

**NETTING ANALYSER LIBRARY**

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06 December 2013

Dear Sirs,

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

You have asked us to give an opinion in respect of the laws of Portugal ("**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.

This opinion is limited to Portuguese law as currently in force and applied by the Portuguese Courts at the date hereof, excluding tax laws, the EU framework (insofar as not implemented in Portuguese law or directly applicable in Portugal) and procurement laws and is given on the basis that it will be construed in accordance with Portuguese law. We have made no independent investigation of any other laws as a basis for this opinion and do not express or imply any opinion thereon in connection with any law of any jurisdiction other than the laws of the Portuguese Republic. We have assumed that there is nothing in the law of any other place which affects this 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.

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## 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 companies incorporated under the Portuguese Companies Code (approved by Decree-Law no. 262/86, dated of September 2<sup>nd</sup>, 1986, as amended) (the “**Portuguese Companies Code**”)<sup>1</sup>;

1.1.2 Banks, credit institutions, financial companies (including investment firms and brokers) incorporated under the General Regime of Credit Institutions and Financial Companies, as approved by Decree-Law no. 298/92, dated of December 31<sup>st</sup>, 1992, as amended (the “**Banking Act**”)<sup>2</sup> or that are otherwise duly authorised to carry out banking activities or investment services and activities; such entities are subject to a specific regulatory authorisation granted by the *Banco de Portugal* and to a specific regulatory environment, established in the “Banking Act (and, to some extent, in the Portuguese Securities Code) and in other laws and regulations governing respective activities, including administrative rules passed by the *Banco de Portugal* and the *Comissão do Mercado de Valores Mobiliários*. Investment firms are defined in Article 199-A of the Banking Act. Brokers are defined in Article 198 of the Banking Act. and

1.1.3 branches in this jurisdiction of foreign banks and other 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 applicable Schedule:

1.2.1 Insurance companies/providers incorporated under the General Regime of Insurance Companies (as approved by Decree Law no. 94-B/98, dated of April 17<sup>th</sup>, as amended) (the “**Insurance Act**”) (Schedule I);

1.2.2 Individuals domiciled in this jurisdiction (Schedule II);

1.2.3 Funds organised as investment funds (Schedule III);

1.2.4 Sovereign and public sector entities, including public sector companies incorporated under Decree-Law no. 558/99, dated of December 17<sup>th</sup>, as amended (the “**Public Sector Companies Act**”) (Schedule IV);

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<sup>1</sup> The organisation of public companies is also subject to the Portuguese Securities Code, approved by Decree-Law no. 486/99, dated October 31<sup>st</sup>, 1999 (as amended, hereinafter referred to as the “**Portuguese Securities Code**”).

<sup>2</sup> The organisation of financial intermediaries is also subject to the Portuguese Securities Code.



- 1.2.5 Pension funds, managed and represented in their acts by a separate management entity, organised under Decree-Law no. 12/2006, dated of January 20<sup>th</sup>, as amended (the "**Pension Funds Law**") (Schedule V).
- 1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the Netting Agreement and the Clearing Agreement are expressed to be governed by English law.
- 1.4 This opinion covers all Transactions which are contemplated in the Agreement, whether entered into an exchange, any other forms of organised market place or multilateral trading facility, or over the counter, subject to the Qualifications set forth below.
- 1.5 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.
- 1.6 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.
- 1.7 **Definitions**

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

- 1.7.1 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1;
- 1.7.2 A Party which is insolvent for the purposes of any insolvency law or otherwise subject to Insolvency Proceedings is called the "**Insolvent Party**" and the other Party is called the "**Solvent Party**".
- 1.7.3 "**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction.
- 1.7.4 "**FOA Member**" means a member (excluding associate members) of the Futures and Options Association which subscribes to the Futures and Options Association's Netting Analyser service (and whose terms of subscription give access to this opinion); and

1.7.5 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. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.
- 2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.
- 2.4 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction.
- 2.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any Insolvency Proceedings against either Party.
- 2.6 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.
- 2.7 The FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms'



length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

- 2.8 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.
- 2.9 That the obligations assumed under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are 'mutual' between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party.
- 2.10 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates, and (b) will be a bank incorporated in this jurisdiction or a branch in this jurisdiction of a foreign bank.
- 2.11 In relation to the opinions set out at paragraphs 3.4, 3.5, 3.8 and 3.9 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.
- 2.12 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).
- 2.13 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.
- 2.14 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.15 That each party is validly incorporated and organized under the laws of the country of its incorporation
- 2.16 That at the time at which a transaction is entered into under the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into, neither party has actual notice of the insolvency of the other party.

### 3. OPINION

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

#### 3.1 Insolvency Proceedings

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

- 3.1.1 "*Processo de Insolvência*" (Insolvency Proceeding), regulated by the Insolvency and Reorganisation Code approved by Decree Law no. 53/2004, dated of March 18th, as amended (the "**Insolvency Act**"), consisting of a global enforcement proceeding aiming at *(i)* the liquidation of the insolvent debtor's assets for the satisfaction of its creditors or *(ii)* the satisfaction of such creditors in accordance with an Insolvency Plan which may provide, inter alia, for the reorganisation of a business being part of the insolvency estate. Immediate liquidation or approval of an insolvency plan (which may also regulate the liquidation of the insolvent debtor's assets) shall depend on a resolution taken in a creditors meeting called by the liquidator following the declaration of insolvency to consider and discuss an insolvency report enclosing an inventory of the insolvency's assets and a list of the insolvency creditors. This proceeding is not applicable to credit institutions, financial companies, investment firms and insurance companies, although certain provisions governing respective winding up and the liquidation of the insolvent's estate are applicable in the context of the special proceedings to which such entities are subject, as detailed below (we refer to Schedule I below).
- 3.1.2 "*Processo Especial de Revitalização*" or "*PER*", also regulated by the Insolvency Act, which was created to enable the reorganization of a company in financial difficulties. This process consists of a request in court – based on a joint declaration between the company and at least one of its creditors – to initiate negotiation efforts in view of approving a revitalization plan aiming to recuperate the company's financial health. This request immediately suspends all lawsuits relating to credit claims and prevent new ones during the negotiation period. The request also suspends an insolvency claim – provided a decision was not rendered at the time of the request. Following this request the court will appoint a judicial administrator, who, from then on, is required to provide his prior approval regarding all relevant actions to be performed by the company. After this appointment, the company shall contact all its creditors inviting them to take part on the negotiation efforts. These creditors will have 20 days to file their credit claim. The judicial administrator will draft a provisional creditor list susceptible to be challenged after its publication. Should the creditor list not be challenged,



it is automatically converted in definitive. The judicial administrator, the company and its recognized creditors will initiate negotiations which have to be concluded within a 2 month period, susceptible to a one month extension. The reorganization plan has to be approved by a 2/3 majority of at least one third of the total credits and is then presented to the court for homologation. The court's decision is binding for all creditors, regardless of having been recognized on the creditors list, participated on the negotiations or voted against the plan.

- 3.1.3 The "SIREVE" process ruled by Decree-Law nr. 178/2012 dated 3 of August. SIREVE aims to obtain, by extrajudicial means, an agreement between the company and all or some of its creditors (public and private), representing at least 50% of all its creditors, in order to allow the recovery of the insolvent company. Any company in a financial distressed situation or in an imminent or actual insolvency situation, according to the regime regulated by the Insolvency Act may apply to the IAPMEI (Public Institute for the Support of Small and Medium-sized Enterprises) requesting to initiate a SIREVE process. The SIREVE process is initiated by the submission of an electronic request form (available in IAPMEI website) and addressed to IAPMEI. The application must be accompanied by a Business Plan with a 5-year forecast, in which the company demonstrates it may reach a financial autonomy ratio higher than 15% or 20% (depending if it is a small and medium-sized enterprise or a big enterprise) and a current ratio higher than 1,05. If public creditors are related in the request form, their participation in the conciliation procedure is mandatory, though they may, since present their reasons, declare to be unavailable to enter in the agreement. In the 15 following days, IAPMEI decides whether to (a) accept the request or (b) deny the request or (c) invites the party to improve the request. Once the request is accepted, the process shall be concluded in a maximum of three months, which may be extended for one additional month if the debtor or any of the creditors involved in the process so request, justifying the need of such additional time, and IAPMEI approves it.

