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**FIA EUROPE - NETTING OPINIONS PROJECT**

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27 March 2015

Dear Sirs,

**FIA Europe 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 the Republic of Poland ("**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.

This opinion letter speaks as at 22 December 2014.

**1. TERMS OF REFERENCE AND DEFINITIONS**

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

- 1.1.1 persons which are capital companies (*spółki kapitałowe*) or partnerships (*spółki osobowe*) within the meaning of the Commercial Companies Code, provided that its business activity is not regulated by any special regulations (for the avoidance of doubt the opinion is not given in respect of a "*Societas Europaea*" established pursuant to EU Regulation No. 2157/2001 on the Statute of a European company, as amended); and

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- 1.1.2 established in this jurisdiction branches of corporations.
- 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 Schedule to this opinion letter applicable to that type of entity:
- 1.2.1 banks within the meaning of the Banking Law, incorporated and existing as either a joint-stock company (*spółka akcyjna*) or a co-operative bank (*bank spółdzielczy*) or a state bank (*bank państwowy*) (the "**Banks**") and branches in this jurisdiction of Credit Institutions (Schedule 1);
  - 1.2.2 investment firms (*domy maklerskie*) within the meaning of the Act on Trading (the "**Investment Firms**") (Schedule 2);
  - 1.2.3 insurance undertakings (*zakłady ubezpieczeń*) within the meaning of the Insurance Law, incorporated and existing as a joint-stock company (*spółka akcyjna*) or a mutual insurance society (*towarzystwo ubezpieczeń wzajemnych*) (the "**Insurance Companies**") (Schedule 3);
  - 1.2.4 individuals (*osoby fizyczne*) who are entrepreneurs (*przedsiębiorcy*) within the meaning of the Civil Code ("**Individuals**") (Schedule 4);
  - 1.2.5 investment funds (*fundusze inwestycyjne*) which are legal persons within the meaning of the Act on Investment Funds and incorporated and existing as either an open-ended investment fund (*fundusz inwestycyjny otwarty*) (the "**Open-Ended Fund**"), a closed-ended investment fund (*fundusz inwestycyjny zamknięty*) (the "**Closed-Ended Fund**") or a specialist open-ended investment fund (*specjalistyczny fundusz inwestycyjny otwarty*) (the "**Specialist Open-Ended Fund**") managed by a fund management company (*towarzystwo funduszy inwestycyjnych*) (the "**TFI**"), within the meaning of the Act on Investment Funds (the "**Investment Funds**") (Schedule 5);
  - 1.2.6 local government entities (*jednostki samorządu terytorialnego*) that are a public sector entities existing in this jurisdiction pursuant to the provisions of – amongst others – the Constitution of the Republic of Poland of 2 April 1997 (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*) and the Act on Public Finance (the "**Local government entities**") (Schedule 6); and
  - 1.2.7 pension funds (*fundusze emerytalne*) within the meaning of Pension Funds Act and incorporated and existing as either a general fund (*fundusz otwarty*) or voluntary fund (*fundusz dobrowolny*) or an occupational fund (*fundusz pracowniczy*), and managed by a fund management company (*towarzystwo emerytalne*), a joint-stock company (*spółka akcyjna*), operating either as a general fund company (*powszechne towarzystwo emerytalne*) or an occupational fund company (*pracownicze towarzystwo emerytalne*), managing

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and representing one (as a general rule) pension fund (the "**Pension Funds**") (Schedule 7).

- 1.3 This opinion is not given in respect of Parties that were created by way of an act of Polish statute (*ustawa*) (unless the statute provides that such a Party may be subject to Bankruptcy Proceedings, in which case opinions in this opinion letter applicable to entities referred to in paragraph 1.1 apply) or in the performance of the obligation imposed by a Polish statute (*ustawa*). This is because pursuant to Article 6.4 of the Bankruptcy Law such a Party cannot be declared bankrupt and consequences of their insolvency need to be reviewed on a case-by-case basis.
- 1.4 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the FOA Netting Agreement and the Clearing Agreement are expressed to be governed by English law.
- 1.5 This opinion covers all types of Transaction (excluding the Transactions defined in paragraph (v) of clause (A) of Annex 2) which are not settled on a T+0 basis (please refer to paragraph 4.2.1 below for further information). This is because only such Transactions are subject to beneficial treatment in Insolvency Proceedings.
- 1.6 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.
- 1.7 A person incorporated or organised in this jurisdiction may be a Party to a Clearing Agreement in the capacity of "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) or as "Client" (as defined in either of them). Where a person incorporated or organised in this jurisdiction is a Party to a Clearing Agreement as Firm, or as the case may be Clearing Member, our opinion relates only to persons incorporated or organised as Banks or Investment Firms.
- 1.8 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.
- 1.9 A reference in this opinion to a Transaction is a reference, in relation to the FOA Netting Agreement to a Transaction (as defined therein) and, in relation to FOA Clearing Module and ISDA/FOA Clearing Addendum to a Client Transaction (as defined therein).
- 1.10 **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,

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unless the context specifies otherwise. Where, in a FOA Netting Agreement or, as the case may be, a Clearing Agreement, a defined term has been changed but the changed term bears the same meaning as a term defined in a FOA Published Form Agreement or, as the case may be, 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.

**"Act on Investment Funds"** means the Act of 27 May 2004 on investment funds (*ustawa z dnia 27 maja 2004 roku o funduszach inwestycyjnych*);

**"Act on the Public Finance "** means the Act of 27 August 2009 on Public Finance (*ustawa z dnia 27 sierpnia 2009 roku o finansach publicznych*);

**"Act on Trading"** means the Act of 29 July 2005 on trading in financial instruments (*ustawa z dnia 29 lipca 2005 roku o obrocie instrumentami finansowymi*);

**"Banking Law"** means the Banking Law of 29 August 1997 (*ustawa z dnia 29 sierpnia 1997 roku Prawo bankowe*);

**"Bankruptcy Law"** means the Act of 28 February 2003 on bankruptcy and recovery proceedings (*ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze*);

**"Bankruptcy Proceedings"** means bankruptcy proceedings with a liquidation option (*postępowanie upadłościowe obejmujące likwidację majątku*) or bankruptcy proceedings with a composition option (*postępowanie upadłościowe z możliwością zawarcia układu*) under the Bankruptcy Law;

**"Civil Code"** means the Civil Code of 23 April 1964 (*ustawa z dnia 23 kwietnia 1964 roku Kodeks cywilny*);

**"Commercial Companies Code"** means the Commercial Companies Code of 15 September 2000 (*ustawa z dnia 15 września 2000 Kodeks spółek handlowych*);

**"Credit Institution"** means an undertaking with its registered office outside the Republic of Poland in one of a member state of the European Free Trade Association (EFTA) - a party to the agreement on the European Economic Area (EEA), acting on its own behalf and on its own account, based on a licence from the competent supervisory authorities, and whose business is to accept deposits or other repayable funds, entrusted on whatever terms of repayment, and to grant credits;

**"EUIR"** means EU Council Regulation No. 1346/2000 on insolvency proceedings;

**"FCA Act"** means the Act of 2 April 2004 on Certain Financial Collateral Arrangements (*ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych*);



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**"FCA Eligible Party"** means a party which belongs to one of the following categories: the National Bank of Poland, a central bank of another state, the European Central Bank, the European Investment Bank, the Bank for International Settlements, the International Monetary Fund, a multilateral development bank as defined in Annex VI, Part I, Section 4 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, an investment firm, an investment fund manager to the extent it manages open investment funds, an open investment fund, a company managing a foreign fund, a bank, a credit institution, a financial institution, a cooperative savings and credit society, the National Cooperative Savings and Credit Society, a pension fund, a central partner, a settlement agent, a clearing house, an insurance undertaking, a reinsurance undertaking, a public administration body acting on behalf of the Polish State Treasury, an EU country public administration body competent for public debt administration or authorised to keep accounts for its clients;

**"Financial Instruments"** means: (1) securities or (2) other than securities: (i) units in collective investment undertakings, (ii) money market instruments, (iii) options, futures contracts, swaps, forward rate agreements and other derivatives based on securities, currencies, interest rates, profitability ratios, other derivatives, financial indices or financial measures which are physically-settled or cash-settled, (iv) options, futures contracts, swaps, forward rate agreements and other derivatives which are based on commodities and which are cash-settled or may be cash-settled at the option of one of the parties, (v) options, futures contracts, swaps and other derivatives which are based on commodities and physically-settled, provided that they are admitted to trading on a regulated market or in a multilateral trading facility, (vi) options, futures contracts, swaps, forward agreements and other derivatives which are based on commodities, that can be physically settled, which are not admitted to trading on a regulated market or in a multilateral trading facility and which are not for commercial purposes, which have the characteristics of other derivative financial instruments, (vii) derivative instruments for the transfer of credit risk, (viii) contracts for difference, and (ix) options, futures contracts, swaps, forward rate agreements and other climate variables, freight rate and emission allowance derivatives, as well as derivatives based on inflation rates or other official statistics which are cash-settled or may be cash-settled at the option of one of the parties, as well as any other derivatives based on assets, rights, obligations, indices and other ratios which have the characteristics of other derivative financial instruments as well as certificates of deposits (issued by banks) and shares in limited liability companies;

**"Insolvency Proceedings"** means the procedures listed in paragraph 3.1;

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

**"Insurance Law"** means the Act of 22 May 2003 on insurance activity (*ustawa z dnia 22 maja 2003 roku o działalności ubezpieczeniowej*);

**"Member State"** means a member state of the European Union;

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**"Omnibus Account"** is an omnibus account within the meaning of the Act on Trading under which an omnibus account is an account in which securities not belonging to the holder of the omnibus account but belonging to (an)other person(s) who is (are) the "owner(s)" of the securities in the omnibus account may be recorded;

**"Pension Funds Act"** means the Act of 28 August 1997 on the organisation and operation of pension funds (*ustawa z dnia 28 sierpnia 1997 roku o organizacji i funkcjonowaniu funduszy emerytalnych*);

**"Recovery Proceedings"** means recovery proceedings (*postępowanie naprawcze*) under the Bankruptcy Law;

**"Rome I Regulation"** means Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations;

**"Rome Convention"** means the Convention 80/934/EEC on the Law Applicable to Contractual Obligations;

**"Settlement Finality Act"** means the Act of 24 August 2001 on Settlement Finality in Payment and Securities Settlement Systems and the Principles of Supervision over These Systems (*ustawa z dnia 24 sierpnia 2001 roku o ostateczności rozrachunku w systemach płatności i systemach rozrachunku papierów wartościowych oraz zasadach nadzoru nad tymi systemami*).

A reference to a **"paragraph"** is to a paragraph of this opinion letter.

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

## 2. **ASSUMPTIONS**

We assume:

- 2.1 That no provision of the FOA Netting Agreement or Clearing Agreement 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 unless the alteration has been set out by us in Section 5 of Annex 5. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 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 or, as the case may be the Firm/CCP Transactions and CM/CCP Transactions are legal, valid, binding and enforceable against both Parties under their governing laws.

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- 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 authorisations, 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 under the laws of any jurisdiction 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 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).
- 2.10 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.
- 2.11 That any cash provided as Margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions. That any cash provided as Margin is money represented by a credit to an account, or similar claims on repayment of money and, in consequence, is not in a physical form.

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- 2.12 Any Margin will be transferred to an account maintained for a Party to which the title to cash or securities, as the case might be, is to be transferred.
- 2.13 That the Polish company has its "centre of main interest" in the Republic of Poland and the branch of a non-Polish company constitutes an "establishment", in each case within the meaning of Regulation (EC) No. 1346/2000 on insolvency proceedings, as amended (the "**EU Insolvency Regulation**"), which applies in all EU member states other than Denmark.
- 2.14 A Party is not a central counterparty (CCP).

### **3. OPINION**

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

#### **3.1 Insolvency Proceedings**

- 3.1.1 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: (i) the Bankruptcy Proceedings and (ii) the Recovery Proceedings.
- 3.1.2 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.
- 3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law, as appropriate, as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the contractual validity of the (i) FOA Netting Provision and the FOA Set-Off Provisions or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions.

#### **3.3 Enforceability of FOA Netting Provision**

- 3.3.1 In relation to a FOA Netting Agreement, and in relation to a Clearing Agreement where the Client is a Defaulting Party, the FOA Netting Provision will be immediately (and without fulfilment of any further conditions)



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enforceable in accordance with its terms so that, following an Event of Default, including as a result of the opening of any Insolvency Proceedings:

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

We are of this opinion for the following reasons.

- 3.3.2 As referred to in paragraph 3.2.1 above, the choice of English law to govern the FOA Netting Agreement and the Clearing Agreement will be recognised by the courts in this jurisdiction. Therefore, following an Event of Default which does not relate to the Insolvency Proceedings, the FOA Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms to the extent it is immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms under English law.
- 3.3.3 Pursuant to the Bankruptcy Law, declaration of bankruptcy and opening of the Recovery Proceedings do not affect the rights following from the close-out netting provision (*klauzula kompensacyjna*) referred to in the FCA Act. Under the FCA Act the close-out netting provision (*klauzula kompensacyjna*) is a provision stipulating an immediate set-off or close-out netting of claims if grounds for enforcement of collateral occur, and the manner in which this is to be done and settled between the parties, as set out in a financial collateral agreement, a master agreement related thereto or in a execution agreement concluded in performance of the master agreement. The FCA Act defines grounds for enforcement of collateral as a breach of the terms of the agreement or other event giving right to satisfaction under the financial collateral. The FCA Act provides that the claims of the parties that arise under or are the subject of the financial collateral arrangement may be the subject of netting if the parties included a close-out netting provision in the agreement. Close-out netting is also permitted when claims are not due and payable. Through close-out netting, the net amount resulting from the calculation of the mutual claims of the parties is payable to the party whose claim or sum of claims is higher, and the claim for payment of the amount is due, and also when the claims subject to close-out netting are not due and payable.
- 3.3.4 On the basis that the Module G - Margin and Collateral (or Module G - Margin, as the case may be), and the Title Transfer Securities and Physical Collateral Annex to the Netting Module each constitute a financial collateral arrangement (please refer to paragraph 4.4.9 below for further information), in our view the FOA Netting Agreement with the Module G - Margin and Collateral (or Module G - Margin, as the case may be), or with the Title

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Transfer Securities and Physical Collateral Annex to the Netting Module, will constitute a master agreement related to a financial collateral arrangement within the meaning of the provisions of the FCA Act referred to in paragraph 3.3.3 above.

- 3.3.5 With respect to the FOA Netting Agreement without the Module G - Margin and Collateral and without the Title Transfer Securities and Physical Collateral Annex to the Netting Module, the FOA Netting Provision will be enforceable in case of the Insolvency Proceedings opened against a party to that FOA Netting Agreement if the FOA Netting Agreement constitutes a master agreement (*umowa ramowa*) within the meaning of Article 85 of the Bankruptcy Law. Article 85 of the Bankruptcy Law introduces a special regime applicable to a master agreement (*umowa ramowa*) and "term financial contracts" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" entered into in its performance that effectively excludes "cherry-picking" rights of the Insolvency Representative (please refer to paragraph 4.2 for further information).
- 3.3.6 Moreover, netting of certain Transactions may be protected if in execution or settlement of such Transactions the Client and the Clearing Member were participating in a payment or settlement system within the meaning of the Settlement Finality Act. The opening of Bankruptcy Proceedings against such a participant of the system is subject to a specific regime under the Bankruptcy Law (please refer to paragraph 4.2.8 for further information).

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Non-Defaulting Party.

Amendments to the FOA Netting Provision specified in Section 1 of Annex 5 to this opinion are necessary in order for the opinions expressed in paragraph 3.3 to apply.

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

- 3.4.1 In relation to a Clearing Agreement which includes the Clearing Module Netting Provision, 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, in respect of each Cleared Transaction Set, 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 for the following reasons.

- 3.4.2 As referred to in paragraph 3.2.1 above, the choice of English law to govern a Clearing Agreement which includes the Clearing Module Netting Provision

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will be recognised by the courts in this jurisdiction. Therefore, following a CCP Default or a Firm Trigger Event which does not relate to the Insolvency Proceedings, the Clearing Module Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms to the extent it is immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms under English law.

