OUR REF C0348.25/TZS/AMK

SHEPHERD+WEDDERBURN

9 December 2013

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

Dear Sirs

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

1. Background

1.1 Introduction

1.1.1 You have asked us to give an opinion in respect of the laws of Scotland in respect of the enforceability and validity of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision contained in an FOA Netting Agreement or a Clearing Agreement.

1.1.2 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.

1.2 Structure of this Opinion

1.2.1 Our opinions on the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision are given in paragraphs 5.3, 5.4, 5.5 and 5.6 of this Opinion.

1.2.2 Our opinions on the FOA Set-Off Provisions, the Clearing Module Set-Off Provisions, the Addendum Set-Off Provisions and the Title Transfer Provisions are given in paragraphs 5.7, 5.8, 5.9, 5.10 and 5.11 of this Opinion.

1.2.3 In certain circumstances, netting may not occur under the FOA Netting Provisions, the Clearing Module Netting Provision or the Addendum Netting Provision, but netting takes effect by virtue of the laws of this jurisdiction on the settlement of market contracts under the rules of a recognised investment exchange. We discuss this in paragraph 7 of this Opinion.

1.2.4 Modifications of our Opinion which apply in respect of particular types of counterparties are set out in the Schedules.

2. Terms of Reference

2.1 Subject as provided at paragraph 2.2, this Opinion is given generally in respect of Parties (and in paragraph 7, parties to market contracts) which are Scottish Companies or Foreign Companies (in both cases, including banks).

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2.2 This opinions at paragraph 5 (but not at paragraph 7) are 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:

2.2.1 Individuals (Schedule 1);

2.2.2 Building Societies (Schedule 2);

2.2.3 OEICs (Schedule 3);

2.2.4 Insurers (Schedule 4);

2.2.5 Partnerships (Schedule 5);

2.2.6 LLPs (Schedule 6);

2.2.7 parties acting as Trustees of Trusts (Schedule 7); and

2.2.8 Local Authorities as Administering Authorities (Schedule 8).

2.3 To the extent that they would otherwise be included within paragraph 2.2 above, the following parties are not covered by this Opinion:

2.3.1 companies incorporated or formed in England and Wales or Northern Ireland (whether under the Companies Act or otherwise);

2.3.2 EEA Insurers and branches established or located in Scotland of EEA insurers;

2.3.3 other than Insurers, insurers (as defined in Article 2 of the Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 and any other person that carries on the activity of effecting or carrying out contracts of insurance;

2.3.4 persons to whom the provisions of the Insurers (Reorganisation and Winding Up) (Lloyds) Regulations 2005 apply; and

2.3.5 Societas Europaea established pursuant to EU Council Regulation No. 2157/2001 of 8 October 2001 on the European Company Statute.

2.4 This Opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement only when the FOA Netting Agreement or, as the case may be, the Clearing Agreement are expressed to be governed by English law.

2.5 Subject to paragraph 2.6, this Opinion covers all Transactions which:

2.5.1 fall within any of paragraphs (A)(i) to (iv), (B), (C), (D) and (E) of the list of Transactions provided in Annex 2 to this Opinion; or

2.5.2 otherwise, are futures, options, contracts for differences, swaps, spot or forward contracts of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof,

in each case, whether entered into on a recognised investment exchange, any other form of organised market place or multilateral trading facility, or over the counter.

2.6 The opinions are given in respect of only such of those Transactions which, under their governing laws, are legal, valid, binding, enforceable and capable 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, respectively.

2.7 The opinions are given only in respect of margin which consists of cash or transferable securities located outside this jurisdiction.

2.8 No opinions are given in this Opinion on (or in relation to):

2.8.1 the availability of any judicial remedy;

2.8.2 any matters of fact;

2.8.3 the enforceability of any net obligation resulting from the operation of the Netting Provisions or Set Off Provisions;

2.8.4 any provisions of an Agreement, other than those to which express reference is made in this Opinion and then only to the extent that such provision relates to the enforceability of the Netting Provisions, Set Off Provisions or the Title Transfer Provisions;

2.8.5 the enforceability or effectiveness of any purported declaration of trust (or any provision which requires any asset to be held on trust) by a Counterparty in an Agreement;

2.8.6 any person found or alleged to be a trustee of a constructive, implied, resulting or other trust constituted by operation of law or who is a trustee in sequestration, or an executor acting in that capacity; or

2.8.7 any tax that may arise or be suffered as a result of the entry into or performance of the Agreement or any Transactions.

2.9 For the purposes of this Opinion we have reviewed the documents listed in Annex 1 and no other documents.

2.10 This Opinion relates solely to matters of Scots law as applied by the Scottish courts as at today's date and we express no opinions on the laws of any jurisdiction other than Scotland. In particular, this Opinion does not consider the impact of the law of any other jurisdiction, even where, under Scots law, the law of that jurisdiction falls to be applied.

2.11 This Opinion and all non-contractual matters which arise out of it are governed by Scots law.

3. Definitions and interpretation

3.1 Terms used in this Opinion and not otherwise defined herein have the meanings ascribed to them in the FOA Netting Agreement or the Clearing Agreement, unless the context specifies otherwise. Where a term defined in an FOA Published Form Agreement or, as the case may be, FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or this Opinion, (a "**defined term**") is referred to in an FOA Netting Agreement or, as the case may be, a Clearing Agreement, by some other term, the meaning of which is the same as the defined term, this Opinion may be read as if a defined term used in this Opinion refers to such other term.

3.2 In this Opinion:

3.2.1 "**Agreement**" means an FOA Netting Agreement or a Clearing Agreement;

3.2.2 "**Annex**" means an annex to this Opinion;

3.2.3 "**Administering Authority**" means a Local Authority acting in their capacity as Administering Authority within the meaning of the LGPS Scotland Regulations for the purpose of maintaining funds under the Local Government Pension Scheme (Scotland) for a Local Authority Pension Fund;

3.2.4 "**AUT**" mean an authorised unit trust scheme (as defined in Section 237(3) of FSMA) in respect of which an authorisation order has been made pursuant to Section 242 of FSMA;

3.2.5 "**Bank**" means a Counterparty (other than a Foreign Company) which has permission to accept deposits under Part 4A of FSMA;

3.2.6 "**Bankruptcy Act**" means the Bankruptcy (Scotland) Act 1985;

3.2.7 "**Building Society**" means a building society incorporated and registered in Scotland under the Building Societies Act 1986;

3.2.8 "**CASS**" means the Client Assets Sourcebook of the FCA's Handbook of Rules;

3.2.9 "**CI Regulations**" means the Credit Institutions (Reorganisation and Winding-up) Regulations 2004;

3.2.10 "**Clearing Netting Provisions**" means:

(i) the Clearing Module Netting Provision; and

(ii) the Addendum Netting Provision;

3.2.11 "**Collateral Directive**" means Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements;

3.2.12 "**Collateral Regulations**" means the Financial Collateral Arrangements (No.2) Regulations 2003;

3.2.13 "**Companies Act**" means the Companies Act 2006;

3.2.14 "**Company**" means a Scottish Company or a Foreign Company;

3.2.15 "**Company Insolvency Proceedings**" has the meaning given to it in paragraph 5.1;

3.2.16 "**Core Provisions**" has the meaning given to it in Annex 3;

3.2.17 "**Core Provisions Corporate Insolvency Event of Default**" means those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow;

3.2.18 "**Core Provisions Individual Insolvency Event of Default**" means those parts of paragraph 4(b) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow;

3.2.19 "**Counterparties**" means the parties listed in paragraphs 2.1 and 2.2;

3.2.20 "**Cross-Border Regulations**" means the Cross-Border Insolvency Regulations 2006;

3.2.21 "**EEA Credit Institution**" has the meaning given to it in the CI Regulations;

3.2.22 "**EEA Insurer**" has the meaning given to it in the Insurers (Reorganisation and Winding Up) Regulations 2004);

3.2.23 "**EMIR**" means Regulation (EU) No.648/2012 on OTC derivatives, central counterparties and trade repositories;

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

3.2.25 "**FCA**" means the UK Financial Conduct Authority;

3.2.26 "**Foreign Company**" means a company (other than a "*Societas Europaea*" established pursuant to EU Council Regulation No. 2157/2001 of 8 October 2001 on the European Company Statute) which is incorporated or formed under the laws of a jurisdiction other than this jurisdiction with a branch or branches established or located in this jurisdiction;

3.2.27 "**FSMA**" means the Financial Services and Market Act 2000;

3.2.28 "**Individual**" means an individual who has the centre of his or her main interests in Scotland for the purposes of the EU Insolvency Regulation and who have an established place of business or are habitually resident in Scotland;

3.2.29 "**Insolvency Act**" means the Insolvency Act 1986;

3.2.30 "**Insolvency Events of Default**" means the Individual Insolvency Events of Default and the Corporate Insolvency Events of Default;

3.2.31 "**Insolvency Proceedings**" means in relation to a Counterparty, Company Insolvency Proceedings or, as applicable, the Scottish insolvency proceedings listed at paragraph 1 of the Schedule in respect of that Counterparty;

3.2.32 "**Insolvency Representative**" means a liquidator, administrator, receiver, or trustee in sequestration, appointed (or in office) in each case in connection with an Insolvency Proceeding in respect of a Counterparty;

3.2.33 "**Insurers**" means Scottish Companies that are insurers (as defined in Article 2 of the Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001;

3.2.34 "**Investment Bank**" means a Counterparty (other than a Foreign Company) which:

(i) has permission under Part 4A of FSMA to carry on the regulated activities of (i) safeguarding and administering investments; (ii) dealing in investments as principal or (iii) dealing in investments as agent; and

(ii) holds client assets (as defined in and for the purposes of section 232 of the Banking Act and The Investment Bank (Amendment of Definition) Order 2011);

3.2.35 "**Investment Bank Regulations**" means The Investment Bank Special Administration Regulations 2011;

3.2.36 "**LGPS Scotland Regulations**" means the Local Government Pension Scheme (Administration)(Scotland) Regulations 2008;

3.2.37 "**Local Authority**" means a local authority constituted under the Local Government Etc. (Scotland) Act 1994;

3.2.38 "**Local Authority Pension Fund**" means a funded statutory pension arrangement established under the Superannuation Act 1972 and governed by, among other things, the LGPS Scotland Regulations;

3.2.39 "**MiFID Directive**" means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments;

3.2.40 "**MiFID Instruments**" means instruments referred to in Section C of Annex I to the MiFID Directive;

3.2.41 "**Netting Provision**" means:

(i) an FOA Netting Provision;

(ii) the Clearing Module Netting Provision; or

(iii) the Addendum Netting Provision;

3.2.42 "**Netting Termination Amount**" means:

(i) in relation to an FOA Netting Agreement, the Liquidation Amount for the purposes of the relevant FOA Netting Provisions; and

(ii) in relation to a Clearing Agreement, the Cleared Set Termination Amount for the purposes of the relevant Clearing Netting Provisions;

3.2.43 "**OEIC**" means an open ended investment company incorporated under the OEIC Regulations in respect of which an authorisation order has been made pursuant to Paragraph 14 of the OEIC Regulations and which has its head office in Scotland in terms of the OEIC Regulations;

3.2.44 "**OEIC Regulations**" means the Open Ended Investment Company Regulations 2001;

3.2.45 "**Other Party**" means, in any particular circumstances, the party to an FOA Netting Agreement or Clearing Agreement which is not the Counterparty;

3.2.46 "**Partnership**" means:

(i) a partnership constituted and formed under Scots law and carrying on business in Scotland; or

(ii) a limited partnership formed and constituted under Scots law and registered in Scotland under the Limited Partnership Act 1907;

3.2.47 "**Pension Trust**" means a Trust which is an occupational pension scheme;

3.2.48 "**Limited Liability Partnership**" or "**LLP**" means a limited liability partnership formed and registered in Scotland under the Limited Liability Partnerships Act 2000;

3.2.49 "**Part VII**" means Part VII of the Companies Act 1989 (and shall include the provisions of Part II and Part IV of the Schedule to the Recognition Requirements;

3.2.50 "**PRA**" means the UK Prudential Regulation Authority;

3.2.51 "**Recognition Requirements Regulations**" means the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001;

3.2.52 "**Schedule**" means a schedule to this Opinion;

3.2.53 "**Schedule B1**" means Schedule B1 to the Insolvency Act;

3.2.54 "**Scottish Company**" means a company which is formed and registered in Scotland under the Companies Act or the former Companies Acts (as defined in section 1171 of the Companies Act);

3.2.55 "**Set Off Provision**" means:

(i) an FOA Set Off Provision;

(ii) the Clearing Module Set Off Provision; or

(iii) the Addendum Set Off Provision;

3.2.56 "**Settlement Finality Regulations**" means the Financial Markets and Insolvency (Settlement Finality) Regulations 1999;

3.2.57 "**Transaction**" means a Transaction under an FOA Netting Agreement (or Client Transaction under a Clearing Agreement) and which is not excluded from this Opinion pursuant to paragraph 2 above (and includes a transfer of margin under the FOA Netting Agreement (with Title Transfer Provisions) or a Clearing Agreement with Title Transfer Provisions and a payment of cash credited to an account provided by the Firm or Clearing Member (as the case may be) to the other party);

3.2.58 "**Trustee**" means a Scottish Company (a "**Corporate Trustee**") or Individual (an "**Individual Trustee**") which is acting as a trustee of a trust constituted and formed under Scots law (a "**Trust**") and carrying on business in Scotland, including Corporate Trustees of Trusts which are:

(i) AUTs (a Corporate Trustee acting as a trustee of an AUT being a "**AUT Trustee**"); and

(ii) Pension Trusts (a Corporate Trustee acting as a trustee of a Pension Trust being a "**Pension Trustee**");

3.2.59 capitalised terms which are used but not defined in this Opinion have the meaning given to them in the relevant Agreement.

3.3 Annex 3 contains further definitions of terms relating to the Agreements.

3.4 References in this Opinion to:

3.4.1 a "**paragraph**" and a "**sub-paragraph**" are (unless the context otherwise requires) to a paragraph and a sub-paragraph (as appropriate) of this Opinion (or, if so stated, a Schedule or an Annex);

3.4.2 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 a successful challenge;

3.4.3 the "**termination and liquidation**" of Transactions are to the termination of obligations to make any further payment or deliveries under such Transactions which would have fallen due for performance on or after the Liquidation Date (in the case of an FOA Netting Agreement) or the occurrence of a Firm Trigger Event, CM Trigger Event or CCP Default or the date the related CM/CCP Transactions are terminated or Transferred (in the case of a Clearing Agreement), except for the obligation to settle the Netting Termination Amount in respect of such Transactions, and references to "**terminated Transactions**" or like expressions shall be construed accordingly;

3.4.4 "**this jurisdiction**" are to Scotland;

3.4.5 "**the opinions**" are to the opinions given in this Opinion; and

3.4.6 any statute, statutory instrument, order or other legislation is to that statute, statutory instrument, order or other legislation as amended as at the date of this Opinion.

3.5 In this Opinion, any references to the "**location**" of any asset in any jurisdiction are references to assets situated in or which are governed by the laws of that jurisdiction, in each case whether for the purposes of the EU Insolvency Regulation, the CI Regulations and/or the rules of Scottish private international law (as applicable).

4. Assumptions

For the purposes of our opinions at paragraph 5 only, we assume:

4.1 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 has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, a Non-Material Amendment would not constitute a material alteration for this purpose. We express no view whether an alteration which is not a Non-Material Amendment would or would not constitute a material alteration.

4.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, (including the Netting Provisions, the Set Off Provisions and the Title Transfer Provisions) and the Transactions are legally binding and enforceable against both Parties under their governing laws, and the effect of the provisions of the FOA Netting Agreement, Clearing Agreement, Netting Provisions, Set-Off Provisions and Title Transfer Provisions which are described in paragraphs 5.3, 5.4, 5.5, 5.7, 5.8, 5.9, 5.10 and 5.11 below is the effect of those provisions under their governing law.

4.3 That each Party has the capacity, power and authority under its constitutional and other governing documentation and all applicable laws to enter into the FOA Netting Agreement or, as the case may be, Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, 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, Clearing Agreement and each Transaction.

4.4 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, 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, Clearing Agreement in this jurisdiction.

4.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the formal commencement of any Insolvency Proceedings against either Party.

4.6 That no provision of the FOA Netting Agreement or, as the case may be, Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, Clearing Agreement forms part, or any other arrangement between the Parties, any rules of a recognised investment exchange, or any Mandatory CCP Provision, constitutes an Adverse Amendment.

4.7 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.

4.8 That the FOA Netting Agreement or, as the case may be, Clearing Agreement has been properly executed by both Parties.

4.9 That the FOA Netting Agreement or, as the case may be, Clearing Agreement accurately reflects the true intentions of each Party.

4.10 That, in relation to a Clearing Agreement, a Party incorporated or established 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) a Scottish Company or Foreign Company, a UK credit institution, UK bank, UK investment bank or a Partnership.

4.11 That neither Party is a recognised investment exchange or recognised clearing house (as defined in section 285 of FSMA) or a CCP (as defined in EMIR).

4.12 That each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.

4.13 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).

4.14 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 and all legal and beneficial title thereto has been absolutely transferred to the relevant transferee.

4.15 That each Party which receives margin from the other Party pursuant to the Title Transfer Provisions does not treat that margin in any manner which could indicate that the other Party retains any proprietary interest in that margin.

4.16 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

4.17 That a Party which is not a Foreign Company and which is not a credit institution, an insurance undertaking, an investment undertaking holding funds or securities for third parties, or a collective investment undertaking, has its *"centre of its main interests"* in the United Kingdom, for the purposes of the EU Insolvency Regulation and the Cross-Border Insolvency Regulations.

4.18 That any party to the FOA Netting Agreement or, as the case may be, Clearing Agreement which is at any time carrying on, or purporting to carry on, a regulated activity in the United Kingdom within the meaning of FSMA will at all relevant times be doing so in circumstances which do not contravene the general prohibition set out in section 19 of FSMA.

4.19 That the FOA Netting Agreement or, as the case may be, Clearing Agreement and the Transactions are not entered into by any party in consequence of a communication made in breach of section 21(1) of FSMA.

4.20 Any branch of a Counterparty which is a Foreign Company in this jurisdiction will constitute an *"establishment"* with the meaning of the EU Insolvency Regulation.

4.21 In relation to our opinions at paragraphs 5.3 to 5.11, insofar as any transaction or obligation arising under a Transaction, Transfer of margin under an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, Clearing Agreement which includes Title Transfer Provisions or a payment of cash credited to an account provided by the Firm to its counterparty is a "*transfer order*" under the Settlement Finality Regulations, that there are no provisions in the rules of any relevant designated system which purport to override or are inconsistent with the FOA Netting Provisions, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Addendum Netting Provision or the Title Transfer Provisions.

4.22 That neither Party is a "*group undertaking*" in relation to the other Party as that phrase is defined in Section 1161(5) of the Companies Act 2006.