Banks and financial institutions are not subject to the general Insolvency and Reorganisation Proceeding that is applicable to Companies. In this jurisdiction, the only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a bank/ financial institution/ investment firm/ broker could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

- (i) the Reorganisation of Credit Institutions, Financial Companies and Investment Firms ("*Saneamento de Instituições de Crédito, Sociedades Financeiras e Empresas de Investimento*"), regulated by the Banking Act, as applicable, and consisting of extraordinary measures for the composition or reorganisation of credit institutions, financial companies and investment firms subject to the prudential supervision of the Bank of Portugal, such as. *inter alia*, following a



reorganisation plan, restrictions on the exercise of certain types of activity, restrictions on lending and on the application of funds in certain classes of assets and restrictions on deposit taking;

- (ii) the Winding Up Proceeding of Credit Institutions, Financial Companies and Investment Firms ("*Processo de Liquidação de Instituições de Crédito, Sociedades Financeiras e Empresas de Investimento*"), regulated by Decree Law no. 199/2006, dated of October 25<sup>th</sup>, 2006 (the "**Winding Up Act**", which implemented Directive 2001/24/CE of the European Council and Parliament on the reorganisation and winding up of credit institutions), consisting of a specific proceeding regulating the winding up of credit institutions, financial companies and investment firms subject to the supervision of Bank of Portugal. The Insolvency Act is applicable to credit institutions, financial companies and investment firms only to the extent that there is no incompatibility with the specific provisions laid down in the Winding Up Act;

In the event that the extraordinary measures determined and imposed by the Bank of Portugal fail to succeed in stabilising the financial situation of the relevant entity, the Bank of Portugal may decide on the revocation of such entity's authorisation to carry out respective activities. This revocation has the same effect as a declaration of insolvency in respect of a Company, in particular, in what concerns the subsequent winding up and estate liquidation proceedings. The Winding Up Act grants the Bank of Portugal jurisdiction to implement reorganisation measures and start winding up proceedings against credit institutions authorised by the Bank of Portugal, including branches of such credit institutions established in other Member States. Furthermore, the Winding Up Act provides that the implementation of reorganisation measures or the opening of winding up proceedings decided by the competent judicial or administrative authorities of another Member State shall be recognised in Portugal without any review, confirmation or any similar formality.

In 10 February 2010, with the enactment Decree-Law no. 31-A/2012, Bank of Portugal was granted with further powers to deal with the deterioration of the financial situation of banks and other financial institutions. The Bank of Portugal may now decide to apply the following measures to a credit institution that is failing or on the verge of failing: (i) sale of all or part of the institution's business to another financial institution in Portugal, (ii) transfer of all or part of the financial institution's business to a bridge bank. In case of partial sale or transfer, the credit or business related to a certain counterparty is transferred in its entirety. The activation of this measures triggers a 48 hour stay of the early termination and close-out rights under any netting arrangement. This 48 hour limit is effective as of the moment when the suspension is notified to the counterparty or when the Bank of Portugal makes his decision public (whichever comes earliest). These provisions do not apply when the Transactions are settled through settled systems, but it seems unclear whether this stay period should apply in regard to transactions that have a Collateral Support Agreement.



Once the liquidation of the relevant entity is decided, the winding-up proceeding of credit institutions, financial companies and investment firms will follow the rules established generally under the Insolvency Act, save for proceedings involving other European Union jurisdictions and certain matters for which specific rules are established.

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 Subject to the provisions of Council Regulation (EC) no. 593/2008, dated of June 17<sup>th</sup> 2008, 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, as long as both Parties are located in European Union Member States. The parties' choice of law is also accepted by the Rome Convention on the Law Applicable to Contractual Obligations – which is, however, superseded by Council Regulation (EC) no. 593/2008. This Convention is applicable to agreements entered into between parties who reside in the countries that have signed such Convention.
- 3.2.2 In case the Parties to the FOA Netting Agreement or, as the case may be, the Clearing Agreement are not incorporated or established in a European Member State – in which case Council Regulation (EC) no. 593/2008 would not apply – or a country that is not a party to the Rome Convention – in which case the Rome Convention would also not apply – Article 41 (2) of the Portuguese Civil Code states that the parties may chose the law applicable to their contracts, as long as (i) the country whose law was chosen has a relevant connection to the agreement or (ii) the choice of law serves a relevant interest of the Parties. In our opinion the choice to subject the FOA Netting Agreement or, as the case may be, the Clearing Agreement to the English law could be regarded as serving a relevant interest, since the complexity of the FOA Netting Agreement or, as the case may be, the Clearing Agreement is better regulated by referring to more sophisticated legal systems, where these type of contractual arrangements benefit from a significant, highly tested legal environment.
- 3.2.3 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 enforceability or effectiveness of the (i) FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions.

- 3.2.4 In what regards the insolvency proceedings of a Portuguese entity, it should be noted that such proceedings will be subject to Portuguese procedural law
- 3.2.5 Also subject to the provisions of Council Regulation (EC) No. 44/2001, dated December 22<sup>nd</sup>, 2000 (the “**Brussels Regulation**”) or, where applicable, the 1968 Brussels or the 1988 Lugano Convention (the “**Conventions**”) on the Jurisdiction and the Enforcement in Civil and Commercial Matters, the submission by the Parties to an eligible court under Brussels Regulation or the Conventions will be recognised by this jurisdiction.

### 3.3 Enforceability of FOA Netting Provision

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

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

We are of this opinion because:

- (i) With respect to Events of Default not consisting of an Insolvency Proceeding, our opinion is that the enforceability of the FOA Netting Provision upon occurrence of an Event of Default is a matter to be decided in accordance with the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement. Therefore, to the extent that, in that context, the FOA Netting Provision is valid and enforceable under the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, a Portuguese court ruling on the matter will uphold and enforce the FOA Netting Provision in Portugal. We have no reasons to change our opinion in the event that the FOA Netting Agreement or, as the case may be, the Clearing Agreement and the Transactions entered into thereunder are governed by Portuguese law.
- (ii) The enforceability of the FOA Netting Provision in this jurisdiction shall not, in our opinion, be affected should their intended operation be triggered by the opening of an Insolvency Proceeding in Portugal.
- (iii) As a general principle, the Insolvency Act establishes that the declaration of insolvency following the opening of an Insolvency Proceeding in Portugal



does not affect the right of creditors to net their claims against the claims of the insolvent debtor, where such netting is permitted by the law applicable to the insolvent debtor's counterclaim (article 286 of the Insolvency Act). This means that, to the extent English laws allow the enforcement of the FOA Netting Provision if an insolvency event occurs, then the FOA Netting Provision will be recognized and enforced in an Insolvency Proceeding started in Portugal.

- (iv) Indeed, the concept of "*compensação*" as used in article 286 of the Insolvency Act (and which is also the Portuguese term used in the Portuguese version of the EU Insolvency Regulation where the English version thereof uses the term "set-off") includes the so-called "*compensação contratual*", a general concept of Portuguese law that, in our view, includes both set-off and close-out netting (and, accordingly, the FOA Netting Provision, including the parts dealing with close-out netting and set-off).
- (v) We further support this view on the fact that, in interpreting article 286 of the Insolvency Act, as well as the internal legislation implementing article 6 of the EU Council Regulation no. 1346/2000 of 29 May 2000, on insolvency Proceedings ("**EU Insolvency Regulation**"), a Portuguese court would likely give consideration to the fact that the legislation enacted in Portugal in connection with (a) the adoption of special legal provisions aimed at insulating the netting arrangements against the opening of an insolvency or reorganisation proceeding in Portugal, in particular under Decree-Law 70/97, dated of April 3rd (hereinafter the "**Netting Act**") (see below) and (b) the implementation of relevant European legislation on this matter in Portugal (such as, for instance, Directive no. 2002/47/EC of 6 June 2006, on financial collateral arrangements), generally interprets and construes netting and close-out provisions as expressing the idea of "*compensação contratual*".
- (vi) Although there are no relevant court precedents on this point, the published opinion available in Portugal accepts that the typical close-out netting provisions (such as the FOA Netting Provision) correspond to a form of contractual set-off (*compensação contratual*) and, as a result, accepts that article 286 of the Insolvency Act applies to such type of contractual arrangements.
- (vii) Moreover, even if the operation of the FOA Netting Provision ("*compensação contratual*" for the purposes of Portuguese law) is challenged on grounds that they breach the rules of the Insolvency Act relating to voidness, voidability or unenforceability of any acts detrimental to all creditors, the Insolvency Act also provides that such rules shall not be applicable to the extent that the Party to the agreement benefiting from the operation of the FOA Netting Provision provides evidence that, under the insolvency regulations of the law governing the FOA Netting Agreement or, as the case may be, the Clearing Agreement (other than Portuguese law) there are no means of challenging that operation



of the FOA Netting Provision upon the opening of an Insolvency Proceeding (article 287 Insolvency Act).

