NETTING ANALYSER LIBRARY
Legal collateral opinion – New Zealand

The Futures & Options Association
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14 January 2013

Dear Sirs

FOA Collateral Opinion

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

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

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

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

1. TERMS OF REFERENCE AND DEFINITIONS

1.1 Subject as provided at paragraph 1.2, this opinion is given in respect of persons which are companies incorporated or re-registered under the Companies Act 1993, insofar as each may act as a counterparty (a "**Counterparty**") providing Collateral (as defined in paragraph 1.3) to a member firm of the Futures and Options Association (each a "**Firm**") under an Agreement.

1.2 However, this opinion is also given in respect of Counterparties providing Collateral to a Firm 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 (if any):

1.2.1 Banks/financial institutions incorporated under that are companies named on the register of registered banks pursuant to section 69 of the Reserve Bank of New Zealand Act 1989 (the "**Reserve Bank Act**") and companies known as "non-bank deposit takers" ("**NBDTs**") and subject to the NBDT regime under Part 5D of the Reserve Bank Act. Banks and NBDTs are not separate types of legal entity under New Zealand law. In practice, entities carrying

out such activities usually take the form of a company incorporated under the Companies Act. No additional terms of reference, definitions, modifications, additional assumptions or qualifications are required to extend this opinion to Banks and NBDTs that are companies. Accordingly, no Schedule has been included for Banks or NBDTs;

1.2.2 Investment firms/broker dealers that are companies or partnerships. Investment firms and broker dealers are not separate types of legal entity under New Zealand law. In practice, entities carrying out such activities usually take the form of a company incorporated under the Companies Act. It is rare for a partnership to be used. We cover companies incorporated under the Companies Act in the body of this opinion. We cover partnerships in paragraph 1.2.3. No additional terms of reference, definitions, modifications, additional assumptions or qualifications are required to extend this opinion to investment firms and broker dealers that are companies or partnerships. Accordingly, no Schedule has been included for investment firms or broker dealers;

1.2.3 Partnerships for the purposes of section 4 of the Partnership Act 1908 (known as general partnerships), and body corporates established under the Limited Partnerships Act 2008 (known as limited partnerships). No additional terms of reference, definitions, modifications, additional assumptions or qualifications are required to extend this opinion to partnerships. Accordingly, no Schedule has been included for partnerships;

1.2.4 Insurance companies (general insurers and life insurers) that are "licensed insurers" under the Insurance (Prudential Supervision) Act 2010 (the "**IPS Act**". No additional terms of reference, definitions, modifications, additional assumptions or qualifications are required to extend this opinion to Insurance Companies. Accordingly, no Schedule has been included for Insurance Companies;

1.2.5 Individuals located in New Zealand (Schedule 1);

1.2.6 Funds organised as ordinary trusts or unit trusts (Schedule 2). Funds are not separate types of legal entity under New Zealand law. In practice, it is likely that a fund in New Zealand will be structured as an ordinary trust or a unit trust;

1.2.7 Sovereign and public sector entities, namely the New Zealand Debt Management Office and the Reserve Bank of New Zealand (the "**Reserve Bank**") (Schedules 3 and 4);

1.2.8 Parties acting as trustees of Trusts. In practice, parties that are trustees of a trust will usually be companies incorporated under the Companies Act or possibly, individuals. We cover companies incorporated under the Companies Act in the body of this opinion. We cover individuals in Schedule 1. No additional terms of reference, definitions, modifications, additional assumptions or qualifications are required to extend this opinion to parties acting as trustees of a trust if those parties are companies or

individuals. Accordingly, no separate Schedule has been included for parties that are trustees of a trust;

1.2.9 Charitable trusts incorporated as a Board under the Charitable Trusts Act 1957. No additional terms of reference, definitions, modifications, additional assumptions or qualifications are required to extend this opinion to charitable trusts. Accordingly, no Schedule has been included for charitable trusts;

1.2.10 Pension entities established as statutory corporations, namely the Government Superannuation Fund Authority established under the Government Superannuation Fund Act 1956 and the Guardians of New Zealand Superannuation established under the New Zealand Superannuation and Retirement Income Act 2001 (Schedules 5 and 6 respectively); and

1.2.11 Building Societies incorporated under the Building Societies Act 1908 or the Building Societies Act 1965. No additional terms of reference, definitions, modifications, additional assumptions or qualifications are required to extend this opinion to building societies. Accordingly, no Schedule has been included for building societies,

insofar as each may act as a Counterparty to a Firm under an Agreement.

