

NETTING ANALYSER LIBRARY

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

4 December 2013

Dear Sirs,

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

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

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

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

I. TERMS OF REFERENCE AND DEFINITIONS

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

- 1.1.1 all persons which are companies (other than Oversea Companies) registered under the Companies Act;
- 1.1.2 credit institutions licensed to carry on the business of banking in terms of the Banking Act, a "Credit Institution"; and
- 1.1.3 branches in this jurisdiction of foreign credit institutions and other companies which are Oversea Companies.



- I -

- 1.2 This opinion is also given in respect of Parties that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:
 - 1.2.1 Investment Firms (Schedule 1);
 - 1.2.2 LPs (Schedule 2);
 - 1.2.3 Insurance Undertakings (Schedule 3);
 - 1.2.4 Traders (Schedule 4);
 - 1.2.5 SICAVs (Schedule 5);
 - 1.2.6 Financial Institutions (Schedule 6);
 - 1.2.7 Parties acting as Trustees (other than Pension Schemes) (Schedule 7); and
 - 1.2.8 Parties acting as Trustees of Pension Schemes (Schedule 8).
- 1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the Netting Agreement and the Clearing Agreement are expressed to be governed by English law.
- 1.4 This opinion covers all types of Transaction.

This opinion is given in respect of only such of those Transactions which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.
- 1.5 In this opinion, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy.
- 1.6 No opinion is expressed on matters of fact and on fiscal matters.
- 1.7 This opinion relates solely to matters of Maltese law (as in force at the date hereof) and does not consider the impact of any laws (including insolvency laws) other than Maltese law, even where, under Maltese law, any foreign law fails to be applied. This opinion letter and the opinions given in it are governed by the terms and conditions found on our website www.camilleripreziosi.com. All non-contractual obligations and any other matters arising out of or in connection with this opinion letter are governed by Maltese law. We express no opinion in this opinion letter on the laws of any other jurisdiction.



1.8 Definitions

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

- 1.8.1 **“Banking Act”** means the Banking Act, Cap 371 of the laws of Malta;
- 1.8.2 **“Civil Code”** means the Civil Code, Cap 16 of the laws of Malta;
- 1.8.3 **“Collateral Regulations”** means the Financial Collateral Arrangements Regulations, Subsidiary Legislation 459.01 of the laws of Malta;
- 1.8.4 **“Commercial Code”** means the Commercial Code, Cap 13 of the laws of Malta;
- 1.8.5 **“Companies Act”** means the Companies Act, Cap 386 of the laws of Malta;
- 1.8.6 **“Controlled Companies Act”** means the Controlled Companies (Procedure for Liquidation) Act, Cap 383 of the laws of Malta;
- 1.8.7 **“Credit Institutions Winding-Up Regulations”** means Credit Institutions (Reorganisation and Winding Up) Regulations, Subsidiary Legislation 371.12 of the laws of Malta;
- 1.8.8 **“Establishment”** means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods;
- 1.8.9 **“EU Insolvency Regulation”** means the EU Council Regulation No. 1346/2000 on insolvency proceedings;
- 1.8.10 **“Financial Collateral Arrangement”** has the same meaning as that provided to it in the Collateral Regulations;
- 1.8.11 **“Financial Institutions Act”** means the Financial Institutions Act, Cap 376 of the laws of Malta;
- 1.8.12 **“FOA Member”** means a member (excluding associate members) of the Futures and Options Association which subscribes to the Futures and Options Association's Netting Analyser service (and whose terms of subscription give access to this opinion);
- 1.8.13 **“Insolvency Party”** means a Party which is insolvent for the purposes of any insolvency law or otherwise subject to Insolvency Proceedings;

- 1.8.14 "Insolvency Proceedings" means the procedures listed in paragraph 3.1;
- 1.8.15 "Insolvency Representative" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction.
- 1.8.16 "Instruments" means:

1. Transferable Securities.

Those classes of securities which are negotiable on the capital market and include:

- (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depository receipts in respect of shares;
- (b) bonds or other forms of securitised debt, including depository receipts in respect of such securities;
- (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

2. Money Market Instruments.

Those classes of instruments which are normally dealt in on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment.

3. Units in collective investment schemes.

4. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivative instruments, financial indices or financial measures which may be settled physically or in cash.

5. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event).

6. Options, futures, swaps, and any other derivative contracts relating to commodities, that can be physically settled provided that they are traded on a regulated market, within the meaning of the Financial Markets Act and, or a Multilateral Trading Facility within the meaning of the First Schedule of the Investment Services Act.

7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled, are not for commercial



purposes, are not included in article 6 of the Second Schedule to the Investment Services Act (the “**ISA Second Schedule**”), and, which have the characteristics of other derivative instruments, having regard to whether, *inter alia*, they are cleared and settled throughout recognized clearing houses or are subject to regular margin calls.

8. Derivative instruments for the transfer of credit risk.

9. Rights under a contract for differences or under any other contract the purpose or intended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price for property of any description or in an index or other factor designated for that purpose in the contract.

10. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in the ISA Second Schedule, which have the characteristics of other derivative instruments, having regard to whether, *inter alia*, they are traded on a regulated market within the meaning of the Financial Markets Act or a Multilateral Trading Facility within the meaning of the First Schedule of the Investment Services Act, are cleared and settled through recognized clearing houses or are subject to regular margin calls.

11. Certificates or other instruments which confer property rights in respect of any instrument falling within the ISA Second Schedule.

12. Foreign exchange acquired or held for investment purposes.

and includes shares in companies and other securities equivalent to shares in companies, partnerships or other entities and bonds and other forms of debt instrument, and any other securities which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment schemes and money market instruments and claims relating to, or rights in, or in respect of, any of the securities, participation interests or rights and instruments described above;

- 1.8.17 “**Investment Services Act**” means the Investment Services Act, Cap 370 of the laws of Malta;
- 1.8.18 “**MFSA**” means the Malta Financial Services Authority;
- 1.8.19 “**Netting and Set-Off Act**” means the Set-Off and Netting on Insolvency Act, Cap 459 of the laws of Malta;

- 1.8.20 **"Oversea Companies"** means a body corporate, banks and insurance companies, constituted or incorporated outside Malta and which establish a branch within Malta in terms of Part XI of the Companies Act;
- 1.8.21 A reference to a "**paragraph**" is to a paragraph of this opinion letter;
- 1.8.22 **"Pensions Act"** means the Special Funds (Regulation) Act, Cap 450 of the laws of Malta;
- 1.8.23 **"Rome Regulation"** means EC Regulation 593/2008/EC of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) of 17 June 2008;
- 1.8.24 **"Security by Title Transfer Provisions"** means Articles 2095F to 2095J (Title XXIIIB) of the Civil Code;
- 1.8.25 **"Settlement Finality Regulations"** means Central Bank of Malta Directive No.2 issued under the Central Bank of Malta Act, Cap 204 of the laws of Malta, which regulations transpose the provisions of Directive 98/26/EC on settlement finality in payment and securities settlements systems; and
- 1.8.26 **"Trusts and Trustees Act"** means the Trusts and Trustees Act, Cap 331 of the laws of Malta.

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

2. ASSUMPTIONS

We assume:

- 2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.
- 2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

- 2.4 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction.
- 2.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any Insolvency Proceedings against either Party.
- 2.6 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.
- 2.7 The FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.8 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.
- 2.9 In relation to the opinions set out at paragraphs 3.4, 3.5, 3.8 and 3.9 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.
- 2.10 That each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such margin at the time of Transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).
- 2.11 That all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of margin pursuant to the Title Transfer Provisions will have been effectively carried out.
- 2.12 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.13 That any collateral will consist of cash and/or securities only.
- 2.14 That any branch of a Party in this jurisdiction will constitute an Establishment.
- 2.15 That where a Party is incorporated, registered or organised in this jurisdiction and is not a credit institution, insurance undertaking, investment undertaking holding funds



or securities for third parties, or a collective investment undertaking, it has the '*centre of main interests*' in Malta, for the purpose of the EU Insolvency Regulation; and

2.16 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates, and (b) will be a company (not being an Oversea Company) registered under the Companies Act, a Credit Institution, an Investment Firm, an LP, or an Insurance Undertaking.

3. OPINION

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

3.1 Insolvency Proceedings

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

- 3.1.1 dissolution and consequential winding up in terms of Article 214 *et seq* of the Companies Act;
- 3.1.2 in relation to an Oversea Company, dissolution and consequential winding up in terms of Article 214 *et seq* of the Companies Act (irrespective of whether the Oversea Company is being or has been wound up) with such modifications as are necessary to accommodate the fact that the branch, the affairs of which are being wound up, is not a Maltese company;
- 3.1.3 company reconstructions in terms of Article 327 *et seq.* of the Companies Act ; and
- 3.1.4 company recovery procedures in terms of Article 329B *et seq.* of the Companies Act.

