3 The Member shall not have any claim against LME Clear in respect of any Loss arising out of the sale of any Charged Property effected pursuant to this Deed from whatever cause and whether or not a better price could have been obtained including

whether by deferring or advancing the date of such sale or otherwise, or selling to another person.

23.4 LME Clear shall not be liable for any Loss sustained by the Member in consequence of the exercise of LME Clear's rights under this Deed, including any loss of dividends, interest or other income caused by the appropriation, disposal or use of any Charged Property or by the fluctuation in any exchange rate at which currency may be bought or sold by LME Clear.

24. POWER OF ATTORNEY

24.1 For the purposes of securing the interest of LME Clear in the Charged Property and the performance of its obligations to LME Clear under the Member Documentation, the Member irrevocably and by way of security hereby appoints LME Clear and separately each Custodian acting for LME Clear to be its attorney (with full power to appoint substitutes and to sub-delegate, including power to authorise the person so appointed to make further appointments, in both cases, with regard to all or any part of the Charged Property) on behalf of the Member and in its name or otherwise:

- (a) to execute any document or do any act or thing which LME Clear or such Custodian or such substitute or delegate may, in its absolute discretion, consider appropriate in connection with the exercise of any of the powers of LME Clear conferred by this Deed and any Member Documentation or which the Member is obliged by LME Clear to execute or do under this Deed and any Member Documentation; and/or
- (b) to act on behalf of the Member with full authority to communicate with the operator of any Approved CSD in all matters relating to the Charged Property and, without limitation, to send and receive messages and instructions on behalf of the Member with respect to the Charged Property.

24.2 The power of attorney contained in clause 24.1 shall be exercisable by LME Clear or a Custodian acting for it at any time or times as LME Clear or such Custodian thinks fit in its absolute discretion (without the necessity for any Default Event or any other condition having been fulfilled first) and shall continue in force until this Security is absolutely and unconditionally released in writing by LME Clear.

25. REIMBURSEMENT OF EXPENSES

The Member shall reimburse or pay to LME Clear on demand (on the basis of a full indemnity) the amount of all expenses and Loss incurred by LME Clear and/or any Custodian acting for LME Clear in connection with the exercise, or the attempted or purported exercise, by or on behalf of LME Clear of any of its powers or any other action taken by or on behalf of LME Clear with a view to or in connection with the recovery of the Secured Obligations, the realisation of this Security, the preservation of the Charged Property or any other purpose contemplated in this Deed.

26. STAMP DUTY, REGISTRATION FEES AND VAT

26.1 The Member shall pay all present and future stamp, registration and similar Taxes or charges which may be payable in connection with the execution of this Deed and the creation, maintenance and enforcement of this Security, and shall indemnify LME Clear against all Loss (including interest and penalties) resulting from any delay or omission to pay any such stamp, registration and similar Taxes or charges.

26.2 The Member shall on demand at any time and from time to time indemnify LME Clear against any Tax which LME Clear and/or any Custodian may incur, suffer, pay or be

obliged to account for in consequence of anything done or purported to be done by or on behalf of LME Clear under or in connection with:

- (a) this Deed or in exercise of any rights or powers conferred on LME Clear or such Custodian by this Deed (including the execution of this Deed);
- (b) the granting of this Security, including the creation, maintenance and enforcement of this Security and the delivery or provision of the Charged Property; and/or
- (c) the conversion of any Precious Metal entitlement (including unallocated Precious Metal on an Unallocated Account) to actual Precious Metal (including allocated Precious Metal), and vice versa.

27. LIEN

Without prejudice to the other rights of LME Clear under the Member Documentation and as a separate and independent stipulation, the Member agrees that, if any Secured Obligation is incurred as a result of the Member failing to perform when due its payment or delivery obligations relating to a transaction for the sale or purchase of an Underlying Asset, LME Clear shall have a specific lien over the Underlying Assets or sale proceeds arising out of that transaction until the discharge of such Secured Obligation, subject only to the provisions of clause 4.2.