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

1.4 In this opinion letter:

1.4.1 **"Security Interest"** means the security interest created pursuant to the Security Interest Provisions;

1.4.2 **"Equivalent Agreement"** means an agreement:

(a) which is governed by the law of England and Wales;

(b) which has broadly similar function to any of the Agreements listed in Annex 1;

(c) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and

(d) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);

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

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

1.4.4 "**enforcement**" means, in the relation to the Security Interest, the act of:

(i) sale and application of proceeds of the sale of Collateral against monies owed; or

(ii) appropriation of the Collateral,

in either case, in accordance with the Security Interest Provisions;

1.4.5 in other instances other than those referred to at 1.4.4 above, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy;

1.4.6 "**Insolvency Proceedings**" means the following insolvency laws and procedures to which a Party could be subject in this jurisdiction:

(i) the liquidation regime set out in Part XVI of the Companies Act, which applies to companies incorporated in New Zealand and bodies corporate incorporated outside New Zealand;

(ii) the administration regime set out in Part XVA of the Companies Act, which applies to companies incorporated in New Zealand and bodies corporate incorporated outside New Zealand;

(iii) the statutory management regimes set out in: (a) the Corporations (Investigation and Management) Act 1989 (the "**CIM Act**"), which applies to corporations, whether incorporated in New Zealand or elsewhere, that have assets or conduct business in New Zealand; (b) the Reserve Bank Act, which applies to banks registered in New Zealand; and (c) the IPS Act, which applies to "licensed insurers" and "associated persons" of licensed insurers;

(iv) the receivership regime set out in the Receiverships Act 1993;

(v) the compromises regime set out in Parts XIV and XV of the Companies Act, which applies to compromises between companies incorporated in New Zealand, or overseas companies registered under the Companies Act, and their creditors; or

(vi) the distress management regime set out in the IPS Act, which principally applies to "licensed insurers" as defined in the IPS Act;

1.4.7 "**Insolvency Representative**" means a liquidator, administrator, statutory manager or analogous or equivalent official in this jurisdiction;

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

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

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

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

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

2. ASSUMPTIONS

We assume the following:

2.1 That the Agreements and Transactions are legally binding and enforceable against both Parties under their governing laws.

2.2 That the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest.

2.3 That the Security Interest Provisions are effective under the law of the place where the Collateral is located to create an enforceable security interest.

2.4 That each Party has the capacity, power and authority under all applicable laws to enter into the Agreement and Transactions; to perform its obligations under the Agreement and Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement and Transactions.

2.5 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement and documents evidencing each Transaction in this jurisdiction.

2.6 That the Agreement has been properly executed by both Parties.

2.7 That the Agreement has been entered into, and each of the transactions referred to therein is carried out, by each of the Parties in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

2.8 That the Agreement accurately reflects the true intentions of each Party.

2.9 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement.

2.10 That there is no other agreement, instrument or other arrangement between the Parties which modifies or supersedes the Agreement.

2.11 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.

2.12 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.

2.13 That all Collateral shall at all relevant times be located outside this jurisdiction. This assumption is key to this opinion due to the potential application of the Personal Property Securities Act 1999 (the "**PPSA**"). Very briefly, the PPSA contains conflict of laws rules that specify the circumstances in which New Zealand law governs the validity, perfection and enforcement of a "security interest". The application of those rules depends on the location of the secured property (in this case, the Collateral). If, as we assume, the Collateral is located outside New Zealand and the Agreements are not New Zealand law-governed, the PPSA does not apply.

2.14 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

2.15 That no provision of the Agreement that is necessary for our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.

3. OPINIONS

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

3.1 Valid Security Interest

3.1.1 Subject to what we say in paragraph 3.1.2, following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.

3.1.2 In circumstances where the Defaulting Party is not subject to Insolvency Proceedings, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

In circumstances where the Defaulting Party is subject to Insolvency Proceedings, the Non-Defaulting Party's right of enforcement may, in certain

circumstances, be affected by a moratorium or stay, or the application of certain statutory clawback provisions, as outlined in paragraph 4.

3.1.3 Following exercise of the Firm's rights under the Security Interest Provisions, the ranking of the Firm's rights to the proceeds of realisation of the Collateral in relation to the interests of the Counterparty and any other person would be a matter to be determined under the law of the place where the Collateral is situated.

3.2 **Further acts**

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

4. QUALIFICATIONS

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

4.1 As is the case with our netting opinion to the Futures and Options Association dated 14 January 2013, the issues addressed in this opinion are considered solely in the context of the liquidation, administration and statutory management regimes (as each of those regimes is described in paragraph 1.4.6 above). These are the regimes that, in our experience, are likely to be of the greatest concern to the Parties because they are the most frequently used in the financial sector.