- (viii) In light of the above, in an Insolvency Proceeding opened in Portugal against an Insolvent Party, a Portuguese court would, in our opinion, look into the insolvency regulations of the law chosen by the parties to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement to ascertain whether under each such law the Solvent Party would be entitled to exercise its rights under the Netting Provisions notwithstanding the opening of an Insolvency Proceeding. Furthermore, if under the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement (other than Portuguese law) there are no means of challenging the FOA Netting Provision, the Portuguese rules relating to voidness, voidability or unenforceability of any acts detrimental to all creditors shall not be applicable.
- (ix) The Netting Act further strengthens the conclusions reached above, for transactions involving certain types of instruments. Under the Netting Act, the laws of this jurisdiction generally allow for the enforceability of netting provisions relating to financial instruments identified in the article 2 of the Portuguese legal framework applicable to netting arrangement, as enshrined in the Netting Act, i.e. securities, futures and forward contracts on currencies, interest rates and exchange rates, swaps, options, and any other contracts of an analogous nature (hereinafter “**Financial Instruments**”) in insolvency (i.e. such netting provisions may be opposable against the insolvency estate and other creditors), provided the following conditions are met: a netting arrangement whereby the parties, in their capacity as parties to contracts relating to Financial Instruments with similar rights and obligations, have agreed to net and set off their mutual obligations should one of the parties be declared insolvent or subject to reorganisation measures.
- (x) Subject to our indications in (a) and (b) below, we are therefore of the opinion that this regime stemming from the Netting Act will result in the validity and enforceability of the FOA Netting Provision in the context of an Insolvency Proceeding. Provided, however, that: (a) considering the wording of the Netting Act, it is doubtful that the Netting Act applies to the one-way Master Netting Agreement on the basis that the Netting Act requires mutuality and similarity of the rights and the obligations of the parties both under each Transaction and under the Agreement; (b) moreover, in order for the set-off provisions to operate in accordance with the Netting Provisions it is necessary to verify whether each particular Transaction refers to Financial Instruments (as referred to above) and, in this context, it is unclear whether all the potential underlying assets of the Transactions are eligible for this purpose.

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.



The preceding conclusions reached in relation to the validity and enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision and of the Addendum Set-Off Provision, as the case may be, are further strengthened where the Insolvent Party is a bank, credit institution, financial company or investment firm, as a result of specific provisions dealing with set-off and netting. Article 31 of the Winding-Up Act establishes that the adoption of recovery measures or filing of liquidation proceedings shall not prejudice the rights of creditors to net their credits against credits of the insolvent credit institution, provided such right is recognised by the law applicable to such insolvent credit institution's counterclaim. Moreover, article 33 of the Winding-up Act establishes that netting agreements shall be exclusively governed by the law applicable thereto, which means that Portuguese substantive law will not apply to the effectiveness and enforceability of such netting agreements. Also, the rules relating to voidness, voidability or unenforceability of legal acts detrimental to all the creditors, as provided under Portuguese law, shall not apply when a person who has benefited from a legal act detrimental to all the creditors provides evidence that *(i)* the said act is subject to the law of a Member State (other than Portugal) and *(ii)* the law of that Member State does not allow any means of challenging that act in the relevant case.

The consequence of the above would be, in our opinion, that, upon the opening in Portugal of a reorganisation or an winding up proceeding against an bank, credit institution or financial company that is a party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement, the validity and enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision (even if not permitted under Portuguese law) would nevertheless be upheld by the Bank of Portugal and, where applicable, the relevant court, in the same circumstances where the operation of the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision would be permitted under the law chosen to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions entered into thereunder upon the opening of a reorganisation or winding up proceeding against an insurance company.

No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 3.3 to apply.

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

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

The reasoning supporting this conclusion is, *mutatis mutandis*, the same used to determine the validity and enforceability of the FOA Netting Provisions.

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 rights under the Clearing Module Netting Provision.

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

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

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

We are of this opinion because:

The reasoning supporting this conclusion is, *mutatis mutandis*, the same used to determine the validity and enforceability of the FOA Netting Provisions.

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 rights under the Addendum Netting Provisions.

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

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

In relation to a Clearing Agreement, the opinions expressed at paragraph 3.3 above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing



Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement. In a case where a Party, who would (but for the use of the FOA Clearing Agreement or the ISDA/FOA Clearing Agreement) be the Defaulting Party for the purposes of the FOA Netting Agreement, acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the question as to whether the FOA Netting Provision will, to the extent inconsistent with the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, be superseded by the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision would be determined under the governing law of the Clearing Agreement.

### **3.7 Enforceability of the FOA Set-Off Provisions**

3.7.1 In relation to an FOA Netting Agreement which includes the FOA Set-Off Provisions, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default, the Non-Defaulting Party would be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

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

The reasoning supporting this conclusion is, *mutatis mutandis*, the same used to determine the validity and enforceability of the FOA Netting Provisions.

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

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

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

We are of this opinion because:

The reasoning supporting this conclusion is, *mutatis mutandis*, the same used to determine the validity and enforceability of the FOA Netting Provisions.

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

3.8.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions is a Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:

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



We are of this opinion because:

The reasoning supporting this conclusion is, *mutatis mutandis*, the same used to determine the validity and enforceability of the FOA Netting Provisions.

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

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

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

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

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

We are of this opinion because:

The reasoning supporting this conclusion is, *mutatis mutandis*, the same used to determine the validity and enforceability of the FOA Netting Provisions.

No amendments to the Addendum Set-Off Provision 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 an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer

Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.

- 3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value.
- 3.10.3 The courts of this jurisdiction would not recharacterise Transfers of margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest.
- 3.10.4 A Party shall be entitled to use or invest for its own benefit, as outright owner and without restriction, any Margin Transferred to it pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

We are of this opinion because:

The reasoning supporting this conclusion is, *mutatis mutandis*, the same used to determine the validity and enforceability of the FOA Netting Provisions.

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

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

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



- (ii) the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

### 3.12 Single Agreement

Under the laws of this jurisdiction it is 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. In our view, the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and Transactions are part of a single agreement.

### 3.13 Automatic Termination

#### 3.13.1 Automatic termination and liquidation; potential consequences under the Insolvency Act of an optional termination and liquidation

It is desirable, although not strictly necessary, for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision to ensure the effectiveness of netting under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, in each case, for example, by turning on the automatic termination mechanism under the relevant transaction documentation, in the event of bankruptcy, liquidation, or other similar circumstances. Considering the Insolvency Act and the uncertainty of whether the Netting Act protects the optional operation of the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision, as the case may be, by the Solvent Party upon the declaration of insolvency or the implementation of reorganisation measures against an Insolvent Party,

- (i) we would recommend the Parties to agree on an automatic termination and liquidation of the outstanding Transactions entered into under FOA Netting Agreement or, as the case may be, the Clearing Agreement, upon occurrence of any Event of Default, subject to the indications below on the validity and enforceability of such contractual arrangement under the laws of this jurisdiction (see 3.13.2); and
- (ii) this is so because, upon the declaration of insolvency of an Insolvent Party subject to an Insolvency Proceeding in this jurisdiction, all the obligations of that party not subject to a condition shall *ope legis* become immediately due and payable and, accordingly, a termination occurring after the occurrence of any Event of Default could leave the relevant Party in a situation where the acceleration of the Parties' obligations under Transactions by operation of the Insolvency Act occurs (with the consequences described in Qualification I) below) before the actual termination and liquidation under and in accordance with the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision, as the case may be; and



If either party has received from the other Party any payments in connection with transactions entered under the relevant master agreement, such amounts (“Payable Amounts”) shall have to be returned to the other party. If the party owing the Payable Amount is the Insolvent Party, the payee shall have a claim against, and subject to, the Insolvent Party's assets; in the event that the payer of the Payable Amount is the Solvent Party, such party shall have to return the Payable Amount to the Insolvent Party's assets or, if applicable, set-off the Payable Amount against the Termination Amount (if any) owed by the Insolvent Party.