- 3.4.3 In our view the Clearing Module Netting Provision will be enforceable in case of the Insolvency Proceedings opened against a party to a Clearing Agreement which includes the Clearing Module Netting Provision if the Clearing Agreement which includes the Clearing Module Netting Provision constitutes a master agreement (*umowa ramowa*) within the meaning of Article 85 of the Bankruptcy Law referred to in paragraph 3.3.5 above. If an agreement is to be recognised as a master agreement referred to in Article 85 of the Bankruptcy Law termination thereof must result in termination of all transactions entered into in performance of that agreement. In Bankruptcy Proceedings each Party may terminate such a master agreement and, in consequence, all transactions entered into in performance of that agreement will be terminated. Therefore, in our view, separate master agreements relevant for each Cleared Transaction Set are needed.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the operation of the Clearing Module Netting Provision.

Amendments to the Clearing Module Netting Provision specified in Section 1 of Annex 5 to this opinion are necessary in order for the opinions expressed in paragraph 3.4 to apply.

### **3.5 Enforceability of the Addendum Netting Provision**

- 3.5.1 In relation to a Clearing Agreement which includes the Addendum Netting Provision, 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, in respect of each Cleared Transaction Set, only the net sum of the positive and negative mark-to-market values of the individual Client Transactions that are terminated in accordance with the Clearing Agreement.

We are of this opinion for the following reasons.

- 3.5.2 As referred to in paragraph 3.2.1 above, the choice of English law to govern a Clearing Agreement which includes the Addendum Netting Provision will be recognised by the courts in this jurisdiction. Therefore, following a CCP Default or a CM Trigger Event which does not relate to the Insolvency Proceedings, the Addendum Netting Provision will be immediately (and

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without fulfilment of any further conditions) enforceable in accordance with its terms to the extent it is immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms under English law.

- 3.5.3 In our view the Addendum Netting Provision will be enforceable in case of the Insolvency Proceedings opened against a party to a Clearing Agreement which includes the Addendum Netting Provision if the Clearing Agreement which includes the Addendum Netting Provision constitutes a master agreement (*umowa ramowa*) within the meaning of Article 85 of the Bankruptcy Law referred to in paragraph 3.3.5 above. If an agreement is to be recognised as a master agreement referred to in Article 85 of the Bankruptcy Law termination thereof must result in termination of all transactions entered into in performance of that agreement. In Bankruptcy Proceedings each Party may terminate such a master agreement and, in consequence, all transactions entered into in performance of that agreement will be terminated. Therefore, in our view, separate master agreements relevant for each Cleared Transaction Set are needed.

Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the operation of the Addendum Netting Provision.

Amendments to the Addendum Netting Provision specified in Section 1 of Annex 5 to this opinion are necessary in order for the opinions expressed in 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 if modifications set out in Annex 5 are made. In a case where a Party, who would (but for the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum) 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 a 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



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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:

- (a) where the FOA Set-Off Provisions include the General Set-Off Clause:
  - (i) 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
  - (ii) 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
- (b) 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 for the following reasons.

- (A) As referred to in paragraph 3.2.1 above, the choice of English law to govern the FOA Netting Agreement will be recognised by the courts in this jurisdiction. Therefore, in the absence of the Insolvency Proceedings in respect of any of the Parties, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms to the extent they are immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms under English law.
- (B) Where Transactions entered into with a Party which has the centre of main interests in this jurisdiction have cross-border effect Article 6.1 of the EU IR will apply (please refer to paragraph 4.1.6 below for further information) and opening of the Bankruptcy Proceedings against that Party will not affect the right of creditors to demand the set-off of their claims against the claims of that Party, where such a set-off is permitted by the law applicable to that Party's claim. Therefore, provided that the insolvent Party's claim is governed by the law other than the law of this jurisdiction, the FOA Set-Off Provisions will be

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immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms to the extent they are immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms under that other law applicable to the insolvent Party's claim.

- (C) Provided that the law of this jurisdiction applies to set-off (because of the law of this jurisdiction is applicable to the insolvent Party's claim, or in relation to the Recovery Proceedings to which the EUIR does not apply), the FOA Set-Off Provision will be enforceable in this jurisdiction if the FOA Netting Agreement constitutes a master agreement within the meaning of Article 85 of the Bankruptcy Law (please refer to paragraph 3.3.5 above and to the drafting modifications recommended in paragraph 3.3) and if this is the Liquidation Amount that is to be set off. We are of this opinion because Article 85 of the Bankruptcy Law provides that set-off of the amount resulting from the settlement of transactions in accordance with Article 85 of the Bankruptcy Law is admissible. Moreover, in respect of the Recovery Proceedings, in our opinion the limitations applicable to set-off referred to in Article 498 of the Bankruptcy Law do not apply to a master agreement within the meaning of the Bankruptcy Law (please refer to paragraph 4.3 below for further information).

Provided that amendments specified in Annex 5 as necessary in order for the opinions expressed in paragraphs 3.3 – 3.5 to apply are made, no further amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 to apply.

- 3.7.2 In relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision (and in which the FOA Set-Off Provisions are not Disapplied 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 in respect of the Client, the Firm or, as the case may be, the Clearing Member would (to the extent that set-off is not already covered by the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision) 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:

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- (a) where the FOA Set-Off Provisions include the General Set-Off Clause:
  - (i) 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
  - (ii) 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
- (b) 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 for the following reasons.

Paragraphs 3.7.1(A) – 3.7.1(C) apply accordingly.

Provided that amendments specified in Annex 5 as necessary in order for the opinions expressed in paragraphs 3.3 – 3.5 to apply are made, no further amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.2 to apply.

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

In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions are 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, if there has been an Event of Default in respect of the Client or a CCP Default, so that the value of any cash balance owed by one Party to the other would be set off against any Available Termination Amount owed by the Party entitled to receive the cash balance, insofar as not already brought into account as part of the Relevant Collateral Value.

We are of this opinion for the following reasons.

Paragraphs 3.7.1(A) – 3.7.1(C) apply accordingly.

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Provided that amendments specified in Annex 5 as necessary in order for the opinions expressed in paragraphs 3.3 – 3.5 to apply are made, no further 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 3.8 to apply.

### **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 a CM Trigger Event or a CCP Default:

- (a) in the case of a CM Trigger Event, the Client; or
- (b) in the case of a CCP Default, either 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 for the following reasons.

Paragraphs 3.7.1(A) – 3.7.1(C) apply accordingly.

Provided that amendments specified in Annex 5 as necessary in order for the opinions expressed in paragraphs 3.3 – 3.5 to apply are made, no further 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 3.9 to apply.

### **3.10 Enforceability of the Title Transfer Provisions**

3.10.1 In relation to a 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) would 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.



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- 3.10.3 The questions in relation to the FOA Netting Agreement (with Title Transfer Provisions) or a Clearing Agreement which includes the Title Transfer Provisions, (x) whether Transfers of Margin would be characterised as outright transfers of title or creating a security or other interest, and (y) whether Margin Transferred may be used without restriction, would, under the conflicts of laws rules of this jurisdiction, be determined with respect to contractual aspects by reference to the governing law of the FOA Netting Agreement (with Title Transfer Provisions) and a Clearing Agreement which includes the Title Transfer Provisions, and with respect to proprietary aspects by reference to the governing law of the place where the Margin is located or to the law where the relevant securities account is held.
- 3.10.4 In relation to Margin located in this jurisdiction, the courts of this jurisdiction would not recharacterise Transfers of Margin under the Title Transfer Provisions of a 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.
- 3.10.5 In relation to Margin located in this jurisdiction, a Party would 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 a FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

We are of this opinion for the following reasons.

- 3.10.6 Polish law distinguishes between the obligation to provide collateral (contractual rights) and the act of providing of such collateral (property rights).
- 3.10.7 The obligation to provide collateral and the choice of English law to govern such obligation will be recognised by the Polish courts under Article 3.1 of the Rome I Regulation. Therefore, the obligation to provide collateral will be effective in this jurisdiction if it is effective under English law.
- 3.10.8 The law applicable to the property rights on the collateral needs to be determined on the basis of the conflict of laws rules in this jurisdiction and would, amongst other things, depend on the nature of the relevant collateral asset and its location and the rights the collateral provider intends to give in respect of that collateral (please refer to paragraph 4.4 below for further information).
- 3.10.9 Provided that the title to the collateral has been effectively transferred to the collateral taker, in a non-insolvency situation the Default Margin Amount would be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision, and the value of the Transferred Margin would be taken into account as part of the Relevant

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Collateral Value, if this were the case under English law governing the FOA Netting Agreement and the Clearing Agreement, respectively.

- 3.10.10 On the basis that the title transfer of collateral constitutes a financial collateral arrangement (please refer to paragraph 4.4.9 for further information), if the Insolvency Proceedings were opened against a Party the Default Margin Amount would be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision, and the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value, if the FOA Netting Agreement and the Clearing Agreement consist of a close-out netting provision (*klauszula komensacyjna*) referred to in 3.3.3 above. We are of this view because Article 85a of the Bankruptcy Law confirms that the declaration of bankruptcy of a Party will not affect the operation of a close-out netting provision (*klauszula komensacyjna*). Similarly, Article 498.5 of the Bankruptcy Law provides that the opening of Recovery Proceedings does not affect the operation of a close-out netting clause (*klauszula komensacyjna*).
- 3.10.11 The concept of outright title transfer in order to collateralise obligations has been established in this jurisdiction in the FCA Act which refers to the outright title transfers as a form of a financial collateral arrangement. Therefore, if the title to collateral was effectively transferred and provided that the intention of the parties was an outright transfer (and not a fiduciary transfer of ownership), in our opinion the courts of this jurisdiction would not recharacterise Transfers of Margin under the Title Transfer Provisions of a 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, and a Party would 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 a FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.
- 3.10.12 With respect to Transactions entered into on a regulated market, in a multilateral trading facility, or outside organised trading arrangements subject to mandatory clearing by a clearing house, the Insolvency Proceedings cannot have any legal effects in relation to the funds in a deposit account, collective account, securities account, cash account or bank account of that party used for the settlement of transactions. Similarly, the Insolvency Proceedings or any other legal action referred to above do not cause any legal effects with respect to the collateral taker in relation to collateral given by that participant.

Provided that amendments specified in Annex 5 as necessary in order for the opinions expressed in paragraphs 3.3 – 3.5 to apply are made, no further amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.10 to apply.

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

In relation to a 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 of the Non-Cash Security Interest Provisions (used with or without the Rehypotheication Clause) and/or the Client Money Additional Security Clause, provided always that:

- 3.11.1 the agreement 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
- 3.11.2 the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

### **3.12 Single Agreement**

Under the laws of this jurisdiction it is not necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision to be enforceable (please also refer to paragraph 4.2 below for further information).

### **3.13 Automatic Termination**

- 3.13.1 It is not recommended for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision. An automatic termination and liquidation under the FOA Netting Provisions in a situation where the FOA Netting Agreement does not constitute a master agreement within the meaning of Article 85 of the Bankruptcy Law will be invalid (and with respect to a situation where the FOA Netting Agreement does constitute a master agreement within the meaning of Article 85 of the Bankruptcy Law it might be invalid) in this jurisdiction in situations where a Party is declared bankrupt (please refer to paragraph 4.5 below for further information).
- 3.13.2 In consequence of our comments referred to in paragraph 3.13.1 above, it is not problematic for the effectiveness of netting that, under the Clearing Module Netting Provision and the Addendum Netting Provision, termination and liquidation of Client Transactions does not occur automatically upon the opening of Insolvency Proceedings in relation to a Firm, or as the case may be Clearing Member, incorporated or organised in this jurisdiction.

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### **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 Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions insofar 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 which is not an Insurance Company, a Credit Institution or an investment undertaking which provides services involving the holding of funds or securities for third parties, or a collective investment undertaking (in which case the authorities in this jurisdiction would defer to the proceedings in the Foreign Defaulting Party's home jurisdiction), can be subject to Insolvency Proceedings in this jurisdiction if the Foreign Defaulting Party has the centre of main interests in this jurisdiction, or the Foreign Defaulting Party is carrying out activity in this jurisdiction or has its residence or registered office in this jurisdiction or has assets located in this jurisdiction.

### **3.16 Special legal provisions for market contracts**

Other than the provisions of the Settlement Finality Act, the Act on Trading and the EUIR there are no special provisions of law which would affect the opinions given in this paragraph 3 which would apply to a Transaction between two Parties as a result of the fact that such Transaction was entered into on, or is back-to-back with a Transaction entered into on an exchange (in this or another jurisdiction), or is cleared at, or is back-to-back with a transaction to be cleared by a central counterparty.

## **4. QUALIFICATIONS**

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

### **4.1 Recognition of choice of law**

4.1.1 Our opinion set out in paragraph 3.2 above applies to contractual obligations only and we express no opinion on the binding effect of the choice of law provisions related to non-contractual obligations. The courts in this jurisdiction will recognise the choice of English law as the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, in each case subject to, and in accordance with, the provisions of Rome I Regulation. It results from the Rome I Regulation that, among other things:



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- (a) the Polish courts may refuse to apply a provision of English law if the application of that provision would be manifestly incompatible with the public policy of the Republic of Poland; in our view, the application of the provisions of English law giving effect to the provisions opined on in this opinion letter will not be manifestly incompatible with the public policy of the Republic of Poland;
- (b) the choice of English law as the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement does not restrict the Polish courts from applying overriding mandatory provisions of the law of this jurisdiction; in our view the consequences of declaration of bankruptcy for the contractual obligations of the bankrupt provided for in the Bankruptcy Law may constitute such overriding mandatory provisions and a court in this jurisdiction may apply those provisions notwithstanding the choice of English law, however, whether or not those provisions constitute overriding mandatory provisions on an international level would depend on the courts' interpretation; and
- (c) where all other elements relevant to the situation at the time the FOA Netting Agreement or, as the case may be, the Clearing Agreement was entered into were located in a country other than England, the choice of English law as the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement does not prejudice the application by the courts in this jurisdiction of provisions of law of that other country which cannot be derogated from by agreement.

4.1.2 With respect to an agreement entered into before 17 December 2009, but on or after 22 January 2008, the courts of this jurisdiction will recognise the choice of English law as the governing law of the agreement in each case subject to, and in accordance with, the provisions of the Rome Convention. According to the Rome Convention, if all the elements relevant to the situation are connected with one country only, the choice of English law will not prejudice the application of mandatory rules of that country. In respect of the agreement entered into before 22 January 2008, the courts of this jurisdiction will recognise the choice of English law as the governing law of the agreement in each case subject to, and in accordance with, the provisions of the Act of 12 November 1965 Private International Law (*ustawa z dnia 12 listopada 1965 roku Prawo prywatne międzynarodowe*). In respect of matters outside the material scope of the Rome I Regulation or the Rome Convention (as the case may be), the conflict of laws rules set out in the above-mentioned Act on Private International Law and since 16 May 2011 in the Act of 4 February 2011 Private International Law (*ustawa z dnia 4 lutego 2011 roku Prawo prywatne międzynarodowe*) apply, subject to provisions of other statutes where the conflict of laws rules are set out.