Moratorium or stay

Administration regime

4.2 The Companies Act administration regime provides that, subject to certain exceptions, a person may not enforce a "charge" over the property of a company in administration.

Specifically, section 239ABC of the Companies Act states that:

> Subject to subpart 10, a person must not, during the administration of a company, enforce a charge over the property of the company, except-
>
> (a) with the administrator's written consent; or
>
> (b) with the permission of the Court.

In this context, "charge" is defined to include:

> a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to [non-preferential unsecured creditors] ...

Section 239ABC will, therefore, apply if the Agreement creates a "charge" under its governing law or if a court decides that the issue involves mandatory New Zealand law and that, under New Zealand law, a "charge" is created.

However, this moratorium is expressed to be subject to subpart 10. Subpart 10 (more specifically, sections 239ABL and 239ABM) allows the enforcement of a charge over the property of a company in administration where:

- a secured creditor having a charge over all, or substantially all, of the company's property begins enforcing the charge no later than the 10th working day after the commencement of the administration. "Enforce" is broadly defined in section 239ABK to include the exercise of any secured creditor rights arising under contract; or

- any secured creditor has begun enforcing its charge prior to the commencement of the administration. However, in this case, the administrator may apply to the court for an order restraining the secured creditor's actions. Any such order granted must adequately protect the secured creditor's interests.

Accordingly, where this moratorium applies, the Firm will be unable to exercise its secured creditor rights unless it qualifies under one of the two exemptions. In practice, it is unlikely that the Firm would have all- (or substantially all-) assets security over the Counterparty. Assuming it does not, the Firm's only protection would be if it were able to begin enforcement prior to the commencement of administration. Obtaining prompt notice of an impending administration would, of course, then be crucial.

The administration of a company ends when the negotiations between the relevant Insolvency Representative and the Counterparty's creditors have been successful, when a court order is made, or when the statutory timeframe (20 working day, or such longer period as set by the court) expires without resolution.

Statutory management

4.3 The statutory management moratorium, in effect, prohibits the exercise of secured creditor rights in respect of "the property of" the insolvent corporation. Accordingly, if, under the governing law of an Agreement (and, possibly, under New Zealand law also), the Collateral is not "the property of" the Counterparty (e.g., under title transfer arrangements), this prohibition should not apply.

Furthermore, importantly, the statutory management moratorium does *not* affect the exercise of rights of set-off under a "bilateral netting agreement". A "bilateral netting agreement" is defined in section 310A of the Companies Act as:

> an agreement that provides, in respect of transactions between 2 persons to which the agreement applies, -
>
> (a) That on the occurrence of an event specified in the agreement, all or any of those transactions must (or may, at the option of a party) be terminated and -
>
> (i) An account taken of all money due between the parties in respect of the terminated transactions; and
>
> (ii) All obligations in respect of that money satisfied by payment of the net amount due from or on behalf of the party having a net debit to or on behalf of the party having a net credit; or

(b) That each transaction is to be debited or credited to an account with the effect that the rights and obligations of each party that existed in respect of the relevant account prior to the transaction are extinguished and replaced by rights and obligations in respect of the net debit due on the relevant account after taking into account that transaction; or

(c) That amounts payable by each party to the other party are to be paid or satisfied by payment of the net amount of those obligations by the party having a net debit to the party having a net credit; -

but does not include any bilateral netting agreement that is part of a multilateral netting agreement.

In broad terms, a "bilateral netting agreement" is an agreement between two persons that provides for any of three different types of netting: close-out netting, netting by novation or payments netting.

In principle, whether an agreement constitutes a "bilateral netting agreement" should, under New Zealand's conflict of laws rules, be determined by its governing law. We assume in this opinion that, under both English and New York law, as appropriate, the Agreement is a "bilateral netting agreement" in terms of section 310A of the Companies Act. It is also possible that a New Zealand court could conclude that the New Zealand's netting legislation contains mandatory insolvency rules that should be interpreted in accordance with New Zealand law. In that regard, the Agreement is, as a matter of New Zealand law, a "bilateral netting agreement".

There are no definitive time limits for the length of a statutory management. A corporation will cease to be subject to statutory management by a declaration made in an Order in Council (which must be declared by the Governor General) or if it is otherwise put into liquidation.

Compromise

4.4 Potentially, a Firm could become bound by the terms of a compromise that adversely affects its secured creditor rights. However, in practice, the Firm should be able to receive a notice of the proposed compromise and close-out and exercise those rights before becoming bound.