28. SET-OFF

- 28.1 Without prejudice to its other rights under the Member Documentation and as a separate and independent stipulation, the Member agrees that any money from time to time deposited or paid by the Member with or to LME Clear, and any payment obligation or the value of any delivery obligation owed by LME Clear to the Member may, at any time without notice to the Member, be applied and set off in or towards the discharge of the Secured Obligations or such part of them as LME Clear may select, regardless of the place of payment, delivery and/or currency of the obligation, subject only to the provisions of clause 4.2.
- 28.2 LME Clear may make any currency conversion necessary to give effect to such set-off. If any obligation is unliquidated or unascertained, LME Clear may set off an amount estimated by it in good faith to be the amount of that obligation. LME Clear will endeavour to notify the Member following the exercise of any such right of set-off but any failure to do so will not affect the validity of such right or its exercise.
- 28.3 The right of set-off conferred by clause 28.1 shall not (in the absence of a Default Event) be exercisable by LME Clear against any payment obligation or the value of any delivery obligation owed by it to the Member in the ordinary course of the settlement of a Contract under the Rules.

29. ACCOUNTS

- 29.1 On receiving notice that a Member has granted a Security Interest over or otherwise encumbered or disposed of any Charged Property in contravention of this Deed, LME Clear may rule off all or any of its Accounts and open one or more new Accounts with the Member.
- 29.2 If LME Clear does not open a new Account immediately on receipt of such notice, it shall nevertheless be treated as if it had opened a new Account of the same type on that day unless LME Clear otherwise directs. From that day, all obligations incurred by the Member to LME Clear shall be treated as having been entered on such new

Account and shall not operate to reduce the amount owing by the Member to LME Clear at the time when it received such notice.

30. RETURN OF CHARGED PROPERTY

30.1 If any Charged Property fails to be returned to the Member pursuant to the Rules or this Deed, such Charged Property shall be released from this Security automatically on the transfer of Equivalent Charged Property to the Member, to another LME Clear Member pursuant to the Porting Process or to a Client of the Member pursuant to Rule 10.5.1(c). The mortgages or charges over all other property and rights forming part of the Charged Property shall continue in full force and effect.

31. THIRD PARTY RIGHTS

31.1 Pursuant to the Contracts (Rights of Third Parties) Act 1999, all powers, discretions or protections conferred by this Deed on the Custodian and any purchaser shall be directly exercisable or enforceable by it.

31.2 Save as otherwise expressly provided in clause 31.1, no person other than a party to this Deed shall have any right by virtue of the Contracts (Rights of Third Parties) Act 1999 to enforce any term (express or implied) of this Deed, but without prejudice to any right or remedy of the third party which may exist or be available apart from that Act.

31.3 LME Clear and the Member may by agreement vary any term of this Deed (including this clause 31) without the necessity of obtaining any consent from any other person.

32. DETERMINATIONS AND DISCRETIONS

32.1 Any certification or determination by LME Clear or its Custodian of a rate or amount under this Deed shall, in the absence of manifest error, be conclusive evidence of the matters to which it relates.

32.2 Any discretion, power or right conferred on LME Clear by this Deed to make or vary any determination or to give any approval or to decide any matter or to form any opinion or judgment shall be construed to be a discretion, power or right exercisable by LME Clear, in its sole and unfettered discretion, at any time and from time to time.

33. TRANSFER

33.1 LME Clear may assign or transfer the whole or any part of the benefit of this Deed (or any of its rights under this Deed) without the Member's consent to the extent that LME Clear, in its capacity as operator of the LME Clear System, is entitled to assign or transfer any of its rights against the Member to any person, including any successor, pursuant to the Rules.

33.2 The Member may not:

- (a) assign or transfer any of its rights or obligations under this Deed; or
- (b) enter into any transaction or arrangement which would result in any of those rights or obligations passing to or being held in trust for or for the benefit of another person,

without the prior written consent of LME Clear.