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- 4.1.3 No law of any jurisdiction will apply in this jurisdiction if its application were to have an effect that is contrary to the basic principles of public order (*podstawowe zasady porządku prawnego*) of the Republic of Poland. Moreover, if the court is unable to determine the substance of the foreign governing law within a reasonable period of time, it will apply Polish law.
- 4.1.4 As a rule, when interpreting applicable foreign law, the Polish courts should refer to the applicable foreign legal doctrine and jurisprudence. However, when applying a foreign legal provision or concept that has its equivalent in the law of this jurisdiction, a Polish court may refer to its interpretation elaborated in the Polish legal doctrine and jurisprudence to the extent that the relevant legal provision or concept retains the meaning attributed to it in the applicable foreign legal system.
- 4.1.5 Pursuant to the Settlement Finality Act, the consequences of the declaration of bankruptcy or of the opening of bankruptcy proceedings under laws other than the law of this jurisdiction against an entity with its registered office in the territory of the Republic of Poland, which is a participant of a system governed by the laws of an EEA member state other than the Republic of Poland, concerning the rights and obligations arising from, or in connection with, participation in the system are determined by the law governing that system. Also, under the EUIR, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market are governed by the law of the Member State applicable to that system or market.
- 4.1.6 Where the Transactions are entered into between a Polish Client and a foreign Clearing Member which are cleared in a foreign CCP based on arrangements between the Client and the Clearing Member governed by the laws other than the law of this jurisdiction, and where the Transactions are entered into between a foreign Client and a Polish Clearing Member which are cleared in a Polish or foreign CCP based on arrangements between the Client and the Clearing Member governed by the laws other than the laws of this jurisdiction, in our opinion Bankruptcy Proceedings opened against a Polish Client or the Polish Clearing Member which has its centre of main interest in this jurisdiction, have cross-border effect and, as such, are subject to the EUIR. As a rule, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. There are, however, certain exceptions to this rule. Article 6.1 of the EUIR provides that the opening of the insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim. Whilst it might be argued that this Article shall be construed broadly to include close-out netting arrangements, Recital 27 of EUIR in connection with Article 9 of EUIR clarifies that the European legislator distinguishes between set-off and netting arrangements. Therefore,

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in our view, the conflict of law rules set out in Article 6.1 of EUIR do not apply to the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision.

4.1.7 Moreover, if entering into transactions between the Client and the Clearing Member involves participation of the Client and the Clearing Member in a payment or settlement system or in a financial market, pursuant to Article 9 of the EUIR, the effects of insolvency proceedings on the rights and obligations of the Client or a Clearing Member as parties to such payment system, settlement system or in a financial market, are governed by the law of the Member State applicable to that system or market. This, however, does not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant system or financial market. Consequently, the application of the Agreement to any Transactions effected in a system or market in another Member State may be modified by operation in the local laws.

4.1.8 Please also refer to paragraph 4.4 below for further information.

## **4.2 Enforceability of netting provisions**

4.2.1 As referred to in paragraph 3.3.5 above, Article 85 of the Bankruptcy Law introduces a special regime applicable to a master agreement (*umowa ramowa*) and "term financial contracts" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" entered into in its performance that effectively excludes "cherry-picking" rights of the Insolvency Representative. We believe that the definition of "term financial transactions" in Article 85.2 of the Bankruptcy Law should be interpreted broadly and applied to most derivatives, whether OTC or exchange-listed derivative transactions, including in particular swaps transactions (basic swaps, bullion swaps, commodity swaps, cross-currency swaps, currency swaps, equity or equity index swaps, interest rate swaps, total return swaps), options (bond options, bullion options, commodity options, currency options, equity index options, equity options, interest rate options, swap options), forward transactions (commodity forwards, equity forwards), bullion trades, cap transactions, collar transactions, floor transactions, foreign exchange transactions, forward rate transactions, credit protection transactions and weather transactions. In our view, "same-day" spots (as opposed to spots settled on a T+1 or T+2 basis) and cash deposits should be considered non-eligible transactions for the purpose of Article 85 of the Bankruptcy Law, because of their nature, which is not compliant with the nature of "term financial transactions", "financial instruments lending transactions" or "contracts for the sale and repurchase of financial instruments". We note that "same-day" spots and cash deposit transactions can be entered into under the FOA Netting Agreement or the Clearing Agreement, as the case may be, such Transactions are excluded from the scope of this opinion letter (please refer to

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paragraph 1.5 above for further information). While we believe that it is probable that they would not be included in the calculations of the single close-out amount when the FOA Netting Agreement or the Clearing Agreement is terminated after the declaration of bankruptcy of a Party, the claims thereunder will be capable of being set off with the claims in respect of the close-out amount (please refer to paragraph 4.3.4 below for further information).

- 4.2.2 In order to be recognised as a "master agreement" within the meaning of Article 85 of the Bankruptcy Law, such agreement should: (i) set out a framework for the execution of "term financial contracts" and/or "lending of financial instruments" and/or "contracts for the sale and repurchase of financial instruments" which will be entered into in the performance of such "master agreement" and (ii) contain provisions providing that its termination upon an occurrence of an Event of Default results in the termination of all transactions (i.e. "term financial contracts" and "lending of financial instruments" and "contracts for the sale and repurchase of financial instruments") entered into in its performance. We have suggested amendments to mitigate a risk that the Clearing Agreement will not be recognised a master agreement within the meaning of 85 of the Bankruptcy Law (please refer to Annex 5).
- 4.2.3 With respect to the Clearing Agreement which includes the Clearing Module Netting Provision, as referred to in paragraph 4.2.2 above, if such Clearing Agreement is to be recognised as a master agreement under Article 85 of the Bankruptcy Law, termination thereof needs to result in termination of all transactions entered into under that master agreement. Moreover, Article 85 of the Bankruptcy Law provides that either party may terminate such a master agreement (not only the Non-Defaulting Party or the Firm). The mechanism provided under the Clearing Agreement is different. We have suggested amendments to mitigate a risk that the Clearing Agreement will not be recognised a master agreement within the meaning of Article 85 of the Bankruptcy Law (please refer to Annex 5). The purpose of the suggested amendments was to create a separate master agreement with respect to each Cleared Transactions Set and corresponding Client Transactions applicable in the case of Client default as well as Firm / Clearing Member default. The Liquidation Amount arising on Client default under each of such master agreements may be subject to set-off in Bankruptcy Proceedings based on Article 85.4 of the Bankruptcy Law which provides that set-off of the liquidation amount under a master agreement is permissible (please refer to paragraph 4.3.4 below for further information). With respect to the Recovery Proceedings, in our opinion the limitations to set-off provided for in Article 498 of the Bankruptcy Law do not apply (please refer to paragraph 4.2.6 for further information). Further, the purpose of the suggested amendments was to give authorisation to a CCP under which the CCP will take actions resulting in acceleration of the Firm or the Clearing Member (as the case may be)



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obligations with respect to the relevant Cleared Transactions Set which will result in termination of a master agreement relevant for that Cleared Transactions Set and all Client Transactions entered into under that Clearing Agreement. Although in our view taking actions under such revised clauses will have an effect of termination of the relevant master agreement, we are not aware of a situation where similar arrangements have been approved by courts. Moreover, our drafting suggestions do not cover a situation where a CM Trigger Event or a Firm Trigger Event are a consequence of an automatic termination of the relevant Firm/CCP Transactions in accordance with the relevant Rule Set. Termination of the Clearing Agreement in consequence of such actions may not be regarded termination of a master agreement by either party to that agreement as referred to in Article 85 of the Bankruptcy Law.

- 4.2.4 To benefit from the close-out netting rules provided for in the Bankruptcy Law, Transactions should be entered into "in performance" of the FOA Netting Agreement or the Clearing Agreement, as the case may be. It would be doubtful that the Transactions have been entered into "in performance" of the FOA Netting Agreement or the Clearing Agreement, as the case may be had such agreement been executed after the Transactions. It is also unclear whether the transferred Transactions referred to in clause 3(b) of the ISDA/FOA Clearing Addendum will be considered entered into in performance of the Clearing Agreement and, in consequence, whether such Transactions would benefit from Article 85 of the Bankruptcy Law. Even if such Transactions are not considered entered into in performance of the master agreement, in our view, this will not affect the right to settle the other Transactions (which were entered into in the performance of the FOA Netting Agreement or the Clearing Agreement, as the case may be) in accordance with the terms of that FOA Netting Agreement or the Clearing Agreement, as the case may be (including with respect to calculation of a net amount).
- 4.2.5 Pursuant to Article 85.4 of the Bankruptcy Law, if a master agreement within the meaning of this Article is terminated, the settlement method in the case of termination which is provided for in the master agreement will be observed. Therefore, from this provision it follows that the settlement method needs to be set out in the master agreement. Although it is not entirely clear how detailed the method should be, in our view, the close-out netting set out in the FOA Netting Agreement or the Clearing Agreement, as the case may be, constitutes a settlement method referred to in Article 85. In this context we note, however, that we are aware of a ruling of a regional court (*sąd rejonowy*) issued in 2011 in which the court recognised the bank's right to calculate the close-out net amount to be an inadmissible breach of the principle of the freedom of contract, consisting in the assignment to the bank of a unilateral right to establish the amount of liability of the other party to the agreement. We have no information whether the case was re-examined by the court.

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- 4.2.6 As mentioned in paragraph 4.2.3 above, if a party to a master agreement within the meaning of Article 85 of the Bankruptcy Law is declared bankrupt, then either party may terminate such a master agreement and not just the non-defaulting party. Therefore, (despite that under the FOA Netting Agreement, or the Clearing Agreement, as the case may be, this is the Non-Defaulting Party (or, in case of one-way clauses this is the Firm) that may terminate the FOA Netting Agreement, or the Clearing Agreement) in case of default of either Party to the FOA Netting Agreement or in case of Client default under the Clearing Agreement, either the non-defaulting party or the Insolvency Representative will be allowed under Article 85 of the Bankruptcy Law to terminate respectively the FOA Netting Agreement and the Clearing Agreement.
- 4.2.7 Pursuant to Article 498 of the Bankruptcy Law from the commencement of the Recovery Proceedings performance of obligation by a debtor and the accrual of interest are suspended. The creditors may not instigate or continue injunctive and execution proceedings against the debtor, save for the proceedings related to the claims that are not covered by an arrangement with creditors. There are also restrictions applicable to set-off. The creditors may not instigate or continue injunctive and execution proceedings against the debtor with the exception of claims which are not covered by an arrangement with creditors. Further, Article 503 of the Bankruptcy Law provides that the proposed restructuring of an enterprise should provide for restructuring of debts that may be subject to an arrangement in Bankruptcy Proceedings. Pursuant to Article 85.1 of the Bankruptcy Law claims due under Transactions entered into in performance of the master agreement (within the meaning of Article 85 of the Bankruptcy Law) are not covered by the arrangement. Therefore, although it is not clearly stated in the relevant provisions and literal interpretation of the above-mentioned Article 498 of the Bankruptcy Law might lead to different conclusions, in our opinion, the consequences of the commencement of the Recovery Proceedings such as suspension of performance of the debtor's obligations and the accrual of interest as well as limitations related to set-off do not apply to claims under master agreements within the meaning of Article 85 of the Bankruptcy Law since such claims cannot be subject to arrangement with creditors and, in consequence, cannot be subject to debt restructuring in the course of the Restructuring Proceedings. Therefore, in our opinion, Article 498 of the Bankruptcy Law would not adversely affect the netting of Transactions entered into under a master agreement within the meaning of Article 85 of the Bankruptcy Law or the set-off of the close-out amount resulting from Transactions under that master agreement. We note, however, that we are not aware of any court ruling related to the above-mentioned issue.
- 4.2.8 Pursuant to Article 80 of the Bankruptcy Law the opening of Bankruptcy Proceedings against the participant of a system will not preclude the right to use money and financial instruments kept and registered in the clearing

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account not encumbered with a right *in rem* for the benefit of third persons, and financial instruments registered in the bankrupt's clearing account as security for a loan granted under the payment system or securities settlement system, if that loan may be made available under the existing loan agreement, in order to pay debts arising from settlement orders registered in the system at the latest on the system's business day commencing on the date when bankruptcy is declared. Pursuant to Article 66 of the Bankruptcy Law, if a participant of the system is declared bankrupt, its bankruptcy estate will not include the assets referred to above or any other assets as may be necessary to perform its obligations as a member of the system incurred before the declaration of bankruptcy. The assets that remain after the performance of its obligations as a member of the system will form part of its bankruptcy estate. Under Article 67 of the Polish Bankruptcy Law, subject to certain exceptions, the collateral provided by the participant for the benefit of the system will not be part of its bankruptcy estate, either. Moreover, pursuant to Article 136 of the Polish Bankruptcy Law, if a participant of the system is declared bankrupt, the legal effect of entering a settlement order in the system and the results of netting are unchallengeable and binding on third parties if the order was entered in the system before the declaration of bankruptcy. If the settlement order is entered in the system after the declaration of bankruptcy and is executed on a business day of the system beginning on the date when bankruptcy is declared, under Article 137 the legal effect of entering that order in such system is unchallengeable and binding on third parties only if the entity managing the system proves that at the time when, in accordance with the rules of the functioning of the system, the order became irrevocable, the entity was unaware or could not have been aware of that bankruptcy declaration. Pursuant to Article 4 of the Settlement Finality Act, the above mentioned rules apply accordingly (a) in the event of the issuance of a judgment or decision on liquidation, suspension or limitation of the conduct of activity by a participant of the system and also if other legal action is taken against a participant of the system that result in the suspension or limitation of the performance of clearing instructions in the system with regard to that participant, (b) to judgments, orders or decisions issued against that participant by a foreign court or other authority in foreign insolvency proceedings, and (c) to a foreign entity that is a member of the system governed by Polish law if foreign bankruptcy proceedings are opened against it.

#### **4.3 Set-Off**

- 4.3.1 Generally, the laws of this jurisdiction provide for a statutory set-off which may be effected by way of a unilateral declaration of a party if certain conditions are met.
- 4.3.2 If the obligations under the FOA Netting Agreement or the Clearing Agreement, as the case might be, are not "mutual" between the Parties they may not be eligible for inclusion in a set-off pursuant to the FOA Set-Off

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Provisions, Clearing Module Set-Off Provision or Addendum Set-Off Provision, as the case may be. For these purposes, under the laws of this jurisdiction, obligations would be regarded as "mutual" if the parties are each individually and solely liable as regards obligations owing by each other and are solely entitled to the benefit of obligations owed to each other, respectively. Circumstances in which the requisite mutuality is missing include, without limitation, where a Party is acting as agent for another person, or is a trustee, or in respect of which a Party has a joint interest (including partnership) or such in respect of which a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law. Accordingly, where such mutuality does not exist, amounts will not be included in set-off. However, the inclusion of amounts in respect of non-mutual obligations would not impair the effectiveness of set-off under the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision in respect of obligations which are mutual. Comments in this paragraph 4.3.2 apply to netting accordingly.

- 4.3.3 Despite the legal framework of statutory set-off, a contractual set-off based on general freedom of contract is generally permissible in this jurisdiction. The Rome I Regulation provides that where the right to set-off is not agreed by the parties, set-off is governed by the law applicable to the claim against which the right to set-off is asserted. Consequently, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision will be enforceable in accordance with their terms if they are enforceable under English law. However, distinction has to be made between: non-insolvency-related set-off and insolvency-related set-off. This is because the Bankruptcy Law contains provisions on insolvency-related set-off which constitute mandatory law and thus may override the general freedom of contract in the context of contractual set-off provisions if Insolvency Proceedings were opened.
- 4.3.4 Pursuant to the Bankruptcy Law, if the Bankruptcy Proceedings with a liquidation option have been opened, the set-off of the bankrupt's claim against the creditor's claim is permitted if both claims existed on the date of declaration of bankruptcy, even if the payment of one of the claims was not due. A set-off is not permitted if the bankrupt's debtor acquired a claim through a transfer or endorsement after the declaration of bankruptcy or acquired it within the year immediately preceding the date of declaration of bankruptcy, being aware of that grounds to declare bankruptcy exist. However, claims may be set off if the acquiring party became the bankrupt's creditor as a result of the repayment of its debt for which it was liable personally or with specific assets, and providing that the acquiring party was not aware of the existence of any grounds to declare bankruptcy at the time of assuming liability for the bankrupt's debt. In any case, claims may be set off if liability was assumed a year or more prior to the declaration of bankruptcy.



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Moreover, a set-off is not permitted if the creditor became the bankrupt's debtor after the date of declaration of bankruptcy. Pursuant to the Bankruptcy Law, during bankruptcy proceedings with a composition option, set-off is not permitted if the creditor became the bankrupt's debtor after declaration of bankruptcy, or if the creditor that is the bankrupt's debtor, became his creditor after the declaration of bankruptcy by acquiring a claim incurred before the declaration of bankruptcy through a transfer or endorsement. However, claims may be set off if a claim was acquired as a result of the repayment of a debt for which the acquiring party was liable personally or with specific assets, and if the acquiring party's liability for the debt was incurred prior to date of submission of the bankruptcy petition.