Clawback

Liquidation regime

4.5 The Companies Act liquidation regime provides for transactions to be challenged by the Insolvency Representative (i.e., the liquidator of the Defaulting Party) if the transactions occurred during certain "suspect periods" (generally, two years prior to the commencement of the liquidation) as follows:

4.5.1 (*Insolvent transactions voidable*) – Section 292 provides that a transaction by a company is voidable by the Insolvency Representative if the transaction is an "insolvent transaction".

An "insolvent transaction" is defined in the Companies Act to mean:

a transaction by a company that –

(a) is entered into at a time when the company is unable to pay its due debts; and

(b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

4.5.2 (*Voidable charges*) – Section 293 provides that a "charge" over property may be voidable by the Insolvency Representative in certain circumstances. Specifically, section 293 provides that:

(1) A charge over any property or undertaking of a company is voidable by the liquidator if –

(a) the charge was given within the [period of two years prior to the commencement of the liquidation]; and

(b) immediately after the charge was given, the company was unable to pay its due debts.

(1A) Subsection (1) does not apply if –

(a) the charge secures money actually advanced or paid, or the actual price or value of property sold or supplied to the company, or any other valuable consideration given in good faith by the grantee of the charge at the time of, or at any time after, the giving of the charge; or

(b) the charge is in substitution for a charge given before the specified period.

Section 293 will only apply if the Agreement creates a "charge" under its governing law. The definition of the term "charge" is set out in paragraph 4.2.

There is a reversed onus provision in section 293(2). Section 293(2) provides that, unless the contrary is proved, a company giving a charge within the period of six months before the commencement of its liquidation is presumed to have been unable to pay its due debts immediately after giving the charge.

4.5.3 (*Transactions at undervalue*) – Section 297 provides that transactions at undervalue may be recovered by the Insolvency Representative in certain circumstances. Specifically, section 297 provides that:

(1) Under subsection (2) the liquidator may recover from a person (**X**) the amount **C** in the formula A – B = C, where –

(a) **A** is the value that X received from a company under a transaction to which the company was or is a party; and

(b) **B** is the value (if any) that the company received from X under the transaction.

(2) The liquidator may recover the difference in value (that is, C in the formula in subsection (1)) from X if –

(a) the company entered into the transaction within the [period of two years prior to the commencement of the liquidation]; and

(b) either –

(i) the company was unable to pay its due debts when it entered into the transaction; or

(ii) the company became unable to pay its due debts as a result of entering into the transaction.

"Transaction" includes a conveyance or transfer of property by the company in liquidation or the creation of a charge over that property. Each transfer of Collateral would, therefore, be a "transaction".

Statutory management regimes

4.6 The above three provisions from the Companies Act liquidation regime (sections 292, 293 and 297) also apply to a corporation that is subject to statutory management under the statutory management regimes. The statutory management regimes are set out in: (a) the the CIM Act, which applies to corporations, whether incorporated in New Zealand or elsewhere, that have assets or conduct business in New Zealand; (b) the Reserve Bank Act, which applies to banks registered in New Zealand; and (c) the IPS Act, which applies to "licensed insurers" and "associated persons" of licensed insurers.

4.7 In addition, the statutory management regimes provide that a court may order that property be transferred or delivered, or that a payment not exceeding the value of the property be made, to the Insolvency Representative (i.e., the statutory manager of the Defaulting Party) where property has been "improperly disposed of" or has been acquired by a person in circumstances which make it "just and equitable" that that person should hold it on trust for the Defaulting Party.

Specifically, section 54(1) of the CIM Act provides that:

> In any case where, whether before or after the passing of this Act, -
>
> (a) Any property has been acquired by a person in circumstances which cause it to be *just and equitable* that that person should hold it upon trust for any corporation that has been declared to be subject to statutory management; or
>
> (b) Any property has been *improperly disposed of*, whether or not the property has become subject to a trust, -
>
> the Court may, if it thinks fit, make an order –
>
> (c) That the property be transferred or delivered to the statutory manager:
>
> (d) That any person who acquired or received the property, or his or her administrator, shall pay to the statutory manager a sum not exceeding the value of that property.
>
> (our emphasis)

(The equivalent provisions are contained in section 138(1) of the Reserve Bank Act and section 180(k) of the IPS Act.)

There is no definition of "property" in the statutory management legislation. However, it has been held that "property" in this context includes both money and

bank deposits.[1] On that basis, "property" could apply to both cash and securities Collateral.