4.23 That neither Party is a "*bridge bank*" as defined in section 12 of the Banking Act 2009.

4.24 Each Party has entered into the FOA Netting Agreement or, as the case may be, Clearing Agreement and the Transactions as principal (and not as agent), is the sole obligor in respect of any obligations owed by it and the sole beneficial owner in respect of all rights owed to it under the Agreement and each Transaction. No such rights are subject to any mortgage, charge, pledge, lien, encumbrance, assignation, assignment, right in security or security interest which arises other than under the Agreement and which is not in favour of the other Party. No creditor of any Party has attached, arrested, executed, done diligence, levied execution or otherwise exercised a creditor's process in respect of such Party's rights under the Agreement or any Transaction.

4.25 Other than in the case of a Counterparty which is a Trustee acting as trustee of a Trust, that neither Party has entered into the FOA Netting Agreement or, as the case may be, Clearing Agreement or any Transaction thereunder in its capacity as trustee nor is any cash, securities or other rights or property held by it in relation to the Agreement or any Transaction thereunder held by it in such capacity.

5. Opinion

On the basis of the foregoing and subject to the qualifications set out below, we are of the following opinions as to the laws of Scotland:

5.1 **Insolvency Proceedings**

5.1.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Counterparty which is a Company could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this Opinion, are those referred to in:

(i) the Insolvency Act and the Insolvency Rules;

(ii) the Bankruptcy Act and any rules made thereunder;

(iii) the Companies Act; and

(iv) the Banking Act,

each as modified, varied or amended as at the date of this Opinion, namely:

(i) the approval of a voluntary arrangement;

(ii) the obtaining of an initial moratorium by the directors of an eligible company where they propose a voluntary arrangement;

(iii) the appointment of an administrator pursuant to the terms of Schedule B1;

(iv) the appointment of an administrative receiver over the whole (or substantially the whole) of a Company's property by or on behalf of the holder of a floating charge granted either prior to 15 September 2003 or in connection with one of the excepted arrangements detailed in sections 72B to 72GA of the Insolvency Act;

(v) the voluntary winding up of a company;

(vi) the compulsory winding up of a company;

(vii) a scheme of arrangement under Part 26 of the Companies Act; and

(viii) if the Company is a Bank, the entry by it into bank insolvency or bank administration under the Banking Act; and

(ix) if the Company is an Investment Bank, the entry by it into special administration, special administration (bank insolvency) and special administration (bank administration) under the Investment Bank Regulations,

(the above are together called for the purposes of this Opinion, "**Company Insolvency Proceedings**").

5.1.2 Subject as set out below, we consider that all of the Company Insolvency Proceedings would be Corporate Insolvency Events of Default.

5.1.3 It is possible that a receiver as defined for the purposes of Chapter II of Part III of the First Group of Parts of the Insolvency Act (a "**Receiver**") may be appointed over part of a Company's business that is covered by a floating charge granted by it. The appointment of such a Receiver (not being an administrative receiver) could be a Corporate Insolvency Event of Default to the extent it is a substantial part of its assets. To the extent that a Receiver is appointed over a part which is not a substantial part of the relevant Party, it would not be a Corporate Insolvency Event of Default in the Agreement. It may therefore be appropriate to remove the reference to "substantial" in the relevant Corporate Insolvency Event of Default. See paragraph 3 of Annex 5.

5.1.4 The short form clauses listed at paragraphs 4 to 6 and 10 to 12 of Annex 1 and the Eligible Counterparty Agreement do not contain a reference to an "arrangement" under any "bankruptcy, insolvency, regulatory, supervisory or similar law". It may therefore be that a voluntary arrangement or a scheme of arrangement would not be a Corporate Insolvency Event of Default under these clauses and agreement if it did not involve a "reorganisation" or "moratorium". See paragraph 3 of Annex 5.

5.2 **Recognition of choice of law**

5.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England.

5.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law as the governing law of the Agreement, in determining the enforceability or effectiveness of the Netting Provision, the Set Off Provisions and the Title Transfer Provisions (to the extent set out in that Agreement).

5.3 **Enforceability of FOA Netting Provision**

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

(i) the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provisions; and

(ii) 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.

5.3.2 We are of this opinion because we consider that the FOA Netting Provision is broadly consistent with the common law rules of insolvency set off (or the "balancing of accounts in bankruptcy") in Scots law and, accordingly, that the court would not seek to interfere with its operation.

5.3.3 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.

5.3.4 No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 5.3 to apply.

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

5.4.1 In relation to a Clearing Agreement which includes the Clearing Module Netting Provision, the Clearing Module Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following:

(i) a Firm Trigger Event; or

(ii) a CCP Default,

the Parties would be entitled to receive or obliged to pay 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.

5.4.2 We are of this opinion because we consider the Clearing Module Netting Provision is broadly consistent with the common law rules of insolvency set off (or the "balancing of accounts in bankruptcy") in Scots law and, accordingly, that the court would not seek to interfere with its operation.

5.4.3 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.

5.4.4 No amendments to the Clearing Module Netting Provision are necessary in order for the opinions expressed in this paragraph 5.4 to apply.

5.5 **Enforceability of the Addendum Netting Provision**

5.5.1 In relation to a Clearing Agreement which includes the Addendum Netting Provision, the Addendum Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following:

(i) a CM Trigger Event; or

(ii) a CCP Default,

the Parties would be entitled to receive or obliged to pay 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.

5.5.2 We are of this opinion because we consider the Addendum Netting Provision is broadly consistent with the common law rules of insolvency set off (or the "balancing of accounts in bankruptcy") in Scots law and, accordingly, that the court would not seek to interfere with its operation.

5.5.3 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.

5.5.4 No amendments to the Addendum Netting Provision are necessary in order for the opinions expressed in this paragraph 5.5 to apply.

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

5.6.1 In relation to a Clearing Agreement the opinions expressed at paragraph 5.3 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.

5.6.2 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.

5.7 **Enforceability of the FOA Set-Off Provisions in the FOA Netting Agreement**

5.7.1 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).

5.7.2 We are of this opinion because we consider the relevant provisions are broadly consistent with the common law rules of insolvency set off (or the "balancing of accounts in bankruptcy") in Scots law and, accordingly, that the court would not seek to interfere with its operation.

5.7.3 No amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 5.7 to apply.

5.8 **Enforceability of the FOA Set-Off Provisions in the Clearing Agreement**

5.8.1 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).

5.8.2 We are of this opinion because we consider the relevant provisions are broadly consistent with the common law rules of insolvency set off (or the "balancing of accounts in bankruptcy") in Scots law and, accordingly, that the court would not seek to interfere with its operation.

5.8.3 No amendments to the General set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 5.8 to apply.

5.9 **Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision**

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

(i) 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

(ii) 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.

5.9.2 We are of this opinion because we consider the relevant provisions are broadly consistent with the common law rules of insolvency set off (or the "balancing of accounts in bankruptcy") in Scots law and, accordingly, that the court would not seek to interfere with its operation.

5.9.3 No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 5.9 to apply.

5.9.4 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 5.9.1 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 5.8.1 above.

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

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

(i) in the case of a CM Trigger Event, the Client (as defined in the ISDA/FOA Clearing Addendum); or

(ii) 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.

5.10.2 We are of this opinion because we consider the relevant provisions are broadly consistent with the common law rules of insolvency set off (or the "balancing of accounts in bankruptcy") in Scots law and, accordingly, that the court would not seek to interfere with its operation.

5.10.3 No amendments to the Addendum Set-Off Provision are necessary in order for the opinions expressed in this paragraph 5.10 to apply.

5.11 **Enforceability of the Title Transfer Provisions**

5.11.1 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 Provisions.

5.11.2 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.

5.11.3 The courts of this jurisdiction would not re-characterise 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.

5.11.4 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.

5.11.5 The reasoning supporting this opinion is set out in paragraph 6.1 below.

5.11.6 Other than as referred to in paragraph 6.1.6 below, no amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 5.11 to apply.

5.12 **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 5.11 (*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 Security Interest Provisions (whether in respect of non-cash margin and/or cash margin) as part of an FOA Netting Agreement (with Title Transfer Provisions), or as part of a Clearing Agreement which includes Title Transfer Provisions, provided always that:

5.12.1 the Agreement unambiguously specifies the circumstances in which the security interest provisions or the Title Transfer Provisions apply in respect of any given item of margin so that it is not possible for both the security interest provisions and the Title Transfer Provisions to apply simultaneously to the same item of margin; and

5.12.2 the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

5.13 **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 the sense of being contained in one document) in order for the termination and liquidation under the Netting Provisions to be enforceable.

5.14 **Automatic Termination**

It is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the Netting Provisions to ensure the effectiveness of netting under the FOA Netting Agreement or, as the case may be, the Clearing Agreement in the event of any Insolvency Proceedings.

5.15 **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 Counterparty with branches in a number of different jurisdictions, including some where netting may not be enforceable would jeopardise the enforceability of the Netting Provisions, the Set Off Provisions or the Title Transfer Provisions in so far as the laws of this jurisdiction are concerned.

5.16 **Insolvency of Foreign Parties**

Where the Defaulting Party is a Foreign Company (a "**foreign Defaulting Party**") the foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction, except:

5.16.1 where the foreign Defaulting Party is a company registered in England and Wales, in which case:

(i) the Scottish courts will have no jurisdiction to wind up (or make an administration order in respect of) such foreign Defaulting Party;

(ii) the foreign Defaulting Party may not be placed into administration in Scotland under paragraphs 14 or 22 of Schedule B1; and

(iii) a receiver cannot be appointed under Scots law in relation to the foreign Defaulting Party (or any of its assets);

5.16.2 where the centre of main interests of the foreign Defaulting Party is in an EU member state other than the United Kingdom or Denmark and the foreign Defaulting Party has no establishment (within the meaning in the EU Insolvency Regulation) in the United Kingdom, in which case the Scottish courts will have no jurisdiction in respect of Insolvency Proceedings other than receivership and schemes of arrangement under Part 26 of the Companies Act;

5.16.3 where the foreign Defaulting Party is an EEA Credit Institution, in which case the Scottish courts will have no jurisdiction in respect of Insolvency Proceedings other than receivership and schemes of arrangement under Part 26 of the Companies Act; and

5.16.4 where the foreign Defaulting Party is an EEA Insurer, in which case the Scottish courts will have no jurisdiction in respect of Insolvency Proceedings other than (possibly) receivership.

5.17 **Special legal provisions for market contracts**

Other than the matters discussed in paragraph 7 below, or as otherwise discussed in this paragraph 5 or paragraph 6 below, there are no special provisions of law which would affect the opinions given in this paragraph 5 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.

6. Qualifications

The opinions given in this Opinion are subject to the following qualifications:

6.1 **Re-characterisation**

6.1.1 The opinions given in this Opinion on the Netting Provisions and the Title Transfer Provisions are given on the basis that a Scottish court would characterise the transfer cash and non-cash margin under the Title Transfer Provisions and any other provision which requires or contemplates an outright transfer of margin ("**Margin Transfers**") as an absolute transfer and not as an attempt to create a security interest (or right in security) over the margin which is the subject of the Margin Transfers.

6.1.2 With regard to the transfer of non-cash margin, we have come to this view for two reasons. Firstly, we believe that the Scottish courts would look to the practical operation of the arrangements in order to determine whether a right in security is created and would regard one of the characteristics of a right in security as being that, if the security subjects are realised and the proceeds of such realisation exceed the amount of the obligation due to the holder of the security by the granter of the security, the holder of the security is only entitled

to the amount due to it, and no more, the excess being required to be paid to the granter of the security.

6.1.3 In the case of the Title Transfer Provisions, however, it is possible for the holder of non-cash margin (the "**Collateral Holder**") to sell the margin for whatever price can be achieved by them at the time of the sale. The only obligation of the Collateral Holder is to re-transfer equivalent non-cash margin in an amount equal to the market value of the margin at the relevant time (the power of sale not being connected to or conditional upon the default by the Counterparty of its obligations under the Agreement). Therefore, it is possible for the Collateral Holder to realise (and retain) a profit in relation to the margin. Conversely, where the Collateral Holder sells the margin prior to the Netting Provisions being effected it will be required to give credit equal to the market value of the securities at the time they are effected when determining the amount due to or from it, notwithstanding that the price which the Collateral Holder obtained was less than that amount.

6.1.4 Secondly, under the clause 2 of the Title Transfer Provisions (a) the Collateral Holder's obligation is only to transfer equivalent margin and not the same non-cash margin as it received as margin and (b) the Collateral Holder is not obliged to hold non-cash margin equivalent to the margin given during the relevant period.

6.1.5 While the above features of Margin Transfers may not be conclusive in establishing that the arrangements do not amount to the creation of a right in security, we believe that a Scottish court is likely to take the view that they are usual features of a right in security and that their absence points towards the arrangements not being a right in security.

6.1.6 We note that clause 2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 and 2011 Versions) is not a Title Transfer Provision and is not a Core Provision. We consider that the features described above materially reduce the risk of re-characterisation of Margin Transfers as security interests under Scots law. Therefore, where clause 2 of the Title Transfer Provisions is not included in an Agreement under which margin may be provided by way of title transfer, we consider that the Agreement (a) should expressly provide that the Collateral Holder's obligation is only to transfer equivalent margin and not the same non-cash margin as it received as margin and (b) not contain any requirement that the Collateral Holder is obliged to hold non-cash margin equivalent to the margin given during the relevant period.

6.1.7 With regard to the transfer of cash as margin, we have come to the view stated at paragraph 6.1.1 above because we believe, on the assumption that, under English law, the effect of the Agreement is to create an obligation on the holder of the cash margin to pay an amount equal to the cash margin to the other party on termination of the relevant Transactions, a Scottish court would take the view that the effect of the Netting Provisions on this obligation would be equivalent to the rights of the holder of the collateral or margin to exercise its rights of retention and set-off under Scots law, such rights not being rights in security.

6.1.8 We would point out that the views expressed above are based on a view that the Scottish courts would take an approach which is more formalistic than substantive when determining whether the provision of margin should be characterised as a right in security[1]. Some case law does, however, suggest that the Scottish courts may take a more substantive approach to the question and would look to the underlying purpose and effects of the arrangements. If this is the case, then we believe that it is more possible (although not certain) that the Scottish courts might characterise the provision of collateral or margin as a right in security.

[1] By this we mean that we believe that the Court would be likely to look at the true legal form of the Agreement and the Transactions when determining whether they involve the creation of a right in security, rather than the economic substance.

6.1.9 If the Scottish courts did characterise the provision of margin as a right in security under Scots law[2], in the case of a party which is a Company or an LLP (and possibly a Corporate Trustee, although this is not certain), it would be necessary to register the right in security with the Registrar for Companies in Scotland under Part 25 of the Companies Act (the "**Charge Registration Provisions**").

6.1.10 Where the Charge Registration Provisions do apply and registration is not completed within 21 days of the creation of the right in security (as defined in Part 25 of the Companies Act) , the right in security will be void as against a liquidator or administrator. Where this is the case, and the Collateral Regulations do not apply, it is not clear how this would affect the operation of the Title Transfer Provisions and Netting Provision.

6.2 **Valuation of future, contingent or unascertained obligations**

Date of valuation

6.2.1 There is almost no authority as to the date on which a set off (or "balancing of accounts in bankruptcy") under the general insolvency set-off rules in Scotland is effected, and no modern authority on the subject at all. However, we consider that it is more likely than not that that date would be the date of commencement of any Insolvency Proceedings (the "**Commencement Date**").

6.2.2 The date that Transactions are terminated and valued for the purposes of the Netting Provisions may occur after the Commencement Date. Similarly, the Set Off Provisions may be effected after the Commencement Date. The question therefore arises as to whether, if any valuation of future, contingent or unascertained obligations of either Party which fall to be included in the Netting Provisions or the Set Off Provisions is required, that value is required to be calculated as at the Commencement Date notwithstanding that, under the Agreement, it would be calculated as at a later date. We would make the following points in relation to this:

(i) If we are correct that the valuation date would be the Commencement Date, then there is a risk that, in any Insolvency Proceedings in respect of a Counterparty, a Scottish court would require valuation of the underlying obligations which are the subject of the netting or set-off to be made as at that date, at least for the purposes of calculating the Other Party's (net) claim in those Insolvency Proceedings. This is because a Scottish court may regard the Scottish insolvency rules as mandatory and the designation of any other valuation date as an attempt to contract out of those rules.

(ii) Where the Netting Provisions is a "close out netting provision" for the purposes of the Collateral Regulations (on which please see paragraph 6.4 below) or the Counterparty is a UK credit institution subject to winding-up proceedings or reorganisation measures (on which please see paragraph 6.5 below), we do not consider that a court would take this approach in relation to the Netting Provisions. The reason for this is that, as discussed below, the Collateral Regulations require that a close out netting should take effect in accordance with its terms. Similarly, under the CI Regulations, the effect of a relevant reorganisation or winding-up on a netting agreement is to be determined in accordance with the law applicable to the relevant agreement (in this case English law).

[2] We believe that the Scottish courts will apply Scots law to determine whether an arrangement constitutes a right in security for the purposes of determining whether the Charge Registration Provisions of the Companies Act requires registration of that right in security, notwithstanding that the arrangement is made pursuant to a contract that is governed by a law other than Scots law and the relevant margin is not located in Scotland.

Valuation methodology

6.2.3 There is very little authority in Scots law on the specific methodology to be applied to value future, contingent or unascertained obligations (both in the context of calculating the claims of a creditor in insolvency proceedings and in calculating the amount to be included in respect of such obligations in any insolvency set off calculation). It is accordingly not certain what approach a Scottish court would take if it was asked to consider the valuation of obligations in the context of the Netting Provisions.

6.2.4 However, we consider that, provided that the valuations of future, contingent or unascertained obligations for the purposes of the Netting Provisions is commercially reasonable, Scottish court would not seek to interfere with those calculations.

6.2.5 We note in particular that no valuation methodology is set out in relation to the Clearing Netting Provisions and that the relevant valuations are based on the valuations of the corresponding obligations by the Agreed CCP. Given that the commercial purpose of the Clearing Agreements is to put the Client in the same economic position as if it was a clearing member of the relevant Agreed CCP, we consider that a Scottish court would not interfere with these calculations.

6.2.6 It should also be noted that, where the Netting Provisions is a "close out netting provision" for the purposes of the Collateral Regulations (on which please see paragraph 6.4 below) or the Counterparty is a UK credit institution subject to winding-up proceedings or reorganisation measures (on which please see paragraph 6.5 below), we consider that a Scottish court would not interfere with the valuation provisions in the Netting Provisions. The reason for this is that, as discussed below, the Collateral Regulations require that a close out netting should take effect in accordance with its terms. Similarly, under the CI Regulations, the effect of a relevant reorganisation or winding-up on a netting agreement is to be determined in accordance with the law applicable to the relevant agreement (in this case English law).