Although this is not clearly stated in the Bankruptcy Law, in our opinion those limitations do not apply to set off of the liquidation amount calculated under a master agreement within the meaning of Article 85 of the Bankruptcy Law, in this case the Liquidation Amount and the Cleared Set Termination Amount. Article 85.4 of the Bankruptcy Law provides that a set-off of the amount resulting from the settlement of transactions in accordance with Article 85 of the Bankruptcy Law is admissible and, in our opinion, this is an exception to the general rules applicable to set-off in Bankruptcy Proceedings (please, however see paragraph 4.3.6 below). Therefore, in our opinion, the limitations described above will not apply where it is the Liquidation Amount or the Cleared Set Termination Amount that is to be set off. If a Party seeks to exercise set-off rights in respect of debts other than the Liquidation Amount or the Cleared Set Termination Amount, the limitations described above will apply subject to paragraph 4.3.5 below.

- 4.3.5 Under Article 6 of the EUIR, a party will be entitled to set off its claims against the claims of the other party, if such set-off is permitted by the laws applicable to the bankrupt's claim. Polish scholars are of the view that the above-mentioned provision of the EUIR applies to claims that arose before Bankruptcy Proceedings were opened. Therefore, a set-off of claims that arose after Bankruptcy Proceedings were opened will be subject to Polish law and, as such, the comments presented in paragraph 4.3.4 apply. The EUIR does not apply to Recovery Proceedings and, in consequence, the conflicts of laws rules referred to in this paragraph 4.3.5 do not apply (with respect to Recovery Proceedings, please refer to paragraph 4.2.7 above for further information).
- 4.3.6 The Bankruptcy Law provides that in Bankruptcy Proceedings, with respect to a creditor's claim, only the amount of the main claim plus interest accrued until the day of declaration of bankruptcy may be set off. Although this is not entirely clear, in our view, there is a risk that a party will not be entitled to set off the interest accrued after the date of declaration of bankruptcy, even if this were allowed under the laws of another jurisdiction applicable to the bankrupts' claim.

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- 4.3.7 Under the General Set-Off Clause and Clearing Module Set-Off Provision, any amounts whether actual or contingent, present or future, may be subject to set-off. Furthermore, from the Addendum Set-Off Provision it follows that unascertained amounts may be subject to a set-off. In our opinion, under the laws of this jurisdiction (and subject to paragraph 4.3.5 above), in Bankruptcy Proceedings the above-mentioned clauses might be unenforceable with respect to amounts which are contingent, future or unascertained.
- 4.3.8 To exercise the set-off right in Bankruptcy Proceedings, a Party would need to make a relevant statement at the latest when lodging the claim.

#### **4.4 Enforceability of the Title Transfer Provisions**

- 4.4.1 If a claim is effectively brought before a court in this jurisdiction, we believe that the court will apply the following conflict of laws rules to the property rights on the collateral.
- 4.4.2 As a general rule, pursuant to Article 41 of the Private International Law, rights *in rem* (property rights) are governed by the laws of the state in which the subject of the rights is located. Therefore, as a rule, if the collateral is not located in this jurisdiction, the proprietary rights will not be governed by the laws of this jurisdiction.
- 4.4.3 With respect to book-entry Financial Instruments, the laws of the jurisdiction where the relevant securities account is maintained will be decisive in respect of the rights attached to the financial collateral, the priority of rights, and the steps required for the realisation of the financial collateral, as well as the good faith acquisition of the book-entry securities. Accordingly, the issue of enforceability of the Title Transfer Provisions may be determined by a system, or systems, of law other than the laws of this jurisdiction.
- 4.4.4 Article 44 of the Private International Law provides that the rights resulting from an entry in a securities account kept in a securities settlement system are governed by the laws of the country where that account is kept.
- 4.4.5 If securities are held via an Omnibus Account, one person is the holder of the Omnibus Account and other persons are the owners of the securities registered in it. The holder of an Omnibus Account is not considered the owner of the securities held via such an account. In order to determine who the actual owners are, as a rule, the laws of Poland will not be applicable, and for the purposes of determining the owners of the securities in Poland from the Polish law perspective it is sufficient for the owner to be specified by a foreign custodian and to notify the Polish custodian who maintains the Omnibus Account, thereof.
- 4.4.6 Pursuant to Polish law, under an agreement on the transfer of dematerialised securities, such securities are transferred upon a relevant entry being made in

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the securities account. Such an entry is effected after the registration of the transfer of the securities between the relevant deposit accounts maintained by Krajowy Depozyt Papierów Wartościowych S.A.

4.4.7 Further, pursuant to Article 12.2 of the Settlement Finality Act, where securities are provided as collateral security to participants in the system, the National Bank of Poland, the central bank of another Member State or the central bank of Iceland, Lichtenstein or Norway, or the European Central Bank, and their rights with respect to the securities are recorded:

- (a) in a register or account located in Poland – the rights of such entities attached to the securities are governed by Polish law; and
- (b) in a register or account located in another Member State, Iceland, Lichtenstein or Norway – the rights of such entities attached to the securities are governed by the laws of that other state.

4.4.8 To the extent that Polish law is decisive:

- (a) with respect to the proprietary aspects of transfer of collateral, in our opinion, transfer by the collateral provider of cash to an account held in the name of the collateral recipient will constitute a "title transfer" of that cash;
- (b) with respect to dematerialized securities, in our opinion, the entry of the securities in a securities account maintained for the collateral taker will constitute a "title transfer" of those securities; and
- (c) with respect to registered securities which are not dematerialized, in our opinion, an assignment combined with the release of the document will constitute a "title transfer" of those securities.

4.4.9 Certain opinions and qualifications in this opinion letter are expressed to apply if a financial collateral arrangement is involved. This is because the Bankruptcy Law provides for the special treatment of a financial collateral arrangement. In this jurisdiction, financial collateral is primarily regulated in the FCA Act which implements Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. The FCA Act provides for the following types of collateral arrangement: a financial pledge, a transfer of title to cash or credit claims or financial instruments, and a lock-up of a brokerage account, an omnibus account or other relevant account or a deposit account. To be recognised as a financial collateral arrangement, the arrangement needs to satisfy the following conditions:

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- (a) at least one party to a financial collateral arrangement is an FCA Eligible Party, and none of the parties to the financial collateral arrangement is an individual (*osoba fizyczna*);
- (b) the financial collateral to be provided consists of cash, Financial Instruments or credit claims;
- (c) an obligation secured by the financial collateral arrangement is a financial claim (*wierzytelność finansowa*), i.e. a pecuniary debt or receivables where the performance is limited to the delivery of Financial Instruments; and
- (d) a financial collateral arrangement needs to specify, among other things, the term (*termin*) for which the collateral arrangement is established; this requirement can be interpreted in a manner that the collateral agreement should specify a long-stop date after which the collateral arrangement should expire (and collateral be returned) regardless of whether the secured obligations will have been satisfied or not by that date; we note that the Agreement does not contain any such provision, please refer to Annex 5 for suggested modifications.

#### **4.5 Automatic Termination**

- 4.5.1 Article 83 of the Bankruptcy Law provides that any contractual provisions reserving the right to modify or terminate, in the event of the declaration of bankruptcy, a legal relationship to which the bankrupt is a party are invalid. There is no specific provision in the Bankruptcy Law that disciplines the operation of Article 83 of the Bankruptcy Law in respect of the master agreements referred to in Article 85 of the Bankruptcy Law. It may be argued that bearing in mind the purpose of Article 85, Article 85 constitutes *lex specialis* with respect to Article 83 of the Bankruptcy Law and that the limitations set out in Article 83 do not apply to master agreements within the meaning of Article 85 and, in consequence, automatic early termination clause would be effective in the event of bankruptcy of a party to such an agreement. On the other hand, automatic termination might not be regarded as termination of a master agreement by either party to it as referred to in Article 85 of the Bankruptcy Law.
- 4.5.2 In any case, an automatic termination triggered by an Event of Default preceding the declaration of bankruptcy (or in relation to counterparties who are not capable of being declared bankrupt under the laws of this jurisdiction, if triggered by an Event of Default other than the declaration of bankruptcy) would, in our view, be valid in general.



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#### **4.6 Insolvency of Foreign Parties**

A foreign Party cannot be subject to Insolvency Proceedings in this jurisdiction if the centre of main interests of the foreign Party is in a Member State (other than the Republic of Poland or Denmark) to which the EUIR applies and the defaulting Party has no establishment (within the meaning of the EUIR) in this jurisdiction, in which case the Polish courts will have no jurisdiction with respect to Insolvency Proceedings, and the authorities in this jurisdiction will defer to the proceedings in the foreign Party's jurisdiction.

#### **4.7 General Qualifications**

4.7.1 Where an obligation has been entered into (including under a Transaction or a transfer of Margin under the Title Transfer Provisions) after the commencement of Insolvency Proceedings in relation to a Party, any amount which is due in respect of such an obligation may not be capable of inclusion in the netting under the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, or a set-off under the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision, but in our opinion this would not impair the effectiveness of the netting under the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, or a set-off under the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision in respect of amounts due in respect of Transactions entered into before the commencement of such Insolvency Proceedings.

4.7.2 Our opinion is qualified in cases where both Parties have defaulted. If, at the time a Party proposes to exercise its rights under the FOA Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions, Insolvency Proceedings have been initiated in relation to that Party, additional considerations will apply which may affect the opinions given in paragraph 3 with regard to those provisions. Likewise, (in relation to a Clearing Agreement) if at the time a Firm Trigger Event or a Clearing Member Trigger Event has occurred in relation to a Party acting as a Firm, or as the case may be a Clearing Member, Insolvency Proceedings have been initiated in relation to the Party acting as a Client, additional considerations will apply which may affect the opinions given in paragraph 3 with regard to the Clearing Module Netting Provision and the Addendum Netting Provision. We have not addressed, in this opinion letter, circumstances of Insolvency Proceedings applying to a Party at the time that it is seeking to exercise rights under those provisions and accordingly, our opinions may not apply in such cases.

4.7.3 Pursuant to the Bankruptcy Law, any claims expressed in foreign currencies are subject to conversion into the Polish currency on the date of declaration of bankruptcy.

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4.7.4 The following claw-back provisions apply under the Bankruptcy Law:

- (a) any legal acts performed by the bankrupt during the year preceding the date on which the bankruptcy petition was filed that result in the disposal of its assets shall be ineffective vis-à-vis the bankruptcy estate if they were made for no consideration or if they were made for consideration but the value of the bankrupt's performance grossly exceeds the value of the consideration received by or stipulated for the bankrupt or a third party;
- (b) the creation of security (whether in the form of *in rem* security or "personal" security, such as a guarantee) in respect of a debt not yet due and payable, and made by the bankrupt during a period of two months directly preceding the date on which the bankruptcy petition was filed, shall also be ineffective vis-à-vis the bankruptcy estate. However, the recipient of the payment or security may, by way of a suit or allegation, demand that such acts be declared effective if at the time the acts were carried out the recipient was unaware of the grounds for declaring bankruptcy.

However, pursuant to Article 127.4 of the Bankruptcy Law, the claw-back provisions referred to above do not apply to collateralisation (including financial collateral arrangements) relating to, among other things, term financial contracts referred to in Article 85.1 of the Bankruptcy Law.

4.7.5 Pursuant to Article 128 of the Bankruptcy Law, any legal act carried out by the bankrupt for consideration during a period of six months directly preceding the date on which the bankruptcy petition was filed, with the bankrupt's affiliated company, are ineffective vis-à-vis the bankruptcy estate.

4.7.6 According to Article 527 of the Civil Code, if, as a result of a legal transaction effected by a debtor to the detriment of its creditors (i.e., where the debtor became insolvent or became insolvent to a greater extent as a result of the transaction) a third party has gained a benefit, each of the creditors (or, if the debtor is declared bankrupt, the relevant bankruptcy officer) may demand that that transaction be recognised as ineffective with regard to it if:

- (a) the debtor consciously acted to the creditors' detriment; and
- (b) the third party knew or, had it acted with due diligence could have known that the debtor was acting to the detriment of its other creditors (and the third party's knowledge is presumed if it remained in a permanent economic relationship with the debtor).

In general, out of bankruptcy, an action based on this article can be raised within five years of the date of the transaction in question, and in bankruptcy, an action can be raised by the bankruptcy officer within two years of the

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declaration of bankruptcy; in certain circumstances, however, an action can be raised even after two years of the date of the declaration of bankruptcy, but in either case such actions are subject to a general period of five years, commencing on the date of the transaction in question.

Neither the FCA Act nor the Bankruptcy Law disapply the operation of Article 128 of the Bankruptcy Law or Article 527 of the Civil Code in respect of term financial operations or the lending of financial instruments or repos or financial collateral arrangements relating to such transactions.

As regards Article 527 of the Civil Code, as a matter of principle, the remedies available thereunder will apply to situations where a Transaction is not effected at arm's length. If a Transaction was effected on market terms it would not be challengeable based on the principles of Article 527 of the Civil Code.

The above-mentioned provisions enabling appeals against acts at law or determining the ineffectiveness of acts at law carried out by a bankrupt do not apply to netting if a participant of the system is declared bankrupt, provided that:

- (c) the transfer orders were entered into the system before the declaration of bankruptcy; or
- (d) the transfer orders are entered into the system after the declaration of bankruptcy and are carried out within the business day, as defined by the rules of the system, during which the bankruptcy is declared, provided that the system operator can prove that at the time that such transfer orders become irrevocable, it was neither aware, nor should have been aware, of the declaration of bankruptcy.

4.7.7 However, if Bankruptcy Proceedings are carried out pursuant to the EUIR, the rules relating to the acts detrimental to all the creditors will not apply to a person who benefited from such act if the person provides a proof that the act is subject to the law of a Member State other than this jurisdiction, and that law does not allow any means of challenging that act in the relevant case.

4.7.8 With respect to branches of foreign entities in this jurisdiction, to the extent the EUIR does not apply and there is no other international treaty to which the Republic of Poland is a party, if the centre of the debtor's main business is located outside this jurisdiction, bankruptcy proceedings instituted by a Polish court will only involve the debtor's assets located in this jurisdiction.

4.7.9 The obligations of the respective parties under an agreement can be cancelled or modified by a competent court if, following an extraordinary change of circumstances, the performance of the agreement would result in excessive difficulties or threaten one of the parties with substantial losses which the

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parties did not foresee when concluding the agreement. The above-mentioned rule, known as the *rebus sic stantibus* clause, is aimed at providing a remedy for a party in a situation where in the period between the conclusion of the agreement and the making of the performances set out in that agreement a material and unexpected change in the circumstances occurs and as a result, the party obliged to make the performances would find itself in a situation resulting in a substantial loss being suffered by it. This remedy is designed to be an exception to the *pacta sunt servanda* rule. In the opinion of some legal scholars a deep economic crisis or major transformations in the structure of the domestic and international market may be classified as such extraordinary changes of circumstances. In one of its rulings the Supreme Court (*Sąd Najwyższy*) stated that an extraordinary change of circumstances should be understood as a state of affairs resulting from circumstances which are not covered by a typical contractual risk and are of an objective nature and, therefore, independent of the parties, which was not foreseen by them upon the conclusion of the agreement and could not have been foreseen by them on any basis. In our view, bearing in mind the current market situations and turbulences on the financial markets in the last few years, a situation where the market moves against one party should not be regarded as a situation not covered by the risk associated with the conclusion of agreements such as the FOA Netting Agreement or the Clearing Agreement, or as a situation that the Parties entering into the FOA Netting Agreement or the Clearing Agreement, could not foresee and, in consequence, should not be considered as an extraordinary change of circumstances. However, this will be assessed by the court each time on the basis of the circumstances of a given case.