It is a question of fact in each case whether the "just and equitable" test in paragraph (a), or the "improperly disposed of" test in paragraph (b), has been satisfied. A lack of judicial authority on point makes it difficult to identify any guidelines as to when section 54(1) may be applicable. Those cases that have considered section 54 tend to involve clear cut situations where it would be difficult to argue against the court making an order.

Setting aside dispositions that prejudice creditors

4.8 Similar to the rule concerning voidable charges in section 293 of the Companies Act (see paragraph 4.5.2 above), subpart 6 of Part 6 of the Property Law Act 2007 sets out rules that enable a court to order that property acquired or received under or through certain "prejudicial dispositions" made by a debtor be restored for the benefit of creditors. Specifically, section 346 of the Property Law Act states that subpart 6 of Part 6 applies to dispositions of property made with "intent to prejudice a creditor...or without receiving reasonably equivalent value in exchange". The term "disposition" is defined broadly in Part 6 to include the grant or creation of a charge. An order under this rule can be made on the application of either a liquidator or a creditor.

There are no other material issues relevant to the issues addressed in this opinion letter which we 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. However, we consent to this opinion being shown to 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

Bell Gully

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1 (*Equiticorp Industries Group Limited (in statutory management)* v *The Crown* (judgment no. 47) [1998] 2 NZLR 481, 706-7 (HC)).

SCHEDULE 1
Individuals

Subject to the modifications and additions set out in this Schedule 1 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Individuals. For the purposes of this Schedule 1 (*Individuals*), "***Individual***" means an individual located in New Zealand.

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

Not applicable.

2. ADDITIONAL ASSUMPTIONS

Not applicable.

3. MODIFICATIONS TO OPINIONS

Not applicable.

4. ADDITIONAL QUALIFICATIONS

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

Clawback

Bankruptcy regime

4.1 The bankruptcy regime under the Insolvency Act 2006 provides for transactions to be challenged during "suspect periods" (generally, two years prior to the commencement of the bankruptcy). The relevant provisions are set out in sections 192 to 216 of the Insolvency Act and are similar to the liquidation regime provisions outlined in paragraph 4.5. Specifically:

4.1.1 (*Insolvent transactions may be cancelled*) - Section 194 of the Insolvency Act provides that a transaction by a bankrupt may be cancelled on the Insolvency Representative's initiative if it is an "insolvent transaction" and was made within two years immediately before the bankrupt's adjudication. Sections 194 to 197 are substantially the same as section 292 of the Companies Act.

The term "insolvent transaction" is defined in section 195 of the Insolvency Act as follows:

> (1) An insolvent transaction is a transaction by the bankrupt that—
>
> (a) is entered into at a time when the bankrupt is unable to pay his or her due debts; and

(b) enables a creditor to receive more towards satisfaction of a debt by the bankrupt than that person would receive, or would be likely to receive, in the bankruptcy.

(2) Transaction, as used in the term **insolvent transaction**, means any of the following steps by the bankrupt:

(a) conveying or transferring the bankrupt's property:

(b) giving a charge over the bankrupt's property:

(c) incurring an obligation:

(d) undergoing an execution process:

(e) paying money (including money paid in accordance with a judgment or an order of a court):

(f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

4.1.2 (*Insolvent charge may be cancelled*) - Sections 198 and 199 of the Insolvency Act provide that a charge over property may be cancelled on the Insolvency Representative's initiative in certain circumstances.

Specifically, section 198 provides that:

A charge over any property of a bankrupt may be cancelled on the Assignee's initiative if—

(a) the charge was given within 2 years immediately before the bankrupt's adjudication; and

(b) immediately after the charge was given, the bankrupt was unable to pay his or her due debts.

The term "charge" is defined in the Insolvency Act as follows:

charge includes a right or interest in relation to property owned by a debtor, by virtue of which a creditor of the debtor is entitled to claim payment in priority to other creditors; but does not include a charge under a charging order issued by a court in favour of a judgment creditor

Section 199 provides that:

(1) A charge may not be cancelled under section 198 if the charge secures money actually advanced or paid, or the actual price or value of property sold or supplied, or any other valuable consideration given in good faith, by the secured creditor to the bankrupt at the time when, or at any time after, the bankrupt gave the charge.

(2) A charge may not be cancelled under section 198 if the charge is a substitute for an existing charge that was given by the bankrupt more than 2 years before adjudication, except to the extent that—

(a) the amount secured by the substituted charge is greater than the amount that was secured by the existing charge; or

(b) the value of the property subject to the substituted charge at the date of substitution was greater than the value of the property subject to the existing charge at that date.