6.3 **Additional set off under the Scottish insolvency set off rules**

Where any sums are owed (or non-monetary obligations are required to be performed) by the parties to each other under or in connection with the Agreement or any Transaction[3], a Scottish court would be likely to allow those sums (or non-monetary obligations) to be set off against each other under the Scots insolvency set off rules in such Insolvency Proceedings, at least for the purpose of calculating the overall (net) claim of the Other Party in the insolvency of the Counterparty[4]. This would be the case even if such a set off is not expressly provided for (or is prohibited) in the relevant Netting Provision, any Set Off Provision or any other provision in the Agreement.

6.4 **Collateral Regulations**

6.4.1 In the Collateral Regulations "financial collateral arrangements" are broken down in to those relating to title transfer and those relating to security.

Title transfer collateral arrangements: the Netting Provisions and Title Transfer Provisions

6.4.2 "Title transfer financial collateral arrangements" are defined in Regulation 3 as being an agreement or arrangement evidenced in writing where:

(i) the purpose of the agreement or arrangement is to secure or otherwise cover the relevant financial obligations owed to the collateral-taker;

[3] The relevant sums might include net sums under the Netting Provisions (including separate net sums arising from the separate netting of Client Transaction Sets under a Clearing Agreement) and sums which are due by one party to the other following the operation of any Set Off Provisions.

[4] Where a contingent, future, unascertained or non-monetary obligation that has not been converted to a monetary obligation that is due and payable under the Agreement is to be included in such a set off, the court will be required to value that obligation if it.

(ii) the collateral-provider transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and beneficial ownership or equivalent financial collateral to the collateral-provider; and

(iii) the collateral-provider and the collateral taker are both non-natural persons.

6.4.3 In our view, each Netting Provision should be a "close out netting provision " for the purposes of the Collateral Regulations where:

(i) margin which is "financial collateral" (as defined in the Collateral Regulations) has been transferred from the [Counterparty to the Firm] under the Title Transfer Provisions in accordance with paragraph 6.4.2 above; and

(ii) the amount or value of such margin requires to be included in the calculation of the Netting Termination Amount in accordance with the relevant Netting Provisions.

6.4.4 Regulation 12 of the Collateral Regulations makes it clear that close out Netting Provision in financial collateral arrangements or an arrangement of which a financial collateral arrangement forms part will remain effective on insolvency in accordance with their terms provided that, at the time the arrangement was entered into or the relevant financial obligations came into existence, the collateral taker was not aware of any steps taken to initiate insolvency proceedings or reorganisation measures, or insolvency proceedings or reorganisation measures having been commenced. Regulation 13 further extends this to situations where the agreement was reached on the same day as insolvency proceedings were commenced where the collateral-taker can show that he was not aware and had no reason to be aware that this was likely.

6.4.5 Paragraph 4 of Schedule 1 of the Cross-Border Regulations prohibits the Court from making any order which would be prohibited under, *inter alia*, Part 3 of the Collateral Regulations. This has the effect of preserving the applicability (as a matter of Scots law) of Regulations 12 and 13 of the Collateral Regulations in cases where they would otherwise apply. There is, however, no such preservation provision in relation to Regulation 19 of the Collateral Regulations (on which please see below).

6.4.6 Subject to the assumptions and qualifications set out in this Opinion, we consider that, if the Netting Provisions are not close out netting provisions for the purposes of the Collateral Regulations, this would not alter the conclusions reached in paragraphs 5.3 to 5.12 of this Opinion. This is because we consider that the Netting Provisions is consistent with the Scots law set-off rules in insolvency and that, accordingly, a Scottish court would not seek to interfere with it on the basis that, for example, they were in breach of the *pari passu* principle in respect of claims in an insolvency of a Counterparty.

Book entry securities collateral: conflict of laws rules

6.4.7 "Book entry securities collateral" is defined in the Collateral Regulations as "financial collateral subject to a financial collateral arrangement which consists of financial instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary".

6.4.8 An "intermediary", for the purposes of the Collateral Regulations, is a person who maintains registers or accounts to which financial instruments may be credited or debited, but excludes (a) a person who acts as a registrar or transfer agent for the issuer of the financial instruments and (b) a person who maintains registers or accounts in its capacity as operator of a system for the holding and transfer of financial instruments or records of the issuer or other records which constitute the primary record of entitlement to financial instruments as against the issuer.

6.4.9 Regulation 19 of the Collateral Regulations applies to financial collateral arrangements where book entry securities collateral is used as collateral under the arrangement and is held through one or more intermediaries.

6.4.10 The effect of regulation 19, is, among other things, to ensure that the legal and proprietary effects of the book entry securities collateral and the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral are determined under the domestic law of the country in which the relevant account is maintained (the "**Collateral Governing Law**"), which we assume will not be Scotland[5]. Accordingly, for the purposes of Scots law, where book entry securities collateral is used as margin under the Agreement, the effectiveness of the Netting Provisions and the Title Transfer Provisions which arises under the Agreement in relation to the matters set out in regulation 19 would be determined by the Collateral Governing Law (and not Scots law or the governing law of the Agreement).

Ultra vires

6.4.11 It should be noted that there has been some discussion amongst commentators in Scotland as regards the extent to which the Collateral Regulations may be ultra vires and invalid because they go beyond the scope of certain aspects of the Collateral Directive (which the Collateral Regulations implement). In particular, for the Collateral Directive to apply to a transaction, the counterparties to it must consist either of a non-natural person and one of a specified list of persons, being a public sector body, central bank, central counterparty or clearing house or "financial institution under prudential supervision[6]" and certain other similar bodies or those persons from the specified list. In contrast, for the Collateral Regulations to apply to a transaction, the counterparties to it can both be non-natural persons.

6.4.12 The reason for the suggestion that the Collateral Regulations may be ultra vires is that the Collateral Regulations are secondary legislation, made under the powers given by the European Community Act 1972 (the "**1972 Act**") for the purpose of implementing obligations under EU law. The extent to which the 1972 Act permits secondary legislation to be made which goes beyond the scope of the relevant provisions of EU law is unclear.

6.4.13 It has been suggested by the English Court of Appeal that subordinate legislation passed pursuant to the 1972 Act could be wider in scope than the provisions of EU law being implemented. This approach was also adopted in the High Court in England in one recent case when the question whether the Collateral Regulations were ultra vires was raised. In that case, it was held that the arguments that the Collateral Regulations were ultra vires or that they should be restricted to the scope of the Collateral Directive were not of sufficient strength to justify allowing them to be raised at that point in the case[7]. The case did not, however, decide that the Collateral Regulations are intra vires.

6.4.14 In an earlier case in the lower courts in Scotland, however, a more restrictive view than has been given by the English courts was taken. In that case it was thought that the relevant secondary legislation, in order to be valid, had to be within the scope of the relevant EU law being implemented. This approach has been specifically rejected by the English Court of Appeal. While we believe that, if the validity of the Collateral Regulations fell to be considered by the Scottish courts, they would find the decisions of the English Courts persuasive, it is possible that they would take a more restrictive approach based on the

[5] We would point out that it is not entirely clear how the country in which the relevant account is maintained is to be determined for the purposes of the FCA Regulations.

[6] "Financial institutions under prudential supervision" would include banks which are authorised to accept deposits for the purposes of FSMA.

[7] The Financial Markets Law Committee (which includes practitioners from certain of the major English law firms and certain leading English Counsel) also considered the issue in a paper in July 2008 and concluded that the FCA Regulations were not ultra vires.

earlier Scottish case law. If such a view was taken, it is more likely that the Collateral Regulations would be found to be ultra vires.

6.4.15 Were a Scottish court to take the view that the Collateral Regulations are ultra vires to the extent that they exceed the scope of the Collateral Directive, it would need to address the question whether the Collateral Regulations should be struck down in whole or in part.

6.4.16 In carrying out this assessment, the court would, in broad terms, consider whether it is possible to sever the ultra vires aspects of the Collateral Regulations. The fundamental consideration would be the extent to which the Collateral Regulations, absent the ultra vires aspects, would remain coherent and operate effectively.

6.4.17 The English courts have developed a two-fold test to severability which is likely to be the methodology that a Scottish court would also follow (along with a consideration of its EU law obligations noted below). The first question is whether the offending text is "textually severable": that is to say, whether a "clause, a sentence, a phrase or a single word may be disregarded as exceeding the law-maker's power, and what remains is still grammatical and coherent". The second question is whether the offending text is "substantially severable"- that is to say, whether "what remains after severance is essentially unchanged in its legislative purpose, operation and effect."[8] The courts have suggested that the tests are not cumulative in the sense that the textual severability need not always be satisfied so long as the substantially severable test is met.

6.4.18 In addition, a court is required under EU law to read national law as far as possible in a manner consistent with the UK's EU law obligations under the Collateral Directive.[9] In particular, the courts have recognised an obligation to give a purposive interpretation to UK measures taken to implement an EU Directive: "If the legislation can reasonably be construed so as to conform with those obligations...such a purposive construction will be applied, even though, perhaps, it may involve some departure from the strict and literal application from the words which the legislature has elected to use."[10] Further, there appear to us to be strong policy reasons for adopting this approach given the validity of the Collateral Regulations "has been accepted in commercial transactions for a number of years"[11].

6.4.19 There has not been a definitive judicial ruling on the issue and it is therefore not clear what approach the courts would take in these circumstances. However, we consider that, based on the above, it is likely that a Scottish court would decide that, if it considers that certain aspects of the Collateral Regulations are ultra vires, a substantial severability test would be applied and, accordingly, that the Collateral Regulations should be upheld as regards those aspects which do not go beyond the scope of the Collateral Directive.

6.4.20 In practice, this would mean limiting the transactions to which the Collateral Regulations apply to those between non-natural persons and the list of counterparties specified in the Collateral Directive (on which please see above).

6.4.21 Sections 255 and 256 of the Banking Act give HM Treasury the power to make regulations about financial collateral arrangements. That power is not restricted to implementing the Collateral Directive and may be used for the purpose of enabling financial collateral arrangements to be commercially useful and effective. The regulations can, in particular,

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[8] See DPP v Hutchinson [1990] 2 AC 738 as well as R vs IR Commissioners, [1990] 1 WLR 1400

[9] See the European Court of Justice's decision in Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA, [1993] BCC 421.

[10] See Lister v Forth Fry Dock & Engineering Co. Ltd, [1989] SLT 540. Evidently, in Marleasing the issue was the wrongful transposition of a Directive, whereas here we are dealing with a case where the UK legislation correctly implements the EU legal requirements. However, the Marleasing principle is of ready application in a case such as ours where, absent a purposive interpretation, the UK implementing legislation is struck down in its totality as invalid. This very point was argued though not ultimately deliberated on in R (on the application of Cukurova Finance International Ltd and another) v HM Treasury [2008] EWHC 2567 (Admin).

[11] See comments of Lord Justice Moses in Cukurova, *ibid.*

provide for any other provision by any legislation to have effect despite any lack of vires. Regulations removing the risk that the Collateral Regulations are ultra vires have, as at the date of this Opinion, however, not been made.

6.5 **CI Regulations**

6.5.1 The CI Regulations broadly have the effect that no winding-up proceedings or reorganisation measures in respect of EEA credit institutions (as defined in the CI Regulations) can be undertaken in the UK except in the circumstances permitted by the CI Regulations. The aim of the CI Regulations is to harmonise the way in which credit institutions are treated in insolvency throughout member states. In relation to UK credit institutions, the CI Regulations provide protection for creditors in certain situations.

6.5.2 A UK credit institution for the purposes of the CI Regulations is an "undertaking" whose head office is in the United Kingdom and which has permission under Part 4A of FSMA to accept deposits or to issue electronic money. Undertakings which also have permission to effect contracts of insurance under Part 4A of FSMA are not UK credit institutions for the purposes of the CI Regulations.

Netting Provision

6.5.3 Regulation 34 of the CI Regulations provides that the effects of a relevant reorganisation or a relevant winding up on a netting agreement shall be determined in accordance with the law applicable to the relevant agreement.

Regulated markets

6.5.4 The effects of a Scottish relevant reorganisation or relevant winding up on transactions carried out in the context of a regulated market operating in an EEA State is to be determined in accordance with the law applicable to those transactions (which may be different from Scots law or the governing law of the Agreement or the Transactions). For these purposes, a "regulated market" has the meaning given by Article 4.1.14 of the MiFID Directive[12].

6.6 **EU Insolvency Regulation**

6.6.1 The objective of the EU Insolvency Regulation is to establish common rules on cross-border insolvency proceedings, based on principles of mutual recognition and co-operation. The EU Insolvency Regulation applies to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator" (Article 1(1)). The EU Insolvency Regulation lists the relevant insolvency proceedings to which it applies in each Member State in Annex A thereto. The insolvency proceedings to which the EU Insolvency Regulation applies are referred to as "**EU Insolvency Regulation Insolvency Proceedings**". Not all of the Insolvency Proceedings are EU Insolvency Regulation Insolvency Proceedings.

6.6.2 Certain types of entity are specifically excluded from its operation (for example credit institutions (on which please see paragraph 6.5 above), Insurers who are "insurance undertakings" within the meaning of Directive 2001/17/EC on the reorganisation and winding up of insurance undertakings, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings (Article 1(2)).

[12] The meaning of "in the context of a regulated market" is unclear. In particular it is unclear whether Client Transactions or Clearing Transactions corresponding to Transactions which are carried on a regulated market would be "in the context of a regulated market"

Insolvency Proceedings

6.6.3 Broadly, the EU Insolvency Regulation serves to grant the courts of the Member State of the European Union (other than Denmark) (a "**Member State**") within the territory of which the centre of a debtor's main interests are located, jurisdiction to open EU Insolvency Regulation Insolvency Proceedings in respect of such debtor. These proceedings are, with regards to other Member States, international in scope, are to be governed by the law of the Member State where proceedings are opened and are to be effective in all Member States, unless secondary proceedings are opened in another Member State[13]. In the case of companies or legal persons, the place of the registered office of such company or legal person is presumed to be the centre of the company's main interests in the absence of proof to the contrary (Article 3(1)).

6.6.4 Even if the centre of a debtor's main interests is in a Member State, the courts of another Member State may open secondary proceedings in the event that such debtor possesses an establishment (being any place of operations where the debtor carried out a non-transitory economic activity with human goods and means) in the territory of such other Member State (Article 3(2)). The applicable law will be the law of that other Member State. However, secondary proceedings are territorial in scope and so will not extend beyond the Member State where they are opened, save in respect of creditors who have given their consent. Generally, they will be opened following the opening of the main proceedings, but there are exceptions to this principle.

Netting Provision/Set Off Provisions

6.6.5 The provisions of the EU Insolvency Regulation dealing with set-off and those dealing with the interaction between primary and secondary proceedings are not clear. The following is a summary of how we consider a Scottish court would apply the EU Insolvency Regulation with regard to set-off (no opinion is given on how any court other than a Scottish court would apply the EU Insolvency Regulation):

(i) Article 4(1) provides that, save as otherwise provided in the EU Insolvency Regulation, the law applicable to EU Insolvency Regulation Insolvency Proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.

(ii) The EU Insolvency Regulation specifically states that "the opening of [*EU Insolvency Regulation Insolvency Proceedings*] shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such set-off is permitted by the law applicable to the insolvent debtor's claim" (Article 6(1)).

(iii) Article 4(2)(d) provides that any set-off is subject to the conditions under which set-offs may be invoked imposed by the law of the Member State where the EU Insolvency Regulation Insolvency Proceedings are opened, but this would seem to be subject to Article 6 (as set-off would seem to be otherwise provided for in Article 6).

(iv) Article 4(2)(m) provides that the laws of the State of the opening of proceedings shall determine "the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors".

(v) Article 6(2) provides that Article 6(1) shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

[13] It should be noted that the United Kingdom (and not its constituent nations) is one Member State. Therefore, the EU Regulation has no application in relation to intra-United Kingdom matters (such as the determination of whether English, Scots or Northern Irish law applies to a particular matter).

(vi) While the interaction between Article 6 and Article 4(2)(m) is not clear, the position would seem to be as follows:

(a) to the extent that set-off is permitted in the jurisdiction of the Member State in which the relevant EU Insolvency Regulation Insolvency Proceedings are opened, set-off should not be affected; and

(b) to the extent that set-off is not permitted in the jurisdiction of the Member State in which the relevant EU Insolvency Regulation Insolvency Proceedings are opened, it may nevertheless be permitted if (i) it is permitted by the law applicable to the insolvent debtor's claim under the conflict of laws principles of the jurisdiction of the Member State in which the relevant EU Insolvency Regulation Insolvency Proceedings are opened[14], unless (ii) permitting the set-off would be regarded, under the laws of that jurisdiction, as contravening rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors (i.e. within Article 4(2)(m)).

Financial market

6.6.6 Article 9 provides that the effects of EU Insolvency Regulation Insolvency Proceedings on the rights and obligations of parties to a payment or settlement system or to a financial market are governed by the law of the Member State which is applicable to that system or market[15]. Article 9 will not however preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m) under the law of the opening of the insolvency proceedings.

Main and secondary proceedings

6.6.7 The precise interaction between main and secondary proceedings in the event of conflicting legal systems' approach on insolvency is unclear. Although the EU Insolvency Regulation does allow the secondary proceedings to be stayed at the request of the Liquidator (as defined in Article 2 of the EU Insolvency Regulation) in the main proceedings, any such request being very difficult to refuse, this remains subject to such Liquidator taking any suitable measure to guarantee the interests of the creditors in the secondary proceedings. It is unclear, for example, what result would follow were set-off is permitted or valid in the Member State where secondary proceedings are opened but not permitted or valid by the applicable law in the main proceedings.

6.7 **Cross-Border Regulations**

6.7.1 The Cross-Border Regulations implement the provisions of the model law on cross-border insolvency as adopted by the United Nations Commission on International Trade Law. The Cross-Border Regulations require a court in Scotland to recognise a foreign insolvency proceeding where certain procedural requirements have been complied with.

6.7.2 The Cross-Border Regulations do not apply to:

(i) Building Societies;

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[14] It is not clear whether the "law applicable to the debtors claim" is the general law of set off in relation to contractual claims in the jurisdiction governing the debtors claim or (if different) the law of set off in insolvency in that jurisdiction. It is also not entirely clear whether Article 6(2) applies to close out netting.

[15] It is unclear what the meaning of "financial market" is in these circumstances. However, the commentary on a draft instrument which was the predecessor of the EU Regulation by Virgos and Schmit indicates that it is understood to be a market where financial instruments, other financial assets or commodity futures and options are traded, and which is subject to supervision by the Member State's regulatory authorities. In addition, we consider that it is unlikely that a Clearing Agreement (or any relevant Cleared Transactions) would constitute rights or obligations to a pa payment or settlement or to a financial market given that the relevant obligations are between a clearing member and its client and not a central counterparty.