- 4.7.10 All contracts and other sources of legal relationship are affected by certain fundamental principles of Polish civil law, such as the prohibition of the misuse of a party's legal right or privilege, the principle of taking into account the socio-economic purpose of each right or claim and the principles of social co-existence while interpreting the content of each agreement or legal instrument and other similar principles based on the concepts of equity and public order.
- 4.7.11 Under the laws of this jurisdiction, when examining the meaning of a contract, one should examine what the congruent intention of the parties and the purpose of the contract were, rather than simply rely on the literal wording of thereof. Therefore, when interpreting a contract, a Polish court can also take into consideration circumstances outside the scope of the wording of the contract that indicate the congruent intention of the parties and purpose of the contract, divergent from its literal wording.
- 4.7.12 Under the law of this jurisdiction, a right or remedy may be deemed to be waived impliedly (*per facta concludentia*), for example by taking no action in circumstances where the lack of action indicates (e.g. by reference to correspondence or other communication) the intention to grant a waiver.



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Similarly, a consent may be deemed to be granted impliedly, and an agreement may be deemed to be amended impliedly.

- 4.7.13 In this jurisdiction there is no doctrine of precedent, i.e. no rule or case upon which one can rely in reviewing or opining on matters relating to the law and there is a likelihood of different opinions and interpretations of the same issue of the law being reached or made by different courts; thus the rendering of opinions on the law of this jurisdiction does not warrant that a court considering a potential dispute will adopt the view or views expressed in this opinion letter.
- 4.7.14 There are exchange control laws in the Republic of Poland relating to the payment of foreign currency obligations.
- 4.7.15 The opinions expressed in this opinion letter are subject to the effects of any United Nations, European Union or Polish sanctions or other similar measures implemented or effective in this jurisdiction with respect to the Party which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted under the laws of, or carries out business activity in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.
- 4.7.16 A Transaction or, as the case may be, a Client Transaction may be affected by the operation of Regulation (EU) no 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("**EMIR**") in the event of a central counterparty ("**CCP**") taking default action against a Party which is a clearing member of the CCP. In particular:
- (a) under articles 48(5) and 48(6) of EMIR, assets and positions of a Party which is a "client" as defined by EMIR (a "**Client Party**") may be transferred to another clearing member of the CCP. If the value of those assets or positions, or a sum calculated so as to take account of that value, is included in a Liquidation Amount or Cleared Set Termination Amount, the Client Party could receive an overpayment unless an adjustment is made to the Liquidation Amount or Cleared Set Termination Amount. Whether such an adjustment is necessary will depend on the transfer mechanism used by the CCP, but in appropriate cases may take the form of clause 5.2.2(i) of the FOA Clearing Module. If such an overpayment could arise but has not been contractually provided for, the result of netting under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision may be adjusted by the court or the Insolvency Representative to take account of the overpayment, but we consider that the effectiveness of the FOA Netting Provision, the Clearing

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Module Netting Provision or the Addendum Netting Provision would not otherwise be impaired;

- (b) under article 48(7) of EMIR, an amount may be paid directly by a CCP to a Client Party, notwithstanding that that amount, or a sum calculated so as to take account of that amount, is included in a Liquidation Amount or Cleared Set Termination Amount. In such circumstances the Client Party would receive an overpayment unless a payment adjustment clause (such as clause 6 of the FOA Clearing Module) is included in the FOA Netting Agreement or, as the case may be, Clearing Agreement. Similarly, if an amount owed to a Client Party by the other Party to an FOA Netting Agreement or, as the case may be, Clearing Agreement has purportedly been set off under an FOA Set-Off Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision, but an amount relating to the same obligation has been paid directly by a CCP to a Client Party, an overpayment may also be received by the Client Party. If such an overpayment could arise but has not been contractually provided for, the result of applying the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision may be adjusted by the court or the Insolvency Representative to take account of the overpayment, but we consider that the effectiveness of such provisions would not otherwise be impaired.

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

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

- (a) the officers, employees, auditors and professional advisers of any addressee or any subscribing member;
- (b) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings; and
- (c) any competent authority supervising a subscribing member or its affiliates

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of

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reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made and in preparing this opinion we have not had regard to the interests of any such person.

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

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

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

Yours faithfully,



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## **SCHEDULE 1**

### ***Banks***

Subject to the modifications and additions set out in this Schedule 1 (*Banks*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Banks.

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 1.3 is deemed deleted and replaced with the following:

"This opinion is not given in respect of Bank that were created by way of an act of Polish statute (*ustawa*) (unless the statute provides that such a Party may be subject to Bankruptcy Proceedings under the Bankruptcy Law, in which case the opinions given in this opinion letter as modified by this Schedule 1 apply to Banks) or in the performance of an obligation imposed by a Polish statute (*ustawa*). This is because pursuant to Article 6.4 of the Bankruptcy Law such a Party cannot be declared bankrupt and the consequences of their insolvency need to be reviewed on a case-by-case basis. In particular, this opinion is not given in respect of Bank Gospodarstwa Krajowego as a Party. This opinion is not given in respect of a Party which is a mortgage bank (*bank hipoteczny*)."

Definition of the term "Bankruptcy Receiver" is deemed deleted and replaced with the following:

"1.9.3 **Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction, in particular a bankruptcy receiver (*syndyk*), bankruptcy estate administrator (*zarządca sądowy*) and court supervisor (*nadzorca sądowy*), appointed by the PFSA curator (*kurator*), commissioner administration (*zarząd komisaryczny*) or liquidator (*likwidator*)."

The following additional definitions shall be added to paragraph 1.9 (Definitions):

"**Bank Insolvency Proceedings**" means Bank Liquidation Proceedings and Bank Recovery Proceedings;

"**PFSA**" is to the Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego*);

### **3. MODIFICATIONS TO OPINIONS**

Paragraph 3.1 is deemed deleted and replaced with the following:



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**"3.1 Insolvency Proceedings: Bank**

3.1.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Bank could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are (i) Bankruptcy Proceedings, (ii) the bank liquidation proceedings under the Banking Law (the "**Bank Liquidation Proceedings**") and (iii) Recovery Proceedings as amended by the bank recovery proceedings under the Banking Law (the "**Bank Recovery Proceedings**").

3.1.2 Branches of Credit Institutions cannot be subject to Insolvency Proceedings in Poland as the Polish courts have no jurisdiction over bankruptcy of Credit Institutions.

3.1.3 We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented or amended as set out in Section 5 of Annex 5."

The following paragraphs 3.3.7, 3.4.4 and 3.5.4 shall be added:

"In the event of the opening of Bankruptcy Proceedings against a Bank which operates in at least one Member State other than this jurisdiction or in a member state of the European Free Trade Association (EFTA) which is a party to the agreement on the European Economic Area (EEA), and in the event of the opening of bankruptcy, reorganisation or any other similar proceedings against a Credit Institution which carries out activity also in this jurisdiction, and in the event of a declaration of bankruptcy, the opening of arrangement proceedings or any other similar proceedings against a foreign bank if it provides services in this jurisdiction and in at least one Member State or any other EEA jurisdiction, pursuant to Article 467 of the Bankruptcy Law, the effectiveness of any netting agreements is governed solely by the law of the contract which governs such agreements."

Paragraphs 3.7.1(B) - .7.1(C) are deemed deleted and replaced with the following:

"(B) In the event of the opening of Bankruptcy Proceedings against a Bank which operates in at least one Member State other than this jurisdiction or in a member state of the European Free Trade Association (EFTA) which is a party to the agreement on the European Economic Area (EEA), and in the event of the opening of bankruptcy, reorganisation or any other similar proceedings against a Credit Institutions which carries out activity also in this jurisdiction, and in the event of a declaration of bankruptcy, the opening of arrangement proceedings or any other similar proceedings against a foreign bank if it provides services in this jurisdiction and in at least one Member State or any other EEA jurisdiction, pursuant to Article 467<sup>1</sup> of the Bankruptcy Law, the opening of Bankruptcy Proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

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(C) Provided that the law of this jurisdiction applies to a set-off, the FOA Set-Off Provision will be enforceable in this jurisdiction if the FOA Netting Agreement constitutes a master agreement within the meaning of Article 85 of the Bankruptcy Law (please refer to paragraph 3.3.5 above and to the drafting modifications recommended therein). We are of this opinion because Article 85 of the Bankruptcy Law provides that set-off of the amount resulting from the settlement of transactions in accordance with Article 85 of the Bankruptcy Law is admissible. Moreover, in respect of the Recovery Proceedings, in our opinion the limitations applicable to set-off referred to in Article 498 the Bankruptcy Law do not apply to a master agreement within the meaning of the Bankruptcy Law (please refer to paragraph 4.2.6 below for further information)."

#### **4. MODIFICATIONS TO QUALIFICATIONS**

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

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

"If the PFSA makes a decision on the takeover of a Bank by another Bank or on the liquidation of a Bank (as the case may be), the surviving Bank or the liquidator (as the case may be) may demand that the content of an obligation incurred within a year before the takeover on the basis of a legal transaction of the Bank taken over or liquidated be changed if as a result of this transaction the other party obtained a receivable on conditions more favourable than the conditions applied at that time by the Bank taken over or by the liquidated Bank.

In the case of Bank liquidation, the liquidator may also deduct from the receivable of the Bank under liquidation the debt resulting from the bank account when the deadlines for its repayment have not taken place yet.

In the cases set out in the Banking Law, the PFSA may suspend the Bank's activity. During such suspension this Bank, among other things, does not regulate its obligations, except for those connected with the incurring of reasonable costs of on-going activity.

In the event of the declaration of bankruptcy of a Bank which operates in at least one Member State other than this jurisdiction or in a member state of the European Free Trade Association (EFTA) - a party to the agreement on the European Economic Area (EEA), and in the event of a declaration of bankruptcy, the opening of arrangement proceedings or any other similar proceedings against a foreign bank (within the meaning of the Banking Law) if it provides services in the territory of the Republic of Poland and in at least one Member State or any other EEA jurisdiction, the following additional qualifications apply:

- the declaration of bankruptcy will not affect the rights *in rem* on the assets located in the territory of another Member State or in any other EEA

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jurisdiction; this, however, will not preclude the actions for voidness or unenforceability of a legal act detrimental to creditors; and

- the rules of this jurisdiction relating to the voidness and voidability of legal acts detrimental to all creditors will not apply if the law governing any such legal act does not allow any means by which it can be challenged.

The above-mentioned qualifications apply to domestic Banks and do not apply to local branches of Credit Institutions.

Banks are not subject to the EUIR and, in consequence, with respect to Banks any references in the opinion letter to the EUIR are deemed deleted."

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**SCHEDULE 2**  
***Investment Firms***

Subject to the modifications and additions set out in this Schedule 2 (*Investment firms*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Firms.

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 QUALIFICATIONS**

The qualifications at paragraph 4 are deemed modified as follows.

"Investment Firms which provide services involving the holding of funds or securities for third parties are not subject to the EUIR and, in consequence, with respect to Investment Firms any references in the opinion letter to the EUIR are deemed deleted."



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**SCHEDULE 3**  
***Insurance Companies***

Subject to the modifications and additions set out in this Schedule 3 (*Insurance Companies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Companies.

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 1.3 is deemed deleted and replaced with the following:

"This opinion is not given in respect of Insurance Companies that were created by way of an act of Polish statute (*ustawa*) (unless the statute provides that such a Party may be subject to Bankruptcy Proceedings under the Bankruptcy Law in which case the opinions given in this opinion letter as modified by this Schedule 3 apply to Insurance Companies) or in the performance of an obligation imposed by a Polish statute (*ustawa*). This is because pursuant to Article 6.4 of the Bankruptcy Law such a Party cannot be declared bankrupt and the consequences of their insolvency need to be reviewed on a case-by-case basis. Furthermore, this opinion is not given in respect of a Party which is a reinsurance company or an Insurance Company which, in addition to insurance activity, carries out reinsurance activity.

Definition of the term "Bankruptcy Receiver" is deemed deleted and replaced with the following:

"**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction, in particular a bankruptcy receiver (*syndyk*), bankruptcy estate administrator (*zarządca sądowy*) and court supervisor (*nadzorca sądowy*), appointed by the PFSA curator (*kurator*), commissioner administration (*zarząd komisaryczny*) or liquidator (*likwidator*)."

The following additional definitions shall be added to paragraph 1.9 (Definitions):

"**PFSA**" is to the Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego*);

"**Recovery Proceedings applicable to Insurance Companies**" means recovery proceedings (*postępowanie naprawcze*) regulated under the Insurance Law.

**2. ADDITIONAL ASSUMPTIONS**

We assume the following:

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"The Insurance Company is either an insurance company offering insurance described in Schedule 1 Part I to the Insurance Law or an insurance company offering insurance described in Schedule 1 Part II to the Insurance Law (respectively, "**Life Insurance Companies**" and "**Non-life Insurance Companies**"), and the FOA Netting Agreement or the Clearing Agreement, as the case may be, may also apply to Transactions entered into in connection with a Life Insurance Company's life insurance products linked to an insurance capital fund (*ubezpieczenia na życie związane z ubezpieczeniowym funduszem kapitałowym*) (the "**Fund-Linked Products**")."

### 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.

Paragraph 3.1 is deemed deleted and replaced with the following:

#### "3.1 Insolvency Proceedings: Insurance Companies

3.1.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an Insurance Company could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are (i) Bankruptcy Proceedings, and (ii) Recovery Proceedings as amended by Recovery Proceedings applicable to Insurance Company.

3.1.3 We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented or amended as set out in Section 5 of Annex 5."

Paragraphs 3.7.1(B) - 7.1(C) are deemed deleted and replaced with the following:

"(B) In the event of the opening of Bankruptcy Proceedings against an Insurance Company which operates in at least one Member State other than this jurisdiction or in a member state of the European Free Trade Association (EFTA) - a party to the agreement on the European Economic Area (EEA), or in the event of the opening of bankruptcy proceedings, recovery proceedings or other similar proceedings against a foreign insurance company with its seat in a Member State or in other EEA jurisdiction which carries out activities in this jurisdiction, or in the event of the opening of bankruptcy proceedings, recovery proceedings or other similar proceedings against a foreign insurance company with its seat in a state other than a Member State or other EEA jurisdiction, if it carries out the activity in the territory of the Republic of Poland and it at least one other Member State or any other EEA jurisdiction, pursuant to Article 481 of the Bankruptcy Law in conjunction with Article 467<sup>1</sup> of the Bankruptcy Law, opening of the Bankruptcy Proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of

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the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

(C) Provided that the law of this jurisdiction applies to set-off, the FOA Set-Off Provision will be enforceable in this jurisdiction if the FOA Netting Agreement constitutes a master agreement within the meaning of Article 85 of the Bankruptcy Law (please refer to paragraphs 3.3.5 above for further information). We are of this opinion because Article 85 of the Bankruptcy Law provides that set-off of the amount resulting from the settlement of transactions in accordance with Article 85 of the Bankruptcy Law is admissible. Moreover, in respect of the Recovery Proceedings, in our opinion the limitations applicable to set-off referred to in Article 498 of the Bankruptcy Law do not apply to a master agreement within the meaning of the Bankruptcy Law (please refer to paragraph 4.3 below for further information)."

#### **4. MODIFICATIONS TO QUALIFICATIONS**

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

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

"Article 481 of the Bankruptcy Law provides that, among other things, Article 453 under which courts in this jurisdiction have no jurisdiction over an EEA Credit Institution applies *mutatis mutandis* to the opening of Bankruptcy Proceedings an Insurance Company which operates in at least one Member State other than this jurisdiction or in a member state of the European Free Trade Association (EFTA) - a party to the agreement on the European Economic Area (EEA), or in the event of the opening of bankruptcy proceedings, recovery proceedings or other similar proceedings against a foreign insurance company with its seat in a Member State or in other EEA jurisdiction which carries out activities in this jurisdiction, or in the event of the opening of bankruptcy proceedings, recovery proceedings or other similar proceedings against a foreign insurance company with its seat in a state other than a Member State or other EEA jurisdiction, if it carries out the activity in the territory of the Republic of Poland and it at least one other Member State or any other EEA jurisdiction. Although the above-mentioned provision is not entirely clear, we believe that based on the rule of pro-European interpretation of the laws of this jurisdiction, it should be interpreted in such a way that the courts in this jurisdiction have no jurisdiction in bankruptcy matters concerning insurance companies which have their head office in Member States and Member States (other than this jurisdiction) branches of insurance companies which have their head office in third countries, and such proceedings will be recognised in this jurisdiction *ipso iure*. We are aware, however, of different views presented in the legal doctrine, that opening in a Member States state other than this jurisdiction of a bankruptcy or other similar proceedings against a branch of an insurance company which has its head office in third countries does not preclude the possibility of opening by courts in this jurisdiction of Bankruptcy Proceedings against that branch.