Sections 198 and 199 are substantially the same as section 293 of the Companies Act (outlined in paragraph 4.5.2).

4.1.3 (*Assignee may recover difference in value*) - Sections 211 and 212 of the Insolvency Act provides that transactions at undervalue may be recovered by the Insolvency Representative in certain circumstances.

Specifically, section 211(1) provides that:

> Under section 212, the Assignee may recover from a person (X), who is a party to a transaction with the bankrupt, the amount C in the formula A − B = C, where—
>
> (a) A is the value that X received from the bankrupt under the transaction; and
>
> (b) B is the value (if any) that the bankrupt received from X under the transaction.

Section 212 provides that:

> The Assignee may recover the difference in value (that is, C in the formula in section 211(1)) from X if—
>
> (a) the bankrupt entered into the transaction with X within 2 years immediately before adjudication; and
>
> (b) either—
>
> (i) the bankrupt was unable to pay his or her debts when the bankrupt entered into the transaction; or
>
> (ii) the bankrupt became unable to pay his or her debts as a result of entering into the transaction.

Sections 211 and 212 are substantially the same as section 297 of the Companies Act (outlined in paragraph 4.5.3).

5. MODIFICATIONS TO QUALIFICATIONS

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

Paragraphs 4.2, 4.4 and 4.5 are deleted.

SCHEDULE 2
Funds

Subject to the modifications and additions set out in this Schedule 2 (*Funds*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are ordinary trusts or unit trusts. For the purposes of this Schedule 2 (*Funds*), "***Fund***" means an investment fund that is structured as an ordinary trust or a unit trust under the laws of this jurisdiction. A trust is not a separate legal person in New Zealand. Therefore, the Party to the Agreement and the Transactions will be the trustee/s of the Fund. With regards to the application of this opinion to the trustees of a trust, see paragraph 1.2.8.

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

Not applicable.

2. ADDITIONAL ASSUMPTIONS

Not applicable.

3. 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.

There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

4. ADDITIONAL QUALIFICATIONS

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

If a Fund itself (as opposed to the trustees of the Fund) were to become insolvent, it could not be wound up under any of the insolvency legislation referred to in the definition of "Insolvency Proceedings" in paragraph 1.4.6. Rather, assuming that the trust deed for the Fund does not expressly address the issue, the most likely consequence of a Fund insolvency is that a discretionary order would be made by the courts applying general principles of insolvency law. We set out the approaches that a court may adopt in making such a discretionary order in section 3.2 of Schedule 4 (*Funds*) of the New Zealand Netting Opinion. It is possible that a court could, as part of such an order, make an order staying secured creditor rights or requiring the clawback of certain transactions entered into by the trustees of the Fund prior to the commencement of the Insolvency Proceedings.

For completeness, it would be unusual for a trust deed to expressly contemplate the insolvency of the underlying Fund. However, some trust deeds contain rules setting out the process for winding up the fund and the manner in which the fund's assets are to be distributed. In fact, the trust deed for certain types of funds is required to contain these provisions: see, for example, section 119(1)(f) of the KiwiSaver Act 2006.

5. MODIFICATIONS TO QUALIFICATIONS

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

Paragraphs 4.2 to 4.8 are deleted.

SCHEDULE 3
Debt Management Office

Subject to the modifications and additions set out in this Schedule 3 (*Debt Management Office*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of the Debt Management Office. For the purposes of this Schedule 3 (*Debt Management Office*), "***Debt Management Office***" means the New Zealand Debt Management Office, being a division of the New Zealand Treasury (the "**Treasury**"). The Treasury is a New Zealand government department. The entry by the Treasury (through the Debt Management Office) into the Agreement and the Transactions is the entry by the Treasury as a department of the Crown (or the Sovereign) into such transactions.

The Crown is defined in section 2 of the Public Finance Act 1989 as follows:

> **Crown** or the **Sovereign**—
>
> (a) means the Sovereign in right of New Zealand; and
>
> (b) includes all Ministers of the Crown and all departments; but
>
> (c) does not include—
>
> (i) an Office of Parliament; or
>
> (ii) a Crown entity; or
>
> (iii) a State enterprise named in Schedule 1 of the State-Owned Enterprises Act 1986

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

Not applicable.

2. ADDITIONAL ASSUMPTIONS

Not applicable.

3. 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.