(ii) UK credit institutions or EEA credit institutions (each as defined by Regulation 2 of the CI Regulations) and branches of UK credit institutions or EEA credit institutions (on which please see paragraph 6.5 above);

(iii) third country credit institutions (as defined in Regulation 36 of the CI Regulations); and

(iv) EEA Insurers (as defined by the Insurers (Reorganisation and Winding Up) Regulations 2004) and Insurers.

6.7.3 Where an insolvency proceeding is taking place in a jurisdiction where the insolvent party has its centre of main interests, and these insolvency proceedings are recognised by the courts in Great Britain, any insolvency proceedings which are opened in Scotland will be restricted to assets located in Great Britain[16]. Accordingly, any set-off pursuant to the Netting Provisions or the Set Off Provisions may be effective in Scotland only in relation to obligations which are deemed to be located in Scotland. In addition, the Courts are given wide powers upon recognition of a foreign insolvency proceeding (whether main or non-main) which could conceivably be exercised in a way which disrupts or renders ineffective a provision of the Agreement (including the Netting Provisions and the Set Off Provisions).

6.7.4 Please see paragraph 6.4.5 above for a discussion on the interaction of the Cross-Border Regulations with the Collateral Regulations. In addition, where the application of any provision of the Cross-Border Regulations would conflict with the application of the EU Insolvency Regulation, the EU Insolvency Regulation will apply.

6.8 **Other recognition of foreign insolvency proceedings**

6.8.1 Under section 426 of the Insolvency Act ("**Section 426**"), the Scottish courts may apply the law of one of a list of specified jurisdictions to the insolvency of an entity if so requested by the competent court of that other jurisdiction in giving assistance to those courts. Those specified jurisdictions are currently: other parts of the United Kingdom (i.e., in respect of Scotland, England and Wales and Northern Ireland), the Channel Islands, the Isle of Man, Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Eire, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu, Virgin Islands, Malaysia, South Africa and Brunei Darussalam. Accordingly, the effectiveness of an Agreement may be determined by reference to the laws of one of these jurisdictions (as to which we express no opinion) and the Scottish courts could take some other action which impacts on the effectiveness of the Agreements.

6.8.2 At common law, a Scottish court may seek to assist the courts or insolvency representatives in a foreign jurisdiction in respect of insolvency proceedings in that jurisdiction and may accordingly exercise its discretion to (a) apply the law of the foreign jurisdiction rather than Scots law to determine the effectiveness of an Agreement or (b) take some other action which impacts on the effectiveness of an Agreement.

6.8.3 However, a court may not in pursuance of Section 426 (or any common law power of recognition) recognise or give effect to an order of a foreign court or an act of a foreign insolvency official insofar as this would be prohibited by Part 3 of the Collateral Regulations if made by a court in the United Kingdom or an office holder in any insolvency proceedings in the United Kingdom. Part 3 of the Collateral Regulations disapplies certain provisions of United Kingdom insolvency law in relation to financial collateral arrangements. In addition,

[16] In practice the jurisdiction of the Scottish courts in such proceedings may be restricted to assets in Scotland. The Cross-Border Regulations provide that any order of the Courts in one jurisdiction in Great Britain shall be effective in the other jurisdiction as if it had been made by the Courts in the other jurisdiction. However, the Courts in one jurisdiction are not bound to enforce the order of a court in the other jurisdiction in respect of property situated in its jurisdiction. There is, however, a provision requiring the Courts in each jurisdiction to cooperate with each other.

Regulation 12 (which, as described above, provides that, subject to certain exceptions, close out Netting Provision should take effect in accordance with their terms) is in Part 3.

6.8.4 Unless it is otherwise required to recognise insolvency proceedings conducted in a foreign jurisdiction, a Scottish court may refuse to recognise proceedings (even in the jurisdiction of incorporation or organisation of the party subject to the proceedings) where it is of the opinion that:

(i) the insolvency proceedings offend against some fundamental principle of public policy;

(ii) there has been a breach of natural justice;

(iii) the insolvency proceedings are tainted by fraud or have been invoked to avoid Scottish proceedings;

(iv) the insolvency proceedings are to enforce the penal laws of another country; or

(v) the insolvency proceedings are solely to enforce the revenue laws of another country.

6.9 **Banking Act 2009**

6.9.1 The Banking Act 2009 (the "**Banking Act**") contains various provisions which might affect the effectiveness of the Netting Provisions, the Set-Off Provisions and the Title Transfer Provisions. In particular, Part I of the Banking Act provides for various remedies for a failing UK bank, which include the ability of the Treasury or the Bank of England to cause the transfer of securities issued by a UK bank or property of a UK bank to another person, by means of a "*share transfer order*", a "*share transfer instrument*", or a "*property transfer instrument*".

6.9.2 Section 75 of the Banking Act gives power to the Treasury to change the law (except the Banking Act itself) for the purpose of enabling the powers granted to the Financial Conduct Authority, the Prudential Regulation Authority, the Treasury and the Bank of England under Part I of the Banking Act to be used effectively. Such changes might affect private law rights and might be used with retrospective effect. Furthermore, under sections 23 and 40 of the Banking Act, a share transfer instrument or order, or a property transfer instrument, may include incidental, consequential or transitional provisions which might impact on private law rights.

6.9.3 Insofar as any Transaction relates to securities issued by a UK bank or building society or a UK incorporated holding company of a UK bank:

(i) under section 22 of the Banking Act a share transfer instrument or order may disapply a right to terminate the Transaction which is exercisable by virtue of the existence or making of the share transfer instrument or order. However, rights to terminate based on the existence or occurrence of other circumstances, and the termination of other Transactions and the operation of the Netting Provisions, the Set Off Provisions and the Title Transfer Provisions in relation to them, should not be affected; and

(ii) a share transfer instrument or order may affect the ability to perform an obligation to deliver the securities, and may replace the provisions of the FOA Netting Agreement or, as the case may be, Clearing Agreement or the Transaction which relate to the amount payable between the Parties in respect of non-delivery so that a different amount(s), or no amount at all, may be payable, and at a different time from that agreed between the Parties.

6.9.4 A property transfer instrument may apply to only part of a UK bank's assets and liabilities (such a transfer being referred to as a "**partial property transfer**"). This may be the case because the property transfer instrument concerned expressly applies to only part of the UK bank's business or because it is ineffective in relation to foreign property, which may include Transactions or obligations arising under Transactions, which are governed by the laws of a non-UK jurisdiction. A partial property transfer could apply so as to cause the transfer of some, but not all, of the Transactions (or obligations arising under Transactions), with the result that the ability to net the amounts due in respect of different Transactions against the amounts due in respect of others is impaired. However, in this regard, Article 3 of the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (the "**Safeguards Order**") prohibits a partial property transfer which applies to some, but not all, of the "*protected rights and liabilities*" between a particular person and a UK bank. Article 3 of the Safeguards Order thus protects the Party which is not the affected UK bank against the adverse consequences of a partial property transfer affecting the Agreement or Transactions, except as follows:

(i) if any Transaction is not a "*relevant financial instrument*" as defined in the Safeguards Order, Article 3 may not apply in relation to that Transaction. For these purposes "*relevant financial instrument*" means: (a) an instrument listed in Section C of Annex I to the MiFID Directive, read with Chapter VI of the Commission Regulation 1287/2006/EC; (b) any option, future, swap, forward, contract for differences or other derivative contract not falling within (a); and (c) any combination of the foregoing, a deposit, a loan, an instrument falling within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (disregarding the exclusions in article 77(2)(b) to (d)) or any contract for the sale, purchase or delivery of transferable securities, currency of any country, territory or monetary union, any precious metal or any other commodity; or

(ii) if any obligation to which the Netting Provisions or the Set-Off Provisions or the Title Transfer Provisions is applied relates to a "*retail deposit*", Article 3 does not apply. For these purposes "*retail deposit*" means a deposit in an account of a class or brand which is mainly used by or marketed to eligible claimants, being in broad terms individuals, small companies within section 382 of the Companies Act 2006, or partnerships with net assets of not more than £1.4 million.

6.10 **Set off in Bank, Building Society and Investment Bank administration / insolvency**

Where a depositor holds deposits in respect of which he or she is eligible for compensation under financial services compensation scheme established under Part 15 of FSMA with:

6.10.1 a Bank which is in bank insolvency or bank administration under the Banking Act;

6.10.2 a Building Society which is in building society insolvency under the Banking Act; or

6.10.3 an Investment Bank which is in special administration (bank insolvency) or special administration (bank administration) under the Investment Bank Regulations,

the Bank, Building Society or Investment Bank will not be entitled to exercise any rights of set off against or in respect of the amount of those protected deposits up to the maximum amount in respect of which compensation is payable under Part 15 of FSMA. Any rights of set off may however be exercised in respect of any amount of the protected deposits in excess of such maximum amount[17].

[17] The relevant legislation in respect of building society special administration in Scotland does not include such a rule. This appears to have been an oversight as the equivalent legislation in England and Wales does include such a rule.

6.11 **Choice of Law**

Contractual Obligations

6.11.1 The Scottish courts' application of the choice of English law to govern the Agreement could be modified to the extent provided by and in the circumstances set out in Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the "**Rome I Regulation**"). The circumstances in which such choice may be modified are as follows:

(i) where all other elements relevant to the situation at the time of the choice of law are located in a country ("**Country X**"), other than the country whose law has been chosen, any provisions of the law of Country X which cannot be derogated from by agreement will apply; or

(ii) where the obligations arising out of the contract have to be or have been performed in another country ("**Country Y**"), any overriding mandatory provisions of the law of Country Y rendering the performance of the contract unlawful may apply; or

(iii) where the application of a provision of law of the governing law of the contract (as determined by the Rome I Regulation) is manifestly incompatible with the Scottish public policy, the provision may not be applied.

6.11.2 We express no opinion as to the choice of English law to govern contractual obligations falling outside the scope of the Rome I Regulation.

Non-Contractual Obligations

6.11.3 The choice of English law to govern non-contractual obligations in the Agreements would not be recognised or upheld by the Scottish courts where such choice would be inconsistent with Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (the "**Rome II Regulation**"). The choice of English law will not, for instance, prejudice the application of provisions of the law of another country where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in:

(i) a country other than the country whose law has been chosen, where that other country has provisions of law which cannot be derogated from by agreement; or

(ii) one or more member states of the European Union, where provisions of European Community law (where appropriate as implemented in the member state of the forum) cannot be derogated from by agreement

6.11.4 We express no opinion as to the choice of English law to govern non-contractual obligations falling outside the scope of the Rome II Regulation.

6.12 **Charities**

6.12.1 Where a Counterparty is a charity section 28 of the Charities and Trustee Investment (Scotland) Act 2005 gives the Office of the Scottish Charity Regulator ("**OSCR**") wide powers to inquire into the activities of charities or bodies controlled by charities. Under the same section it may make directions (for six months) to prohibit the organisation from undertaking the activities specified in the direction. Section 31 of that Act gives OSCR the powers, where inquiries under section 28 have shown misconduct, to require the charity to cease activities or to restrict transactions or to refrain from parting with property. It is possible that action taken by OSCR pursuant to such powers might adversely affect the Netting Provisions, Title Transfer Provisions or Set Off Provisions as it might prevent the fulfilment of obligations under those provisions.

6.12.2 Section 87 of The Charities Act 2011 gives the Charities Commissioners similar powers over certain Scottish charities controlled wholly or mainly in England or Wales where misconduct has been shown. It is possible that action taken by Charities Commissioners pursuant to such powers might adversely affect the Netting Provisions, Title Transfer Provisions or Set Off Provisions as it might prevent the fulfilment of obligations under those provisions.

6.13 **General**

6.13.1 A Scottish court will not necessarily grant any remedy the availability of which is subject to equitable or public policy considerations or which is otherwise at the discretion of the court. In particular, the power of a court to order specific performance or implement of an obligation or to grant interdict (the Scottish equivalent of injunction) is discretionary and, accordingly, a Scottish court may in its discretion refuse to make an award of specific performance or implement or to grant interdict and may instead make an award of damages where specific performance or implement of an obligation or any other equitable remedy was sought if damages were considered by the court to be an adequate remedy.

6.13.2 Rules 4.16 and 4.17 of the Insolvency (Scotland) Rules and section 49 of the Bankruptcy Act provide for the purposes of proving a debt incurred by a party in a currency other than sterling that it shall be converted into sterling at a rate calculated by reference to a market rate as at the commencement of the insolvency. To the extent that any amounts that are calculated for the purposes of the Netting Provisions or Set Off Provisions, or the resulting amount are not denominated in sterling they may fall to be re-calculated at such rate. These provisions will not apply if the transaction constitutes a financial collateral arrangement within the meaning of the Collateral Regulations, unless the arrangement provides for, or a mechanism within the arrangement is used to apply, an unreasonable exchange rate.

6.13.3 Under section 242 of the Insolvency Act and section 34 of the Bankruptcy Act a transaction entered into at any time within certain specified periods ending with the commencement of certain Insolvency Proceedings whereby assets of the relevant party are "alienated" may be reduced and an order for restoration of the property made on application to the court. The court will not grant such an order if it is shown that after the date of the alienation the assets of the relevant party were greater than its liabilities or the alienation was made for adequate consideration or it was a birthday, Christmas or other conventional gift or was a charitable gift to a non-associate which in all the circumstances it was reasonable to make[18]. A transfer of margin pursuant to the Title Transfer Provisions could be characterised as an "alienation" for these purposes. However, when considering whether the Counterparty received adequate consideration for that alienation, a court would take into account the fact that such a transfer of margin was, in effect, intended to provide security to the Other Party for the obligations of the Counterparty under the Agreement and the relevant Transactions and that any "excess" collateral which had been provided by way of margin as at the commencement of Insolvency Proceedings would, in effect, be returned to the Counterparty through the inclusion of the margin in the calculation of the Liquidation Amount for the purposes of the Netting Provisions. On this basis, we consider that it would be unlikely that a court would consider that any transfer of margin should be avoided or reduced under these provisions.

6.13.4 Under section 243 of the Insolvency Act and section 36 of the Bankruptcy Act anything done within specified periods ending with the commencement of certain Insolvency Proceedings which has the effect of creating a preference in favour of a creditor to the prejudice of the

[18] It is also possible under common law to challenge a transaction giving rise to an alienation where the Counterparty did not receive adequate consideration. There is no time limit beyond which such a challenge becomes unavailable. However, for a challenge to succeed, the Counterparty would need to be insolvent (on a balance sheet or cash from basis) for the whole of the period from the transaction giving rise to the alienation until the date of formal insolvency proceedings.

general body of creditors may be challenged and reduced. However certain transactions cannot be challenged, namely:

(i) a transaction in the ordinary course of business;

(ii) a payment in cash for a due debt, unless such payment was collusive with the purpose of prejudicing the general body of creditors;

(iii) a transaction whereby the parties to it undertake reciprocal obligations, unless the transaction is collusive as aforementioned; and

(iv) the granting of a mandate authorising payment of arrested funds to the arrester where decree for payment or a warrant for summary diligence has been given and this was preceded by arrestment on the dependence of the action or followed by arrestment in execution[19].

6.13.5 Failure by an Other Party to exercise any rights under the Agreement prior to the approval of a scheme of arrangement under Part 26 of the Companies Act or a voluntary arrangement under Part I of the Insolvency Act (if applicable) by the Counterparty's creditors, or the entry by the Counterparty into a trust deed for a its creditors or a debt payment programme under the Debt Arrangement and Attachment (Scotland) Act 2002 may prejudice the Other Party's rights to enforce the Agreement or any Transactions.

6.13.6 Any provision to the effect that any calculation, determination or certification will be conclusive and binding will not be effective if such calculation, determination or certification is fraudulent, and a Scottish court may regard any calculation, determination or certification as no more than prima facie evidence of the matter calculated, determined or certified. Furthermore, notwithstanding the terms of the Agreement, the certification, determination, notification or opinion of any party as to any matter therein provided might be held by a Scottish court not to be conclusive if it could be shown to the satisfaction of the court to have any unreasonable or arbitrary basis.

6.13.7 Any question as to whether or not any provision of any agreement or instrument which is illegal, invalid, not binding, unenforceable or void may be severed from the other provisions thereof in order to save those other provisions would be determined by a Scottish court in its discretion.

6.13.8 Any opinions expressed in this Opinion as regards the binding effect or enforceable nature of obligations are subject to the provisions of Scots law applicable to contracts held to have been frustrated by events happening after their execution.

6.13.9 Any agreement may be varied, amended or discharged, or any provision thereof waived, by a further agreement or effected by a collateral agreement which may be effected by oral agreement between the parties, or by a course of dealing, notwithstanding any provision to the contrary.

6.13.10 Under section 8 of the Law Reform (Miscellaneous Provisions) Scotland Act 1985, a court may, on application to that effect, declare the terms of a contract to be varied on the basis that they fail to express accurately the common intention of the parties thereto at the date when they were made. However, where the parties have sought legal advice prior to executing such a contract, a presumption that those agreements do accurately express the common intention of the parties will be more difficult for the applicant to rebut.

[19] It is also possible under common law to challenge a preference in favour of a creditor. There is no time limit beyond which such a challenge becomes unavailable. However, for a challenge to succeed, the Counterparty would need to be insolvent (on a balance sheet or cash from basis) for the whole of the period from the transaction giving rise to the preference until the date of formal insolvency proceedings.

6.13.11 A Scottish court may sist (suspend) proceedings if concurrent proceedings are brought elsewhere.

6.13.12 Any opinion to the effect that obligations arising under a contract are or will be effective and/or enforceable is to be taken as meaning that such obligations are in a form and of a type which the Scottish courts treat as effective and/or enforceable under Scots law provided that:

(i) they would be valid, binding and enforceable according to the chosen proper law of the relevant contract;

(ii) all appropriate procedures will be taken within the relevant time limits on any relevant judgement obtained in the courts of the chosen proper law as the relevant forum so as to enable such judgement to be enforced as if it were a decision of a Scottish court pursuant to the Civil Jurisdiction and Judgements Act 1982 and any applicable subordinate legislation or rules of court made in connection therewith; and

(iii) in the event of it being sought to enforce the obligations in the Scottish courts as the relevant forum the relevant provisions of the proper chosen law establishing the obligations as valid and binding would be established and proved as foreign law.

6.13.13 A monetary judgement given by a Scottish court will normally be expressed in sterling but on a monetary claim in respect of foreign currency due under the contract, a Scottish court can give a judgement expressed as an order to pay the appropriate amount of foreign currency or its sterling equivalent at the date of payment or at the date of extract of the judgement, whichever is earlier. In the case of *Commerzbank Aktiengessellschaft v. Large 1977 S.C. 375*, the Court of Session held that for the purpose of enforcement in Scotland, it was necessary to provide in any decree (judgement) for the conversion of the foreign currency to sterling.

6.13.14 Under Scots law, any provision requiring any person to pay amounts (including interest) imposed in circumstances which include circumstances of breach or default might be held to be unenforceable on the grounds that it is a penalty and thus void if such provision does not constitute a genuine and reasonable pre-estimate of the loss likely to be suffered as a result of the circumstances in question.