That said, it should be ascertained, on a case by case basis, whether each Transaction relates to Financial Obligations for the purposes of the Insolvency Code. For these purposes, Financial Obligations means (a) obligations to deliver securities (save for physically settled transactions giving rise to the obligation to deliver shares representing more than 10% of the share capital of the issuer); (b) obligations to deliver precious metals; (c) obligations to effect cash payments calculated by reference to an exchange rate, an interest rate, a calculation unit or the price of other goods and services; or (d) options or other rights relating to the sale of the assets referred to in (a) and (b) or to payments referred to in (c).

### **3.13.2 Validity and enforceability of automatic termination and liquidation**

The Insolvency Act establishes as mandatory the rules governing the effects of a declaration of insolvency in the ongoing contracts of the relevant insolvent party. Under article 119(2) of the Insolvency Act, a contractual provision stipulating that the insolvency of a party gives the other party a right to a specific compensation, or otherwise a right to terminate the contractual arrangements deviating from the mandatory provisions of the Insolvency Act, shall in principle be considered null and void. This means, accordingly, that under the laws of this jurisdiction there are effective limitations to contractual provisions (i) establishing the insolvency of a party as a termination event and/or (ii) stipulating contractual effects stemming from such termination which deviate from the general rules enshrined in the Insolvency Act.

However, the Insolvency Act itself establishes a deviation to this rule, which applies to particular types of contracts. Pursuant to article 119(3) of the Insolvency Act, taking into account the nature and characteristics of the relevant agreement, the insolvency of one party thereto may be qualified as just cause for the termination of such agreement.

Our view is that, considering the particular characteristics, the mechanics and sophistication of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and of the Transactions contemplated thereunder, article 119(3) of the Insolvency Act should apply thereto and, accordingly, a contractual provision establishing the automatic termination and liquidation would be valid and enforceable. Moreover, further evidence that Portuguese law recognizes the peculiar nature of contractual arrangements such as the FOA Netting Agreement or, as the case may be, the Clearing Agreement, (and, specifically, the peculiar nature of close out



netting provisions) and that, as a result, such contractual arrangements fall within the scope of said article 119(3) is given by the Netting Act, which expressly protects and affirms the operation of close out netting provisions in the context of an insolvency.

As further comfort, and although there are not, to be best of our knowledge, relevant precedents on this point, we should also stress that there is already published opinion in Portugal taking a position substantially in line with the conclusions reached above.

### 3.14 **Multibranch Parties**

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

### 3.15 **Insolvency of Foreign Parties**

Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default or a Firm Trigger Event or, as the case may be, a CM Trigger Event occurs in respect of such Party (a "**Foreign Defaulting Party**") to Insolvency Proceedings in this jurisdiction if the Defaulting Party has a branch in this jurisdiction set up or established pursuant to the applicable legislation, in which case:

- (a) there can be separate Insolvency Proceedings in this jurisdiction with respect to the Defaulting Party's branch located in this jurisdiction, whether or not the relevant authorities in any other jurisdiction have initiated proceedings in respect of the Defaulting Party (the effect of the Insolvency Proceedings being restricted to the assets of the Defaulting Party located in this jurisdiction), save for branches in this jurisdiction of credit institutions, investment companies or insurance companies incorporated and authorised in another EU Member State (in which case no separate Insolvency Proceedings will be opened in this jurisdiction – see Schedule I); and
- (b) an Insolvency Representative in this jurisdiction would only include obligations arising from Transactions entered into through the branch in this jurisdiction in the calculation of amounts owed to and from the Defaulting Party, notwithstanding the terms of the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

Where the obligations in respect of Transactions entered into from the branch in this jurisdiction are treated separately, the courts of this jurisdiction are likely to recognise those obligations as having been satisfied if under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, they were included in a set-off or netting in another jurisdiction of obligations owed in respect of Transactions entered into from



all branches of the Defaulting Party. Specifically, the provisions of the Insolvency Act under which netting and set-off provisions will be enforceable in an Insolvency Proceeding in Portugal to the extent such netting and/or set-off is permitted by the law applicable to the insolvent debtor's counterclaim (see 3.3 to 3.9 above) remain applicable in this scenario. Accordingly, our view is that, although there is no relevant court precedents on this point, the Insolvency Representative in this jurisdiction of a Defaulting Party would give effect to the global termination and liquidation provisions of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, (whereby the Non-Defaulting Party may terminate and liquidate obligations arising from all and any Transactions, regardless of the type of the Transaction or the branch from which it was entered into) by treating the obligations in respect of Transactions entered into from the branch in this jurisdiction separately from other obligations arising under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or other Transactions.

The enforceability or effectiveness of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, in this jurisdiction would not be adversely affected by its unenforceability or effectiveness under the law of any jurisdiction, unless otherwise determined by the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, (other than Portuguese law).

Branches in this jurisdiction of credit institutions, investment companies or insurance companies incorporated and authorised in another EU Member State will not be subject to separate Insolvency Proceedings in this jurisdiction, which means, specifically, that the Bank of Portugal will not have the powers to start a reorganization and/or winding-up process as described above. Conversely, branches in this jurisdiction of credit institutions, investment companies or insurance companies incorporated and authorised in countries other than EU Member State may be subject to separate Insolvency Proceedings in this jurisdiction, in which case, specifically, the Bank of Portugal will have the powers to start a reorganization and/or winding-up process as described above.

Our opinions under this paragraph 3.15 remain applicable in case of an Insolvency Proceeding involving a branch in this jurisdiction of a bank, credit institution or financial company incorporated under the laws of another jurisdiction. Without prejudice to article 54 of the Banking Act, under which assets of the branch registered in this jurisdiction shall only be used to pay for liabilities of the relevant bank or credit institution provided all liabilities in Portugal have been previously satisfied, our opinion is that the rules stemming from the Winding-Up Act dealing with netting and set-off contractual arrangements (articles 31 and 33 such Act – see 3.3 above) will prevail and, accordingly, the global operation of netting and set-off clauses involving the Portuguese branch and other branches and/or the relevant bank should be recognized by an Insolvency representative in this jurisdiction.

For the purposes of this paragraph 3.15, “Centre of Main Interests” has the meaning ascribed to it in EU Insolvency Regulation, it being presumed that, in the case of a



company or a legal person, the centre of its main interests shall be the place of the registered office. The Insolvency Act also presumes that a insolvent debtor, whether a legal or a natural person, has his centre of main interests in the place where (i) such interests are administered on a regular basis and (ii) such administration is capable of being ascertained by third parties.

### 3.16 Special legal provisions for market contracts

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.

- A) Under Council Regulation (EC) no. 593/2008, dated of June 17<sup>th</sup> 2008, the fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign court, where all the other elements relevant to the situation at the time of the choice are connected with one country only, shall not prejudice the application of the mandatory provisions of the laws of such country (i.e., the provisions which cannot be derogated from by contract). Moreover, where all the elements relevant to the situation are solely connected with this jurisdiction and the parties have submitted any disputes arising under or in connection with that situation to the courts of another jurisdiction, the Portuguese courts will have and will accept jurisdiction to settle any such disputes.
- B) Whenever a Party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement, is an individual entering into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions for a purpose which can be regarded as being outside his trade or profession ("**Consumer**"), unless the services are exclusively provided in a country other than the Consumer's habitual residence, a choice of law made by the parties shall not have the result of depriving the Consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: (i) if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or (ii) if the other party or his agent received the consumer's order in that country. Although, please note that Portuguese laws applicable to Consumers do not affect the validity and enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, as the case may be, subject to the conclusions reached in paragraph 2 of the section headed "Opinion".