There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

4. ADDITIONAL QUALIFICATIONS

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

There is no statutory regime in New Zealand that contemplates the insolvency of the Crown or any of its government departments or divisions. Accordingly, if the Crown were to become insolvent, it is likely that special legislation would be enacted to deal with various aspects of that insolvency (which could include a secured creditor stay or the clawback of certain transactions entered into by the Crown prior to the commencement of the insolvency).

5. MODIFICATIONS TO QUALIFICATIONS

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

Paragraphs 4.2 to 4.8 are deleted.

SCHEDULE 4
Reserve Bank

Subject to the modifications and additions set out in this Schedule 4 (*Reserve Bank*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of the Reserve Bank. For the purposes of this Schedule 4 (*Reserve Bank*), "***Reserve Bank***" means the Reserve Bank of New Zealand constituted pursuant to the Reserve Bank 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

Not applicable.

2. ADDITIONAL ASSUMPTIONS

Not applicable.

3. MODIFICATIONS TO OPINIONS

Not applicable.

4. ADDITIONAL QUALIFICATIONS

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

There is no statutory regime in New Zealand that expressly contemplates the insolvency of the Reserve Bank. However, strictly speaking, the Reserve Bank could be subject to:

- the liquidation regime set out in the Companies Act, by virtue of the application of sections 17A and 17B of the Judicature Act 1908. This is possible in principle because section 17A of the Judicature Act gives the High Court jurisdiction to appoint a liquidator to an "association". The definition of "association" in section 17A(1) includes "any ... body corporate or unincorporated body of persons". Accordingly, the Reserve Bank could be deemed to be an "association". Section 17B of the Judicature Act provides that the liquidation regime set out in Part XVI of the Companies Act applies in relation to the liquidation of an "association"; or

- the statutory management regime set out in the CIM Act.

If either of these Insolvency Proceedings were commenced in respect of the Reserve Bank then the relevant moratorium and clawback provisions described in paragraph 4 would be available to the Insolvency Representative. However, given the inevitable

public interest and political sensitivity that would surround the insolvency of the Reserve Bank (being New Zealand's central bank), we believe it is unlikely that either of these generic insolvency proceedings would apply in that case. It is much more likely that special legislation would be enacted to deal with various aspects of that insolvency (which could include a secured creditor stay or the clawback of certain transactions entered into by the Reserve Bank prior to the commencement of the insolvency).

5. MODIFICATIONS TO QUALIFICATIONS

Paragraphs 4.2 and 4.4 are deleted.

SCHEDULE 5
Government Superannuation Fund Authority

Subject to the modifications and additions set out in this Schedule 5 (*Government Superannuation Authority Fund*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of the Government Superannuation Authority Fund. For the purposes of this Schedule 5 (*Government Superannuation Authority Fund*), "***GSF Authority***" means the Government Superannuation Fund Authority, being a statutory corporation and a Crown entity established under the Government Superannuation Fund Act to manage and administer the Government Superannuation Fund.

The Government Superannuation Fund is a Government-operated superannuation scheme for civil servants, which is now closed off to new entrants. The Government Superannuation Fund is not itself a legal entity.

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

Not applicable.

2. ADDITIONAL ASSUMPTIONS

Not applicable.

3. MODIFICATIONS TO OPINIONS

Not applicable.

4. ADDITIONAL QUALIFICATIONS

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

There is no statutory regime in New Zealand that expressly contemplates the insolvency of the GSF Authority. However, strictly speaking, the GSF Authority could be subject to:

- the liquidation regime set out in the Companies Act, by virtue of the application of sections 17A and 17B of the Judicature Act 1908, as the GSF Authority is an "association" under the Judicature Act. Specifically, section 177 of the Crown Entities Act 2004 provides that, "[f]or the avoidance of doubt, sections 17A to 17E of the Judicature Act 1908 apply to a statutory entity [e.g., the GSF Authority], unless the statutory entity may be put into liquidation in accordance with the entity's Act". The Government Superannuation Fund Act does not provide for the liquidation of the GSF Authority. Section 17B of the Judicature

Act provides that the liquidation regime set out in Part XVI of the Companies Act applies in relation to the liquidation of an "association"; or

- the statutory management regime set out in the CIM Act.

If either of these Insolvency Proceedings were commenced in respect of the GSF Authority then the relevant moratorium and clawback provisions described in paragraphs would be available to the Insolvency Representative. However, given the inevitable public interest and political sensitivity that would surround the insolvency of the GSF Authority, we believe it is unlikely that either of these generic insolvency proceedings would apply in that case. It is much more likely that special legislation would be enacted to deal with various aspects of that insolvency (which could include a secured creditor stay or the clawback of certain transactions entered into by the GSF Authority prior to the commencement of the insolvency).