6.13.15 Any provision purporting to require a party to indemnify another person against the costs or expenses of proceedings in the Scottish courts is subject to the discretion of the court to decide whether and to what extent the party to such proceedings should be awarded costs and expenses incurred by it in connection therewith.

6.13.16 A judgement obtained by a court in a foreign jurisdiction may, in certain circumstances, be enforced in Scotland without the Scottish courts considering the merits of it having been examined by them. If such a judgement is so enforced, it may, depending on the circumstances of the case, undermine the effectiveness of the Agreement as applied in Scotland. Furthermore, if the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the Scottish courts may recognise the extinction of those claims or liabilities.

6.13.17 Where, under any Transaction, the obligations of a Counterparty which is subject to Insolvency Proceedings to deliver property have been completed but a counter-obligation of the other party to pay for that property has not been completed at the time of exercise of the Netting Provisions, it may not be possible to include the amount of the counter-obligation of the other party within the calculation of the liquidated amount due, and the full amount of the counter-obligation may (subject to the operation of the Set Off Provisions or any other right

of set off) have to be paid to the Counterparty. This will, however, be subject to Regulations 12 and 13 of the Collateral Regulations (on which please see above).

6.13.18 Where the obligations owed to a Counterparty under an Agreement or a Transaction have been arrested by a third party creditor of that Counterparty, it may not be possible for those rights to be the subject of any included in any netting or set off pursuant to the Netting Provisions or Set Off Provisions.

6.13.19 Where the winding up of a Counterparty under the Insolvency Act is commenced by the presentation of a petition for winding up any disposition of that party's property made after the presentation of the petition is void, unless the Court orders otherwise. This may affect the validity of the transfer of any asset (including margin) by the Counterparty pursuant to the terms of the Agreement and could prejudice the operation of the provisions of the Agreement (including the Title Transfer Provisions, Netting Provision and the Set Off Provisions) in relation to those assets.

6.13.20 Where the sequestration of a Counterparty under the Bankruptcy Act is commenced by a petition for sequestration, the assets of the Counterparty will vest in the trustee in sequestration on the date of sequestration. This date is either (a) where the Counterparty present the petition, the date that the sequestration order is made by the Court or (b) in all other cases, the first date that the Court grants a warrant to cite the Counterparty (or any other persons) in connection with the petition. Any disposition following the date of sequestration may (depending on the circumstances) be void. This may affect the validity of the transfer of any asset (including margin) by the Counterparty pursuant to the terms of the Agreement and could prejudice the operation of the provisions of the Agreement (including the Title Transfer Provisions, Netting Provision and the Set Off Provisions) in relation to those assets.

6.13.21 Under Scots common law a liquidator or trustee in sequestration may disclaim a contract prior to it being terminated and liquidated in accordance with the Netting Provisions. To the extent that each Transaction constitutes a separate contract there might, therefore, be scope for a liquidator or trustee to "cherry pick" profitable Transactions and disclaim unprofitable Transactions if this was done prior to the Netting Provisions being triggered. There is little authority in Scots law in relation to the power to disclaim contracts (and almost no modern authority). However, provided that each of the Transactions to which the Netting Provisions apply are regarded under their respective governing laws (which we assume will not be Scots law) as constituting one contractual arrangement, we consider that this should be sufficient to remove the risk of cherry picking. Further, if the Collateral Regulations apply and the Agreement constitutes a financial collateral arrangement (on which please see paragraph 6.4.3 above) under the Collateral Regulations and the Counterparty is the subject of a winding up or has been sequestrated, the Collateral Regulations provide that it will not be possible for a liquidator to repudiate them.

6.13.22 Under Section 186 of the Insolvency Act, a court may, on the application of a liquidator entitled to the benefit subject to the burden of a contract made with a Counterparty make an order rescinding the contract on such terms as to the payment by or to either Counterparty of damages for the performance of the contract or otherwise as the court thinks just. Where such an order is made in relation to the Agreement (or any Transaction) this could prejudice the operation of the provisions of the Agreement.

6.13.23 Any provision of the Agreement which constitutes or purports to constitute a restraint on the exercise of any statutory power of the Counterparty may be ineffective.

6.13.24 Any obligation to hold a benefit, right, payment or amount to the order of or in trust for a Counterparty may constitute a charge which may require to be registered in accordance with the Companies Act.

6.13.25 Following an insolvency of any Counterparty, any rights arising under the Agreement may be affected by the application of anti-deprivation principles.

6.13.26 Any obligation of a Counterparty to the Agreement under the Agreement which involves the currency (and is contrary to the exchange control rules) of any member of the International Monetary Fund may not be enforceable.

6.13.27 To the extent that a Transaction may be for the supply of gas by a gas supplier (within the meaning of Part 1 of the Gas Act 1986) or for the supply of electricity by an electricity supplier (within the meaning of Part 1 of the Electricity Act 1989) to a Counterparty which is the subject of insolvency proceedings, under section 233 of the Insolvency Act, the supplier may make it a condition of the giving of the supply that the relevant insolvency official personally guarantees the payment of any charges in respect of the supply. Where an insolvency official does guarantee the payment of such charges, this may impair the effectiveness of the Netting Provisions or Set Off Provisions in relation to the relevant Transaction(s).

6.13.28 A Transaction may be affected by the operation of EMIR in the event of a central counterparty ("**CCP**") taking default action against a Party which is a clearing member of the CCP. In particular:

(i) Under articles 48(5) and 48(6) of EMIR, assets and positions of a Party which is a "client" as defined by EMIR (a "**Client Party**") may be transferred to another clearing member of the CCP. If the value of those assets or positions, or a sum calculated so as to take account of that value, is included in a Liquidation Amount or Cleared Set Termination Amount, the Client Party could receive an overpayment unless an adjustment is made to the Liquidation Amount or Cleared Set Termination Amount. Whether such an adjustment is necessary will depend on the transfer mechanism used by the CCP, but in appropriate cases may take the form of clause 5.2.2(i) of the FOA Clearing Module. If such an overpayment could arise but has not been contractually provided for, the result of netting under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision may be adjusted by the court or the Insolvency Representative to take account of the overpayment, but we consider that the effectiveness of the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision would not otherwise be impaired.

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

overpayment, but we consider that the effectiveness of such provisions would not otherwise be impaired.

6.13.29 A Counterparty which is an authorised person under FSMA and has its head office or (where a legal person) its registered office in this jurisdiction (a "**regulated Counterparty**") may be required, pursuant to client money rules made under section 137B(1) of FSMA, to procure the agreement of the other party not to set off any amount due from him to the regulated Counterparty in respect of Transactions made by the regulated Counterparty for the account of any of his clients whose monies are required to be treated by the regulated Counterparty as client money ("**segregated clients**") against any amount due from the regulated Counterparty in respect of other Transactions made between the Parties. In such a case, the Agreement may need to be amended to provide for two discrete Netting Termination Amounts to be calculated in order to produce, separately, a net sum payable in respect of Transactions made for the account of segregated clients and a net sum payable in respect of all other Transactions; or the regulated Counterparty may need to enter into two Agreements, one to apply to Transactions made with the other party for the account of segregated clients and the other to cover all other Transactions. We express no opinion as to the effect under the laws of this jurisdiction of any failure by the regulated Counterparty to adopt either course of action.

6.13.30 The Financial Services Authority (which has now been succeeded by the FCA and PRA) expressed concerns relating to the use of title transfer collateral arrangements with retail clients. Although the FSA did not expressly prohibited these in all circumstances, it reminded authorised firms of the client's best interest rule, in the context of the transfer arrangements (at CASS 6.1.7G of the FCA Handbook). Our opinions are therefore subject to the effects of any decision or action by the FCA in respect of title transfer collateral arrangements in respect of Parties that are, or should be (or the FCA determines are or should be) classified as retail clients, which may have the direct or indirect effect of reversing or re-characterising or otherwise compromising the Title Transfer Provisions and the characterisation of Margin Transfer thereunder.

6.13.31 A Bank or Building Society may be able to transfer the liability it owes to an account holder in respect of an account which has been dormant for a period of 15 years to an authorised reclaim fund, in accordance with the provisions of the Dormant Bank and Building Society Accounts Act 2008. Where the Other Party is a Bank or Building Society and cash collateral provided by the Counterparty to the Other Party is recorded as a deposit in the name of the Counterparty with the Other Party, the consequence of the transfer of the deposit liability pursuant to the Dormant Bank and Building Society Accounts Act 2008 may be to render the transferred deposit liability (i.e. the obligation to return such cash collateral to the Counterparty) non-mutual with other obligations owed to the Other Party by the Counterparty (including pursuant to Transactions) and therefore ineligible for effective set-off pursuant to the Set-Off Provisions or inclusion in the Netting Termination Amount pursuant to the Title Transfer Provisions.

6.13.32 The enforceability of a contract or obligation in accordance with its terms may be impaired as a result of any actings of the parties to it which are not in accordance or consistent with those terms.

6.13.33 An exchange contract[20] (which in our view may include the FOA Netting Agreement or, as the case may be, the Clearing Agreement and any Transactions) is unenforceable in the United Kingdom if (i) it involves the currency of any member of the International Monetary Fund and (ii) it is contrary to the exchange control regulations of any member of the International Monetary Fund which are maintained or imposed consistently with the

[20] "Exchange contract" here has the meaning used in the International Monetary Fund Agreement and related legislation, and is not a reference specifically to on-exchange derivative contracts.

International Monetary Fund Agreement. In our opinion the FOA Netting Agreement or, as the case may be, Clearing Agreement is not contrary to any exchange control regulations maintained or imposed by the United Kingdom. However, there is inconsistent authority on what amounts to an "*exchange contract*" for these purposes. It is not clear whether the term encompasses any contract which in any way affects a country's exchange resources or only a contract for the exchange of one currency for another, although the better view is probably that the latter (narrow) interpretation is correct.

6.13.34 The opinions expressed in this Opinion are subject to the effects of any United Nations, European Union or UK sanctions or other similar measures implemented or effective in the United Kingdom with respect to any Party which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.

7. Market Contracts

7.1 Background on market contracts

7.1.1 In certain circumstances netting may be achieved by virtue of default rules of a recognised investment exchange (as defined in section 285 of FSMA) rather than under the terms of an FOA Netting Agreement or, as the case may be, Clearing Agreement. This paragraph 7 sets out our opinion on the netting under such default rules, where applicable.

Netting by virtue of default rules will occur, and our opinion at paragraph 7.3 applies, where:

(i) the recognised investment exchange takes action under its default rules;

(ii) the Transaction, or as the case may be, Client Transaction, constitutes a "market contract" for the purposes of Part VII of the Companies Act 1989; and

(iii) the operation of the FOA Netting Provision, or as the case may be the Clearing Module Netting Provision or the Addendum Netting Provision, has been expressly disapplied or it has been agreed (for example by virtue of a clause in the form of clause 1.5 of the Professional Client Agreement 2011) that the rules of the relevant recognised investment exchange will prevail; and

(iv) the default rules of the recognised investment exchange prescribe that the rights and liabilities under the relevant market contracts are to be netted in accordance with the Recognition Requirements Regulations.

Paragraphs 7.1.2 and 7.1.3 explain the obligation of recognised investment exchanges to achieve netting of "market contracts" and which types of market contract fall within the scope of our opinion, and set out further terms of reference. Paragraph 7.2 sets out additional assumptions applicable to our opinion in relation to netting of market contracts under the default rules of a recognised body, which is given in paragraph 7.3, and which is subject to the qualifications set out in paragraph 7.4.

7.1.2 Part II of the Schedule to the Recognition Requirements Regulations requires that a recognised investment exchange must have default rules which provide for what is to happen in the event of a member of the exchange being or appearing to be unable to meet his obligations in respect of one or more market contracts (a "**defaulter**"). In particular, these rules must provide for:

(i) all rights and liabilities between those party as principal to unsettled market contracts to which the defaulter is party as principal to be discharged and for there to be paid by one party to the other such sum of money (if any) as may be determined in accordance with the rules;

(ii) for the sums so payable in respect of different contracts between the same parties to be aggregated or set off so as to produce a net sum; and

(iii) for the certification by or on behalf of the exchange of the net sum payable or, as the case may be, that no sum is payable.

7.1.3 For the purposes of our opinion in this paragraph, only the following types of "market contract" fall within Part II of the Schedule to the Recognition Requirements Regulations and are relevant:

(i) a contract entered into by a member of the exchange on the exchange; and

(ii) a contract entered into by a member of the exchange in the making of which the member was subject to the rules of the exchange,

except that we do not give any opinion where either party to the contract is a recognised investment exchange, recognised clearing house, or recognised central counterparty (as those terms are defined in FSMA), or where the head office of the recognised investment exchange is outside the United Kingdom.

7.2 **Assumptions in respect of this Paragraph 7**

For the purposes of the opinions given in this paragraph 7, we assume:

7.2.1 That each party to a market contract has the capacity, power and authority under all applicable law(s) to enter into the market contract and to be bound by the rules of the relevant recognised investment exchange; to perform its obligations thereunder; and that each party has taken all necessary steps to execute, deliver and perform the same.

7.2.2 That each market contract has been entered into and carried out by each of the parties thereto in good faith, for the benefit of each of them, and for the purpose of carrying on and by way of their respective businesses.

7.2.3 That the rules of the relevant recognised investment exchange house are legally binding and enforceable against the parties to a market contract connected with such recognised investment exchange.

7.2.4 That the default rules of any relevant recognised investment exchange provide for the matters referred to in paragraph 7.1.2, above.

7.2.5 That insofar as any transaction or obligation arising under a Transaction is a "*transfer order*" under the Settlement Finality Regulations, that there are no such provisions in the rules of any relevant designated system which purport to override or are inconsistent with the default rules of the relevant recognised investment exchange.

We also make (and repeat here) the assumptions set out in paragraphs 4.2, 4.17, 4.22 and 4.23.

7.3 **Opinions in respect of market contracts**

On the basis of the foregoing terms of reference in paragraph 2, the assumptions in paragraph 7.2 and subject to the qualifications set out in paragraph 7.4, we are of the following opinion.

In relation to any Transactions which are market contracts referred to in paragraph 7.1.3, in the event of a default (including as a result of the opening of any Insolvency Proceedings) of a person party to a market contract in respect of which the relevant recognised investment exchange takes action in respect of such Transactions, the action taken by the relevant investment exchange in respect of such Transactions will result in the calculation of a single net sum payable in respect of such Transactions.

We are of this opinion because in relation to market contracts of the types identified in paragraph 7.1.3, Part VII provides that:

7.3.1 neither (i) a market contract, (ii) the default rules of a recognised investment exchange or (iii) the rules of a recognised investment exchange for settlement of market contracts not dealt with under its default rules can be held to be invalid at law on the ground of any inconsistency with the law relating to the distribution of assets of a person on winding-up or administration;

7.3.2 the powers of a relevant office-holder and of a court under the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985 shall not be exercised in such a way as to prevent or interfere with the settlement of a market contract in accordance with the rules of a recognised investment exchange or any other action taken under the default rules of a recognised investment exchange;

7.3.3 any debt or other liability arising out of a market contract which is the subject of default proceedings may not be proved in a winding up, bankruptcy or administration, or in Scotland claimed in a winding up or sequestration, until the completion of the default proceedings and shall not be taken into account for the purposes of any set-off until the completion of such default proceedings.

7.4 **Qualifications**

The opinions in paragraph 7.3 are subject to the following qualifications:

7.4.1 It is not certain whether a Transaction which is also a market contract within the scope of paragraph 7.1.3 would be netted by virtue of default rules of a recognised investment exchange, in the event that the default rules are not expressed to prevail over the FOA Netting Agreement, or as the case may be the Clearing Agreement; but the preferred view is that the court or the Insolvency Representative would recognise netting to have been achieved under one approach or the other. In addition, where the default rules of a recognised investment exchange make provision for collateral provided by a person party to a market contract to be taken into account in determining the sum payable in respect of the person's market contracts, and the default rules are not expressed to prevail over the FOA Netting Agreement, or as the case may be the Clearing Agreement, it is not certain whether the collateral would be taken into account by operation of the default rules or the FOA Netting Agreement, or as the case may be the Clearing Agreement, but the preferred view is that the court or Insolvency Representative would recognise the collateral to have been taken into account under one approach or the other.

7.4.2 Market contracts within the scope of this paragraph may also be affected by action taken by a CCP under its default rules and/or EMIR. Part VII does not cater for the unlikely event of a conflict between action which a CCP wishes to take and operation of default rules of a recognised investment exchange in respect of a market contract, though we would expect the outcome to be either a transfer of the market contract (or a combination of market contracts and/or margin) to a person other than the defaulter under the procedures of the CCP or a close-out and netting.

7.4.3 If a creditor of a defaulter who has attached an amount owed by the other party to a market contract is itself subject to set-off, the ability to include that amount in a netting under default rules is not assured by Part VII.

7.4.4 If the subject-matter of a market contract is bank securities or other securities within the scope of paragraph 6.9.3, similar issues to those described in that paragraph may arise, affecting the ability of the recognised investment exchange to deal with the market contract in the manner envisaged by its default rules.

7.4.5 If a defaulter is subject to a scheme of arrangement under the Companies Act 2006, the protections of Part VII would appear not to apply. Accordingly, the issues described in paragraph 6.13.28 might arise in relation to the set-off rights, and the net sum, expected by virtue of default rules.

7.4.6 The Scottish courts may be required, or have a discretion, to cooperate with the courts of other jurisdictions in the event of insolvency proceedings affecting a defaulter, as described in paragraphs 6.5 to 6.8. However, subject to paragraph 7.4.7, by virtue of section 183 of the Companies Act 1989, the Scottish courts are not, pursuant to section 426 of the Insolvency Act 1986 or any other enactment or rule of law, permitted to recognise or give effect to any order of a court exercising jurisdiction in relation to insolvency law in a country or territory outside the United Kingdom or any act of a person appointed in any such country or territory to discharge any functions under insolvency law, if the Scottish courts would be prevented from making such an order or a relevant office-holder would be prevented from doing such an act by virtue of a provision made by or under Part VII.

However, Section 183 of the Companies Act may afford no protection against:

(i) the acts of a person whose functions do not arise under insolvency law (as defined in section 190(6) of the Companies Act 1989), such as a person exercising regulatory powers of intervention; or

(ii) acts or orders which are not prohibited by virtue of Part VII, such as the imposition of a moratorium on exercise of rights of set-off pending certain events; and

(iii) requests for assistance in exercising insolvency jurisdiction made by courts in other jurisdictions of the United Kingdom.