- C) Moreover, whenever a Party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement, is a Consumer, the Parties to such agreement may be restricted under the Brussels Regulation or, where applicable, the Conventions, in its ability to agree on the submission of any disputes arising under or in connection with the relevant agreement to the court of a Member State or to the courts of a State that is a party to the Conventions.
- D) Pursuant to Portuguese law, irrespective of the choice of a foreign law by the parties, the mandatory provisions regarding standard contractual terms (i.e., contractual terms which have not been individually negotiated and that an undetermined addressee has entered into without being able to influence its terms) apply, where such contract has a close connection with territory of this jurisdiction. Therefore, the provisions of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, regarding “Governing Law and Jurisdiction” should remain in a schedule subject to individual negotiation between the Parties so as to avoid that the aforementioned Portuguese laws applying to such agreement.
- E) Transactions not relating to Financial Instruments, are covered by this opinion with certain limitations (please refer to paragraph 3 of the section headed “Opinion”). In fact, it is unclear whether all the eligible Transactions for the purposes of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, will be characterised as Transactions relating to Financial Instruments for the purposes of the Netting Act. Please see Qualification F) below for a discussion of the types of Transactions to which the Netting Act applies.
- F) Considering the existing legal or regulatory guidance or applicable case law on the concept of Financial Instruments, the opinions expressed above represent a tentative interpretation on how a reasonable Portuguese court would be likely to construe (i) the concept of *compensação* for the purposes of the Insolvency Act (and, where applicable, the Winding Up Act and the Insurance Liquidation Act) and (ii) the concept of Financial Instrument for the purposes of determining the scope of the Netting Act. For this latter purpose, we believe that it will be helpful to conduct a separate analysis in respect of each of the transactions to which the Netting Act would, in our opinion, apply – although, as is clear from our reasoned opinion above, our conclusions in relation to the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions do not rely exclusively on the application of the Netting Act. That said, our view is that the Netting Act will apply to:
- i) **Transactions in relation to securities.** Under Portuguese law, securities mean any documents representing homogeneous rights and obligations and capable of being traded in a market, including, but not limited to, shares, bonds, notes, warrants, units in collective investment undertakings, sovereign



debt securities (treasury bills, treasury bonds, etc). Therefore, futures, options, contracts for differences and any kind of contracts (excluding spot contracts) in relation to securities (as defined above) will fall within the scope of the Netting Act;

- ii) **Futures and forward contracts on currencies, interest rates and exchanges rates.** Based on parallel legal definitions of forward transactions and the concept of “contract of an analogous nature” used in the law, our view is that there is no reason for excluding from the scope of the Netting Act all Transactions relating to currencies and interest rates;
  - iii) **Swaps and Options.** The Netting Act provides that all swaps and options will be eligible transactions for the purposes of the Netting Act, without specifying the types of eligible underlying assets therefor. Accordingly, we believe that it can be reasonably argued that all Transactions that are swaps and options relating to commodities, metals, financial instruments, currencies, interest rates, and indexes are eligible transactions for the purposes of the application of the Netting Act;
  - iv) **Contracts that are analogous to the contracts referred to in paragraphs (ii) and (iii) above.** The question here is the interpretation of the expression “contracts of an analogous nature” used in the Netting Act. Taking into consideration the fact that the Netting Act has been enacted in connection with recognition of the netting agreements for the purposes of the regulatory capital requirements (Directive no. 89/647/EEC of 18 December 1989, as amended, repealed by Directive 2000/12/EC of 20 March 2000 and consolidated into Directive 2006/48/EC of 14 June 2006, relating to the taking up and pursuit of the business of credit institutions (the “**Consolidated Directive**”)), our view is that all Transactions being characterised as any of the types of off-balance sheet items listed in Annex IV of the Consolidated Directive, if not directly covered by the definition of Financial Instruments, will also fall within the definition of “contracts of an analogous nature” for the purposes of the Netting Act; and
  - v) **Transactions relating to any of the instruments referred to in (ii) to (iv) above.**
- G) Netting in the context of Insolvency Proceedings governed by the Netting Act is permitted with regard to Transactions over Financial Instruments only. It should also be noted that there is no case law on the enforcement of netting provisions by Portuguese courts, including on the interpretation and application of the Netting Act or Decree-Law no. 105/2004 of 8 May 2004 (the “**Financial Collateral Act**”, which implemented Directive no. 2002/47/EC of 6 June 2002) and the specific legislation providing for the enforceability of netting and close-out provisions, including relevant conflict of law provisions thereon.



- H) The Portuguese Netting Act refers to the concept of "negócio" and to the concept of "contratos sobre instrumentos financeiros" which might be construed as a reference to a single umbrella (master) agreement, in the first case, and to the relevant transactions executed under such umbrella agreement, in the second case. Assuming that, as a rule, a Firm will only have one umbrella agreement with each Client, our opinion above remains true. However, in those cases where a Firm will have more than one umbrella agreement, it is possible to argue that the Clearing Module Netting Provision will only apply between transactions under the same umbrella agreement. Notwithstanding, it is our opinion that there is a strong argument to support the extension of the concept of "negócio" to all transactions executed between a Firm and a Client as a result of the fact that, even if considered autonomously, each Cleared Set Termination Amount will benefit from the protection of the Netting Act and may therefore be subject to set-off between themselves.
- I) The Insolvency Act provides that, following a declaration of insolvency, all transactions ("Eligible Transactions") relating to commodities or Financial Obligations (as defined below) that, under a master agreement, may only be terminated simultaneously upon occurrence of a default thereunder, shall be treated as a single bilateral agreement. Furthermore, the Insolvency Act provides that if the maturity date of Eligible Transactions under the master agreement (treated as a single bilateral agreement) would only occur on a date falling after the declaration of insolvency, neither party may require the other party to perform its respective obligations thereunder and each of the payer and the payee (or, if applicable, seller or buyer) under the initial transaction shall only be entitled to claim from the other party the payment of an amount ("Termination Amount") corresponding to the difference between the agreed price and the market price of the relevant commodity or Financial Obligation (as the case may be), determined in the second day after the declaration of insolvency (the result of which, being an amount payable by the Insolvent Party, shall constitute a claim of the payee against, and subject to, the Insolvent Party's assets). The Termination Amount resulting from the determinations made in accordance with the Insolvency Act would not necessarily be the amount that would otherwise result from the determinations made in accordance with the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision, as the case may be.
- J) Upon a declaration of insolvency by a court ruling on the matter or issue of a liquidation order by the Bank of Portugal, in the case of entities which are credit institutions, financial companies or branches of credit institutions, financial companies and investment firms, all obligations owed by the Party concerned shall immediately be converted into the lawful currency in this jurisdiction at the then applicable exchange rate. Furthermore, upon a declaration of insolvency or the issuance of a liquidation order by the Bank of Portugal against a Portuguese Party, the value of such obligations that would not have matured but for the declaration of insolvency or the issuance of a winding-up order will be reduced



by an amount equivalent to the accrued or capitalised interest by reference to their original maturity dates.

- K) Unless otherwise expressly agreed between the Parties (i.e. the Parties having specifically agreed that the Parties will not discharge their obligations in a currency other than Base Currency and in particular that they will not discharge their obligations in their respective national currencies), an obligation to pay in a foreign currency shall not prevent the Party concerned from discharging its payment obligations through the use of Euros. We are nevertheless of the opinion that, in accordance with the applicable conflict of laws principles of Portuguese law, this legal regime would only be applicable should the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or the Transaction be subject to the laws of Portugal.
- L) Net amounts denominated in a foreign currency may have to be converted into the lawful currency in this jurisdiction for enforcement purposes.
- M) Without prejudice to conclusions reached in Section 3 of this opinion, contractual netting set-off (“*compensação contratual*”) made under unusual or abusive commercial terms - i.e. under terms that can be considered excessive, abusive or abnormal in face of the function and nature of the obligations of the parties, or the circumstances of the case, and that, as such have the potential of unjustly benefiting one of the creditors against the other creditors (such as the allocation of an asset with no consideration) -, during the six months prior to the opening of the insolvency proceedings against a Party shall be set aside. However, considering that the values which will be used for netting and set-off under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, are values determined in accordance with market standards and the regime provided for in the Insolvency Act, Winding Up Act and Insurance Liquidation Act, the enforceability of the Netting Provisions in this jurisdiction will not be affected by the commencement or continuation of Insolvency Proceedings, winding up procedures or reorganisation measures provided that such Netting Provisions are valid and enforceable under the law governing the FOA Netting Agreement or, as the case may be, the Clearing Agreement.
- N) As a condition to their admissibility in enforcement or insolvency proceedings in Portugal, the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or any documentation evidencing the agreement regarding each Transaction must be accompanied by a duly legalised translation in Portuguese.
- O) In a case where the Brussels Regulation or the Conventions apply, Portuguese courts may be obliged to assume jurisdiction in certain circumstances, including where Article 22 of the Brussels Regulation or, as the case may be, Article 16 of the Conventions applies.

- P) To the extent that the netting and set-off of Transactions between participants on a settlement system or a clearing house is made in accordance with the applicable rules of such settlement system or clearing house, the rights and obligations of the parties under or in connection with such participation upon the opening of an Insolvency Proceeding against a participant shall be determined by the law applicable to relevant settlement system or clearing house.
- Q) Should Portuguese law be the law governing the relevant settlement system or clearing house, as it is the case of Omi Clear – Sociedade de Compensação de Mercados de Energia, S.A., the insolvency of a participant on such settlement system or clearing house shall not affect the irrevocability or effectiveness of any orders given nor the finality of the netting and set-off of Transactions made in accordance with the rules of that system to the extent that (i) the transfer orders were entered into the system before the declaration of insolvency or before the decision to submit the relevant participant to a reorganisation measure (“**Opening of an Insolvency Proceeding**”) or (ii), if the orders were entered into the system after the Opening of an Insolvency Proceeding, provided that such orders were carried out on the day of the Opening of an Insolvency Proceeding and the settlement agent, the central counterparty or the clearing house can prove that they were not, nor should have been, aware of the Opening of an Insolvency Proceedings against the relevant participant.