5. MODIFICATIONS TO QUALIFICATIONS

Paragraphs 4.2 and 4.4 are deleted.

SCHEDULE 6
Guardians Of New Zealand Superannuation

Subject to the modifications and additions set out in this Schedule 6 (*Guardians of New Zealand Superannuation*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of the Guardians of New Zealand Superannuation. For the purposes of this Schedule 6 (*Guardians of New Zealand Superannuation*), "*the* ***Guardians***" means the Guardians of New Zealand Superannuation, being a statutory corporation and Crown entity established under section 48 of the New Zealand Superannuation and Retirement Income 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

Not applicable.

2. ADDITIONAL ASSUMPTIONS

Not applicable.

3. MODIFICATIONS TO OPINIONS

Not applicable.

4. ADDITIONAL QUALIFICATIONS

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

There is no statutory regime in New Zealand that expressly contemplates the insolvency of the Guardians. However, strictly speaking, the Guardians could be subject to:

- the liquidation regime set out in the Companies Act, by virtue of the application of sections 17A and 17B of the Judicature Act 1908, as the Guardians is an "association" under the Judicature Act. Specifically, section 177 of the Crown Entities Act 2004 provides that, "[f]or the avoidance of doubt, sections 17A to 17E of the Judicature Act 1908 apply to a statutory entity [e.g., the Guardians], unless the statutory entity may be put into liquidation in accordance with the entity's Act". The New Zealand Superannuation and Retirement Income Act does not provide for the liquidation of the Guardians. Section 17B of the Judicature Act provides that the liquidation regime set out in Part XVI of the Companies Act applies in relation to the liquidation of an "association"; or

- the statutory management regime set out in the CIM Act.

If either of these Insolvency Proceedings were commenced in respect of the Guardians then the relevant moratorium and clawback provisions described in paragraph 4 would be available to the Insolvency Representative. However, given the inevitable public interest and political sensitivity that would surround the insolvency of the Guardians, we believe it is unlikely that either of these generic insolvency proceedings would apply in that case. It is much more likely that special legislation would be enacted to deal with various aspects of that insolvency (which could include a secured creditor stay or the clawback of certain transactions entered into by the Guardians prior to the commencement of the insolvency).

5. MODIFICATIONS TO QUALIFICATIONS

Paragraphs 4.2 and 4.4 are deleted.

ANNEX 1
FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2007**")

2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2009**")

3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2011**")

4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2007**")

5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2009**")

6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2011**")

7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2007**")

8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2009**")

9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

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

Where the form of any Agreement listed in this Annex 1 (as published by the Futures and Options Association) (the "**FOA Published Form Agreement**") expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement.

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).

2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).

3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).

4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.

5. "**Core Provisions**" means:

   (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and

   (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.

6. "**Rehypothecation Clause**" means:

   (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);

   (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);

   (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); and

   (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

7. "**Security Interest Provisions**" means:

   (a) the "**Security Interest Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (***Security interest***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (***Security interest***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (***Security interest***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (***Security interest***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (***Security interest***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (***Security interest***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (***Security interest***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (***Security interest***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (***Security interest***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(b) the "**Power to Charge Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (***Power to charge***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (***Power to charge***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (***Power to charge***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (***Power to charge***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (***Power to charge***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (***Power to charge***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (***Power to charge***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (***Power to charge***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (***Power to charge***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(c) the "**Power of Sale Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (***Power of sale***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (***Power of sale***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (***Power of sale***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (***Power of sale***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (***Power of sale***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (***Power of sale***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (***Power of sale***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (***Power of sale***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (***Power of sale***); and

(x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(d) the "**Power of Appropriation Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (***Power of appropriation***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (***Power of appropriation***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (***Power of appropriation***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (***Power of appropriation***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (***Power of appropriation***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (***Power of appropriation***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (***Power of appropriation***)

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (***Power of appropriation***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (***Power of appropriation***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);

(e) the "**Lien Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (***General lien***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (***General lien***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (***General lien***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (***General lien***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (***General lien***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (***General lien***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (***General lien***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (***General lien***);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (***General lien***); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and

(f) the "**Client Money Additional Security Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (***Additional security***) at module F Option 4 (where incorporated into such Agreement);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement);

(ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (***Additional security***) at module F Option 1 (where incorporated into such Agreement); and

(x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the

foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).

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

ANNEX 3
NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B") provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.

3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death, or incapacity of a Party or its general partner, any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.

4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) requiring that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.

5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.

6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.

7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).

8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.