In addition, the bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party which is a Credit Institution could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the following:

- (i) Credit Institutions Winding-Up Regulations;
- (ii) the liquidation and distribution of assets belonging to controlled Credit Institutions in terms of the Controlled Companies Act; and
- (iii) powers of the MFSA to take control of Credit Institutions in terms of the Banking Act.

In relation to an obligation which is a transfer order (as defined in the Settlement Finality Regulations), the Settlement Finality Regulations will also be applicable. If the FOA Netting Agreement or, as the case may be, the Clearing Agreement constitutes a financial collateral arrangement or an arrangement of which a financial collateral arrangement forms part, the Collateral Regulations will also apply. The EU Insolvency Regulation has a direct effect in this jurisdiction.

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

3.2 Recognition of choice of law

- 3.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England in accordance with the provisions of Regulation 593/2008/EC of the European Parliament and of the Council on the law applicable to contractual provisions (Rome I) of 17 December 2009 ("Rome I Regulation").
- 3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the enforceability or effectiveness of the (i) FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions.

3.3 Enforceability of FOA Netting Provision

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

- 3.3.1 the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and
- 3.3.2 the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because in terms of the Netting and Set-Off Act, close-out netting provisions, such as the FOA Netting Provision, are valid and enforceable in accordance with their terms whether such close-out netting takes place before or after bankruptcy or insolvency provided that the mutual debts, mutual credits or mutual dealings have arisen or occurred before the insolvency or bankruptcy of one



of the Parties. In terms of the Netting and Set-Off Act, the general principle relating to the enforceability of such close-out netting provisions is subject to the following exceptions:

- a. The close-out netting agreement was entered into at a time when the other party knew or ought to have known that an application for the dissolution of the company by reason of insolvency was pending or that the company has taken formal steps under any applicable law to bring about its dissolution and winding up by reason of insolvency;
- b. The close-out netting agreement was entered into at a time when the other party knew or ought to have known that an event analogous to those described in paragraph (a) above took place in relation to the Insolvent Party being an individual or a commercial partnership; and
- c. In the event of fraud or similar ground.

A close-out netting provision is defined as "*a provision of a contract under which on the occurrence of a specified event, whether through the operation of netting or set-off or otherwise -*

(a) the benefit of time for the performance of relevant obligations by the debtor may no longer be claimed and, or the relevant obligations become immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount, and, or,

(b) any obligation of a party to deliver property to the other is immediately performable notwithstanding any benefit of time granted to the debtor and expressed as an obligation to pay an amount representing its estimated current value or replacement value or is terminated and replaced by an obligation to pay such an amount, and

(c) an account is taken of what is due from each party to the other in respect of such obligations and those obligations fall to be discharged by the payment of an aggregate net sum equal to the balance of account by the party from whom the larger amount is due;"

The Netting and Set-Off Act provides that, in the event of an enforcement of a close-out netting provision, obligations expressed in different currencies are converted into a single currency and such obligations shall be discharged by the payment of an aggregate net sum equal to the balance of account by the party from whom the larger amount is due.

Furthermore, in terms of the Netting and Set-Off Act, a close-out netting provision entered into by an Oversea Company is considered to be valid and enforceable in terms of Maltese law notwithstanding the provisions of any other law which may be applicable to such party, including the law under which such company is constituted.

The Netting and Set-Off Act stipulates that it is lawful for the parties to a contract, when entering into the contract, to agree:-

- a. on a system or mechanism which will enable the parties to convert a non-financial obligation into a monetary obligation of equivalent value and to value such obligation for the purposes of any set-off or netting;
- b. on the rate of exchange or the method to be used to establish the rate of exchange to be applied in effecting any set-off or netting when the sums to be set off or netted are in different currencies, and to establish the currency in which payments of the net sum is to be effected; and
- c. that any transactions or other dealings carried out pursuant to any contract, whether identified specifically or by reference to a type or class of transactions or dealings, shall be treated as a single transaction or dealing for the purpose of the set-off or netting provisions in the contract and that all such transactions or dealings by the parties or any liquidator, receiver, curator, controller or special controller or other officer acting for the parties and any court.

The Netting and Set-Off Act does not limit its applicability to specific types of persons or to specific types of underlying transactions. Further, other than on the basis of fraud or similar ground, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Non-Defaulting Party.

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

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

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

We are of this opinion because, barring in the case of fraud, or notice of insolvency or bankruptcy at the time of entry into the Clearing Agreement, the Netting and Set-Off Act ensures that a close-out netting provision, such as the Clearing Module Netting Provision, is valid and enforceable in accordance with its terms.

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



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

3.5 Enforceability of the Addendum Netting Provision

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

We are of this opinion because, barring in the case of fraud, or notice of insolvency or bankruptcy at the time of entry into the Clearing Agreement, the Netting and Set-Off Act ensures that a close-out netting provision, such as the Addendum Netting Provision, is valid and enforceable in accordance with its terms.

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

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

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

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

3.7 Enforceability of the FOA Set-Off Provisions

- 3.7.1 In relation to an FOA Netting Agreement which includes the FOA Set-Off Provisions, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default, the Non-Defaulting Party would

be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

- (i) where the FOA Set-Off Provisions include the General Set-Off Clause:
 - (a) the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Defaulting Party); or
 - (b) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or
- (ii) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because, in terms of the Netting and Set-Off Act, any provision in any contract providing for or relating to the set-off of sums due from each party to the other in respect of mutual credits, debts or dealings is said to be enforceable in accordance with its terms whether before or after bankruptcy or insolvency, in respect of mutual debts, credits or dealings which have arisen or occurred before the bankruptcy or insolvency of one of the parties, against: (a) the parties to the contract, (b) any guarantor or any person providing security for any party to the contract, (c) the liquidator, receiver, curator, controller, special controller or other similar officer of either party to the contract, and (d) the creditors of the parties to the contract. The exceptions to this rule are set out in paragraph 3.3 of this opinion. :

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

In addition to the highlighted words, it is necessary that the words shown as underlined in Part 1 of Annex 4 of this opinion letter be treated as Core Provisions in order for the opinions expressed in this paragraph 3.7.1 to apply.

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



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

We are of this opinion because, barring in the case of fraud, or notice of insolvency or bankruptcy, the Netting and Set-Off Act ensures that a close-out netting provision, such as the General Set-Off Clause and the Margin Cash Set-Off Clause, is valid and enforceable in accordance with its terms.

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

In addition to the highlighted words, it is necessary that the words shown as underlined in Part 1 of Annex 4 of this opinion letter be treated as Core Provisions in order for the opinions expressed in this paragraph 3.7.2 to apply.

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

- 3.8.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions is a Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:
 - (a) if the Client is a Defaulting Party, so that the value of any cash balance owed by the Firm to the Client would be set-off against any Liquidation Amount owed by the Client to the Firm; and

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

We are of this opinion because, barring in the case of fraud, or notice of insolvency or bankruptcy, the Netting and Set-Off Act ensures that a close-out netting provision, such as the General Set-Off Clause and the Margin Cash Set-Off Clause, is valid and enforceable in accordance with its terms.

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

In addition to the highlighted words, it is necessary that the words shown as underlined in Part 1 of Annex 4 of this opinion letter be treated as Core Provisions in order for the opinions expressed in this paragraph 3.8.1 to apply.

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

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

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

- (a) in the case of a CM Trigger Event, the Client (as defined in the ISDA/FOA Clearing Addendum); or
- (b) in the case of a CCP Default, either Party (the "Electing Party"),

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



We are of this opinion because barring in the case of fraud, or notice of insolvency or bankruptcy, the Netting and Set-Off Act ensures that a close-out netting provision, such as the General Set-Off Clause and the Margin Cash Set-Off Clause, is valid and enforceable in accordance with its terms.

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

In addition to the highlighted words, it is necessary that the words shown as underlined in Part I of Annex 4 of this opinion letter be treated as Core Provisions in order for the opinions expressed in this paragraph 3.9 to apply.

3.10 Enforceability of the Title Transfer Provisions

- 3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.
- 3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value.
- 3.10.3 The courts of this jurisdiction would not recharacterise Transfers of Margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest.
- 3.10.4 A Party shall be entitled to use or invest for its own benefit, as outright owner and without restriction, any Margin Transferred to it pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.
- 3.10.5 We are of this opinion because to the extent that the FOA Netting Agreement (with Title Transfer Provisions) or a Clearing Agreement which includes the Title Transfer Provisions constitutes a financial collateral arrangement, the Collateral Regulations apply and thus would be valid and enforceable in accordance with its terms and the Collateral Regulations, and:
 - (a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral

provider or collateral taker. Such a financial collateral arrangement and the provision of financial collateral thereunder, will not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided:

- (i) on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order making that commencement; or
- (ii) in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or the taking of any other action or occurrence of any other event in the course of such proceedings or measures;

(b) where on the day of, but after the moment of the commencement of winding-up proceedings or reorganisation measures -

- (i) a financial collateral arrangement has come into existence;
- (ii) a relevant financial obligation has come into existence; or
- (iii) financial collateral has been provided,

it will be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor ought to have been aware, of the commencement of such proceedings or measures; and

(c) where a financial collateral arrangement contains an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or where such arrangement contains a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be declared invalid or void or be reversed on the sole basis that:

- (i) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order making that commencement or in a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or the taking of any other



action or occurrence of any other event in the course of such proceedings or measures; and, or

(ii) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral.