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

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

Yours faithfully,



Magda Viçoso



Hugo Rosa Ferreira

**A.M. Pereira, Sáragga Leal, Oliveira Martins, Júdice & Associados**  
**Sociedade de Advogados, R.L.**



## **SCHEDULE I**

### **Insurance companies/ providers**

Subject to the modifications and additions set out in this Schedule II, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are insurance companies/ providers.

We further confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings if supplemented by the events provided for in this Schedule.

For the purposes of this Schedule II, "**Insurance companies/providers**" are companies that are duly authorised to carry out insurance activities; insurance companies are subject to a specific regulatory authorisation granted by the *Instituto dos Seguros de Portugal* (the "**ISP**"), the Portuguese Insurance Authority, and to a specific regulatory environment, established in the Insurance Companies Act ("*Regime Jurídico da Actividade Seguradora e Resseguradora*"), approved by Decree-Law 94-B/98 of 17 April 1998, as amended, and in other laws and regulations governing respective activities, including administrative rules passed by the ISP.

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 1.10.1 is deemed deleted and replaced with the following:

*"Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule II ("Insurance companies/ providers").*

#### **2. MODIFICATIONS TO OPINIONS**

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

##### **2.1 Insolvency Proceedings: insurance companies/ providers**

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an insurance company/ provider could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

Reorganisation and Winding Up of Insurance Companies ("*Saneamento e Liquidação de Empresas de Seguros*"), regulated by the Insurance Act and Decree-Law no.



90/2003, dated of April 30<sup>th</sup>, 2003 (the “**Insurance Liquidation Act**”), consisting of a specific proceeding regulating the liquidation of insurance companies subject to the supervision of the Portuguese Insurance Institute. The Insolvency Act is applicable to insurance companies only to the extent that there is no incompatibility with the specific provisions laid down in the Insurance Act and Insurance Liquidation Act

Insurance Companies are not subject to the general Insolvency and Reorganisation Proceeding that is applicable to companies. The reorganisation of insurance companies consists of extraordinary measures for the reorganisation of insurance companies imposed by the ISP, the insurance regulator. These measures may consist of, *inter alia*, the correction of the technical provisions or submission of a financing or reorganization plan, restrictions on the carrying out of insurance business, in particular on the underwriting of certain classes of insurance or the entering into certain types of operations, restrictions on the underwriting of credits or on the application of funds towards the acquisition of certain types of assets and subjection of certain acts or transactions to the prior consent of the Portuguese Insurance Institute.

The Insurance Liquidation Act has implemented Directive no. 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding up of insurance undertakings, and has laid down specific provisions on the winding up and liquidation of insurance companies, as well as amended the Insurance Companies Act.

Finally, the winding-up proceeding of Insurance Companies consists of a special proceeding regulating the winding up and liquidation of insurance companies subject to the supervision of the ISP. In the part regulating the winding up of companies and businesses, the Insolvency and Reorganisation Proceeding is applicable to insurance companies only to the extent that there is no incompatibility with the special provisions laid down in the Insurance Act and in the above Insurance Liquidation Act.

## **2.2 Enforceability of FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision and of the Addendum Set-Off Provision**

The conclusions reached in relation to the validity and enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision and of the Addendum Set-Off Provision, as the case may be, are further strengthened where the Insolvent Party is an insurance company. Under article 22 of the Insurance Liquidation Act, the opening of liquidation proceedings shall not affect the right of creditors to net its credits over the insolvent Insurance Company, whenever such netting is available under the law applicable to such insolvent Insurance Company counterclaim. Moreover, the rules relating to voidness, voidability or unenforceability of legal acts detrimental to all the creditors, as provided under Portuguese law, shall not apply when a person who has benefited from a legal act detrimental to all the creditors provides evidence that (i) the said act is subject to the law of a Member State



(other than Portugal) and **(ii)** the law of that Member State does not allow any means of challenging that act in the relevant case.

The consequence of the above would be, in our opinion, that, upon the opening in Portugal of a reorganisation or an winding up proceeding against an insurance undertaking that is a party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement, the validity and enforceability of the Netting Provisions (even if not permitted under Portuguese law) would nevertheless be upheld by the Portuguese insurance regulator or by the relevant court (as the case may be) in the same circumstances where the operation of the Netting Provisions would be permitted under the law chosen to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions entered into thereunder upon the opening of a reorganisation or winding up proceeding against an insurance company.

### 3. **ADDITIONAL QUALIFICATIONS**

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

- A) Upon a declaration of insolvency by a court ruling on the matter or issue of a liquidation order by the Portuguese Insurance Institute, in the case of entities which are insurance companies or insurance companies incorporated and authorised in a non EC member State, all obligations owed by the Party concerned shall immediately be converted into the lawful currency in this jurisdiction at the then applicable exchange rate. Furthermore, upon a declaration of insolvency or the issuance of a liquidation order by the Portuguese Insurance Institute against a Portuguese Party, the value of such obligations that would not have matured but for the declaration of insolvency or the issuance of a winding-up order will be reduced by an amount equivalent to the accrued or capitalised interest by reference to their original maturity dates.



## **SCHEDULE II**

### **Individuals domiciled in this jurisdiction**

Subject to the modifications and additions set out in this Schedule III, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are individuals domiciled in this jurisdiction.

We further confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings if supplemented by the events provided for in this Schedule.

For the purposes of this Schedule III, "**Individuals**" are individual people who, in their activities, take the role of Counterparties to the Transactions pursuant to this Agreement and who are subject to the provisions of the Portuguese Civil Code. Individuals are also protected by Consumer provisions and by mandatory provisions regarding standard contractual terms (i.e., contractual terms which have not been individually negotiated and that an undetermined addressee has entered into without being able to influence its terms).

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 1.10.1 is deemed deleted and replaced with the following:

*"Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule III ("Individuals").*

#### **2. MODIFICATIONS TO OPINIONS**

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

##### **2.1 Insolvency Proceedings: individuals**

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an individual could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, is the Insolvency Act, consisting of a global enforcement proceeding aiming at (i) the liquidation of the insolvent debtor's assets for the satisfaction of its creditors or (ii) the satisfaction of such creditors in accordance with an Insolvency Plan which may provide, inter alia, for the reorganisation of a business being part of the insolvency estate. Immediate liquidation or approval of an insolvency plan (which may also regulate the liquidation of the insolvent debtor's assets) shall depend on a



resolution taken in a creditors meeting called by the liquidator following the declaration of insolvency to consider and discuss an insolvency report enclosing an inventory of the insolvency's assets and a list of the insolvency creditors.

The Portuguese laws applicable to Consumers do not affect the validity and enforceability of the Netting Provisions subject to the conclusions reached in paragraph 2 of the section headed "Opinion".

### SCHEDULE III

#### Funds organised as investment funds

Subject to the modifications and additions set out in this Schedule IV, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are funds organised as investment funds.

We further confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings if supplemented by the events provided for in this Schedule.

For the purposes of this Schedule IV, “**investment funds**” are segregated estates without legal personality that serve as vehicles for investment purposes, providing the agents who invest in them with a share of the profits and income arising from the assets acquired, held, managed and disposed by the managers of such estate or with a with a right to a payment calculated according to such profits or income. Investment funds are regulated by the Undertakings for Collective Investment Act (“*Regime Jurídico dos Organismos de Investimento Colectivo*”), approved by Decree-Law 63-A/2013, of 10 May 2013, as well as by other laws and regulations governing respective activities, including administrative rules passed by the CMVM; Management Companies are separate legal entities that are duly authorised to carry out management activities; Management Companies are subject to a specific regulatory authorization granted by the *Banco de Portugal* and to a specific regulatory environment, established in the Legal Framework of Credit Institutions and Financial Companies, in the Undertakings for Collective Investment Act and in other laws and regulations governing respective activities, including administrative rules passed by the *Banco de Portugal* and by the CMVM. Investment funds include “mutual funds” and “hedge 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.