7.4.7 Regulation 29 of the CI Regulations provides, in relation to a UK credit institution, that the effects of a relevant reorganisation or winding-up on transactions carried out in the context of a regulated market operating in an EEA State must be determined in accordance with the laws applicable to those transactions. Article 9 of the EU Insolvency Regulation provides that the effects of insolvency proceedings on the rights and obligations of the parties to a financial market shall be governed solely by the law of the Member State applicable to that market. Accordingly, in respect of a defaulter which is a UK credit institution or to which the EU Insolvency Regulation applies (as to which see paragraph 6.6), the rights and obligations of parties to market contracts to which the defaulter is party should be governed by the rules of the relevant recognised investment exchange, notwithstanding any insolvency laws of a Member State which are inconsistent with such rules.

7.4.8 Under section 164(4) of the Companies Act 1989, the value of any profit arising to the solvent party from any market contract entered into by it or, as the case may be, the amount or value of the margin or default fund contribution can be recovered by the relevant office-holder if the solvent party had notice (within the meaning of section 190(5) of that Act), at the time the relevant market contract was entered into, that a petition had been presented for the winding-up or bankruptcy or sequestration of the estate of the insolvent party.

7.4.9 If the defaulter has entered into market contracts as principal ("**Segregated Contracts**"), being contracts which correspond to transactions entered into with segregated clients ((that is, clients whose monies are required to be treated by the defaulter as client money under client money rules made pursuant to FSMA)), a recognised investment exchange is obliged to calculate under its default rules a discrete net amount payable in respect of such Segregated Contracts discharged under its default rules and a discrete net amount payable in respect of all other market contracts discharged under its default rules to which the defaulter is party as principal. Furthermore, to the extent that a recognised investment exchange or recognised clearing house is obliged pursuant to its default rules to register

other specific types of market contract in separate accounts, the recognised investment exchange or recognised clearing house will be obliged to calculate a separate net sum in respect of each such class of market contract.

7.4.10 A recognised investment exchange is not obliged to take action following the default of a member unless required to do so pursuant to directions given by the appropriate regulator (the FCA or PRA, as applicable) under section 166 of the Companies Act 1989. The appropriate regulator may direct a recognised investment exchange not to take action (or certain types of action) under its default rules in certain circumstances permitted by section 166.

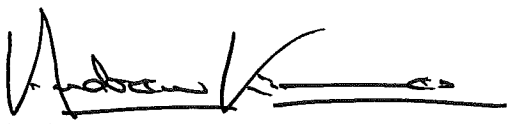
7.4.11 Netting under the default rules of a recognised investment exchange may not be effective against the attaching creditor if that creditor is in liquidation or administration or has been sequestrated under the laws of this jurisdiction, since there may not be the requisite mutuality of obligations for effective set-off in such creditor's insolvency proceedings.

7.4.12 The issues described in paragraphs 6.13.33 (exchange controls) and 6.13.34 (sanctions) may also be relevant to market contracts.

8. Reliance

This opinion is given for the sole benefit of the Futures and Options Association and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by FSMA) 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



Andrew Kinnes, Partner
For and on behalf of
Shepherd and Wedderburn LLP

SCHEDULE 1
Individuals

1. **Insolvency Proceedings: Individuals**

1.1 The only bankruptcy, composition, rehabilitation (e.g. administration, receivership or voluntary arrangement) or other insolvency proceedings to which an Individual would be subject in Scotland are those referred to in:

1.1.1 the Bankruptcy (Scotland) Acts 1985 or 1993 and any rules made thereunder; and

1.1.2 the Debt Arrangement and Attachment (Scotland) Act 2002 and any rules made thereunder,

(each as modified, varied or amended as at the date hereof), namely:

1.1.3 the sequestration of the estate of the Individual in relation to the debts incurred by it;

1.1.4 the execution of a trust deed (whether or not a protected trust deed under the Bankruptcy Act) by the Individual for his or her creditors; and

1.1.5 the entry by the Individual into a debt payment programme under the Debt Arrangement and Attachment (Scotland) Act 2002,

(the above are, together, called, for the purposes of this opinion, "**Individual Insolvency Proceedings**").

1.1 Subject as set out below, we consider that all of the Individual Insolvency Proceedings are Individual Insolvency Events of Default.

1.2 It is possible that a trustee appointed upon the execution of a voluntary trust deed by an Individual may be appointed only over part of an Individual's estate. To the extent that such a trustee is appointed over a part of the estate of the Individual which is not a substantial part, this appointment would not be covered by the Individual Insolvency Events of Default other than the Core Provisions Individual Insolvency Event of Default ("**Non-Core Individual Insolvency Events of Default**").

1.3 The language of the Non-Core Individual Insolvency Events of Default is based on corporate insolvencies. As regards the execution of a voluntary trust deed by an Individual, a narrow interpretation of the words "case or other procedure seeking" could result in the appointment of a trustee under a trust deed not constituting a Non-Core Individual Insolvency Event of Default. We would therefore suggest amending Non-Core Individual Insolvency Events of Default so that there will be an Event of Default in the Agreements where any steps are taken to appoint a Custodian of the Individual by any person.

1.4 While we believe that the entry into a debt payment programme by an Individual is likely to come within the Non-Core Individual Insolvency Events of Default which provide for the seeking of an "arrangement" under any "bankruptcy, insolvency, regulatory, supervisory or similar law", we would advise that specific provision be made for an Event of Default which is the entry by an Individual into a debt payment programme.

1.5 We do not consider the execution of a trust deed or the entry into a debt payment programme would be a Core Provisions Individual Insolvency Event of Default. Furthermore we consider that express reference to the appointment of a trustee in sequestration should be included in the Core Provisions Individual Insolvency Event of Default in order to avoid any risk that such an appointment is not an Event of Default. See paragraph 1 of Annex 5.

2. **Additional/Modified Qualifications**

2.1 The Collateral Regulations only apply to financial collateral arrangements which have been entered into between two non-natural persons and will not therefore apply to the Agreement and any Transactions when entered into by an Individual. While this does not affect the substance of our opinions in paragraph 5 of this Opinion, it does mean that the various protections given to financial collateral arrangements under the Collateral Regulations would not apply.

2.2 The Charge Registration Provisions (on which please see paragraph 6.1.9 of this Opinion) do not apply to Individuals.

SCHEDULE 2
Building Societies

1. **Insolvency Proceedings: Building Societies**

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

1.1.1 those referred to in the Insolvency Act and the Insolvency Rules;

1.1.2 those referred to in the Bankruptcy Acts 1985 and 1993 and any rules made thereunder;

1.1.3 those referred to in the Building Societies Act 1986; and

1.1.4 those referred to in the Banking Act, the Building Societies (Insolvency and Special Administration) Order 2009 and the Building Society Special Administration (Scotland) Rules 2009,

each as modified, varied or amended as at the date hereof, namely:

1.1.5 the approval of a voluntary arrangement;

1.1.6 the making of an administration order under the provisions set down by Part II of the Insolvency Act as in force immediately prior to the coming into force of the Enterprise Act 2002[21];

1.1.7 the compulsory winding up under the Insolvency Act;

1.1.8 the voluntary winding up under the Insolvency Act;

1.1.9 dissolution by consent of its members, under section 87 of the Building Societies Act 1986 (a "**BS Dissolution**");

1.1.10 building society insolvency under Part 2 of the Banking Act;

1.1.11 building society special administration under Part 3 of the Banking Act; and

1.1.12 the appointment of an administrative receiver over the whole (or substantially the whole) of a Company's property by or on behalf of the holder of a floating charge which was permitted under the Building Societies (Financial Assistance) Order 2010; and

1.1.13 if the Building Society is an Investment Bank, the entry by it into special administration, special administration (bank insolvency), and special administration (bank administration under the Investment Bank Regulation.

(the above are together called for the purposes of this Opinion, "**Building Society Insolvency Proceedings**").

1.2 Subject as set out below, we consider that all of the Building Society Insolvency Proceedings are Corporate Insolvency Events of Default.

1.3 It is possible that a receiver as defined for the purposes of Chapter II of Part III of the First Group of Parts of the Insolvency Act (a "**Receiver**") may be appointed over part of a Building Societies' business that is covered by a floating charge granted by it. The appointment of such a Receiver (not being an administrative receiver) could be a Corporate Insolvency Event of Default to the extent it is a substantial part of its assets. To the extent that a Receiver is appointed over a part which is not a substantial part of the relevant Party, it would not be a Corporate Insolvency Event of Default in the

[21] Section 249(1)(e) of the Enterprise Act 2002 provides that the amendments to the Insolvency Act introduced by the Enterprise Act 2002 do not apply to building societies.

Agreement. It may therefore be appropriate to remove the reference to "substantial" in the relevant Corporate Insolvency Event of Default. See paragraph 4 of Annex 5.

1.4 A BS Dissolution may not be a Corporate Insolvency Event of Default unless certain optional language is included[22].

1.5 The short form clauses listed at paragraphs 4 to 6 and 10 to 12 of Annex 1 and the Eligible Counterparty Agreement do not contain a reference to an "arrangement" under any "bankruptcy, insolvency, regulatory, supervisory or similar law". It may therefore be that a voluntary arrangement or a scheme of arrangement would not be a Corporate Insolvency Event of Default under these clauses and agreement if it did not involve a "reorganisation" or "moratorium". See paragraph 4 of Annex 5.

1.6 A Building Society may also amalgamate with another Building Society under section 93 of the Building Societies Act 1986. Such an amalgamation may or may not result from the insolvency of one of the Building Societies and would not constitute an Insolvency Event of Default without being specifically included.

2. **Additional/Modified Qualifications**

2.1 GEN PRU (on which please see Schedule 6 below) applies to Building Societies in a similar manner as it does to Insurers. Other rules of the FCA to which they are subject include the Building Societies Regulatory Guide and the Prudential Sourcebook for Banks, Building Societies and Investment Firms. Again, these rules are subject to section 138Eof FSMA which provides that contravention of FCA rules does not make any transaction void or unenforceable.

2.2 The Building Societies Act 1986 also contains restrictions on the entry by Building Societies into 'derivative' instruments'. However, section 9A(1) of that Act provides that no breach of this restriction renders the transaction invalid.

2.3 The Charge Registration Provisions do not apply to Building Societies.

[22] This optional language is that which is set out at paragraph (h) of that Clause 10.1 of the Professional client agreement (2011 version).

SCHEDULE 3
Open Ended Investment Companies (OIECs)

1. **Insolvency Proceedings: Open Ended Investment Companies**

1.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Counterparty which is an Open Ended Investment Companies could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows:

1.1.1 the Insolvency Act and the Insolvency Rules;

1.1.2 the Companies Act;

1.1.3 the OEIC Regulations; and

1.1.4 COLL;

each as modified, varied or amended as at the date hereof, namely:

1.1.5 the appointment of an administrative receiver over the whole (or substantially the whole) of the OEIC's property by or on behalf of the holders of a floating charge granted (1) in connection with one of the excepted arrangements detailed in Sections 72B to 72GA of the Insolvency Act or (2) prior to 15 September 2003;

1.1.6 the compulsory winding up of an OEIC as an unregistered company pursuant to Part V of the Insolvency Act and regulations 31 and 32 of the OEIC Regulations;

1.1.7 the voluntary winding up of an OEIC which is solvent under regulation 21 of the OEIC Regulations and Chapter 7.3 of COLL (an "**OEIC Voluntary Winding Up**");

1.1.8 a scheme of arrangement under Part 26 of the Companies Act (as modified by the OEIC Regulations);

(the above are together called for the purposes of this Opinion, "**OEIC Insolvency Proceedings**").

1.2 Subject as set out below we confirm that all of the OEIC Insolvency Proceedings would be Corporate Insolvency Events of Default.

1.3 It is possible that a receiver as defined for the purposes of Chapter II of Part III of the First Group of Parts of the Insolvency Act (a "**Receiver**") may be appointed over part of an OEIC's business that is covered by a floating charge granted by it. The appointment of such a Receiver (not being an administrative receiver) could be a Corporate Insolvency Event of Default to the extent it is a substantial part of its business. To the extent that a Receiver is appointed over a part which is not a substantial part of the business of the relevant party, it would not be covered by the Corporate Insolvency Events of Default.

1.4 The short form clauses listed at paragraphs 4 to 6 and 10 to 12 of Annex 1 and the Eligible Counterparty Agreement do not contain a reference to an "arrangement or composition" under any "bankruptcy, insolvency, regulatory, supervisory or similar law". It may therefore be that a scheme of arrangement which did not involve a "reorganisation" or "moratorium" would not be a Corporate Insolvency Event of Default under these provisions unless this language is included. See paragraph 2 of Annex 5.

1.5 An OEIC Voluntary Winding Up may not constitute a Corporate Insolvency Event of Default which is not a Core Provisions Corporate Insolvency Event of Default as the relevant definition strikes at insolvency proceedings relating to the insolvency of a Counterparty which is a Company. If an OEIC Voluntary Winding Up is required to be an Event of Default we would suggest the addition of a further Event of Default to provide for this. See paragraph 2 of Annex 5.

1.6 Furthermore, although there is a reference in the Core Provisions Corporate Insolvency Event of Default to a procedure proposing liquidation under any regulatory law which may apply to an OEIC Voluntary Winding Up, we consider that an additional Event of Default should be included to provide for this expressly. See paragraph 2 of Annex 5.

1.7 On 20 December 2011 the OEIC Regulations were amended in order to provide for a "protected cell regime" for umbrella OEICs. Under that regime, each sub-fund of the OEIC is generally treated as a separate legal entity, and the assets of a particular sub-fund belong exclusively to that sub-fund and cannot be used to discharge any liabilities of the company or any other person, except where they were incurred on behalf of (or are attributable to) that sub-fund. In addition, OEIC Insolvency Proceedings can apply in respect of a sub-fund of the OEIC and not only the OEIC itself.

1.8 Unless amended, a Corporate Insolvency Event of Default would only occur on in relation to an OEIC Insolvency Proceeding in relation to the OEIC itself. Accordingly it may be appropriate for the Events of Default to be extended so that they also cover OEIC Insolvency Proceedings in relation to the particular sub-fund that the OEIC and the Other Party are entering into Transactions in relation to. See paragraph 2 of Annex 5.

2. Additional/Modified Qualifications

2.1 Restrictions on Investment Powers

COLL imposes restrictions on the investment powers of OEIC's. The restrictions which apply would depend on the rules applicable to the particular OEIC (which would depend principally on whether it is an UCITS Scheme or a non-UCITS Scheme). However, section 138E of FSMA provides that any transaction entered into in contravention of such rules will not be void or unenforceable by reason only of such contravention.

2.2 Protected cell regime

2.2.1 As described above each sub-fund of an umbrella OEIC is generally treated as a separate legal entity, and the assets of a particular sub-fund belong exclusively to that sub-fund and cannot be used to discharge any liabilities of the company or any other person, except where they were incurred on behalf of (or are attributable to) that sub-fund. Any provision in an agreement which is inconsistent with this is void.

2.2.2 Where an umbrella OEIC has entered into an Agreement and Transactions (and so the protected cell regime described above applies), we do not consider that:

(i) the Netting Provisions could be applied to net Transactions entered into in respect of one sub-fund of the OEIC against Transactions entered into in respect of another sub-fund (and vice versa)[23]; or

(ii) the Set Off Provisions could be used to set off liabilities of the OEIC to the Other Party entered into in respect of one sub-fund with liabilities of the Other Party to the OEIC in respect of another sub-fund (and vice versa).

2.2.3 Given the points made above, we consider that an Other Party should ensure that the sub-fund with which they are entering into Transactions with is clearly identified and that the Agreement clearly provides that if the Agreement only applies in relation to Transactions entered into in respect of that sub-fund. Where the Other Party is entering into Transactions with more than one sub-fund of an OEIC, we recommend that separate Agreements are entered into in respect of each sub-fund.

[23] In particular, we do not consider that any margin posted in respect of one sub-fund could be used to calculate the Netting Termination Amount in respect of Transactions entered into by another sub-fund pursuant to a Netting Provision.

2.3 **Charge Registration Provisions**

The Charge Registration Provisions (on which please see paragraph 6.1.9 of this Opinion) do not apply to OEICs.

SCHEDULE 4
Insurers

1. **Insolvency Proceedings**

1.1 There are no composition, rehabilitation (e.g. administration, receiverships or voluntary arrangement) or other insolvency proceedings in Scotland in relation to Insurers which do not also apply to Scottish Companies (on which please see paragraph 5.1 (*Insolvency Proceedings*)). Subject to the points made in paragraph 5.1, we consider that such proceedings would be adequately covered by the Corporate Insolvency Events of Default.

1.2 However, there is a modified insolvency regime for the winding up and administration of Insurers. The insolvency of Insurers is governed by the provisions of the Insolvency Act, the Bankruptcy Act, FSMA, the Insolvency Rules, the Insurers (Reorganisation and Winding Up) Regulations 2004 (the "**Insurers Winding Up Regulations**"), the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2010, and the Insurers (Winding Up) (Scotland) Rules 2001[24].

1.3 Furthermore, where an Insurer which has permission under Part 4A of FSMA to carry out general contracts of insurance as principal is also authorised under Part 4A of FSMA to accept deposits, the additional insolvency procedures in the Banking Act will not apply to it.

1.4 The Insurers Winding Up Regulations were enacted to implement the Directive of the European Council and of the Parliament of 19 March 2001 on the reorganisation and winding up of insurance undertakings (2001/17/EC). The Insurers Winding Up Regulations contain provisions similar to those in the EU Insolvency Regulation and the Credit Institutions Directive.

1.5 The general effect of the Insurers Winding Up Regulations is that voluntary arrangements, administrations or winding ups in respect of insurers (referred to below as relevant reorganisations and winding ups) must be started in the member state where the relevant insurer is authorised.

1.6 Regulation 4 contains a general prohibition (subject to limited exceptions) on the commencement of certain insolvency proceedings in the UK in respect of an EEA Insurer. The definition of "EEA Insurer" for these purposes is contained in the Insurers Winding Up Regulations. Specifically excluded from the definition of EEA Insurer are UK Insurers, which the Insurers Winding Up Regulations define as being all persons having permission under Part 4A of FSMA to effect or carry out contracts of insurance (such referred to below as "**Included Insurers**"), except any person who, in accordance with that permission, carries on that activity exclusively in relation to reinsurance contracts (referred to below as "**Excluded Insurers**"). The Insurers Winding Up Regulations therefore require that, in respect of UK Insurers which are incorporated in the UK and are Included Insurers, the relevant insolvency proceedings should be commenced in the United Kingdom.

1.7 The Insurers Winding Up Regulations also apply to a certain extent to third country insurers which do not fall within the definition of an "EEA Insurer", where the third country insurer is subject to a "relevant measure" (as defined in regulation 48(1)(a) of the Insurers Winding Up Regulations). A third country insurer is a person who has permission under FSMA to effect or carry out contracts of insurance, but whose head office is not in the UK or an EEA state (a third country insurer subject to a relevant measure is referred to below as a relevant third country insurer). The Insurers Winding Up Regulations do not specifically prohibit the commencement of relevant reorganisations and winding ups of third country insurers.

[24] One effect of the modified regime is that an Insurer cannot be placed into administration using the "out of court" administration appointment route provided for in paragraphs 14 and 22 of Schedule B1.