(d) the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement will not be dependent on the performance of any formal act. The following are not considered to be formal acts within the meaning of the Collateral Regulations: any act required by law as a condition for effecting the transfer or creation of a security interest on Instruments, other than book entry securities, including endorsement in the case of credit instruments, or any recording on the issuer's register in the case of registered instruments.

(e) The Collateral Regulations provide that a collateral taker must ensure that any action taken pursuant to a financial collateral arrangement be conducted in a commercially reasonable manner and in good faith so as to ensure fair treatment to the collateral giver.

(f) The Collateral Regulations are limited:

- a. to those instances where the collateral giver and the collateral taker are the parties listed in paragraph 4.9;
- b. to financial collateral consisting of cash (money credited to an account in any currency, or similar claims for the repayment of money, including money market deposits) or Instruments or credit claims;
- c. to financial collateral which has been provided (delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf) and can be evidenced in writing (the evidencing of the provision of financial collateral must allow for the identification of the financial collateral to which it applies. For this purpose, it is sufficient to prove that the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account);
- d. to financial collateral arrangement which can be evidenced in writing or in a legally equivalent manner;



- e. to obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and, or delivery of instruments.
- 3.10.6 The opinion expressed in paragraph 3.10 above would also apply where the FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, the Clearing Agreement which includes the Title Transfer Provision falls outside the scope of the Collateral Regulations subject to the following matters potentially having a mandatory effect in terms of the Security by Title Transfer Provisions:
 - (a) the property being the subject of the title transfer must be movable;
 - (b) the debtor and, or transferor and the creditor must enter into an agreement in writing designating the property being transferred, the secured obligations (which may be existing or future obligations) and the rights of the transferee in the case of default;
 - (c) a transfer by way of security operates as a transfer with regard to third parties, in the case of debts and rights against an obligor, when notice is given in writing or the obligor of the assigned right has acknowledged the assignment, or in the case where the rights consist of property, where there is no obligor and where the title to which is registered in a public registry, the effects of the transfer shall arise when the transfer is registered in the relevant register;
 - (d) in the case of a default, the creditor is bound to give notice in writing to the debtor and the transferor of the property before realising the property transferred;
 - (e) the creditor may realise the property transferred by way of sale or by netting and setting off the value of the property and applying its value in discharge of the secured obligation. In any event, a creditor is obliged to exercise his rights as aforesaid in a commercially reasonable manner and is bound by fiduciary obligations in that regard and to account to the debtor as to the value used for such enforcement;
 - (f) It is not permissible for the debtor to agree on the value of property transferred by way of security for the purposes of enforcement before the receipt by him of a notice of sale or set-off above described. It is however permissible to agree on a value to be established by reference to a market or on valuation mechanisms to be followed in case of disagreement between the parties;
 - (g) In terms of the Article 303 of the Companies Act, the general rule is that there is a six month period before the effective date of dissolution of the relevant company within which practically any transaction can be deemed to constitute a fraudulent preference against its creditors if



it is considered to be: (i) a transaction at an undervalue; or (ii) if a preference is given. Any transaction, whether it is the granting of a privilege, hypothec or other charge, or a transfer or other disposal of property or rights or a payment, execution or any other act relating to property or rights made or done by or against a company or an obligation incurred by the company may be deemed to be a fraudulent preference if it is given in the six month period preceding the dissolution of the company unless the person in whose favour it is made, done or incurred, proves that he did not know and did not have reason to believe that the company was likely to be dissolved by reason of insolvency, and in the event of the company being so dissolved every such fraudulent preference will be void.

A title transfer constituting a financial collateral arrangement would not be declared invalid or void or reversed on the sole basis that the said arrangement has come into existence or was provided within the six month suspect period determined under the fraudulent preference provisions of the Companies Act. However, the Security by Title Transfer Provisions only regulate the enforceability of the title transfer in the context of the bankruptcy or insolvency of the debtor of the debt or the grantor of security by title transfer or the commencement or continuation of any insolvency or winding up proceedings or re-organisation measures. Thus, although to our knowledge the matter is untested ground in Malta, it would appear that any title transfers entered into at an undervalue or if in relation to the title transfer, a preference is given, then such transaction would be void.:.

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

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

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



3.12 Single Agreement

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

3.13 Automatic Termination

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

3.14 Multibranch Parties

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

3.15 Insolvency of Foreign Parties

Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default or a Firm Trigger Event or, as the case may be, a CM Trigger Event occurs in respect of such Party (a "Foreign Defaulting Party") the Foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction except where the centre of main interests of the Foreign Defaulting Party is in an EU member state other than Malta or Denmark and the foreign Defaulting Party has no establishment (within the meaning of the EU Insolvency Regulation) in Malta. The company recovery procedures and company reconstructions are not listed in the EU Insolvency Regulation as being one of the insolvency proceedings applicable to this jurisdiction and thus the foreign Defaulting Party could still be subject to company recovery procedures and reconstructions if its centre of main interests is in an EU member state other than Malta or Denmark.

3.16 Special legal provisions for market contracts

In addition to the Settlement Finality Regulations, there are other special provisions of law which would affect the opinions given in this paragraph 3 which would apply to a Transaction between two Parties as a result of the fact that such Transaction was entered into on, or is back-to-back with a Transaction entered into on an exchange (in

this or another jurisdiction), or is cleared at, or is back-to-back with a transaction to be cleared by a central counterparty. Such additional legislation includes the Financial Markets Act, Cap 345 of the laws of Malta pursuant to which the Listing Authority has the power to suspend temporarily the trading in financial instruments on any regulated market, if in its opinion, the orderly transaction of business is being prevented, or is likely to be prevented because of the occurrence of: (a) any emergency or natural disaster; (b) any economic, financial or political crisis; or (c) any other event which disrupts trading. In the event of such a temporary suspension any transaction executed in contravention of the temporary suspension is considered to be invalid.

4. QUALIFICATIONS

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

- 4.1 This opinion and the enforceability of the rights and remedies of each Party are limited by and subject to the pleas counter-claim and prescription.
- 4.2 If in respect of the FOA Netting Agreement, or the FOA Clearing Agreement any issue of public policy is raised then the choice of law therein will be disregarded and Maltese law will be applied. Furthermore, there are certain matters which are mandatorily determined by the law of the forum and which would override the choice of law. We express no opinion on the binding effect of the choice of law provisions in the FOA Netting Agreement or Clearing Agreement insofar as they relate to non-contractual obligations arising from or connection with the FOA Netting Agreement or Clearing Agreement.
- 4.3 The Netting and Set-Off Act only applies whether the amounts being set-off are "mutual" between the parties. In this context, "mutual" means that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, where a Party is acting as a trustee, where a Party has a joint interest (other than where a Party is a partnership organised under the laws of this jurisdiction and then only in relation to the position between the partnership and the other Party to the FOA Netting Agreement or, as the case may be, Clearing Agreement), or where a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part). Accordingly, where such mutuality does not exist in respect of any Transactions or Client Transactions (as the case may be), amounts in respect of such Transactions shall not be included in any netting and set-off.
- 4.4 The Netting and Set-Off Act would only apply where no Party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement had actual notice of the insolvency or other events of the same nature of the other Party at the time the FOA Netting Agreement or, as the case may be, the Clearing Agreement was entered into. Actual notice of insolvency or similar events at that time would prohibit the netting and set-off of Transactions.

4.5 In terms of the Rome I Regulation, where all other elements relevant to the situation at the time of the choice of law are located in a country other than the country whose law has been chosen, the choice of the parties does not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. It is also relevant to point out that in terms of the Rome I Regulation, there are other instances where laws other than the governing law may prevail (namely in the case of overriding mandatory provisions or public policy of the forum).

4.6 Money judgments awarded by the courts of Malta, as well as any precautionary and executive warrants, are denominated in the lawful currency for the time being of Malta. However, the courts of Malta ordinarily entertain and accede to specific applications for the currency to be converted into and expressed in a foreign currency denomination. In these cases, the rate of exchange applied is ordinarily that obtained at the time when the obligation was due and not at the time of delivery of the judgment. There have been instances however where the courts of Malta have ordered that payment be made using the rate of exchange obtaining at the time of the delivery of the judgement.