#### 3. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.10.1 is deemed deleted and replaced with the following:

““*Insolvency Proceedings*” means the procedures listed in section 2.1 of Schedule IV (“*investment funds*”).

#### 4. 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.

##### 4.1 Insolvency Proceedings: investment funds



The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an investment fund could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

Winding Up of Undertakings for Collective Investment ("*Liquidação de Organismos de Investimento Colectivo*"), under which these entities may be wound up and liquidated following one of the following situations: (i) decision taken by the Management Company; (ii) decision taken by the unitholders, in certain circumstances; (iii) revocation of the authorization by the CMVM. The winding up of Investment Funds determines the immediate liquidation of the fund's estate, for which purpose the liquidator, which may be the Management Company itself, shall carry out the necessary steps, and only those, deemed necessary to close out all transactions and sell all assets in the estate.

It is not absolutely clear whether Investment Funds are subject to the insolvency proceedings established by the Insolvency Act. Although the Insolvency Act expressly foresees that such proceedings might be applicable to segregated estates without legal personality, the Winding Up of Undertakings for Collective Investment fails to explicitly establish that the Insolvency Act is applicable to investment funds. As such, some of Portugal's most prominent legal authors argue that Investment Funds are not subject to general insolvency proceedings under the Insolvency Act, as there is a special legal framework that applies specifically to the liquidation of funds. However, we have found some case law that shows that courts in Portugal have sometimes deemed the Insolvency Act applicable to investment funds when such funds undergo the liquidation proceedings established in the Winding Up of Undertakings for Collective Investment and a court is called upon to intervene in these proceedings.

#### **SCHEDULE IV**

##### **Sovereign and State sector entities**

Subject to the modifications and additions set out in this Schedule V, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Sovereign and Public sector entities.

We further confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings if supplemented by the events provided for in this Schedule.

For the purposes of this Schedule V, "**Sovereign and Public sector entities**", the following entities are included:

- i) The State;
- ii) Public Institutes;
- iii) State Companies, under the type of Entrepreneurial state entities only;
- iv) Public associations;
- v) Municipalities and;
- vi) Self-governing Regions of Azores and Madeira.

The above mentioned entities are deemed public legal entities (*peçoas colectivas públicas*). In this regard and with particular respect to the aspects explained later on, we would call your attention to the following:

- a) State sector companies are incorporated under the Decree-Law no. 558/99, dated of December 17<sup>th</sup>, as amended (the "State Sector Companies Act"). As provided under the State Sector Companies Act, the State Companies are entities whose organization and business model are subject to private law, although State controls (please see article 3). In contrast, the State Owned Private Companies are companies whose structure and organization is determined by private law, but in which the State has a strategic and permanent shareholding (please see article 2). Entrepreneurial State Entities are included in the State Companies. These entities are created by Decree-Law and are subject to the rules established under the Chapter III of the State Sector Companies Act (please see article 3 (2), 23 (1) and 24 (1)).
- b) Self-governing Regions of Azores and Madeira are public legal entities created by the State with the objective of pursuing the public interest, granted with special rights and duties that allow them to develop their objective. These may include public charitable bodies. The Self-governing Regions are public legal entities with a special financial and asset management autonomy in relation to the central State



Government. The Self-governing Regions, just like the State, also have their own sector companies, according to the article 5 of the State Sector Companies Act (please also see the Regional Decree-Law no. 7/2008/A, dated of March 24<sup>th</sup>, and the Regional Decree-Law no. 13/2010/M, dated of August 5<sup>th</sup>, as amended, for both. Please note that State Sector Companies Act is subsidiary applicable).

- c) The State / Self-governing Regions Companies (except the Entrepreneurial State Entities / Entrepreneurial Self-governing Regions Entities) and State / Self-governing Regions Owned Private Companies are not deemed public legal entities.

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.

## 5. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.10.1 is deemed deleted and replaced with the following:

*"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule V ("Sovereign and Public sector entities").*

## 6. ADDITIONAL ASSUMPTIONS

We assume:

*"That the Agreement is excluded of the scope of the application of the rules included under the Titles II and III of the Portuguese Public Contracts Code and, consequently, the Agreement is subject to private law. By excluding the application of these Titles, we assume that the Agreement will not be subject to the specific proceedings that precede the execution of Public Contracts, and which are characterized by an extensive set of rules aiming to prevent Sovereign and State Entities from using unfair criteria in selecting the party with whom they enter into such Public Contracts. We further assume that the execution of the Agreement will be governed by private law, which is, that the contracting Sovereign and State Entities will not have access to the special prerogatives regulated in the Public Contracts Code. The exclusion of the application of Titles II and II of the Portuguese Public Contracts Code to agreements entered into by Sovereign and State Entities should be determined on a case by case basis, according to the extensive criteria set forth in Title I of the Portuguese Public Contracts Code, which specifies the entities and the types of Contracts covered by the scope of application of the mentioned Code".*

## 7. 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.



## **7.1 Insolvency Proceedings: Sovereign and Public sector entities**

In what regards Sovereign and Public sector entities, the Insolvency Act expressly states that its provisions are not applicable to public legal entities (please see article 2 (2) (a)). Accordingly, the issue of the validity and enforceability of close-out netting and set-off provisions could in principle be raised in a context where the relevant Sovereign and Public sector entity admits to its inability generally to pay its debts as they become due (by, specifically, declaring a moratorium to all due payments).

## **3.3 Validity of FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision and of the Addendum Set-Off Provision**

- (i) The general principle according to which the parties are free to set the terms of an agreement as they see fit does apply to public sector entities. However, article 853 (1) (c) of the Portuguese Civil Code establishes that netting or set-off provisions included in agreements to which the State or any other public legal entity is a party, are only valid specifically authorized by law. According to the article 1 of Decree-Law no. 1/97, dated of January 7<sup>th</sup>, as amended, netting and set-off clauses (*compensação contractual*) entered into by the Portuguese State are valid. The article 4 of the same Decree-Law further states that the Finance Minister may authorise other public legal entities to use these clauses in their agreements.
- (ii) It is unclear whether this provision applies to the Self-governing Regions, since, unlike other public legal entities, they have financial and asset management autonomy, under the Portuguese Constitution and the respective Political and Administrative Statutes. Indeed, the Self-governing Regions have powers to manage and dispose of their regional assets – when doing so, the authorization of the Minister of Finance is not legally required. As a result, the article 4 of the Decree-Law no. 1/97 is insufficient to exclude the restrictions to netting foreseen under article 853 (1) (c) of the Portuguese Civil Code and it would be necessary a specific law to clearly state that netting clauses in financial agreements entered into by the Self-governing Region are valid and enforceable. On the other hand, according to the article 228 (2) of the Portuguese Constitution, whenever the Self-governing Region has not enacted a specific regional law, the law approved at a central level (like the Decree-Law no. 1/97) shall apply, as adapted. Pursuant to what was set forth before, it may be sustained that netting provisions shall be enforceable against the Self-governing Region whenever authorised by the Regional Secretary of Finance.
- (iii) Furthermore, Portuguese law specialists have been advising counterparties to take margin upfront when entering into derivative transactions with Self-governing Regions, since that may trigger the applicability of the Financial Collateral Act, which regulates financial collateral arrangements. Since netting clauses are admissible pursuant to the Financial Collateral Act, this would



clarify that the Self-governing Regions would indeed be able to enter into agreements with such clauses.

- (iv) The article 2 (2) (a) specifically establishes that the provisions of the Insolvency Act are not applicable to Entrepreneurial State Entities. Article 34 (2) of the State Sector Companies Act further states that these counterparties are not subject to insolvency law and the rules applicable to the respective liquidation shall be set by a Decree-Law specially enacted for this purpose. As such, the exception provided under the article 853 (1) (c) of the Portuguese Civil Code applies, allowing Entrepreneurial State Entities to set forth netting and set-off clauses as long as such clauses are authorized by the Minister of Finance. If the Entrepreneurial State Entity is controlled by an Self-governing Region, these counterparties are also not subject to insolvency law either (please see articles 43 (2) of the Regional Decree-Law no. 7/2008/A and the Regional Decree-Law no. 13/2010/M). Consequently, the exception provided under the Portuguese Civil Code may apply as established pursuant to what was set forth above.
- (v) Finally, a note on the State / Self-governing Regions owned private companies, which do not fall under the scope of Sovereign and Public sector entities. These state owned private companies (unless stated differently in the legislative act that approved their incorporation of the company will in turn to be subject to the both the Netting Act, as well as generally to the Insolvency Act. As such, the netting and set-off clauses to which this type of entities agree will be valid and enforceable, including in an insolvency scenario of such party, in accordance with our general indications set out in our opinion above – see 3.3 above.