2. Additional/modified qualifications

2.1 Restrictions on investment powers

2.1.1 Insurers are required to be authorised by the PRA and FCA for the purpose of carrying on insurance business. Insurers are subject to a number of regulatory rules including rules contained in the General Prudential Sourcebook (GENPRU) and the Prudential Sourcebook for Insurers (INSPRU) of the PRA and FCA.

2.1.2 Insurers may not carry on any commercial business other than insurance business and activities directly arising from that business. Insurers are required to make deductions from their regulatory capital in respect of assets which are inadmissible and/or which exceed various specified "concentration limits" (which impose limits in Insurers' exposure to particular categories of assets and to hold particular counterparties). They are also required to hold admissible assets of a value at least equal to the amount of their technical provisions. A transaction entered into in breach of the asset admissibility rules will affect the value which an Insurer may attribute to the transaction for insolvency purposes. Insurers carrying on "*long term insurance business*" (as defined in the glossary to the FCA and PRA Handbooks) are required to maintain a separate account in respect of the long term business. They are also required to ensure that (subject to certain qualifications) long term insurance business assets are applied only for the purposes of the Insurer's long term business. In relation to linked long term contracts of insurance, there are restrictions under INS PRU on the types of asset or index by reference to which benefits may be determined.

2.1.3 Where an Insurer enters into a Transaction in breach of any FCA or PRA rules (including those in INSPRU, and GENPRU (as applicable)), this would not affect the validity or enforceability of Transactions against the Insurer as section 138E of FSMA provides that contravention of FCA or PRA rules does not make any transaction void or unenforceable. It should also be noted that a contravention of the rules in INSPRU, and GENPRU does not give rise to a right of action by a private person against the counterparty.

2.2 Insurers Winding Up Regulations

2.2.1 Regulation of 37 of the Insurers Winding Up Regulations provides that, in a relevant winding up of an Included Insurer, the conditions under which set-off may be invoked in are to be determined by the general law of insolvency of the United Kingdom (which will, in relation to any Insolvency Proceedings in relation to an Included Insurer that is a relevant winding up, be Scots law).

2.2.2 However, Regulation 43 of the Insurers Winding Up Regulations states that relevant reorganisations and winding ups shall not affect the rights of creditors to demand the set-off of their claims against the claims of the Included Insurer or relevant third country insurer, where such a set-off is permitted by the law of the EEA State which is applicable to the claim of the Included Insurer or relevant third country insurer.

2.2.3 The Insurers Winding Up Regulations do not apply to Excluded Insurers. Although it is not beyond doubt, it seems to us to be likely that Excluded Insurers are subject to the EU Insolvency Regulation (on which please see paragraph 6.6 of this Opinion). Therefore, in relation to Excluded Insurers, set-off should be recognised in any proceedings which are subject to Scots law in accordance with the terms of the EU Insolvency Regulation (on which please see Part 2 of the Schedule).

2.2.4 The Insurers Winding Up Regulations prescribe a different order or priority of debts in a winding up of an Included Insurer to that set out in the Insolvency Act. In broad terms:

(i) Unsecured debts rank in the following order of priority (a) preferential debts (after expenses of the winding up); (b) insurance debts (broadly, claims under insurance policies; and (c) ordinary creditors.

(ii) Insurance debts must be paid out of the prescribed part of the assets of the Insurer which are covered by any floating charge and which is made available to unsecured creditors under section 176A of the Insolvency Act in priority to the claims of ordinary creditors.

2.2.5 In relation to Insolvency Proceedings against Included Insurers which are commenced in the UK and in respect of which the Netting Provisions and Set Off Provisions fall to be considered, set-off would be recognised under the terms of the Insurers Winding Up Regulations to the extent that it is (or would be) recognised as a matter of English law (if that is the governing law of the Agreement)[25].

2.3 Composite insurers

2.3.1 In the context of the Netting Provisions and Set Off Provisions, the separate regime which applies to insurers under the Insurers Reorganisation and Winding Up Regulations means that on a winding-up the assets and liabilities of insurer's *long-term business* have to be treated separately. The creditors of the *long-term fund* of an Insurer carrying on *long-term business* have priority in respect of the assets of that fund and other creditors have priority as regards other assets[26].

2.3.2 Where an Insurer carries on both *long-term business* and *general business* it is not clear what the effect of this is on an Insurers unsecured creditors (not being in the category of preferential creditors or direct insurance creditors) in a winding up or an administration. It may be that a liquidator or administrator would be able to satisfy liabilities in relation to Transactions entered into by the Insurer in relation to its *long-term business* and *general business* only from the assets attributable to its *long-term business* and *general business* respectively. Accordingly, it may not be possible to apply the Netting Provisions so as to net Transactions entered into by an Insurer in relation to its *long-term business* against Transactions entered into in relation to the Insurer's *general business* or to set off liabilities/obligations incurred by an Insurer in relation to its *long-term business* against obligations/liabilities entered into in relation to the Insurer's *general business* pursuant to the Set Off Provisions.

2.4 Section 377 of FSMA

2.4.1 Under section 377 of FSMA, where an Insurer is unable to pay its debts, the court charged with the winding up of the Insurer may reduce certain of the contracts of the Insurer on such terms and subject to such conditions as the court thinks fit in place of making a winding-up order. Accordingly, the enforceability of Title Transfer Provisions, Netting Provision and Set Off Provisions in relation to an insolvent Insurer will be subject to the application of the provisions of FSMA and the ability of a Scottish court to reduce contracts of the Insurer thereunder.

2.4.2 It is currently unclear whether this power under section 377 can be used in connection with insurance policies only or whether it applies to more general contracts including the Agreement. There is currently no authority giving clear support for either position and there are arguments either way.

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[25] It should however be noted that it is not entirely clear whether the reference to set off in Regulation 43 applied to close out netting provisions (and therefore the Netting Provisions). In addition, it is unclear whether relevant law applicable to the claim of the Included Insurer would be the general law of set off in England or the law of insolvency set off in England.

[26] The order of priority within each pool of assets and liabilities is as set out in paragraph 2.2.4 above.

2.4.3 An argument in favour of a wider interpretation of section 377 can be made by reference to the rules of statutory construction. The argument is based on reading section 377 with section 376(8) of FSMA. section 376(8) deals with a liquidator's right to apply to the court for the reduction of contracts of *long-term insurance*. Section 376(8) states that the section applies only to *long-term insurance* and the argument is therefore that the use of the term "insurer's contracts" in section 377 must have been intended to apply to a wider category of contracts and therefore cover all contracts, including the Agreements. Equally however a wider interpretation can be given to section 377 by applying the term "insurer's contracts" to both *long-term insurance* and *general insurance* but not to a wider category of all contracts.

2.4.4 In our experience, most practitioners support a narrower construction of section 377. They argue that section 377 should apply only to contracts of insurance. It is possible to support this by reference to the Insurers Winding Up Regulations. Regulation 43 there states that a reorganisation or winding up is not to affect the right of creditors to demand the set off of their claim where such set off would otherwise be permissible. Section 377 applies instead of a winding up and is not a relevant reorganisation for the purposes of the Insurers Winding Up Regulations so Regulation 43 does not apply directly to it. Regulation 43 is a provision introduced to protect creditors' rights of set off in insolvency proceedings and a wide interpretation of section 377 would provide a way of getting around it. Accordingly, such a result might be seen by a court as grounds for construing Section 377 narrowly.

2.4.5 It is also worth noting that section 22 of the Life Assurance Companies Act 1870, the statutory predecessor to section 377, was only ever exercised by the court in relation to policies of insurance.

2.4.6 In *Re Nelson & Co*[27] the court refused to sanction a scheme under section 22 which was intended to enable an insolvent company to continue to carry on business by relieving it of part of its present and future liabilities. Accordingly, if a wider interpretation were to be given to section 377 then it is likely that the court would only use section 377 to reduce the value of a subsequent net claim under an Agreement if owed by an Insurer.

2.4.7 Accordingly, while we favour a narrow interpretation of section 377, we are unable to state with certainty whether the Title Transfer Provisions, Netting Provision and Set Off Provisions in the Agreement would be effective in the context of the insolvency of an Insurer.

[27] (1905) 1 Ch 551

SCHEDULE 5
Partnerships

1. **Insolvency Proceedings: Partnerships**

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

1.1.1 those referred to in the Bankruptcy Acts 1985 or 1993 and any rules made thereunder;

1.1.2 those referred to in the Partnership Act 1890;

1.1.3 those referred to in the Banking Act; and

1.1.4 those referred to in the Investment Bank Regulations,

(each as modified, varied or amended as at the date hereof), namely:

1.1.5 the sequestration of the estate of the Partnership in relation to the debts incurred by it;

1.1.6 the dissolution and winding up of the business and affairs of the Partnership pursuant to sections 32 to 44 (inclusive) of the Partnership Act 1890 (the "**1890 Act**");

1.1.7 the execution of a trust deed (whether or not a protected trust deed under the Bankruptcy Act) by the Partnership for its creditors;

1.1.8 if the Partnership is a Bank, the entry by it into bank insolvency or bank administration under the Banking Act; and

1.1.9 if the Partnership is an Investment Bank, the entry by it into special administration, special administration (bank insolvency), and special administration (bank administration under the Investment Bank Regulation.

(the above are, together, called, for the purposes of this Opinion, "**Partnership Insolvency Proceedings**").

1.2 Subject to as set out below, Partnership Insolvency Proceedings would fall within the Corporate Insolvency Events of Default so long as it was clear that the Partnership was a party to the Agreement and subject to the Events of Default rather than the partners or partner executing it. Please also note that, in Scotland, Partnerships have a separate legal personality from their partners.

1.3 The dissolution of a Partnership under the 1890 Act can happen automatically under certain circumstances. It would only be covered by the Corporate Insolvency Events of Default if additional language is included to provide for it. We consider that the additional optional language set out at paragraph (h) of Clause [10.1] of the Professional Client Agreement (2011 version) would cover this. See paragraph 5 of Annex 5.

1.4 It is possible that a trustee appointed upon the execution of a voluntary trust deed by an Individual may be appointed only over part of a Partnership's estate. To the extent that such a trustee is appointed over a part of the estate of the Partnership which is not a substantial part, this appointment would not be covered by the Corporate Insolvency Events of Default.

1.5 The language of the Corporate Insolvency Events of Default is based on corporate insolvencies. As regards the execution of a voluntary trust deed by an Individual, a narrow interpretation of the words "case or other procedure seeking" could result in the appointment of a trustee under a trust deed not constituting an Event of Default. We would therefore suggest amending the Corporate Insolvency Events of Default for Partnerships so that there will be an Event of Default where any steps are taken to appoint a Custodian of the Partnership by any person. See paragraph 5 of Annex 5.

1.6 The short form clauses listed at paragraphs 4 to 6 and 10 to 12 of Annex 1 and the Eligible Counterparty Agreements do not contain a reference to an "arrangement" under any "bankruptcy, insolvency, regulatory, supervisory or similar law". It may therefore be that a trust deed which did not involve a "reorganisation" or "moratorium" would not be an Event of Default unless this language is included. See paragraph 5 of Annex 5.

2. **Additional Qualifications**

2.1 There are a number of circumstances in which a Partnership may be dissolved under the 1890 Act. These include the death or bankruptcy of one of its partners (unless the partners have agreed otherwise); if the partnership is entered into for a fixed term or for a single purpose, the expiry of that term or the occurrence of that purpose (as the case may be); the dissolution by the court in certain circumstances; and in any circumstances where the partners have agreed that it shall be dissolved.

2.2 On dissolution of a Partnership, certain partners may continue the business of it under a new Partnership. This will, however, be a separate legal entity from the dissolved Partnership. Accordingly, it may not be possible to apply the Netting Provisions so as to net liabilities and obligations arising from Transactions entered into (or otherwise incurred) by the dissolved Partnership against liabilities and obligations Transactions entered into (or otherwise incurred by) with the new Partnership or apply the Set Off Provisions so as to set off liabilities/obligations of the dissolved Partnership against obligations/liabilities of the Other Party.

2.3 The Charge Registration Provisions (on which please see paragraph 6.1.9 of this Opinion) do not apply to Partnerships.

SCHEDULE 6
LLPs

1. **Insolvency Proceedings: LLPs**

1.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Counterparty which is an LLPs could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are those referred to under:

1.1.1 the Insolvency Act and the Limited Liability Partnership (Scotland) Regulations 2001;

1.1.2 the Bankruptcy Act and any rules made thereunder;

1.1.3 the Companies Act;

1.1.4 the Banking Act; and

1.1.5 the Investment Bank Regulation,

each as modified, varied or amended by *inter alia* the Limited Liability Partnership Regulations 2001 and the Limited Liability Partnership (Scotland) Regulations 2001 as at the date hereof, namely:

1.1.6 the approval of a voluntary arrangement;

1.1.7 the obtaining of an initial moratorium by the members of an eligible LLP where they propose a voluntary arrangement;

1.1.8 administration pursuant to Schedule B1 of the Insolvency Act;

1.1.9 the appointment of an administrative receiver over the whole (or substantially the whole) of an LLP's property by or on behalf of the holders of a floating charge granted either prior to 15 September 2003 or in connection with one of the excepted arrangements detailed in Sections 72B to 72GA of the Insolvency Act;

1.1.10 the voluntary winding up of an LLP;

1.1.11 the compulsory winding up of an LLP;

1.1.12 a scheme of arrangement under Part 26 of the Companies Act;

1.1.13 if the LLP is a Bank, the entry by it into bank insolvency or bank administration under the Banking Act; and

1.1.14 if the LLP is an Investment Bank, the entry by it into special administration, special administration (bank insolvency), and special administration (bank administration under the Investment Bank Regulation.

(the above are together called, for the purposes of this Opinion, "**LLP Insolvency Proceedings**").

1.2 Subject as set out below, we consider that all of the LLP Insolvency Proceedings would be Corporate Insolvency Events of Default.

1.3 It is possible that a receiver as defined for the purposes of Chapter II of Part III of the First Group of Parts of the Insolvency Act (a "**Receiver**") may be appointed over part of an LLPs business that is covered by a floating charge granted by it. The appointment of such a Receiver (not being an administrative receiver) could be a Corporate Insolvency Event of Default to the extent it is a substantial part of its business. To the extent that a Receiver is appointed over a part which is not a substantial part of the relevant party, it would not be covered by the Corporate Insolvency Events of Default. It may therefore be appropriate to remove the reference to "substantial" in the relevant Event of Default. See paragraph 6 of Annex 5.

1.4 The short form clauses listed at paragraphs 4 to 6 and 10 to 12 of Annex 1 and the Eligible Counterparty Agreement do not contain a reference to an "arrangement or composition" under any "bankruptcy, insolvency, regulatory, supervisory or similar law". It may therefore be that a voluntary arrangement or a scheme of arrangement would not be an Event of Default if it did not include a "reorganisation" or "moratorium" unless this language is included. See paragraph 6 of Annex 5.

SCHEDULE 7
Trustees and Trusts

1. Insolvency Proceedings

1.1 Corporate Trustees

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Corporate Trustee could be subject under the laws of this jurisdiction are those to which a Scottish Company could be subject (on which please see paragraph 5.1 (*Insolvency Proceedings*)):

1.2 Individual Trustees

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which an Individual Trustee could be subject in this jurisdiction are those to which an Individual could be subject (on which please see Schedule 3).

1.3 Trusts

1.3.1 The only bankruptcy, composition, rehabilitation (e.g. administration, receivership or voluntary arrangement) or other insolvency proceedings to which a Trust would be subject in Scotland are those referred to in:

(i) the Insolvency Act and the Insolvency Rules;

(ii) the Bankruptcy Act and any rules made thereunder;

(iii) in the case of an AUT, COLL,

(iv) each as modified, varied or amended as at the date hereof, namely:

(v) the sequestration of the trust estate of the Trust in relation to the debts incurred by it;

(vi) the execution of a trust deed (whether or not a protected trust deed under the Bankruptcy Act) by the Trustee(s) for the creditors of the Trust; and

(vii) in the case of an AUT, the winding up of the AUT in accordance with the provisions of Chapter 7 of COLL (an "**AUT Winding Up**"),

(viii) (the above are, together, called, for the purposes of this Opinion, the "**Trust Insolvency Proceedings**").

1.3.2 Subject as set out below, we confirm that all of the Trust Insolvency Proceedings would be adequately covered by the Insolvency Events of Default.

1.3.3 As Trustees will enter the Agreement as trustees of the relevant Trust, it may be that a court would interpret the relevant trustees as being a "Party" (as defined in the Agreement) rather than the Trust, in which case a Trustee Insolvency Proceeding would not be an Insolvency Event of Default. Careful consideration requires to be given as to whether the Insolvency Events of Default in the Agreement should be extended to the Trust (or indeed, whether such Events of Default should apply only in relation to the Trust and not the Trustee(s)).

1.3.4 The language of the Insolvency Events of Default as regards the execution of a voluntary trust deed by any Individual Trustee(s) of a Trust, a narrow interpretation of the words "case or other procedure seeking" could result in the appointment of a trustee under a trust deed not constituting an Event of Default. We would therefore suggest amending the Events of Default for Individual Trustees and for Trusts so that there will be an Event of Default in the Agreement where any steps are taken to appoint a Custodian of the Individual Trustee or the Trust by any person. See paragraph 8 of Annex 5.

1.3.5 An AUT Winding Up may not constitute an Insolvency Event of Default for the purposes of the Agreement unless the definition is amended to include it.

1.3.6 The short form clauses listed at paragraphs 4 to 6 and 10 to 12 of Annex 1 and the Eligible Counterparty Agreement do not contain a reference to an "arrangement or composition" under any "bankruptcy, insolvency, regulatory, supervisory or similar law". It may therefore be that entry into a trust deed which did not involve a "reorganisation" or "moratorium" would not be an Event of Default unless this language is included. See paragraph 7 of Annex 5.

1.4 **Insolvency of a Trustee**

1.4.1 If the relevant Agreement and all of the Transactions and transfers thereunder have been entered into by the Trustee in its capacity as trustee of the Trust, then the creditors of any insolvent Corporate Trustee (as opposed to the creditors of the Trust) would not be entitled to have recourse to the assets held by that Trustee on trust.

1.4.2 Further, under the laws of Scotland, for the liabilities of one party to its counter-party to be set off against the liabilities owed to the party by its counter-party, it is necessary for the party and the counter-party to have been acting in the same capacity. Therefore, provided that the relevant Agreement and all of the Transactions and transfers thereunder have been entered into by the Corporate Trustee in its capacity as trustee of the Trust, the opinions given in this Opinion in relation to the effectiveness of the Netting Provisions and Set Off Provisions will apply equally to the Trust.