4.7 Article 1028A of the Civil Code provides that "*Whosoever, without a just cause, enriches himself to the detriment of others shall, to the limits of such enrichment, reimburse and compensate any patrimonial loss which such other person may have suffered.*" Article 1029B then goes on to limit the application of the action (known as the *actio de in rem verso*) as follows: "*The actio de in rem verso may not be exercised where the person who suffers the loss may take another action to make up for such loss.*". If it is deemed that a Party was unjustifiably enriched as a result of entry into the Transactions, that Party may be liable to restitution or clawback.

4.8 The Civil Code also provides a remedy to a creditor to impeach any act made by the debtor in fraud of his claims.

4.9 The Collateral Regulations apply only, *inter alia*, to where the collateral taker and the collateral giver are:

- (a) a corporation or other legal person, in either case established by law;
- (b) a public authority, including:
 - (i) public sector bodies of Member States charged with or intervening in the management of public debt; and
 - (ii) public sector bodies of Member States authorised to hold accounts for customers;

The term 'public authority' does not include publicly guaranteed undertakings except for those falling within the meaning of paragraphs (c) to (i) below.

- (c) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as referred to in Annex VI, Part 1, Section 4 of Directive 2006/48/EC, the International Monetary Fund and the European Investment Bank;
- (d) a Credit Institution, or other bank licensed or authorised by a foreign authority in a recognised jurisdiction or a credit institution within the meaning of article



4(1) of Directive 2006/48/EC including the institutions listed in article 2(1) of that Directive;

- (e) an Investment Firm, or other similar firm licensed or authorised by a foreign authority in a recognised jurisdiction or an investment firm within the meaning of Article 4(1) of Directive 2004/39/EC;
- (f) a Financial Institution or a financial institution within the meaning of Article 4 of Directive 2006/48/ EC;
- (g) an Insurance Undertaking or an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC, an assurance undertaking as defined in Article 1(1)(a) of Council Directive 2002/ 83/EC;
- (h) an undertaking for collective investment in transferable securities (UCITS) as defined in article 1(2) of Council Directive 85/611/EEC whether licensed in terms of the Investment Services Act or authorised in a Member State or EEA State.
- (i) a management company as defined in Article 1a(2) of Directive 85/611/EEC as amended by Directive 2001/107/EC;
- (j) any other collective investment scheme or management company of such scheme which is licensed or recognised in terms of the Investment Services Act or otherwise licensed or authorised by a foreign authority in a recognised jurisdiction;
- (k) a securitisation vehicle as defined in article 2 of the Securitisation Act;
- (l) a central counterparty, settlement agent or clearing house;
- (m) a non-natural person who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or on behalf of any entity as defined in paragraphs (a) to (l); or
- (n) a non-natural person other than the entities mentioned in paragraph (a), provided that the other party is an entity as defined in paragraphs (a) to (m).

4.10 In the event that the Title Transfer Provisions fall outside the scope of the Collateral Regulations and the Security by Title Transfer Provisions, there is a remote possibility that Maltese courts could re-characterise the Title Transfer Provisions as a security interest. In this case, it is possible that the security interest may not be properly constituted or perfected, with the effect of the collateral taker becoming an unsecured creditor.

4.11 Where financial collateral does not consist of cash (money credited to an account in any currency, or similar claims for the repayment of money, including money market deposits) or Instruments or certain credit claims, the Collateral Regulations would not apply. In this case, it is possible that the commencement of Insolvency Proceedings would render the security invalid, void or reversible.

4.12 The EU Insolvency Regulation provides that the courts of the Member/EEA State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings and limits the instances when secondary proceedings can be opened in another Member/EEA State. In the case of a company or legal person, the said regulation provides that, in the absence of proof to



the contrary, the centre of main interest is the place of its registered office. Accordingly, in the event that the registered office of a Party being a company or legal person is in Malta but its centre of main interest is situated outside of Malta, the Insolvency Proceedings may not apply to such Party. Secondary proceedings may be opened in the Member/EEA State where the debtor has an establishment and are limited to the assets situated in that Member State. The EU Insolvency Regulation provides that the opening of Insolvency Proceedings will not affect the right of creditors to demand set-off of their claims against the debtor, where permitted by the law applicable to the insolvent debtor's claim. This however does not preclude action for voidness, voidability or unenforceability. The said regulations do not apply to credit institutions, insurance undertakings, investment undertaking that provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. The company recovery procedures and company reconstructions are not listed in the EU Insolvency Regulation as being one of the insolvency proceedings applicable to this jurisdiction. Denmark did not participate in the adoption of the EU Insolvency Regulation, and is therefore not bound by it nor subject to its application.

4.13 Article 13 of the EU Insolvency Regulation states that where the person who benefited from an act detrimental to all the creditors proves that:

- 4.13.1 the said act is subject to the law of a Member State other than that of the state of the opening of the proceedings; and
- 4.13.2 that law does not allow any means of challenging the said act in the relevant case

then the laws on claw backs in the Member State of the opening of the proceedings will not apply. This principle is generally replicated in the Credit Institutions Winding-Up Regulations and the Insurance Undertakings Regulations.

4.14 The MFSA is granted wide-reaching powers in relation to the affairs of persons licensed under the Malta Financial Services Authority Act, Cap 330 of the laws of Malta, the Banking Act, the Investment Services Act, the Financial Institutions Act, the Insurance Business Act, the Trust and Trustees Act and other regulated activities.

4.15 Under the Banking Act, the MFSA is granted specific powers in relation to Credit Institutions, including the right to take charge of any of its assets, take control of its business, require it to wind up its business and appoint a liquidator for the purpose of winding up the affairs of the Credit Institution.

4.16 In terms of the Controlled Companies Act, Article 485 of the Commercial Code is rendered applicable to controlled Credit Institutions and provides that:

- 4.16.1 every act transferring property, (corporeal or incorporeal, renunciation of any succession, or of an acquired prescription), and every obligation incurred or other act made by the bankrupt under a gratuitous title for the purpose of



defrauding his creditors, will be null and void as regards the body of creditors, of whatever kind they may be, even though the parties interested be in good faith.

- 4.16.2 every act of the same kind and every obligation, act or payment made or incurred under an onerous title can be annulled if there be fraud also on the part of the party interested; and
- 4.16.3 any such acquisition, obligation, act or payment shall be deemed to be fraudulent as regards the party interested, if it is proved that such party knew of the bankruptcy or of the existence of circumstances giving rise to a declaration of bankruptcy.

4.17 Furthermore, in terms of the Controlled Companies Act, where any act has been made or omitted to be made by a controlled asset (which could be the Credit Institution itself or any of its assets), or by the owner, director or manager of such asset, which results in the fraudulent deprivation of the rights of the creditors of such a controlled asset, the controller appointed in terms of the Banking Act shall be entitled, as the case may be, to ignore the act so made or to deem the act as having been made despite the omission to make such act.

4.18 In terms of the Banking Act, the MFSA may direct that a Credit Institution operating in Malta and elsewhere the offices and branches in Malta of that Credit Institution be deemed to constitute a separate Credit Institution.

4.19 Insolvency proceedings of credit institutions are regulated by Directive 2001/24/EC on the reorganisation and winding-up of credit institutions. The Credit Institutions Winding-Up Regulations implemented the provisions of the said directive. The said legislation provides that it is the home Member/EEA State of a credit institution that has exclusive jurisdiction to open winding-up proceedings and reorganisation measures in relation to credit institutions and their branches in other host Member/EEA States. The said proceedings will be governed, subject to certain exceptions, by the laws of the home Member/EEA State. The said directive and regulations do not permit the opening of secondary proceedings with respect to establishments/branches of credit institutions. Accordingly, credit institutions and their branches located in other Member/EEA States will be wound up in accordance with the laws of the home Member/EEA State.

4.20 The Credit Institutions Winding-Up Regulations also state that netting agreements shall be governed by the law of the contract which governs such agreements. This however does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to creditors.

4.21 In Malta there is no rule or precedent upon which one can rely in reviewing or opining on such matters relating to law, and there is an appreciable likelihood of varying opinions, decisions and interpretations on the same issue of law by different courts; thus the rendering of opinions on the law is less certain by nature than in a jurisdiction which adopts the principle of precedent. Maltese civil law judges when interpreting



and applying foreign law might not interpret and apply that law in the same manner as judges of the relevant foreign jurisdiction.