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Pursuant to Article 477 of the Bankruptcy Law, once an Insurance Company is declared bankrupt, the assets covering its technical provisions constitute a separate bankruptcy estate – the Provisions-Related Estate which should be used to satisfy all liabilities of the Insurance Company arising from insurance policies, reinsurance contracts and the costs of liquidation. The remaining assets will constitute a distinct bankruptcy estate. Furthermore, Article 199.1 of the Insurance Law introduces a corresponding regulation in respect of the liquidation of an Insurance Company without any insolvency proceedings being commenced.

There is also the question of the interrelation between: (i) Article 85 and 85a of the Bankruptcy Law (which both confirm the operation of close-out netting, including the collateral netting, in bankruptcy) on the one hand and (ii) Article 477 of the Bankruptcy Law<sup>1</sup> (which provides that upon an Insurance Company's bankruptcy there will be two bankruptcy estates, one for "general assets" and the other one for the assets covering the Insurance Company's technical provisions) on the other hand. There are reasons to argue that Article 85a of the Bankruptcy Law overrides the application of Article 477 in the context of close-out netting arrangements.

The enforceability of collateral netting provisions upon bankruptcy is directly referred to in Article 85a of the Bankruptcy Law. This means that a counterparty to an agreement with an Insurance Company is allowed to benefit from the netting provisions if such Insurance Company is declared bankrupt. We believe that Article 85a shows that it was the law makers' intention that where there is a close-out netting arrangement in place, e.g. in a derivatives master agreement executed by an Insurance Company, the principles applicable to the netting contained in Article 85 and 85a are an exemption from the principles contained in Article 477. Had the law makers thought otherwise, they would have specifically addressed the two separate bankruptcy estates in Articles 85a or elsewhere. There is nothing in Article 477 (or elsewhere in the Bankruptcy Law) that would exclude the application of the principles relating to the protection of the close-out netting referred to above in respect of Insurance Companies if there is an eligible master agreement in place with them. There would be no close-out netting if there were no such master agreement in place (or another master agreement related to a financial collateral arrangement) and the Insurance Company were declared bankrupt. In such a case, Article 477 would be applicable and no overriding principle of close-out netting could be invoked by the counterparty of the Insurance Company (or the bankruptcy receiver of the Insurance Company, as the case may be).

Life Insurance Companies may offer Fund-Linked Products. Each "class" of such products is backed by a separate pool of assets (an insurance capital fund). Such fund is not a separate entity. The assets in the fund form a reserve created from proceeds from the premiums of Fund-Linked Products, invested in accordance with the relevant contracts relating to the Fund-Linked Products. Each Life Insurance Company might have multiple insurance capital funds. As far as the protection of the policyholders is

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<sup>1</sup> And the analogous provision in Article 199.1 of the Insurance Law.



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concerned, there are two types of Fund-Linked Products. The first is a product type where the policyholders "do not bear the risk of investment", i.e. the Life Insurance Company will make up any loss up to an amount guaranteed in the contract if the fund backing the relevant Fund-Linked Product is not sufficient. The second is a product type where the policyholders "bear the risk of investment", i.e. any pay-outs will come exclusively from the relevant fund backing a given Fund-Linked Product and not from other assets of the Life Insurance Company. The rules described in the preceding section could imply that the assets of an insurance capital fund should not be commingled with any other assets of a Life Insurance Company (be it "free assets", assets covering its technical provisions or assets of any other insurance capital fund). However, the provisions of the Bankruptcy Law (in particular Article 477) do not provide for the special treatment of the assets of a capital fund. Therefore, if the Life Insurance Company is declared bankrupt, we are of a view that such assets will form part of a single "technical provisions" bankruptcy estate and will, upon the bankruptcy declaration, commingle with assets of other capital funds and the general cover for the technical provisions of the bankrupt Life Insurance Company.

In the event of the declaration of bankruptcy of an Insurance Company which carries out activities also in at least one Member State other than this jurisdiction or in any other EEA jurisdiction, or a foreign insurance company with its seat in a Member State or in other EEA jurisdiction which carries out activities in this jurisdiction, or a foreign insurance company with its seat in a state other than a Member State or other EEA jurisdiction, if it carries out activity in the territory of the Republic of Poland and it at least one other Member State or other EEA jurisdiction, the following additional qualifications apply:

- the declaration of bankruptcy will not affect the rights *in rem* on the assets located in the territory of another Member State or in the other EEA jurisdiction; this, however, will not preclude the actions for voidness or unenforceability of a legal act detrimental to the creditors; and
- the rules of this jurisdiction relating to the voidness and voidability of legal acts detrimental to all creditors will not apply if the law governing any such legal act does not allow any means by which it can be challenged."

Insurance Companies are not subject to the EUIR and, in consequence, with respect to Insurance Companies any references in the opinion letter to the EUIR are deemed deleted."

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**SCHEDULE 4**  
***Individuals***

Subject to the modifications and additions set out in this Schedule 4 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Individuals.

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 1.3 is deemed deleted and replaced with the following:

"This opinion is not given in respect of Parties that are individuals running an agricultural holding (*gospodarstwo rolne*)."

**2. ADDITIONAL ASSUMPTIONS**

We assume the following:

"The FOA Netting Agreement, the Clearing Agreement and the Transactions are entered into by an Individual in relation to the Individual's business or professional activity."

**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.

Paragraph 3.10 is deemed deleted and replaced with the following:

"3.10.1 In relation to a 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 not 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) would 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

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Event, or a CCP Default, the value of the Transferred Margin would not be taken into account as part of the Relevant Collateral Value.

- 3.10.3 The questions in relation to the FOA Netting Agreement (with Title Transfer Provisions) or a Clearing Agreement which includes the Title Transfer Provisions, (x) whether Transfers of Margin would be characterised as outright transfers of title or creating a security or other interest, and (y) whether Margin Transferred may be used without restriction, would, under the conflicts of laws rules of this jurisdiction, be determined with respect to contractual aspects by reference to the governing law of the FOA Netting Agreement (with Title Transfer Provisions) and a Clearing Agreement which includes the Title Transfer Provisions, and with respect to proprietary aspects by reference to the governing law of the place where the Margin is located.
- 3.10.4 In relation to Margin located in this jurisdiction, the courts of this jurisdiction may recharacterise Transfers of Margin under the Title Transfer Provisions of a 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 transfer of ownership (*przewłaszczenie na zabezpieczenie*).
- 3.10.5 In relation to Margin located in this jurisdiction, a Party would not 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 a FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

We are of this opinion for the following reasons:

- 3.10.6 Polish law distinguishes between the obligation to provide collateral (contractual rights) and the act of providing such collateral and its proprietary consequences (property rights).
- 3.10.7 The obligation to provide collateral and the choice of English law to govern such obligation will be recognised by the Polish courts under Article 3.1 of the Rome I Regulation. Therefore, subject to limitations set out in the Rome I Regulation, the obligation to provide collateral will be effective in this jurisdiction if it is effective under English law.
- 3.10.8 The law applicable to the property rights of the collateral needs to be determined on the basis of the conflict of laws rules in this jurisdiction and would, amongst other things, depend on the nature of the relevant collateral asset and its location and the rights the collateral provider

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intends to give in respect of that collateral (please refer to paragraph 4.4 below for further information).

- 3.10.9 A Title Transfer may be recharacterised by the courts of this jurisdiction as creating a security transfer of ownership (*przewłaszczenie na zabezpieczenie*) of cash or securities and this will be treated in bankruptcy proceedings in the same way as an ordinary pledge. This means that a right assigned or asset transferred for security constitutes part of the bankrupt estate of the transferor, and the obligation secured by it will be satisfied from the encumbered asset or right after certain costs and debts awarded priority by the mandatory provisions of the law of this jurisdiction (such as the costs relating to the liquidation of the asset and other costs related to the bankruptcy proceedings) are paid. Furthermore, a security transfer of ownership is effective vis-à-vis the bankruptcy estate only if it has been executed with an authenticated date (*data pewna*). The most popular way to comply with this requirement is to present an agreement creating this security to a notary public and obtain a certificate from a Polish notary public."

#### **4. MODIFICATIONS TO QUALIFICATIONS**

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

Under the laws of this jurisdiction an Individual cannot be a party to a financial collateral arrangement and, in consequence, with respect to Individuals, any references in this opinion letter to financial collateral arrangements are deemed deleted.

#### **5. ADDITIONAL QUALIFICATIONS**

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

"An individual (*osoba fizyczna*) cannot be a party to a financial collateral arrangement.

If the Insolvency Proceedings were opened against a Party in theory the Default Margin Amount might be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision, and the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value, if this was considered to be a settlement method provided for in a master agreement within the meaning of Article 85 of the Bankruptcy Law. It is unclear whether this will be recognised by a court in this jurisdiction as an element of a settlement method provided for in a master agreement, and we are not aware of any court decisions or opinions of legal scholars in this jurisdiction supporting such an interpretation.



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The actual domicile of an Individual is decisive when determining certain aspects relevant to the transacting with this Individual and in determining the courts competent to adjudicate certain matters relevant to the Individual, such as on the declaration of bankruptcy (for the purpose of which, the location of assets comprising the bankrupt estate is relevant if the Individual has no domicile in this jurisdiction).

Pursuant to the Act of 25 February 1964 – Family and Guardianship Code (*ustawa z dnia 25 lutego 1964 roku Kodeks rodzinny i opiekuńczy*), in the case of the joint property of a husband and wife, a creditor can satisfy its claims towards one of the spouses from the joint property of the husband and wife only if the other spouse has expressed his/her consent to the assumption of the obligations towards the creditor by his / her spouse. The spouse's consents may be held to be unenforceable in relation to future undertakings (if any) of the Individual under the the FOA Netting Agreement or the Clearing Agreement, as the case may be. In particular, any amendment to the the FOA Netting Agreement or the Clearing Agreement will require a separate consent of the spouse of the Individual if such amendment would result in an increase of the liability of the Individual.

Pursuant to Article 423 of the Bankruptcy Law, if bankruptcy proceedings are opened after the death of an insolvent debtor (being an Individual), the claw-back provisions under the Bankruptcy Law should apply to the actions of the Individual performed in the last six months prior to the Individual's death."

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**SCHEDULE 5**  
***Investment Funds***

Subject to the modifications and additions set out in this Schedule 5 (*Investment Funds*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Funds.

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 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.

Subject to additional qualifications set out below, paragraph 3.1.2 is deemed deleted and replaced with the following:

"We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented or amended as set out in Section 5 of Annex 5."

**2. ADDITIONAL QUALIFICATIONS**

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

"It is not entirely clear if an Investment Fund is capable of formally being declared bankrupt in this jurisdiction. However, the possibility of its liabilities becoming higher than its assets (i.e. the state of actual insolvency) cannot be completely ruled out. We are not aware of any guidelines on this issue from recognised legal scholars or judgments of courts in this jurisdiction, and we cannot confirm that this issue has been tested in practice. Therefore, it remains to be seen which view is shared by the courts of this jurisdiction. However, whichever view prevails, our opinions presented in this opinion letter will not be fundamentally different.

According to the first view, no Investment Fund, even though it is a legal person under Polish law, can be declared bankrupt or be subject to Recovery Proceedings (and, consequently, the Bankruptcy Law provisions relevant to such events do not apply to Investment Funds). Therefore, Investment Funds would not be subject to Insolvency Proceedings. The reasoning for this position is based on a number of arguments, including, among others, the following:

- under the Act on Investment Funds, Investment Funds are managed and represented vis-à-vis third parties by the TFI managing them. Although TFIs are closely connected with the Investment Funds they manage, and are

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themselves capable of being declared bankrupt or becoming subject to Recovery Proceedings, their assets are separate from the assets of the Investment Funds managed by them, which are protected by a number of measures. For instance, the assets of Investment Funds are registered and, where appropriate, deposited, with a depository and cannot be attached or used to satisfy the claims of creditors of the depository if the depository is declared bankrupt. In addition, they are also immune from the claims of the creditors of the TFI;

- it is sometimes argued that Investment Funds are not "entrepreneurs" (*przedsiębiorcy*) (business entities) for the purposes of the Bankruptcy Law and, as they are not specifically mentioned in the Bankruptcy Law as one of the "non-entrepreneur" categories of entities capable of being declared bankrupt, the relevant provisions of the Bankruptcy Law relating to bankruptcy declaration or Recovery Proceedings do not apply to them; and
- in relation to Open-Ended Funds, liquidation proceedings under the Act on Investment Funds would most likely be triggered before the insolvency tests under the Bankruptcy Law could be met. Under Article 246.1.4 in conjunction with Article 92.1 of the Act on Investment Funds, such Investment Funds must be liquidated if their net asset value drops below PLN 2,000,000. In addition, under Article 92.2 of the Act on Investment Funds, the Open-Ended Fund must promptly publish a notice in accordance with the rules set forth in its articles every time its net asset value drops below PLN 2,500,000.

For the avoidance of doubt, the above special liquidation proceedings are applicable to all of the types of Investment Funds and not only to Open-Ended Funds. However, the grounds referred to in the section above only apply, under the Act on Investment Funds, to Open-Ended Funds and not to Closed-Ended Funds. There are no statutory grounds that relate directly to the inability of an Investment Fund to repay its creditors or a similar event which can be assimilated or lead to the de facto bankruptcy of an Investment Fund.

If the first view is shared by courts of this jurisdiction, our analysis in the context of Bankruptcy Proceedings would not be applicable to Investment Funds and, in particular, the FOA Netting Agreement or the Clearing Agreement, as the case may be, would not have to be a master agreement for the purposes of Article 85 of the Bankruptcy Law and there will be no need for the agreement to contain close-out netting provisions as Article 85 and Article 85a of the Bankruptcy Law would not be applicable. In consequence, with respect to Investment Firms, any references in this opinion letter to the Bankruptcy Proceedings are deemed deleted.

Paragraph 3.13 would be deemed deleted and replaced with the following:

"It is neither necessary nor desirable for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision to

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ensure the effectiveness of netting under the FOA Netting Agreement in the event of liquidation, or other similar circumstances."

Provided that Investment Funds are capable of being declared bankrupt in this jurisdiction, it is unclear whether the EUIR (and, in consequence, our comments in this opinion letter related to the EUIR) would apply to them.

As it is not possible to predict at this stage which of the two views will prevail, it is prudent to assume that the requirements of the Bankruptcy Law should be met and, as such, the FOA Netting Agreement and the Clearing Agreement should contain the close-out netting provision or the requirement that it is a master agreement within the meaning of Article 85 of the Bankruptcy Law should be satisfied (please refer to Annex 5 for the drafting suggestions).

In addition to the analysis contained above, specific considerations should be taken into account where Transactions are entered into with an Investment Fund with sub-funds. Each Transaction entered into by an Investment Fund with sub-funds will be entered into by it in connection with a particular sub-fund, and as such, the Transaction should be unambiguously attributed to such sub-fund. We believe that a special netting regime applies to such Investment Funds and Transactions entered into by them. While each Investment Fund is a separate legal entity, a sub-fund within that Investment Fund is a separate pool of assets and liabilities but it does not exist as a distinct entity. Under Article 161 of the Act on Investment Funds, each sub-fund is, however, ring-fenced against the liabilities connected with other sub-funds within the same Investment Fund. The liabilities connected with a sub-fund are attributed solely to such sub-fund, and the creditors of other sub-funds cannot enforce their claims from the assets of such sub-fund. The general liabilities of the entire Investment Fund are attributed to each sub-fund pro-rata to the share of each sub-fund in the total net asset value of the entire Investment Fund. In light of the above, the netting of liabilities across sub-funds would not be possible, and the close-out netting provisions contained in an agreement would not necessarily be effective if they were to apply to Transactions attributable to various sub-funds without those Transactions being split into separate pools relating to individual sub-funds. Therefore, it is advisable that an Investment Fund with sub-funds executes a separate FOA Netting Agreement or the Clearing Agreement, as the case may be, in respect of each sub-fund in relation to which it will enter into Transactions.