## **SCHEDULE V**

### **Pension funds**

Subject to the modifications and additions set out in this Schedule VI, the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Pension funds managed and represented in their acts by a separate management entity, organised under Decree-Law no. 12/2006, dated of January 20<sup>th</sup>, as amended (the “**Pension Funds Law**”).

We further confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings if supplemented by the events provided for in this Schedule.

For the purposes of this Schedule VI, “**pension funds**” are autonomous pools of assets/estates that are managed and represented in their acts by a separate management entity. The establishment of the Pension fund and the incorporation of the entity that manages it is subject to approval by the ISP (local insurance regulator).

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.

#### **8. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS**

Paragraph 1.9.1 is deemed deleted and replaced with the following:

*“Insolvency Proceedings” means the procedures listed in section 2.1 of Schedule VI (“private charitable bodies”).*

#### **9. 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.

##### **9.1 Insolvency Proceedings: pension funds**

Pursuant to article 80 of the Pension Funds Law and to article 114 of the Insurance Act, the ISP may intervene in the recovery process of a pension fund that started struggling financially. In particular, the ISP may restrict or forbid the utilization of the assets of the relevant Fund.

If this intervention is not sufficient to recover the financial situation of the relevant pension fund, it will be deemed insolvent and its managing entity shall, following an authorization by the ISP, terminate the relevant deed of incorporation of the pension fund and proceed with its liquidation. The Pension’s Fund Regime expressly provided



that such liquidation of the pension fund shall be conducted by the respective managing entity and not by a court.

This particular regime does not affect, in our view, the opinions given in relation to the validity and enforceability of the netting and set-off provisions. Since the Insolvency Act would not be applicable in this case, this validity stems from general contract law as enshrined in the Portuguese civil code (in particular, the principles of contractual freedom stemming from article 405 and 801/2 of the Portuguese civil code).

In any case, it would be advisable to amend the Insolvency Event of Default pertaining to pension funds so that such Event of Default occurs as soon as the fund starts to struggle financially and will likely require, as such, the intervention of the ISP.

**ANNEX 1**  
**FORMS OF FOA NETTING AGREEMENTS**

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



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

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

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

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



## **ANNEX 2**

### **List of Transactions**

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

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

### **ANNEX 3**

#### **DEFINITIONS RELATING TO THE AGREEMENTS**

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

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

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

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

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

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

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

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

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

- (a) on the terms of the FOA Netting Agreement when used (i) in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or (ii) in conjunction with a Clearing Module Netting Provision and/or an Addendum Netting Provision and with or without a Clearing Module Set-Off Provision and/or an Addendum Set-Off Provision;
- (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.



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

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

- (a) Clause 5.2 (*Firm Events*), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module; or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

- (a) Clause 5.5 (*Set-Off*) of the FOA Clearing Module; or
- (b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

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

- (a) for the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*) and 3.6 (*Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;
- (b) for the purposes of paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value";
- (c) for the purposes of paragraph 3.5 (*Enforceability of the Addendum Netting Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value";

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

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

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

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

"**Eligible Counterparty Agreements**" means each of the Eligible Counterparty (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).

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

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

**"FOA Netting Agreement"** means an agreement:

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

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

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

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

- (b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (*Liquidation Date*), Clause 2.3 (*Calculation of Liquidation Amount*) and Clause 2.4 (*Payer*);
- (c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;
- (d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (*Liquidation Date*), Clause 10.3 (*Calculation of Liquidation Amount*) and Clause 10.4 (*Payer*);
- (e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*);
- (f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (*Liquidation Date*), Clause 11.4 (*Calculation of Liquidation Amount*) and Clause 11.5 (*Payer*); or
- (d) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

"FOA Set-off Provisions" means:

- (a) the "General Set-off Clause", being:
  - (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (*Set-off*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (*Set-off*);
  - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (*Set-off*);
  - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (*Set-off*);
  - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (*Set-off*);



- (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (*Set-off*);
  - (vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (*Set-Off*);
  - (viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (*Set-Off*); or
  - (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
- (b) the "**Margin Cash Set-off Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (*Set-off on default*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (*Set-off upon default or termination*);
  - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (*Set-off on default*),
  - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (*Set-off upon default or termination*);
  - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (*Set-off on default*);
  - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (*Set-off upon default or termination*); or
  - (vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
  - (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);
  - (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
  - (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);
  - (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or
  - (vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and
- (b) where the FOA Member's counterparty is a natural person:
- (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
  - (ii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);
  - (iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or
  - (iv) any modified version of such clauses provided that it includes at least those parts of paragraph 4(b) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

**"Limited Recourse Provision"** means Clause 8.1 of the FOA Clearing Module or Clause 15(a) of the ISDA/FOA Clearing Module.

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



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

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

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

**"One-Way Versions"** means the Long Form One-Way Clauses 2007, the Short Form One-Way Clauses, the One-Way Master Netting Agreement 1997, and the FOA Netting Provision as published in the Retail Client Agreements and the Professional Client Agreements in each case in the form of an FOA Published Form Agreement.

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

**"Professional Client Agreements"** means each of the Professional Client (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:

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

**"Retail Client Agreements"** means each of the Retail Client (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).

**"Non-Cash Security Interest Provisions"** means:

- (a) the "**Non-Cash Security Interest Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (*Security interest*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (*Security interest*);
  - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (*Security interest*);
  - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (*Security interest*);
  - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (*Security interest*);
  - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (*Security interest*);
  - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (*Security interest*);
  - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (*Security interest*);
  - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (*Security interest*); or
  - (x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow; and
- (b) the "**Power of Sale Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (*Power of sale*);
  - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (*Power of sale*);
  - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (*Power of sale*);
  - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (*Power of sale*);



- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (*Power of sale*);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (*Power of sale*);
- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (*Power of sale*);
- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (*Power of sale*);
- (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (*Power of sale*); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
- (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);

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

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

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

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

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

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



## ANNEX 4

PART 1  
CORE PROVISIONS

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

## 1. FOA Netting Provision:

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

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

**2. General Set-Off Clause:**

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

**3. Margin Cash Set-Off Clause:**

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

**4. Insolvency Events of Default Clause:**

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

"The following shall constitute Events of Default:

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



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

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

"The following shall constitute Events of Default:

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

## 5. Title Transfer Provisions:

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



Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

**6. Clearing Module Netting Provision / Addendum Netting Provision:**

a) [Firm Trigger Event/CM Trigger Event]

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

- (a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];
- (b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;
- (c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with



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

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

b) CCP Default

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

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[ as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];
2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and



Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;

3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the date on which the CCP Default occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the day on which the relevant Client Transactions had all been terminated and, in either case, will be an amount equal to the sum, but without duplication, of (1) the Aggregate Transaction Value, (2) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (3) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (4) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[ and any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in [Clauses 5.3.3(1) to 5.3.3(3)] [Sections 8(c)(iii)(1) to 8(c)(iii)(3)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing member]);
4. if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable, in accordance with this [Module/Addendum].

c) Hierarchy of Events



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

Or

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

Or

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

d) Definitions

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

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



Member], the value determined in respect of [or otherwise ascribed to] such terminated Client Transaction(s) will reflect a positive value for [Firm/Clearing Member] vis-à-vis Client (and will constitute a negative amount for any determination under this [Module/Addendum]). The value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set may be equal to zero.

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

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

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

## 7. Clearing Module Set-Off Provision

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

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



## 8. Addendum Set-Off Provision

- (i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("**CM Other Amounts**"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its set-off against any other termination amount payable by or to X (where "X" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing Agreement at such time ("**EP Other Amounts**" and together with CM Other Amounts, "**Other Amounts**"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).
- (ii) For the purposes of this Section 8(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 has previously been reduced in part by set-off pursuant to this Section 8(e).
- (iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to

which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.



## **PART 2**

### **NON-MATERIAL AMENDMENTS**

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

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



16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.
17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).
18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:
  - more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
  - more than one FOA Clearing Module or Clearing Module Netting Provision
  - one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision

provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.
19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with equivalent effect to, clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.
20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in an FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).
21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).
22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.
23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and

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



## **PART 3**

### **SECURITY INTEREST PROVISIONS**

#### **1. Security Interest Clause:**

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

#### **2. Power of Sale Clause:**

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

#### **3. Client Money Additional Security Clause**

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

#### **4. Rehypothecation Clause**

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

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