- 4.22 It should be noted that contractual stipulations concerning the severability of certain provisions may not be binding and the question of whether or not provisions which may be invalid, illegal, prohibited or unenforceable may be severed from other provisions in order to save such other provisions would be determined by the courts of Malta at their discretion depending on the materiality of the provision or on whether the provision runs counter to a mandatory rule of Maltese law.
- 4.23 Under Maltese Law, an agreement granting a form of security generally only gives rise to an ancillary obligation which is dependent for its validity on the validity of the principal obligation. Accordingly, in the event that this were to be considered to be a matter of public policy, and in the event that Maltese courts were to be seized with the matter, security provided by a Maltese company is likely to be considered illegal, invalid, non-binding and unenforceable should the principal obligation itself be illegal, invalid, non-binding and unenforceable.
- 4.24 A novation of an obligation results in the loss of security for such obligation, unless express action is taken to avoid this. Maltese courts may consider this to be a matter of public policy.
- 4.25 In terms of Maltese law, the release of security by a creditor may only be re-instated with the consent of all the parties thereto. Maltese courts may consider this to be a matter of public policy.
- 4.26 The waiver or renunciation of certain rights, defences and remedies in the FOA Netting Agreement or Clearing Agreement, may not be upheld by a Maltese court if such defences, rights and remedies are considered to be rules of public policy. It is to be noted that all procedural laws are treated as rules of public policy and thus the waiver of procedural rights and remedies in the FOA Netting Agreement or Clearing Agreement may not be valid.
- 4.27 As a general rule, under the Civil Code, interest can only be charged up to 8% per annum. In addition, the compounding of interest is not enforceable in Malta unless the obligation to pay interest is due for a period of more than one year and certain procedures prescribed in the Civil Code are followed. Pursuant to the Interest Rate (Exemption) Regulations, 2009 (Legal Notice 142 of 2009) these restrictions have been liberalised, *inter alia*, in the following instances:-
 - 4.27.1 where the interest rate or the compounding of interest rates arises in relation to debts and other obligations from so-called "financial transactions" and where one of the parties is a "designated entity". The definition of "financial transaction" includes amongst others: contracts for differences, derivative contracts including options, forwards, swaps, foreign currency exchange contracts and similar agreements, securities lending transactions, sale and buy back agreements, repurchase and reverse repurchase agreements and similar agreements, as well as any collateral agreements, whether by way of



title transfer or otherwise, which are entered into for the purpose or in connection with any of the said transactions. The definition of “designated entity” includes amongst others, a Credit Institution, an Insurance Undertaking, a Financial Institution, Investment Firms and Funds but excludes natural persons;

4.27.2 where

- (a) (i) such obligations arise under a contract governed or otherwise regulated by the law of a country other than Malta; (ii) the agreed interest rate and/or compounding of interest are in accordance with international market conditions prevailing at the time that the debt or obligation has been contracted; and (iii) the payor of interest is not a natural person;
- (b) security which is governed by Maltese law and which is entered for the purpose of, or in connection with, any transaction specified in the foregoing paragraph (a) above.

For the purposes of this paragraph, the word “interest” includes any fee or other amount which would be deemed to be (disguised) interest by a court in Malta.

- 4.28 Malta has, with effect from the 1 March 2012, implemented the provisions of Directive 2011/7/EU of the European Parliament and the Council of 16 February 2011 on combating late payment in commercial transactions into the Commercial Code.
- 4.29 In terms of Maltese law, unless a mandate is expressly stated to be granted by way of security and to be irrevocable and is granted in writing, a mandate is of its nature revocable. The service of process provisions of the FOA Netting Agreement or Clearing Agreement ought to be construed accordingly. As a general rule, a mandate is terminated by virtue of a declaration of bankruptcy of either the mandator or the mandatary. This principle is disappiled in the case of the implementation of close-out netting provision (within the meaning of the Netting and Set-Off Act) – *“any authority or mandate in a contract to implement any close-out netting provision shall not be revoked by the declaration of bankruptcy or the insolvency of any other party to the contract”*.
- 4.30 Maltese law regulates an option to purchase or sell as a *promise* to purchase or a *promise* to sell and also applies specific formalities relating to the preservation of rights and their enforcement. The formalities arise pursuant to Article 1357(2) of the Civil Code and failure to observe them within the strict time limits stated in the Civil Code will result in the loss, under Maltese law, of the remedy of specific performance and possibly also the lapse of the right to damages for non-performance of the promise to re-sell. In the event that an option is not regulated by Maltese law but a remedy for specific performance or damages in terms of the option is sought in Malta, these rules may be deemed to be of a procedural nature and as a result Maltese law as



the law of the forum would override the applicable choice of law in respect of these formalities.

- 4.31 A Maltese Court might not treat as conclusive certificates or determinations, those certificates and determinations which the Transaction Documents state are to be so treated.
- 4.32 Any reference in this opinion letter to public policy refers to our understanding of public policy in Malta based on jurisprudence as at the date hereof. We should caution that the Maltese legal system does not adopt the principle of binding precedents and that the position currently obtaining on matters of public policy may be determined differently by Maltese courts in the future.

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

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

Yours faithfully,



Laragh Cassar

Camilleri Preziosi

SCHEDULE 1
Investment Firms

Subject to the modifications and additions set out in this Schedule 1 (Investment Firms), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Firms. For the purposes of this Schedule 1 (Investment Firms), "**Investment Firms**" means companies (not being a protected cell company) licensed to provide investment services in terms of the Investment Services Act.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings" means the procedures listed in paragraph 3.1 and 2.1 of Schedule I (Investment Firms)".

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: Investment Firms

In addition, the bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party which is an Investment Firm could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the following:

- (i) powers of the MFSA to take control of Investment Firms in terms of the Investment Services Act.

3. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows.

- 3.1 Under the Investment Services Act, the MFSA is granted specific powers in relation to Investment Firms, including the right to require the Investment Firm to cease operations and to wind up its affairs and for the appointment of a person to take possession and control of all documents, records, assets and property belonging to or in the possession or control of the Investment Firm.



SCHEDULE 2 LPs

Subject to the modifications and additions set out in this Schedule 2 (LPs) the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Limited Partnerships. For the purposes of this Schedule 2 (LPs), "Limited Partnerships" means limited partnerships (partnership *en commandite*) organised pursuant to the Companies Act.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule 2 (LPs)".

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: LPs

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an LPs could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are bankruptcy proceedings in terms of Article 477 *et seq.* of the Commercial Code.

3. MODIFICATIONS TO QUALIFICATIONS

The opinions in this opinion letter are subject to the additional qualifications contained in Schedule 4 (Traders) with the exception of section 3.3 thereof.



SCHEDULE 3
Insurance Undertakings

Subject to the modifications and additions set out in this Schedule 3 (Insurance Undertakings), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Undertakings. For the purposes of this Schedule 3 (Insurance Undertakings), "**Insurance Undertakings**" means companies licensed to carry on the business of insurance (other than the business of reinsurance) in terms of article 7 of the Insurance Business Act which are incorporated and registered under the laws of this jurisdiction or formed under the laws of another jurisdiction with a branch or branches established or located in this jurisdiction.

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

I. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings" means the procedures listed in paragraph 3.1 and section 2.1 of Schedule 3 (Insurance Undertakings)".

In addition, the following definitions shall apply:

""Malta Insurance Winding-Up Regulations" means the Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) Regulations, Subsidiary Legislation 403.15 of the laws of Malta;"

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: Insurance Undertakings

In addition, the bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party which is an Insurance Undertaking could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the following:

- (i) The powers of the MFSA to take control of Insurance Undertakings in terms of the Insurance Business Act;
- (ii) The provisions relating to the dissolution and winding up of Insurance Undertakings in the Insurance Business Act; and

(iii) The Malta Insurance Winding-Up Regulations.

3. ADDITIONAL QUALIFICATIONS

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

- 3.1 Under the Insurance Business Act, the MFSA is granted specific powers in relation to Insurance Undertakings, including the right to take charge of any of its assets, take control of its business, require it to wind up its business and appoint a liquidator for the purpose of winding up the affairs of the Insurance Undertaking.
- 3.2 The Malta Insurance Winding-Up Regulations implemented the provisions of Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings. The latter regulations, *inter alia*, state that the applicable home Member/EEA State has exclusive jurisdiction to open winding up and reorganisation proceedings. The said proceedings will be governed, subject to certain exceptions, by the laws of the home Member/EEA State. The said directive and regulations do not permit the opening of secondary proceedings with respect to establishments/branches of insurance undertakings. Accordingly, insurance undertakings and their branches located in other Member/EEA States will be wound up in accordance with the laws of the home Member/EEA State.
- 3.3 Furthermore, where it appears to the MFSA that an Insurance Undertaking is likely to dissolve and wind up or has given notice or is being dissolved and wound up, the MFSA will prohibit the free disposal of its assets irrespective of whether the assets are in Malta or not, however in the case where its head office is in another jurisdiction, such assets must relate to the Insurance Undertaking's business in this jurisdiction. Such assets will be made available only for meeting the liabilities of the Insurance Undertaking's business of insurance. Debts and other liabilities arising out of contracts of insurance attributable to its business of insurance will rank before any other claim against such assets (unless the value of the assets exceeds the liabilities). The provisions described in this paragraph, by virtue of the Insurance Business Act, prevail over any other law to the extent that such other law is inconsistent with them.
- 3.4 The Insurance Business Act prohibits the voluntary winding up of an Insurance Undertaking that carries on long term business (within the meaning of the Insurance Business Act). In the event that such an Insurance Undertaking is being dissolved and wound up (unless the value of the assets exceeds the amount of liabilities, the below restriction will not apply to the excess assets):
 - 3.4.1 the assets representing the technical provisions maintained by the company in respect of its long term business shall be available only for meeting the liabilities of the company attributable to that business;
 - 3.4.2 the other assets of the company shall be available only for meeting the liabilities of the company attributable to its other business.