Since the Closed-Ended Funds and the specialist open-ended investment funds are not Eligible Counterparties, our opinions in this opinion letter, apply if the other party to the FOA Netting Agreement or the Clearing Agreement, as the case may be, is an FCA Eligible Party."



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**SCHEDULE 6**  
*The local government entities*

Subject to the modifications and additions set out in this Schedule 6 (*The local government entities*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Investment Funds.

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 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.

Paragraph 3.13 would be deemed deleted and replaced with the following:

"It is neither necessary nor desirable for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision to ensure the effectiveness of netting under the FOA Netting Agreement in the event of liquidation, or other similar circumstances."

**2. MODIFICATIONS TO QUALIFICATIONS**

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

"A Local Government Entity is not capable of formally being declared bankrupt and, in consequence, our analysis in the context of Bankruptcy Proceedings would not be applicable to Local Government Entities and, in particular, the FOA Netting Agreement and the Clearing Agreement, as the case may be, would not have to be a master agreement for the purposes of Article 85 of the Bankruptcy Law and there will be no need for the agreement to contain a close-out netting provisions as Article 85 and Article 85a of the Bankruptcy Law would not be applicable. Consequently, with respect to local government entities any references in this opinion letter to the Bankruptcy Proceedings are deemed deleted."

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**SCHEDULE 7**  
***Pension Funds***

Subject to the modifications and additions set out in this Schedule 6 (*Pension Funds*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Pension Funds.

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 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.

Subject to additional qualifications set out below, paragraph 3.1.2 is deemed deleted and replaced with the following:

"We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, if supplemented or amended as set out in Section 5 of Annex 5."

**2. ADDITIONAL QUALIFICATIONS**

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

"It is not entirely clear if a Pension Fund is capable of formally being declared bankrupt in this jurisdiction. However, the possibility of its liabilities becoming higher than its assets (i.e. the state of actual insolvency) cannot be completely ruled out. We are not aware of any guidelines on this issue from recognised legal scholars or judgments of courts in this jurisdiction, and we cannot confirm that this issue has been tested in practice. Moreover, provided that a Pension Fund is capable of formally being declared bankrupt, it is not clear whether the EUIR would apply to it. Therefore, it remains to be seen which view is shared by the courts of this jurisdiction. However, whichever view prevails, our opinions presented in this opinion letter will not be fundamentally different.

Provided that a Pension Fund is not capable of formally being declared bankrupt in this jurisdiction, our analysis in the context of Bankruptcy Proceedings would not be applicable to the Pension Funds and, in particular, the Agreement would not have to be a master agreement for the purposes of Article 85 of the Bankruptcy Law and there will be no need for the agreement to contain a close-out netting provisions as Article 85 and Article 85a of the Bankruptcy Law would not be applicable. In consequence, with respect to Pension Funds, any references in this opinion letter to Bankruptcy Proceedings would be deemed deleted.

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Paragraph 3.13 would be deemed deleted and replaced with the following:

As it is not possible to predict at this stage which of the two views will prevail, it is prudent to assume that the requirements of the Bankruptcy Law should be met and, as such, the requirement that the FOA Netting Agreement and the Clearing Agreement constitute a master agreement within the meaning of Article 85 of the Bankruptcy Law should be satisfied (please refer to Annex 5 for the drafting suggestions)."

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**ANNEX 1  
FORMS OF FOA NETTING AGREEMENTS**

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



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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**")

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

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

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**ANNEX 2  
List of Transactions**

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

- (A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
  - (i) a contract made on an exchange or pursuant to the rules of an exchange;
  - (ii) a contract subject to the rules of an exchange; or
  - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,  
  
in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
  - (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
  - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC, including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

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**ANNEX 3  
DEFINITIONS RELATING TO THE AGREEMENTS**

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

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

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

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

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

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

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

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

**"Clearing Agreement"** means an agreement:

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



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**"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 a 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.

**"Client Money Additional Security Clause"** means:

- (a) 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);
- (b) 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);
- (c) 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);
- (d) 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);

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- (e) 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);
- (f) 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);
- (g) 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);
- (h) 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);
- (i) 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
- (j) 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.

**"Core Provision"** means those parts of the clauses or provisions specified below in relation to a paragraph of this opinion letter (and/or 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 (*Enforceability of the FOA Set-Off Provisions*), 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 3.8 (*Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision*), the Clearing Module Netting Provision together

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with the defined terms "Aggregate Transaction Value", "Available Termination Amount", "Disapplied Set-Off Provisions", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provisions;

- (f) 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", "Available Termination Amount", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;
- (g) for the purposes of paragraph 3.10.1 and 3.10.2, (i) in relation to a 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
- (h) for the purposes of paragraphs 3.10.4 and 3.10.5, the Title Transfer Provisions;

in each case, incorporated into a 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 and necessary amendments set out in Section 1 of Annex 5.

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

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

"**FCA Act**" means the Act of 2 April 2004 on Certain Financial Collateral Arrangements (*ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych*).

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

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**"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 Provisions, 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 a 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*);



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- (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 FIA Europe 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
  - (ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or

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(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):

- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) and (c) (inclusive);
- (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (b) and (c) (inclusive);
- (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (ii) and (iii) (inclusive);
- (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (b) and (c) (inclusive);
- (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(b) and (c) (inclusive); or

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- (vi) any modified version of such clauses provided that it includes at least those parts of paragraph 4(a) 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).

**"Margin"** means any cash collateral provided to a Party and any cash or non-cash collateral comprising Acceptable Margin provided to a Party pursuant to the Title Transfer Provisions which (in either case) has been credited to an account provided by the Party which is the transferee.

**"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-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);

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- (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.

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

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



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**"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 a FOA Published Form Agreement.

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

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

**"Rehypothecation Clause"** means:

- (a) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (*Rehypothecation*);
- (b) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (*Rehypothecation*);
- (c) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (*Rehypothecation*); or

any modified version of such clauses provided that it includes at least those parts of paragraph 4 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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

**"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).

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**"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.

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## **ANNEX 4**

### **PART 1 CORE PROVISIONS**

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

#### **1. FOA Netting Provision:**

- a) **"Liquidation date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, then the other party (the **"Non-Defaulting Party"**) may, by notice to the party in default (the **"Defaulting Party"**), specify a date (the **"Liquidation Date"**) for the termination and liquidation of Netting Transactions in accordance with this clause.
- b) **Calculation of Liquidation Amount:** Upon the occurrence of a Liquidation Date:
  - i. (neither party shall be obliged to make any further payments or deliveries under any Netting Transactions which would, but for this clause, have fallen due for performance on or after the Liquidation Date and such obligations shall be satisfied by settlement (whether by payment, set-off or otherwise) of the Liquidation Amount;
  - ii. the Non-Defaulting Party shall as soon as reasonably practicable determine (discounting if appropriate), in respect of each Netting Transaction referred to in paragraph (i), 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."

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**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:**

"The following shall constitute Events of Default:

- i. 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."

**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



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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

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[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 [Core 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

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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]);



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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



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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

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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(ii):
  - (A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;
  - (B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and
  - (C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that

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has previously been reduced in part by set-off pursuant to this Section 8(e).

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

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**PART 2  
NON-MATERIAL AMENDMENTS**

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



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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 Provisions, 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 use of currency conversion in case of cross-currency set-off, (iv) the application or disapplication of any grace period to set-off; 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).

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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 the agreement 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 a 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.

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### **PART 3 SECURITY INTEREST PROVISIONS**

**1. Security Interest Clause:**

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

**2 Power of Sale Clause:**

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

**3. Client Money Additional Security Clause**

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

**4. Rehypothecation Clause**

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

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



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**ANNEX 5  
NECESSARY OR DESIRABLE AMENDMENTS**

1. Necessary amendments

- (a) For the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*):

In the Eligible Counterparty (with Security Provisions) Agreement 2011<sup>2</sup>:

Clause "***Set-off on default***" shall be amended by replacing the phrase "*we may set off*" with "*we shall set off*" and the square brackets in this clause shall be removed.

Clause "***Liquidation date***" shall be amended to read as follows:

*"Liquidation date: Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions.*

Clause "***Automatic termination***" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice."*

Clause "***Termination***" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

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<sup>2</sup> Documentation that is using other versions of the Eligible Counterparty Agreement may have to make conforming changes.

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Clause "**Existing rights**" shall be amended to read as follows:

*"Existing rights: Termination shall not affect then outstanding rights and obligations (in particular relating to Netting, the Indemnities and Limitation of Liability Module and the Miscellaneous and Governing Law Module) which shall continue to be governed by this Agreement until all obligations have been fully performed."*

Clause "**Miscellaneous**" shall be amended by adding the following:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowego i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011<sup>3</sup>:

Clause "**Liquidation date**" shall be amended to read as follows:

*"Liquidation date: Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions."*

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<sup>3</sup> Documentation that is using other versions of the Eligible Counterparty Agreement may have to make conforming changes.

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Clause "***Automatic termination***" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice."*

Clause "***Termination***" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

Clause "***Existing rights***" shall be amended to read as follows:

*"Existing rights: Termination shall not affect then outstanding rights and obligations (in particular relating to Netting, the Indemnities and Limitation of Liability Module and the Miscellaneous and Governing Law Module) which shall continue to be governed by this Agreement until all obligations have been fully performed."*

Clause "***Miscellaneous***" shall be amended by adding the following:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowego i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

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In the Professional Client (with Security Provisions) Agreement 2011<sup>4</sup> and in the Retail Client (with Security Provisions) Agreement 2011<sup>5</sup>:

Clause "**Set-off upon default or termination**" shall be amended by replacing the phrase "we may set off" with "we shall set off" and the square brackets in this clause shall be removed.

Clause "**Rights on Default**" shall be amended to read as follows:

*"Rights on Default: On the occurrence of an Event of Default, we may exercise our rights under this clause, except that [, if so specified by us in the Individually Agreed Terms Schedule attached to these Terms of Business or otherwise.] in the case of the occurrence of any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default (each a "**Bankruptcy Default**"), other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), the automatic termination provision of this clause shall apply."*

Clause "**Liquidation Date**" shall be amended to read as follows:

*"Liquidation Date: Subject to the following sub-clause, at any time following the occurrence of an Event of Default, we may, by notice to you, specify a date (the "**Liquidation Date**") (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions."*

Clause "**Automatic termination**" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, the date of the occurrence of any Bankruptcy Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice by us and the provisions of the following sub-clauses shall then apply."*

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<sup>4</sup> Documentation that is using other versions of the Professional Client Agreement may have to make conforming changes.

<sup>5</sup> Documentation that is using other versions of the Retail Client Agreement may have to make conforming changes.



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Clause "**Termination**" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

Clause "**Surviving Terms**" shall be amended to read as follows:

*"Surviving Terms: Outstanding rights and obligations (in particular relating to the Netting Module, the Indemnities and Limitation of Liability Module and the Miscellaneous and Governing Law Module) shall survive the termination of this Agreement, and shall continue to be governed by its provisions until all obligations have been fully performed."*

Clause "**Miscellaneous**" shall be amended by adding the following:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowego i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In the Professional Client (with Title Transfer Provisions) Agreement 2011<sup>6</sup> and in the Retail Client (with Title Transfer Provisions) Agreement 2011<sup>7</sup>:

Clause "**Rights on Default**" shall be amended to read as follows:

*"Rights on Default: On the occurrence of an Event of Default, we may exercise our rights under this clause, except that [, if so specified by us in the Individually Agreed Terms Schedule attached to these Terms of*

<sup>6</sup> Documentation that is using other versions of the Professional Client Agreement may have to make conforming changes.

<sup>7</sup> Documentation that is using other versions of the Retail Client Agreement may have to make conforming changes.

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*Business or otherwise,] in the case of the occurrence of any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default (each a "**Bankruptcy Default**"), other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), the automatic termination provision of this clause shall apply."*

Clause "**Liquidation Date**" shall be amended to read as follows:

*"**Liquidation Date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default, we may, by notice to you, specify a date (the "**Liquidation Date**") (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions."*

Clause "**Automatic termination**" shall be amended to read as follows:

*"**Automatic termination:** Where so specified in the Individually Agreed Terms Schedule, the date of the occurrence of any Bankruptcy Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice by us and the provisions of the following sub-clauses shall then apply."*

Clause "**Termination**" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

Clause "**Surviving Terms**" shall be amended to read as follows:

*"**Surviving Terms:** Outstanding rights and obligations (in particular relating to the Netting Module, the Indemnities and Limitation of Liability Module and the Miscellaneous and Governing Law Module) shall survive the termination of this Agreement, and shall continue to be governed by its provisions until all obligations have been fully performed."*

Clause "**Miscellaneous**" shall be amended by adding the following:

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*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze and all Transactions are entered into in performance of this Agreement)."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

#### In Short Form One-Way Clauses 2011<sup>8</sup>

Documentation that is using the Short Form One-Way Clauses 2011 should also be using Module G (**Margin**) or the Title Transfer Securities and Physical Collateral Annex to the Netting Module 2011.

In the documentation that is using the Short Form One-Way Clauses 2011 with Module G (**Margin**):

Clause "**Set-off upon default or termination**" shall be amended by replacing the phrase "we may set off" with "we shall set off" and the square brackets in this clause shall be removed.

Clause "**Liquidation date**" shall be amended to read as follows:

*"Liquidation date: Subject to the following sub-clause, at any time following the occurrence of an Event of Default, we may, by notice to you, specify a date (the "**Liquidation Date**") (a) for the termination and liquidation of Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions.*

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<sup>8</sup> Documentation that is using other versions of the Short Form One-Way Clauses 2011 may have to make conforming changes.

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Clause "**Automatic termination**" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice by us in sub clauses (b) or (c) above."*

Clause "**Termination**" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

Clause "**Existing rights**" shall be amended to read as follows:

*"Existing rights: Termination shall not affect then outstanding rights and obligations (in particular relating to Netting, the Indemnities and Limitation of Liability Module and the Miscellaneous and Governing Law Module) which shall continue to be governed by this Agreement until all obligations have been fully performed."*

The following additional clauses shall be added:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowego i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In the documentation that is using the Short Form One-Way Clauses 2011 with the Title Transfer Securities and Physical Collateral Annex to the Netting Module 2011:

Clause "**Liquidation date**" shall be amended to read as follows:



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*"Liquidation date: Subject to the following sub-clause, at any time following the occurrence of an Event of Default, we may, by notice to you, specify a date (the "Liquidation Date") (a) for the termination and liquidation of Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions.*

Clause "**Automatic termination**" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice by us in sub clauses (b) or (c) above."*

Clause "**Termination**" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

Clause "**Existing rights**" shall be amended to read as follows:

*"Existing rights: Termination shall not affect then outstanding rights and obligations (in particular relating to Netting, the Indemnities and Limitation of Liability Module and the Miscellaneous and Governing Law Module) which shall continue to be governed by this Agreement until all obligations have been fully performed."*

The following additional clauses shall be added:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowego i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement*

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*shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In Short Form Two -Way Clauses 2011<sup>9</sup>

Documentation that is using the Short Form Two-Way Clauses 2011 should also be using Module G (**Margin**) or the Title Transfer Securities and Physical Collateral Annex to the Netting Module 2011.

In the documentation that is using the Short Form Two-Way Clauses 2011 with Module G (**Margin**):

Clause "**Set-off on default**" shall be amended by replacing the phrase "*we may set off*" with "*we shall set off*" and the square brackets in this clause shall be removed.