34. FORBEARANCE, SEVERABILITY, VARIATION

- 34.1 No failure to exercise and no delay on the part of LME Clear in exercising any right, remedy, power or privilege under this Deed and no course of dealing between the parties shall be construed or operate as a waiver of that right, remedy, power or privilege, nor shall any single or partial exercise of any right, remedy, power or privilege preclude any other or further exercise of it or the exercise of any other right, remedy, power or privilege. The rights and remedies provided by this Deed are cumulative and are not exclusive of any rights or remedies provided by law.
- 34.2 If any provision of this Deed is held to be illegal, invalid or unenforceable in whole or in part, this Deed shall continue to be valid as to its other provisions and the remainder of the affected provision.
- 34.3 No variation, supplement, deletion or replacement of or from this Deed or any of its terms shall be effective unless made in writing and signed by or on behalf of each party.
- 34.4 If there is any inconsistency between the provisions of this Deed and the Rules or any Member Documentation, this Deed shall take precedence to the extent of the inconsistency.

35. DEMANDS, NOTICES, ETC

Any demand or notice to the Member under this Deed shall be effective only if made in writing by an officer of LME Clear and served on the Member in accordance with the Rules.

36. COUNTERPARTS

This Deed may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all of which shall together constitute one and the same instrument. Delivery of an executed signature page to this Deed by fax or email shall be as effective as delivery of a manually signed counterpart of this Deed.

37. GOVERNING LAW AND JURISDICTION

- 37.1 This Deed and all non-contractual obligations arising out of or in connection with it shall be governed by, and construed in accordance with, English law.
- 37.2 The provisions relating to jurisdiction, waiver of immunity, waiver of objection to proceedings on the basis of inconvenient forum, and appointment of a process service agent set out in the Membership Agreement and in the Rules shall apply to this Deed as if repeated in full in this Deed with the necessary consequential changes.

THIS DEED has been executed by the Member as a deed, and by LME Clear under hand, and the security hereby constituted shall be created and take effect on the date stated below (being the date on which it is accepted and executed by LME Clear).

EXECUTED as a Deed¹ by
 INSERT MEMBER NAME
 acting by:

(sign)
 Name:
 Title: Director

and

(sign)
 Name:
 Title: Director/Secretary*

*delete as applicable

EXECUTED as a Deed by
 INSERT MEMBER NAME
 acting by:

(sign)
 Name:
 Title: Director

In the presence of:

(sign)
 Name:
 Occupation:
 Address:

EXECUTED as a Deed by
 INSERT MEMBER NAME
 acting by:

(sign)
 Name:
 Title: Attorney

pursuant to a power of attorney dated

in the presence of:

(sign)
 Name:
 Occupation:
 Address:

¹ The Member must comply with the applicable rules for the execution of 'deeds'. For a company incorporated in England and Wales, this generally means signing by (i) a director (in the presence of a witness who also signs), (ii) two directors or (iii) a director and the company secretary. However, the Member should take its own legal advice.

Accepted by **LME CLEAR LIMITED** on _____ 20_____

EXECUTED by
LME Clear Limited
acting by:

.....
Name: _____

Title: _____

and

.....
Name: _____

Title: _____

SCHEDULE**Notice of Charge to Custodian**

To: **INSERT CUSTODIAN'S NAME AND ADDRESS**
(in its capacity of Custodian as defined in the Security Deed referred to below)

Date:

We hereby give you notice that we have charged or mortgaged to LME Clear Limited ("LME Clear") by a security deed dated [on or about the date of this Notice] (the "Security Deed") all our rights, title and interest in and to all securities and other property referred to in clause 3.1 of the template security deed in materially the form of the security deed previously provided to you by LME Clear.

We irrevocably and unconditionally authorise and instruct you (notwithstanding any previous instructions of any kind which we may have given to you) to hold all securities, property and rights thereby charged by way of fixed charge or mortgage (the "Fixed Charged Property") to the order of LME Clear and to comply with such instructions as may be given to you from time to time and at any time by LME Clear, without reference to or further authority from us and without any enquiry by you as to the justification or validity of such instructions. No Fixed Charged Property may be withdrawn or utilised without the prior written consent of LME Clear.

The above authorisations and instructions may not be modified, revoked or withdrawn, without the prior written consent of LME Clear or its written confirmation that the Fixed Charged Property has been released to us.

For and on behalf of
INSERT MEMBER NAME

.....
Name: _____
Title: _____