- 3.5 The Malta Insurance Winding-Up Regulations state that the commencement of reorganisation measures or winding up proceedings will not affect the rights of creditors to demand the set-off of their claims against the claims of the Maltese insurance undertaking (as defined therein) where such a set-off is permitted by the law of the Member State or EEA State which is applicable to the claim of the Maltese insurance undertaking. Furthermore, this does not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to creditors.
- 3.6 Where reorganisation measures and winding up proceedings have been instituted, the rules relating to detrimental transactions do not apply where a person who has benefited from a legal act detrimental to all creditors provides proof that the act is subject to the law of the Member State or EEA State and that law does not allow any means of challenging that act in the relevant case.
- 3.7 Subject to certain exceptions, where the Maltese insurance undertaking (as defined in the Malta Insurance Winding-Up Regulations) is authorised to carry on both general business and long term business, it must keep at separate registers for each type of business.



SCHEDULE 4 Traders

Subject to the modifications and additions set out in this Schedule 4 (Traders), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Traders. For the purposes of this Schedule 4 (Traders), "Traders" means individuals acting in their capacity as traders within the meaning attributed thereto in the Commercial Code.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule 4 (Traders)".

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1 the Trader when entering into the FOA Netting Agreement or Clearing Agreement is acting for purposes related to his trade, business, craft or profession.

2.1 Insolvency Proceedings: Traders

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Trader could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are bankruptcy proceedings in terms of Article 477 *et seq.* of the Commercial Code.

3. ADDITIONAL QUALIFICATIONS

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

3.1 In terms of the Commercial Code, every act transferring property, whether corporeal or incorporeal, including any renunciation of any succession whatsoever or of an acquired prescription, and every obligation incurred or other act made by the bankrupt under a gratuitous title for the purpose of defrauding his creditors, is null and void as regards the body of creditors, of whatever kind they may be, even though the parties interested be in good faith. Every act of the same kind and every obligation, act or payment made or incurred under an onerous title can be annulled if there be fraud also on the



part of the party interested. Furthermore, any such acquisition, obligation, act or payment shall be deemed to be fraudulent as regards the party interested, if it is proved that such party knew of the bankruptcy or of the existence of circumstances giving rise to a declaration of bankruptcy.

- 3.2 From the date of the declaration of bankruptcy made by the Trader himself or, as the case may be, from the date of the judgment declaring the bankruptcy, the bankrupt is *ipso jure* dispossessed of the administration of all his property, whether corporeal or incorporeal, and whether relating to his business or not. Generally, everything that devolves on the debtor after the bankruptcy falls under such dispossession.
- 3.3 Under Maltese law, debts owing by the bankrupt, not yet fallen due, even if privileged, secured by pledge, or hypothecary, become exigible upon the declaration of bankruptcy made by the trader himself or upon the judgment of the court declaring the bankruptcy.
- 3.4 The Collateral Regulations and the Interest Rate (Exemption) Regulations, 2009 (Legal Notice 142 of 2009) do not apply to Traders.
- 3.5 A mandate is terminated by, *inter alia*, the death, the interdiction or the incapacitation, whether general or special, from entering into contracts, the declaration of bankruptcy, or the cession bonorum either of the mandator or of the mandatary.
- 3.6 Where a Defaulting Party is a Trader who is neither ordinarily resident nor carrying on business in this jurisdiction (a “foreign Trader”), the foreign Trader can be subject to Insolvency Proceedings in this jurisdiction, except that if the centre of main interests of the foreign Trader is in an EU member state other than Malta or Denmark and the foreign Trader has no establishment (within the meaning of the EU Insolvency Directive) in Malta, there can be no separate Insolvency Proceedings in this jurisdiction in relation to the foreign Trader and the authorities in this jurisdiction would defer to the proceedings in the foreign Trader’s jurisdiction.



SCHEDULE 5
SICAVs

Subject to the modifications and additions set out in this Schedule 5 (SICAVs), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are SICAVs. For the purposes of this Schedule 5 (SICAVs), "SICAVs" mean investment companies with variable share capital incorporated under the Companies Act.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings"" means the procedures listed in paragraph 3.1 and in section 2.1 of Schedule 5 (SICAVs)".

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: SICAVs

In addition to paragraph 3.1 of the opinion letter, we recommend that an additional event of default be included such that the events specified in the Insolvency Events of Default Clause apply *mutatis mutandis* to the relevant sub-fund of the SICAV as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a Maltese company.

3. ADDITIONAL QUALIFICATIONS

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

In terms of the Companies Act (Investment Companies with Variable Share Capital) Regulations, Subsidiary Legislation 386.02 of the laws of Malta, investment companies with variable share capital may be constituted as multi-fund companies (umbrella funds). Such multi-fund SICAVs may elect, in their memorandum of association, to have the assets and liabilities of each sub-fund comprised in that company treated for all intents and purposes of law as a patrimony separate from the assets and liabilities of each other sub-fund of such company. The said regulations lay down that proceedings relating to the Dissolution and Consequential Winding up of Companies and Company Reconstructions under the Companies Act relating to insolvency proceedings of a company shall apply *mutatis mutandis* to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to

accommodate the fact that the sub-fund is not a company and any such proceedings in relation to one sub-fund shall have any effect on the assets of any other sub-fund of the company or the company itself.



- 38 -

SCHEDULE 6
Financial Institutions

Subject to the modifications and additions set out in this Schedule 6 (Financial Institutions), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Financial Institutions. For the purposes of this Schedule 6 (Financial Institutions), "Financial Institutions" means financial institutions licensed to carry on the business of a financial institution in terms of the Financial Institutions Act.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings" means the procedures listed in paragraph 3.1 and section 2.1 of Schedule 6 (Financial Institutions)".

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: Financial Institutions

In addition, the bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party which is a Financial Institution could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the following:

- (i) powers of the MFSA to take control of Financial Institutions in terms of the Financial Institutions Act.

3. ADDITIONAL QUALIFICATIONS

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

3.1 Under the Financial Institutions Act, the MFSA is granted specific powers in relation to Financial Institutions, including the right to take charge of any of its assets, take control of its business, require it to wind up its business and appoint a liquidator for the purpose of winding up the affairs of the Financial Institution.

SCHEDULE 7
Parties acting as Trustees (other than of Pension Schemes)

Subject to the modifications and additions set out in this Schedule 7 (Parties acting as Trustees (other than of Pension Schemes)), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 4 (Traders) in the case of a Trustee that is a Trader) will also apply in respect of Parties which are Trustees.

For the purposes of this Schedule 7 (Parties acting as Trustees (other than of Pension Schemes)), a "Trust" means an express trust validly constituted under the Trust and Trustees Act, and "Trustee" means a person who is an individual, a Maltese company or a foreign company and acting as trustee of a Trust.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule 7 (Parties acting as Trustees (other than of Pension Schemes))".

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: *Parties acting as Trustees (other than of Pension Schemes)*

To the extent that a Trustee is an individual, the procedures listed in section 3.1 of Schedule 4 (Traders) shall apply. To the extent that a Trustee is a Limited Partnership, the procedures listed in section 2.1 of Schedule 2 (LPs) shall apply. To the extent that Trustee is a Maltese company, paragraph 3.1 shall apply.

In addition, other bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Trustee could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the powers of the MFSA to take control of Trustees in terms of the Trust and Trustees Act.

3. ADDITIONAL QUALIFICATIONS

In addition to the qualifications set out in Schedule 2 (LPs) (in the case where the Trustee is a Limited Partnership) and Schedule 4 (Traders) (in the case where the

Trustee is a Trader), the opinions in this opinion letter are subject to the following additional qualifications.

- 3.1 In terms of the Trusts and Trustees Act, a trustee is not liable for a breach of trust committed prior to his appointment and by some other person. The Trustee is however obliged, on becoming aware of it, to take all reasonable steps to have such breach remedied. Accordingly, in the event that during the life of any Transaction, there is a change in Trustee(s) of the relevant Trust in respect of which a Party is acting as Trustee, the incoming Trustee will not be held liable for a breach of trust by its predecessors, subject to the obligation to take reasonable steps to remedy the breach.
- 3.2 A Trustee ceases immediately to be a Trustee immediately upon, *inter alia*, steps are taken for the winding up of, or declaration of bankruptcy, of the person acting as Trustee.
- 3.3 The MFSA is empowered to, *inter alia*, require that any Trustee be removed or replaced or require a Trustee to cease operations and to wind up its affairs, (in accordance with such procedures and directions laid down by the MFSA) and to take possession and control of all documents, records, assets and property belonging to or in the possession or control of the Trustee. The MFSA may also generally require anything to be done or be omitted to be done, or impose any prohibition, restriction or limitation, or any other requirement, and confer powers, with respect to any transaction or other act, or to any assets, or to any other thing whatsoever.