Clause "**Liquidation date**" shall be amended to read as follows:

*"Liquidation date: Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions.*

Clause "**Automatic termination**" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice."*

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<sup>9</sup> Documentation that is using other versions of the Short Form Two-Way Clauses 2011 may have to make conforming changes.

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Clause "**Termination**" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

The following additional clauses shall be added:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In the documentation that is using the Short Form Two-Way Clauses 2011 with the Title Transfer Securities and Physical Collateral Annex to the Netting Module 2011:

Clause "**Liquidation date**" shall be amended to read as follows:

*"Liquidation date: Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions."*

Clause "**Automatic termination**" shall be amended to read as follows:

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*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice."*

Clause "**Termination**" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

The following additional clauses shall be added:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

#### In Long Form Two-Way Clauses 2011<sup>10</sup>

Documentation that is using the Long Form Two-Way Clauses 2011 should also be using Module G (**Margin**) or the Title Transfer Securities and Physical Collateral Annex to the Netting Module 2011.

In the documentation that is using the Long Form Two-Way Clauses 2011 with Module G (**Margin**):

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<sup>10</sup> Documentation that is using other versions of the Long Form Two-Way Clauses 2011 may have to make conforming changes.



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Clause "***Set-off upon default or termination***" shall be amended by replacing the phrase "*we may set off*" with "*we shall set off*" and the square brackets in this clause shall be removed.

Clause "***Rights on Default***" shall be amended to read as follows:

*"Rights on Default: On the occurrence of an Event of Default in relation to a party, the other party may exercise its rights under this clause, except that [, if so agreed in writing by the Parties (whether by specifying as such by us in the Individually Agreed Terms Schedule or otherwise),] in the case of the occurrence of any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default (each a "Bankruptcy Default"), other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), the automatic termination provision of this clause shall apply."*

Clause "***Termination on notice***" shall be amended to read as follows:

*"Termination on notice: Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions."*

Clause "***Automatic termination***" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, the date of the occurrence of any Bankruptcy Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice by us and the provisions of the following sub-clauses shall then apply."*

Clause "***Termination***" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

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The following additional clauses shall be added:

***"Master Agreement:** This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) and all Transactions are entered into in performance of this Agreement."*

***"Margining arrangements:** This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

***"Termination:** Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In the documentation that is using the Long Form Two-Way Clauses 2011 with the Title Transfer Securities and Physical Collateral Annex to the Netting Module 2011:

Clause **"Rights on Default"** shall be amended to read as follows:

***"Rights on Default:** On the occurrence of an Event of Default in relation to a party, the other party may exercise its rights under this clause, except that [, if so agreed in writing by the Parties (whether by specifying as such by us in the Individually Agreed Terms Schedule or otherwise),] in the case of the occurrence of any Event of Default specified in paragraphs (b) or (c) of the definition of Events of Default (each a **"Bankruptcy Default"**), other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), the automatic termination provision of this clause shall apply."*

Clause **"Termination on notice"** shall be amended to read as follows:

***"Termination on notice:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, the other party (the **"Non-Defaulting Party"**) may, by notice to the party in default (the **"Defaulting Party"**), specify a date (the **"Liquidation Date"**) (a) for the termination and liquidation of Netting Transactions in accordance with this clause, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003*

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*roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with this clause and for this purpose all Transactions shall be Netting Transactions.*

Clause "**Automatic termination**" shall be amended to read as follows:

*"Automatic termination: Where so specified in the Individually Agreed Terms Schedule, the date of the occurrence of any Bankruptcy Default, other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze), shall automatically constitute a Liquidation Date, without the need for any notice by us and the provisions of the following sub-clauses shall then apply."*

Clause "**Termination**" shall be amended by adding the following after the words "Upon terminating this Agreement":

*"all Transactions are terminated and"*

The following additional clauses shall be added:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Margining arrangements: This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In Two-Way Master Netting Agreement:

Clause 4.2 shall be amended to read as follows:

*"4.2 Subject to Clause 4.3, at any time following the occurrence of an Event of Default, the Non-Defaulting Party may, by notice to the Defaulting Party, specify a Liquidation Date (a) for the termination and liquidation of Transactions in accordance with Clause 4.4, or (b)*

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*in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with Clause 4.4."*

Clause 4.3 shall be amended to read as follows:

*"4.3 If the Parties have so agreed, the date of the occurrence of any Event of Default specified in paragraph (ii) or (iii) of Clause 4.1 (other than opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze)) shall automatically constitute a Liquidation Date, without the need for any notice by either Party and to the intent that the provisions of Clause 4.4 shall then apply."*

The following additional clauses shall be added:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowego i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

In One-Way Master Netting Agreement:

Clause 4.2 shall be amended to read as follows:

*"4.2 Subject to Clause 4.3, at any time following the occurrence of an Event of Default, the Firm may, by notice to the Counterparty, specify a Liquidation Date (a) for the termination and liquidation of Transactions in accordance with Clause 4.4, or (b) in respect of an Event of Default which is opening of bankruptcy proceedings in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze) for the termination of the Agreement which will result in termination and liquidation of Transactions in accordance with Clause 4.4."*

Clause 4.3 shall be amended to read as follows:

*"4.3 If the Firm has so specified, the date of the occurrence of any Event of Default specified in paragraph (ii) or (iii) of Clause 4.1 (other than opening of bankruptcy proceedings in the meaning of the Polish*



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*Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze)) shall automatically constitute a Liquidation Date, without the need for any notice by either Party and to the intent that the provisions of Clause 4.4 shall then apply."*

The following additional clauses shall be added:

*"Master Agreement: This Agreement constitutes a master agreement (umowa ramowa) in the meaning of the Polish Bankruptcy Law (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowego i naprawcze) and all Transactions are entered into in performance of this Agreement."*

*"Termination: Termination of the Agreement results in termination and liquidation of all Transactions in accordance with this Agreement."*

- (b) For the purposes of paragraph 3.4.1: amendments set out in section (a) above and the following additional amendments:
- (c) *"This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100".*
- (a) The third paragraph in the FOA Clearing Module shall be amended to read as follows: *"Each of the parties agree that for the purposes of its execution, performance, termination and interpretation, this Clearing Agreement shall be deemed to constitute as many distinct Clearing Agreements as there are Cleared Transaction Sets. Notwithstanding anything in this Clearing Agreement to the contrary, each of the parties agrees that, for all purposes, Client Transactions in Cleared Transaction Sets shall be treated as if they had been entered into under a separate Clearing Agreement that applies to that Cleared Transaction Set".*
- (b) The following additional clause 3.4 shall be added to clause 3 (Client Transactions and Payment Netting) of the FOA Clearing Module: *"The Client hereby authorises the Agreed CCP to formally declare to Firm that an event constitutes a default in respect of Firm in respect of the relevant Cleared Transaction Set and this shall constitute termination by the Client of that Clearing Agreement relevant for that Cleared Transaction Set and all Client Transactions entered into under that Clearing Agreement. Notwithstanding anything in the Agreement to the*

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*effect that a person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999, each Agreed CCP has the benefit of this Clause to the extent of the delegation in its favour (but this Clause may be amended by the parties without the consent of any Agreed CCP)."*

- (c) Paragraph 5.2.2(a) of the FOA Clearing Module shall be amended to read as follows: *"the occurrence of the Firm Trigger Event constitutes termination of the Clearing Agreement applicable to the relevant Cleared Transaction Set and termination of each Client Transaction in that Cleared Transaction Set and, following such termination, no further payments or deliveries in respect of such Client Transaction 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 5.2.2."*
- (d) Paragraph 5.3.1 of the FOA Clearing Module shall be amended to read as follows: *"termination of the Firm/CCP Transactions constitutes termination by the Firm of the Clearing Agreement applicable to the relevant Cleared Transaction Set and termination of each Client Transaction in that Cleared Transaction Set and, following such termination, no further payments or deliveries in respect of such Client Transaction 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."*

For the purposes of paragraph 3.5.1: amendments set out in section (a) above and the following additional amendments:

- (a) *"This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*
- (b) The third paragraph in the Addendum shall be amended to read as follows: *"Each of the parties agree that for the purposes of its execution, performance, termination and interpretation, this Clearing Agreement shall be deemed to constitute as many distinct Clearing Agreements as there are Cleared Transaction Sets. Notwithstanding anything in this Clearing Agreement to the contrary, each of the*

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*parties agrees that, for all purposes, Client Transactions in Cleared Transaction Sets shall be treated as if they had been entered into under a separate Clearing Agreement that applies to that Cleared Transaction Set".*

- (c) The following additional clause shall be added to clause 3 (Client Transactions) of the Addendum: "*(i) **Authorisation:** The Client hereby authorises the Agreed CCP to formally declare to Clearing Member that an event constitutes a default in respect of Clearing Member in respect of the relevant Cleared Transaction Set and this shall constitute termination by the Client of that Clearing Agreement relevant for that Cleared Transaction Set and all Client Transactions entered into under that Clearing Agreement. Notwithstanding anything in the Agreement to the effect that a person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999, each Agreed CCP has the benefit of this Clause to the extent of the delegation in its favour (but this Clause may be amended by the parties without the consent of any Agreed CCP).*"
- (d) Paragraph 8(b)(ii)(1) of the Addendum shall be amended to read as follows: "*the occurrence of the CM Trigger Event constitutes termination of the Clearing Agreement applicable to the relevant Cleared Transaction Set and termination of each Client Transaction in that Cleared Transaction Set and, following such termination, no further payments or deliveries in respect of such Client Transaction 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 Section 8(b)(ii).*"
- (e) Paragraph 8(c)(i) of the Addendum shall be amended to read as follows: "*termination of the CM/CCP Transactions constitutes termination by the Firm of the Clearing Agreement applicable to the relevant Cleared Transaction Set and termination of each Client Transaction in that Cleared Transaction Set and, following such termination, no further payments or deliveries in respect of such Client Transaction 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 Section 8(c).*"

For the purposes of paragraph 3.6 – amendments similar to those set out above for the purpose of paragraph 3.5.1.

For the purpose of paragraph 3.10:

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*"This Agreement and any margining arrangements hereunder constitute a financial collateral arrangement in the meaning of the Polish Act on Financial Collateral Arrangements (ustawa z dnia 2 kwietnia 2004 roku o niektórych zabezpieczeniach finansowych). Any Margin transferred by a party under this Agreement shall be transferred by the receiving party back to the transferring party on 2<sup>nd</sup> January 2100."*

2. Alterations which constitute material alterations:

*"A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes effect."*

*"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."*

For the purpose of **SCHEDULE 1 Banks**

Additional events for the purposes of paragraph 3.1:

*"recovery proceedings (postępowanie naprawcze) under the Act of 29 August 1997 the Banking Law (ustawa z dnia 29 sierpnia 1997 roku Prawo Bankowe) (the "Banking Law") are commenced against a party or a decision with respect to a party is taken by the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego) (the "PFSA"): on the basis of Article 147.1 of the Banking Law regarding the takeover of the party by another bank, or regarding the annulment of the permit for the establishment of the party and the liquidation of the party, or an application to the Council of Ministers for the liquidation of a party if the party is a state-owned bank, or on the basis of Article 158.1 or 158.4 of the Banking Law regarding the suspension of the party's activities and the takeover of the party by another bank, or the PFSA's submitting a bankruptcy petition with respect to the party in accordance with the Act of 28 February 2003 on bankruptcy and recovery proceedings (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze)."*

For the purpose of **SCHEDULE 2 Investment Firms**

Additional events for the purposes of paragraph 3.1:

*"expiry of the permit to conduct brokerage activity as a result of the occurrence of any of the circumstances set out in the Act on Trading in Financial Instruments of 29 July 2005 (ustawa z dnia 29 lipca 2005 roku o obrocie instrumentami finansowymi) (the "Act on Trading") or the supervision authority's withdrawal of the Party's permit to conduct brokerage activity as a result of the occurrence of any of the circumstances referred to in the Act on Trading."*

For the purpose of **SCHEDULE 3 Insurance Companies**

Additional events for the purposes of paragraph 3.1:

*"recovery proceedings (postępowanie naprawcze) under the Act of 22 May 2003 on insurance activity (ustawa z dnia 22 maja 2003 roku o działalności ubezpieczeniowej) are*



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*commenced against a party, including the requirement for the Insurance Company to submit a programme to restore its correct financial position with respect to technical provisions (plan przywrócenia prawidłowych stosunków finansowych w zakresie rezerw techniczno-ubezpieczeniowych) or to submit a programme to restore its correct financial position (plan przywrócenia prawidłowych stosunków finansowych) or to submit by the Insurance Company of a short term solvency plan (krótkoterminowy plan wypłacalności) or a recovery plan (program naprawczy), or liquidation (likwidacja) of the Insurance Company, or the Polish Financial Supervision Authority (Komisja Nadzoru Finansowego) submitting a bankruptcy petition with respect to the party in accordance with the Act of 28 February 2003 on bankruptcy and recovery proceedings (ustawa z dnia 28 lutego 2003 roku Prawo upadłościowe i naprawcze)."*

For the purpose of **SCHEDULE 4 Individuals**

For the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*): amendments similar to those set out above for the purpose of paragraph 3.3 with the exception of amendments to clause "*Set-off on default*" and "*Set-off upon default or termination*" and without additional clause "*Margining arrangements*" in the "*Miscellaneous*" clause.

For the purpose of **SCHEDULE 5 Investment Funds**

Additional events for the purposes of paragraph 3.1:

*"dissolution of a Party which is an investment fund (fundusz inwestycyjny) in the meaning of the Act of 28 June 2004 on investment funds (ustawa z dnia 27 maja 2004 roku o funduszach inwestycyjnych) (the "Act on Investment Funds") in accordance with the Act on Investment Funds."*

For the purpose of paragraph 3.3 (*Enforceability of FOA Netting Provision*), paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*) and paragraph 3.5 (*Enforceability of the Addendum Netting Provision*) if an agreement is entered into by more than one investment fund managed and represented by the fund management company:

*"The parties acknowledge and agree that this contractual format is for the sole purpose of documentary simplification and that no investment fund shall have any liability under this Agreement for the obligations of any other investment fund. Each party recognizes and agrees that, for the purposes of this Agreement, each investment fund's obligations are separate and distinct from those of each other investment fund. Each reference in this Agreement to a party that is a fund management company representing investment funds listed in this Agreement shall be a reference to the fund management company acting for and on behalf of a given investment fund, severally and not jointly with any other investment fund. Each of the parties agree that for the purposes of its execution, performance, termination and interpretation, this Agreement shall be deemed to constitute as many distinct Agreements as there are investment funds."*

For the purpose of **SCHEDULE 7 Pension Funds**

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Additional events for the purposes of paragraph 3.1:

*"the competent supervision authority issued a decision revoking the permit to set up the Party that is a pension fund in the meaning of the Act of 28 August 1997 on the organisation and operation of pension funds (ustawa z dnia 28 sierpnia 1997 roku o organizacji i funkcjonowaniu funduszy emerytalnych, the "**Pension Funds Act**") (the "**Pension Fund**"), or an application was filed to the relevant supervision authority for a permit to take over the management of the Party that is a Pension Fund by a pension fund manager other than the one currently managing the Party that is a Pension Fund or an application is filed to the relevant supervision authority for a permit to merge the pension fund manager managing the Party that is a Pension Fund with another pension fund manager".*

For the purpose of paragraph 3.3 (*Enforceability of FOA Netting Provision*), paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*) and paragraph 3.5 (*Enforceability of the Addendum Netting Provision*) if an agreement is entered into by more than one pension fund managed and represented by the fund management company:

*"The parties acknowledge and agree that this contractual format is for the sole purpose of documentary simplification and that no pension fund shall have any liability under this Agreement for the obligations of any other pension fund. Each party recognizes and agrees that, for the purposes of this Agreement, each pension fund's obligations are separate and distinct from those of each other pension fund. Each reference in this Agreement to a party that is a fund management company representing pension funds listed in this Agreement shall be a reference to the fund management company acting for and on behalf of a given pension fund, severally and not jointly with any other pension fund. Each of the parties agree that for the purposes of its execution, performance, termination and interpretation, this Agreement shall be deemed to constitute as many distinct Agreements as there are pension funds."*