SCHEDULE 8
Parties acting as Trustees of Pension Schemes

Subject to the modifications and additions set out in this Schedule 8 (Parties acting as Trustees of Pension Schemes), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 7 (Parties acting as Trustees (other than of Pension Schemes)), will also apply in respect of Parties which are acting as Trustees of Pension Schemes.

For the purposes of this Schedule 8 (Parties acting as Trustees of Pension Schemes), "**Pension Scheme**" means an occupational scheme (as defined in and established in terms of the Pensions Act) and which is established as a trust under the laws of this jurisdiction.

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

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.6.14 is deemed deleted and replaced with the following:

""Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule 8 (Parties acting as Trustees of Pension Schemes)".

2. MODIFICATIONS TO OPINIONS

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

2.1 Insolvency Proceedings: Parties acting as Trustees of Pension Schemes

The insolvency proceedings set out in section 2.1 of Schedule 7 (*Parties acting as Trustees (other than of Pension Schemes)*) shall apply in this Schedule 8 (*Parties acting as Trustees of Pension Schemes*).

In addition thereto, other bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party which is a Trustee of a Pension Scheme could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are the following:

- (i) powers of the MFSA to take control of the Trustee of a Pension Scheme in terms of the Pensions Act.



3. ADDITIONAL QUALIFICATIONS

In addition to the qualifications set out in Schedule 7 (*(Parties acting as Trustees (other than of Pension Schemes))*), the opinions in this opinion letter are subject to the following additional qualifications.

- 3.1 Under the Pensions Act, the MFSA is granted specific powers in relation to Trustees of Pension Schemes, including the right to require the said Trustee to wind up the Pension Scheme by an established date and in accordance with an established procedure. Furthermore, the MFSA may require the Trustee to cease operations and wind up its affairs.
- 3.2 The MFSA is also generally empowered to issue any directives to regulate the activities of Trustees of Pension Schemes and it may impose such conditions as it deems appropriate in relation to the services of the said Trustee. The MFSA may also restrict or prohibit the free disposal of the assets of the Pension Scheme.
- 3.3 In the event of a Pension Scheme accepting sponsorship from sponsoring undertakings located within the EEA/Member States other than this jurisdiction, the Pension Scheme is required to have its technical funding requirements at all times fully funded in respect of the total range of occupational retirement plans operated by it if the Act does not apply. If this condition is not met, the MFSA may require ring-fencing of the assets and liabilities in accordance with Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision.



ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

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

16. Professional Client Agreement (2007 Version), excluding Module G (*Margin and Collateral*) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "Professional Client (with Title Transfer Provisions) Agreement 2007")
17. Professional Client Agreement (2009 Version), excluding Module G (*Margin and Collateral*) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "Professional Client (with Title Transfer Provisions) Agreement 2009")
18. Professional Client Agreement (2011 Version), excluding Module G (*Margin and Collateral*) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "Professional Client (with Title Transfer Provisions) Agreement 2011")
19. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "Retail Client (with Security Provisions) Agreement 2007")
20. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "Retail Client (with Security Provisions) Agreement 2009")
21. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "Retail Client (with Security Provisions) Agreement 2011")
22. Retail Client Agreement (2007 Version), excluding Module G (*Margin and Collateral*) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "Retail Client (with Title Transfer Provisions) Agreement 2007")
23. Retail Client Agreement (2009 Version), excluding Module G (*Margin and Collateral*) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "Retail Client (with Title Transfer Provisions) Agreement 2009")
24. Retail Client Agreement (2011 Version), excluding Module G (*Margin and Collateral*) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "Retail Client (with Title Transfer Provisions) Agreement 2011")
25. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "Eligible Counterparty (with Security Provisions) Agreement 2007")
26. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "Eligible Counterparty (with Security Provisions) Agreement 2009")
27. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "Eligible Counterparty (with Security Provisions) Agreement 2011")



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

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

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



ANNEX 2
List of Transactions

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

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

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

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

- (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
- (v) any other Transaction which the parties agree to be a Transaction;

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

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

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

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

ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

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

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

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

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

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

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

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

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

"Clearing Agreement" means an agreement:

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (d) for the purposes of paragraph 3.7.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;
- (e) for the purposes of paragraph 3.7.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;
- (f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;
- (g) for the purposes of paragraph 3.8.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provision;
- (h) for the purposes of paragraph 3.9 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;
- (i) for the purposes of paragraph 3.10.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and
- (j) for the purposes of paragraphs 3.10.3 and 3.10.4, the Title Transfer Provisions;

in each case, incorporated into an FOA Netting Agreement or a Clearing Agreement together with any defined terms required properly to construe such provisions, in such a way as to preserve the essential sense and effect of the highlighted parts.

References to "**Core Provisions**" include Core Provisions that have been modified by Non-material Amendments.

"Defaulting Party" includes, in relation to the One-Way Versions, the Party in respect of which an Event of Default entitles the Non-Defaulting Party to exercise rights under the FOA Netting Provision.

"Eligible Counterparty Agreements" means each of the Eligible Counterparty Agreement (with Security Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty Agreement (with Security



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

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

"FOA Clearing Module" means the FOA Client Cleared Derivatives Module as first published on 9 October 2013 or any subsequent published version up to the date of this opinion letter.

"FOA Netting Agreement" means an agreement:

- (a) on the terms of the forms specified in Annex 1 to this opinion letter or which has broadly similar function to any of them, when not used in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum and/or a Clearing Module Netting Provision and/or an Addendum Netting Provision;
- (b) which is governed by the law of England and Wales; and
- (c) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provision, and with or without the Title Transfer Provisions, with no Adverse Amendments.

"FOA Netting Agreements (with Title Transfer Provisions)" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2011, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009 and the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1) or an FOA Netting Agreement which has broadly similar function to any of the foregoing.

"FOA Netting Provision" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

- (a) in relation to the terms of the Long Form One-Way Clauses 2007 and the Long Form Two-Way Clauses, Clause 2.2 (**Liquidation Date**), Clause 2.4 (**Calculation of Liquidation Amount**) and Clause 2.5 (**Payer**);
- (b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (**Liquidation Date**), Clause 2.3 (**Calculation of Liquidation Amount**) and Clause 2.4 (**Payer**);

- (c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;
- (d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (*Liquidation Date*), Clause 10.3 (*Calculation of Liquidation Amount*) and Clause 10.4 (*Payer*);
- (e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*);
- (f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*); or
- (g) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"FOA Published Form Agreement" means a document listed at Annex 1 in the form published by the Futures and Options Association on its website as at the date of this opinion.

"FOA Set-off Provisions" means:

- (a) the "General Set-off Clause", being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (*Set-off*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (*Set-off*);
 - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (*Set-off*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (*Set-off*);
 - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (*Set-off*);
 - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (*Set-off*);
 - (vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (*Set-Off*);



- (viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (*Set-Off*); or
- (vix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or

(b) the "Margin Cash Set-off Clause", being:

- (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (*Set-off on default*);
- (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (*Set-off upon default or termination*);
- (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (*Set-off on default*),
- (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (*Set-off upon default or termination*);
- (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (*Set-off on default*);
- (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (*Set-off upon default or termination*); or
- (vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"Insolvency Events of Default Clause" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

(a) where the FOA Member's counterparty is not a natural person:

- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
- (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);



- (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
- (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive); and
- (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or
- (vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and

(b) where the FOA Member's counterparty is a natural person:

- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
- (ii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);
- (iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or
- (iv) any modified version of such clauses provided that it includes at least those parts of paragraph 4(b) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"ISDA/FOA Clearing Addendum" means the ISDA/FOA Client Cleared OTC Derivatives Addendum as first published on 11 June 2013, or any subsequent published versions up to the date of this opinion letter.

"Long Form Two-Way Clauses" means each of the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"Master Netting Agreements" means each of the One-Way Master Netting Agreement 1997 and the Two-Way Master Netting Agreement 1997 (each as listed and defined at Annex 1).

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

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

"One-Way Versions" means the Long Form One-Way Clauses 2007, the Short Form One-Way Clauses, the One-Way Master Netting Agreement 1997, and the FOA Netting Provision



as published in the Retail Client Agreements and the Professional Client Agreements in each case in the form of an FOA Published Form Agreement.

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

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

"Rehypothecation Clause" means:

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

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

"Non-Cash Security Interest Provisions" means:

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



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

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

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



- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (***Power of sale***) or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (***Security Interest Provisions***) of Annex 4 which are highlighted in yellow.

(c) the "Client Money Additional Security Clause", means:

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);
- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);
- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);
- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);
- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 3 (***Security Interest Provisions***) of Annex 4 which are highlighted in yellow.



"Short Form One Way-Clauses" means each of the Short-Form One-Way Clauses 2007, the Short-Form One-Way Clauses 2009 and the Short-Form One-Way Clauses 2011 (each as listed and defined at Annex 1).

"Short Form Two Way-Clauses" means each of the Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009 and the Short-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"Title Transfer Provisions" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

- (a) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version); or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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



ANNEX 4

PART 1 CORE PROVISIONS

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

1. FOA Netting Provision:

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



c) **Payer:** If the Liquidation Amount is a positive amount, the Defaulting Party shall pay it to the Non-Defaulting Party and if it is a negative amount, the Non-Defaulting Party shall pay it to the Defaulting Party. The Non-Defaulting Party shall notify the Defaulting Party of the Liquidation Amount, and by which Party it is payable, immediately after the calculation of such amount."

2. General Set-Off Clause:

"Set-off: Without prejudice to any other rights to which we may be entitled, we may at any time and without notice to you set off any amount (whether actual or contingent, present or future) owed by you to us against any amount (whether actual or contingent, present or future) owed by us to you. For these purposes, we may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained."

3. Margin Cash Set-Off Clause:

"Set-off upon default or termination: If there is an Event of Default or this Agreement terminates, we may set off the balance of cash margin owed by us to you against your Obligations (as reasonably valued by us) as they become due and payable to us and we shall be obliged to pay to you (or entitled to claim from you, as appropriate) only the net balance after all Obligations have been taken into account. [The net amount, if any, payable between us following such set-off, shall take into account the Liquidation Amount payable under the Netting Module of this Agreement.]"

4. Insolvency Events of Default Clause:

a) In the case of a Counterparty that is not a natural person:

"The following shall constitute Events of Default:

- i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];
- ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief with respect to itself or to its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a trustee, receiver, liquidator, conservator, administrator, custodian, examiner or other similar official (each a "Custodian") of it or any substantial part of its assets, or takes any corporate action to authorise any of the foregoing;



iii. an involuntary case or other procedure is commenced against a party seeking or proposing liquidation, reorganisation, or moratorium, or other similar relief with respect to it or its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a Custodian of it or any substantial part of its assets."

b) In the case of a Counterparty that is a natural person:

"The following shall constitute Events of Default:

- i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];
- ii. you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)."

5. Title Transfer Provisions:

- a) "Default: If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date will be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "Default Margin Amount" means the amount, calculated in the Base Currency of the aggregate value as at the relevant Liquidation Date (as determined by us) of the Transferred Margin.
- b) Clean title: Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."



6. Clearing Module Netting Provision / Addendum Netting Provision:

a) [Firm Trigger Event/CM Trigger Event]

Upon the occurrence of a [Firm Trigger Event/CM Trigger Event], the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise stated in the [Core Provisions of the] relevant Rule Set, be dealt with as set out below:

(a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];

(b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;

(c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (C) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and

(D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[or any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributed] [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included [Clauses 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

(d) if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable in accordance with this [Module/Addendum].

b) CCP Default

Upon the occurrence of a CCP Default, the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise stated in the [Cor Provisions of the relevant] Rule Set, be dealt with as set out below:

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3/Section 8(c)];
2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;
3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the date on which the CCP Default occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the day on which the relevant Client Transactions had all been terminated and, in either case, will be an amount equal to the sum, but without duplication,

of (1) the Aggregate Transaction Value, (2) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (3) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (4) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[and any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in [Clauses 5.3.3(1) to 5.3.3(3)] [Sections 8(c)(iii)(1) to 8(c)(iii)(3)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing member]);

4. if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable, in accordance with this [Module/Addendum].

c) Hierarchy of Events

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]



Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the clause pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

d) Definitions

"Aggregate Transaction Value" means, in respect of the termination of Client Transactions of a Cleared Transaction Set, an amount (which may be positive or negative or zero) equal to the aggregate of the [Firm/CM]/CCP Transaction Values for all Client Transactions in the relevant Cleared Transaction Set or, if there is just one [Firm/CM]/CCP Transaction Value in respect of all such Client Transactions, an amount (which may be positive or negative or zero) equal to such [Firm/CM]/CCP Transaction Value.

"[Firm/CM]/CCP Transaction Value" means, in respect of a terminated Client Transaction or a group of terminated Client Transactions, an amount equal to the value that is determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction or group of related [Firm/CM]/CCP Transactions in accordance with the relevant Rule Set following a [Firm/CM] Trigger Event or CCP Default (to the extent such Rule Set contemplates such a value in the relevant circumstance). If the value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set reflects a positive value for [Firm/Clearing Member] vis-à-vis the Agreed CCP, the value determined in respect of such terminated Client Transaction(s) will reflect a positive value for Client vis-à-vis [Firm/Clearing Member] (and will constitute a positive amount for any determination under this [Module/Addendum]) and, if the value determined in respect of the related terminated [Firm/CCP]/CCP Transaction(s), under the relevant Rule Set reflects a positive value for the relevant Agreed CCP vis-à-vis [Firm/Clearing Member], the value determined in respect of [or otherwise ascribed to] such terminated Client Transaction(s) will reflect a positive value for [Firm/Clearing Member] vis-à-vis Client (and will constitute a negative amount for any determination under this [Module/Addendum]). The value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set may be equal to zero.

"Relevant Collateral Value" means, in respect of the termination of Client Transactions in a Cleared Transaction Set, the value (without applying any "haircut" but otherwise as determined in accordance with the [Agreement/Collateral Agreement]) of all collateral that:

(a) is attributable to such Client Transactions;



- (b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and
- (c) is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

The Relevant Collateral Value will constitute a positive amount if the relevant collateral has been transferred by Client to [Firm/Clearing Member] and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement] and a negative amount if the relevant collateral has been transferred by [Firm/Clearing Member] to Client and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the [Agreement/Collateral Agreement].

7. Clearing Module Set-Off Provision

Firm may at any time and without notice to Client, set-off any Available Termination Amount against any amount (whether actual or contingent, present or future) owed by Firm to Client under the Clearing Agreement or otherwise. For these purposes, Firm may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained.

This Clause shall apply to the exclusion of all Disapplied Set-off Provisions in so far as they relate to Client Transactions; provided that, nothing in this Clause shall prejudice or affect such Disapplied Set-off Provisions in so far as they relate to transactions other than Client Transactions under the Agreement.

8. Addendum Set-Off Provision

- (i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("CM Other Amounts"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its set-off against any other termination amount payable by or to X (where "X" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing Agreement at such time ("EP Other Amounts" and together with CM Other Amounts, "Other Amounts"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of

default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).

(ii) For the purposes of this Section 8(e):

(A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;

(B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and

(C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that has previously been reduced in part by set-off pursuant to this Section 8(e).

(iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.



PART 2
NON-MATERIAL AMENDMENTS

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

9. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).
10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.
11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.
13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.
14. Any change to the FOA Set-Off Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the scope of the provision where a Party acts as agent, (iv) the use of currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.
15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.
16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.
17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).

18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:

- more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
- more than one FOA Clearing Module or Clearing Module Netting Provision
- one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision

provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with equivalent effect to, clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.

20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in an FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).

21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).

22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.

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



PART 3
SECURITY INTEREST PROVISIONS

1. Security Interest Clause:

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

2. Power of Sale Clause:

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

"You agree and authorise us to borrow, lend, appropriate, dispose of or otherwise use for our own purposes, from time to time, all non-cash margin accepted by us from you and, to the extent that we do, we both acknowledge that the relevant non-cash margin will be transferred to a proprietary account belonging to us (or to any other account selected by us from time to time) by way of absolute transfer and such margin will become the absolute property of ours (or that of our transferee) free from any security interest under this Agreement and from any equity, right, title or interest of yours. Upon any such rehypothecation by us you will have a right against us for the delivery of property, cash, or securities of an identical type, nominal value, description and amount to the rehypothecated non-cash margin, which, upon being delivered back to you, will become subject to the provisions of this Agreement. We agree to credit to you, as soon as reasonably practicable following receipt by us, and as applicable, a sum of money or property equivalent to (and in the same currency as) the type and amount of income (including interest, dividends or other distributions whatsoever with respect to the non-cash margin) that would be received by you in respect of such

non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid.".



ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

1. Necessary amendments

(a) For the purposes of paragraphs 3.3 to 3.9:

None

2. Desirable amendments

(a) For the purposes of paragraphs 3.3 to 3.9:

None

3. Additional wording to be treated as part of the Core Provisions

(a) For the purposes of paragraphs 3.7.1 and with respect to the “General Set-Off Clause”:

“For these purposes, we may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained.”

(b) For the purposes of paragraph 3.7.2 and with respect to the “General Set-Off Clause”:

“For these purposes, we may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained.”

(d) For the purposes of paragraph 3.8.1 and with respect to the “Clearing Module Set-Off Provision”:

“For these purposes, Firm may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained.”

(e) For the purposes of paragraph 3.9 and with respect to the “Addendum Set-Off Provision”:

“For the purposes of this Section 8(e):

(A) *all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;”.*