2. **Additional Assumptions**

2.1 **Additional assumptions: all Trustees**

The opinions expressed in this Opinion, are, in respect of a Trustee who is entering into the Agreement and Transactions and transfers thereunder as a trustee of a Trust, subject to the following assumptions:

2.1.1 the Trustee(s) has/have been validly appointed as trustees of the Trust and is/are entitled to deal with all of the Trust's assets;

2.1.2 there has been no breach of trust in connection with the entry by the Trustee(s) into the Agreement or the Transactions or transfers thereunder or otherwise;

2.1.3 the Trustee(s) has/have specific capacity, power and authority to enter into the Agreement, and Transactions or transfers thereunder and to perform all of its obligations in relation thereto under the terms of the Trust's governing documentation, including its trust deed, (where applicable) its rules and, in the case of AUTs, its prospectus;

2.1.4 the Trustee(s) has/have validly exercised its/their powers in entering into an Agreement and into any Transactions or transfers thereunder;

2.1.5 where the Trustee(s) has/have delegated authority to any other person to enter into the relevant Agreement or any Transaction or transfers thereunder on its behalf, this has been properly done in accordance with an available power of delegation; and

2.1.6 the Trustee(s) have entered into the Agreement and each Transaction (and has provided all margin) as trustee of the same Trust (or, in the case of a Corporate Trustee of an AUT, as trustee of the same sub-fund).

3. Additional Qualifications

3.1 Application of Collateral Regulations

3.1.1 The Collateral Regulations only apply to financial collateral arrangements which have been entered into between two non-natural persons. It is not at all clear whether Trustees of a Trust would be considered to be non-natural persons for the purposes of the Collateral Regulations. However, on balance, we consider that Trustees of a Trust are unlikely to be non-natural persons and therefore that the Collateral Regulations will not apply to a financial collateral arrangement entered into by them.

3.1.2 While this does not affect the substance of our opinions in this Opinion, if Trustees of a Trust are non-natural persons, it would mean that the various protections given to financial collateral arrangements under the Collateral Regulations would not apply in the case of an Agreement and Transactions entered into by Trustees of a Trust.

3.2 Change of Trustee

As a general principle of Scots Law, trustees are liable personally for obligations under contracts with third parties. To ensure that a trustee is not held personally liable there must be an express or implied agreement between the trustee and the other contracting party that the liability under the contract is limited to the trust estate rather than on the trustee personally. Therefore, provided the relevant Agreement (1) expressly excludes personal liability on the Trustee(s); (2) sets out that it is entered into by the Trustee(s) as trustee of the Trust, and (3) sets out that any liabilities under it are limited to the trust estate of the Trust, then, upon a change of Trustee(s), the trust estate of the Trust will retain any liabilities, and these will be passed to any new or replacement Trustee(s), as trustee of the Trust. Where this is the case, it would be possible to operate the Netting Provisions and Set Off Provisions in relation to Transactions and transfers entered into prior to and after the change of trustee. If this is not the case it is unlikely that the Netting Provisions and Set Off Provisions could be so applied.

3.3 Restrictions on investment powers

3.3.1 In relation to assumption at paragraph 2.1.4 above, if a Corporate Trustee does not have appropriate capacity, power and authority under the scheme's governing documentation, Scots trust law will not provide appropriate default powers to Trustee(s) to enter into an Agreement or transactions thereunder. The Trust (Scotland) Act 1921 (the "**1921 Act**") gives trustees certain default powers in relation to the administration of the trust estate. Wider powers of investment were added to the original powers contained in the 1921 Act by the Charities and Trustees Investment (Scotland) Act 2005 (the "**2005 Act**"). However, we do not consider that the entry by Trustees into any Agreement and Transactions would fall within these wider powers. Even if they did, the wider powers of investment are not available to AUTs and any other Trust, the Trustees powers of investment of which are governed any other piece of legislation.

3.3.2 In addition:

(i) While Pension Trustees are granted certain powers of investment under the Pensions Act 1995[28] (the "**1995 Act**") we do not consider that the 1995 Act would apply to allow a Pension Trustee to validly enter into the Agreement or Transactions. In our view, entry into the Agreement or the Transactions would not fall within the statutory powers of investment contained within the 1995 Act.

[28] Section 34 of the Pensions Act 1995 gives the trustees of an occupation pension scheme, subject to any restriction imposed by the scheme, the same power to make an investment of any land as if they were absolutely entitled to the assets of the scheme.

(ii) The Financial Conduct Authority's ("**FCA**") New Collective Investment Schemes Sourcebook ("**COLL**") imposes restrictions on the investment powers of Corporate Trustees of AUTs. The restrictions which apply would depend on the rules applicable to the particular AUT and whether it is an UCITS Scheme or a non-UCITS Scheme. However, section 138E of FSMA provides that any transaction entered into in contravention of such rules will not be void or unenforceable by reason only of such contravention.

3.4 **Umbrella AUTs**

3.4.1 In an umbrella AUT, the property which is held by the AUT Trustee is likely to be allocated or attributed to different sub-funds of the AUT.

3.4.2 Where this is the case, it is likely that the AUT Trustee of the umbrella AUT will hold the property allocated or attributed to such sub-fund on trust for the holders of the units in that sub-fund and not for all of the holders of all the units in all of the sub-funds of the umbrella AUT, although it will be necessary to examine the governing documentation of each umbrella AUT (including its trust deed) to determine whether this is the case. Where an AUT Trustee does hold property allocated or attributed to a particular sub-fund on trust for the holders of units in that sub-fund, it is likely that it will not be possible to invoke the Netting Provisions and Set Off Provisions of a particular Agreement in connection with Transactions entered into pursuant to the same Agreement but which have been entered into by the AUT Trustee as trustee of another of its sub-funds. Further, upon the insolvency of one sub-fund of an umbrella AUT, it will not be possible to access the assets of another sub-fund of the same umbrella AUT in order to recover any liabilities owed by the insolvent sub-fund.

3.4.3 The conclusions expressed as sections 3.4.1 and 3.4.2 above apply equally in relation to a Trustee of more than one Trust (not being an AUT or a sub-fund to an AUT) which enters into transactions as a trustee of more than one Trust. It is unlikely that the Netting Provisions and Set Off Provisions will be enforceable in that situation.

3.5 **Transfers of the assets and liabilities of a Pension Trust to the PPF**

Where the Pension Protection Fund assumes responsibility for a Pension Trust all of the assets and liabilities of the Pension Trust will transfer to the Board of the PPF. If, in those circumstances, the Board considers that a provision of a contract entered into by the trustee(s) of the Pension Trust is onerous, the Board may disapply that provision or substitute it for a provision that the Board considers reasonable. If the Board were to exercise this power in relation to a provision of the Agreement or any Transaction, this could adversely affect the operation of the Title Transfer Provisions, the Netting Provisions or the Set Off Provisions[29]. See paragraph 9 of Annex 5

3.6 **Charge Registration Provisions**

3.6.1 Where all of the Trustees of a Trust are Individual Trustees, the Charge Registration Provisions will not apply.

3.6.2 If (contrary to our view) the Charge Registration Provisions do apply to the Title Transfer Provisions where the Counterparty is a Scottish Company (on which please see paragraph 6.1.9 of this Opinion) it is unclear whether they would also apply where the Counterparty is (or are) the Trustee(s) of a Trust and one or more Trustees is a (or are) Corporate Trustee(s). The reason for this is that, where they apply, the Charge Registration Provisions only require a security interest over the property of a company. It is arguable that, if a

[29] Market practice is currently developing to deal with this risk in connection with derivatives and other financial contracts through the inclusion of additional events of default which would be triggered on certain events that will occur early in the process of a Pension Trust being (or potentially being) transferred to the PPF such that the non-defaulting party could terminate the contract and the underlying transactions and effect netting under the relevant FOA Netting Provision.

company holds property on trust, that property is not the property of the company for the purposes of the Charge Registration Provisions, and therefore that any security interest over the property would not have to be registered. The safer view is, however, that it would have to be registered in respect of the relevant Corporate Trustee(s).

SCHEDULE 8
Administering Authorities and Local Government Pension Schemes

1. **Insolvency proceedings**

1.1 Administering Authorities are bodies corporate constituted by statute. While the matter is not free from doubt, it may be that their estates could be sequestrated under the Bankruptcy Act and/or wound up as unregistered companies under the Insolvency Act. Although highly unlikely, it may also be that they could execute a trust deed (whether or not a protected trust deed under the Bankruptcy) for their creditors. Such a sequestration, winding up or trust deed would fall within the Corporate Insolvency Events of Default for the purposes of the Agreements.

1.2 If sequestration or winding up is not available, then it is likely that where an Administrating Authority becomes insolvent, in circumstances where this is not dealt with by statute, the Court of Session in Scotland would exercise its inherent jurisdiction to regulate that insolvency if the government did not intervene by passing statutory regulations to deal with it.

1.3 We consider that any application for the exercise of the inherent jurisdiction of the Court of Session would be likely to come within the Insolvency Events of Default. However, there is some risk that it would not come within that definition and also that some procedure may be taken in relation to the insolvency of the relevant LGPS Fund (as opposed to the Administering Authority itself).

1.4 We therefore consider that an additional Event of Default which is the commencement of any voluntary or involuntary case or procedure with a view to the sequestration, termination, winding up or discontinuation of the Administering Authority or the relevant LGPS Fund should be included in the Agreement. See paragraph 10 of Annex 5.

2. **Change of administering authority**

2.1 We have assumed that the Administering Authority that is party to Agreement and Transactions will remain the contracting party, except in circumstances where there is a statutory reorganisation of Local Authorities (in which case we assume that any assets and liabilities of the Administering Authority under the relevant Agreement will be dealt with in accordance with the arrangements made under the statutory reorganisation concerned, and that all of the obligations and liabilities of an Administering Authority under the Agreement and the Transactions are transferred to the same successor entity).

3. **Additional assumptions**

3.1 The opinions expressed in this opinion, and the opinions expressed in the Original Opinion are, in respect of an Administering Authority, subject to the following assumptions:

3.2 the Administering Authority is entitled to deal with the assets of the pension scheme to which the Agreement and Transactions relate (this will be the relevant LGPS Fund);

3.3 the Administering Authority has specific power and authority to enter into the Agreement and the Transactions on its behalf, and to enter into the transactions thereunder and is not prevented by, or otherwise acting ultra vires or in breach of, its statutory powers in so doing;

3.4 without limiting the assumption at paragraph 3.2 above, the Administering Authority has formulated an investment policy and prepared and maintained a statement of investment principles in accordance with the requirements of The Local Government Pension Scheme (Management and Investment of Funds)(Scotland) Regulations 2010 (the "**LGPS Investment Regulations**"), and the Agreement and Transactions fall within and comply with such investment policy and statement of investment principles;

3.5 the Administering Authority has validly exercised its statutory powers in entering into the relevant Agreement and any Transactions; and

3.6 where the Administering Authority has delegated authority to any person to enter into the relevant Agreement (or the Transactions thereunder), this has been properly done in accordance with an available power of delegation.

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 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 the MiFID Directive, 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 FOA NETTING 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 6.2 (*Firm Events*), 6.3 (*CCP Default*) and 6.4 (*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) Clause 6.5 (*Set-Off*) of the FOA Clearing Module 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 yellow in Annex 4:

(a) for the purposes of paragraph 5.3 (*Enforceability of FOA Netting Provision*) and 5.6 (*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 Provisions;

(b) for the purposes of paragraph 5.4 (*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 5.5 (*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 5.7 (*Enforceability of the FOA Set Off Provisions in the FOA Netting Agreement*), the Insolvency Events of Default Clause, the FOA Netting Provisions and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;

(e) for the purposes of paragraph 5.8 (*Enforceability of the FOA Set Off Provisions in the Clearing Agreement*), the Insolvency Events of Default Clause, the FOA Netting Provisions, 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 5.9.1 (*Set Off under a Clearing Agreement with a Clearing Module Set Off Provision*), 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 5.9.4 (*Set Off under a Clearing Agreement with a Clearing Module Set Off Provision*), 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 5.10 (*Set-Off under a Clearing Agreement with an 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 5.11.1 (*Enforceability of the Title Transfer Provisions*) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provisions and the Title Transfer Provisions;

(j) for the purposes paragraph 5.11.2 (*Enforceability of the Title Transfer Provisions*) 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;

(j) for the purposes of paragraphs 5.11.3 and 5.11.4, 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 Provisions.

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

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

"**FOA Clearing Module**" means the FOA Client Cleared Derivatives Module as first published in 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 Provisions, 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***); and

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

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

"**FOA Set-Off Provisions**" means:

(a) the "**General Set-off Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (***Set-off***);

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (***Set-off***);

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (***Set-off***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (***Set-off***);

(vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);

(viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);

(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***); and

(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) in relation to a Counterparty which is not an Individual or an Individual Trustee:

(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 modifications of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted yellow,

(together, the "**Corporate Insolvency Events of Default**"); and

(b) in relation to a Counterparty which is an Individual or an Individual Trustee:

(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,

(together, the "**Individual Insolvency Events of Default**").

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

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

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

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

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

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

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

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

"**Security Interest Provisions**" means:

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

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

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

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

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

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

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

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

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

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

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Core Provisions*) of Annex 4 which are highlighted in yellow;

(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 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and

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

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

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

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

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

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

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

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

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

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

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 3 (*Core 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) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version).

"**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:

1. 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)];

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 the relevant part thereof;

3. 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]);

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].

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 the 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 Provisions, 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 Provisions, 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 Provisions 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 Provisions 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

    in each case 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 Provisions providing that any applicable Liquidation Amount will be determined by the Defaulting Party.

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

PART 3
SECURITY INTEREST PROVISIONS

1. **Security Interest Clause**

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

2. **Power of Sale Clause**

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

3. **Client Money Additional Security Clause**

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

4. **Rehypothecation Clause**

"You agree and authorise us to borrow, lend, appropriate, dispose of or otherwise use for our own purposes, from time to time, all non-cash margin accepted by us from you and, to the extent that we do, we both acknowledge that the relevant non-cash margin will be transferred to a proprietary account belonging to us (or to any other account selected by us from time to time) by way of absolute transfer and such margin will become the absolute property of ours (or that of our transferee) free from any security interest under this Agreement and from any equity, right, title or interest of yours. Upon any such rehypothecation by us you will have a right against us for the delivery of property, cash, or securities of an identical type, nominal value, description and amount to the rehypothecated non-cash margin, which, upon being delivered back to you, will become subject to the provisions of this Agreement. We agree to credit to you, as soon as reasonably practicable following receipt by us, and as applicable, a sum of money or property equivalent to (and in the same currency as) the type and amount of income (including interest, dividends or other distributions whatsoever with respect to the non-cash margin) that would be received by you in respect of such non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid.".

ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

Necessary Amendments:

1. Necessary amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with an Individual:

   For the purposes of our opinions at paragraphs 5.3, 5.7 and 5.8, where they are given in relation to individuals, the following amendments to the Insolvency Events of Default Clause:

   "The following shall constitute Events of Default:

   […]

   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 you are sequestrated;*** *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* ***or diligence*** *against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)****; or you sign a trust deed for your creditors or enter into a debt payment programme****.".*

2. Necessary amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with an OEIC:

   For the purposes of our opinion at Schedule 3 where it is given in relation to OEICs, the following amendments to the Insolvency Events of Default Clause:

   "*The following shall constitute Events of Default,* ***whether it occurs in relation to either or both of the [Sub-Fund][30] and [its Umbrella Company][31]*** *:*

   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 ***(by way of voluntary arrangement, scheme or arrangement or otherwise)*** *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.".*

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[30] Please use appropriate defined term, as per your Agreement.
[31] Please use appropriate defined term, as per your Agreement.

Desirable Amendments:

3. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Company:

   For the purposes of our opinion at paragraph 5.1 where it is given in relation to Companies, the following amendments to the Insolvency Events of Default Clause:

   "The following shall constitute Events of Default:

   […]

   ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief ***(by way of voluntary arrangement, scheme or arrangement or otherwise)*** *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.".*

4. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Building Society:

   For the purposes of our opinion at Schedule 2 where it is given in relation to Building Societies, the following amendments to the Insolvency Events of Default Clause:

   "The following shall constitute Events of Default:

   […]

   ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, ***dissolution,*** *reorganisation, moratorium, or other similar relief* ***(by way of voluntary arrangement, scheme or arrangement or otherwise)*** *with respect to itself or to its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a trustee, receiver, liquidator, conservator, administrator, custodian, examiner or other similar official (each a "**Custodian**") of it or any* ***substantial part*** *of its assets, or takes any corporate action to authorise any of the foregoing;*

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

5. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Partnership:

   For the purposes of our opinion at Schedule 5 where it is given in relation to Partnerships, the following amendments to the Insolvency Events of Default Clause:

   "The following shall constitute Events of Default:

   […]

   ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, ***dissolution,*** *reorganisation, moratorium, or other similar relief* ***(by way of voluntary arrangement, scheme or arrangement or otherwise)*** *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**, factor*** *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. a party is dissolved;

iv. *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.".*

6. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with an LLP:

For the purposes of our opinion at Schedule 6 where it is given in relation to LLPs, the following amendments to the Insolvency Events of Default Clause:

"The following shall constitute Events of Default:

[...]

*ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief **(by way of voluntary arrangement, scheme or arrangement or otherwise)** 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.".*

7. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Trust:

For the purposes of our opinion at Schedule 7 where it is given in relation to Trusts, the following amendments to the Insolvency Events of Default Clause:

"The following shall constitute Events of Default:

[...]

*ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, **winding-up** or other similar relief **(by way of voluntary arrangement, scheme or arrangement or otherwise)** 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**, factor*** *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.".*

8. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Trust:

For the purposes of our opinion at Schedule 7 where it is given in relation to Trusts, the following amendments to the Insolvency Events of Default Clause:

"The following shall constitute Events of Default:

[...]

ii. *a party **(or, where that party is a trust, any trustee of that trust)** 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 **(or, where that party is a trust, any trustee of that trust)** 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.".*

9. Desirable amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Trustee of a Pension Trust:

For the purposes of our opinion at Schedule 7 where it is given in relation to Trustees of Pension Trusts, the following amendments to the Insolvency Events of Default Clause:

"***The following shall constitute Events of Default:***

[...]

i. ***a winding up of the Pension Scheme is commenced other than in circumstances where the winding up of the Pension Scheme is deferred pursuant to section 38 of the Pensions Act 1995 or a power in the governing documents of the Pension Scheme and the Pension Scheme continues to be administered by you as a frozen scheme;***

ii. ***in the event a Pension Protection Fund assessment period (within the meaning of section 132 of the Pensions Act 2004) (an "Assessment Period") has commenced:***

a) ***the Board of the Pension Protection Fund (the "PPF") approves under section 144 of the Pensions Act 2004 a valuation under section 143 of that Act which verifies that the Pension Scheme's protected liabilities (within the meaning of section 131 of that Act) exceed its assets;***

b) ***the PPF determines under section 152(2) of the Pensions Act 2004 that it must accept responsibility for the Pension Scheme; or***

c) ***the PPF approves under section 158(3) of the Pensions Act 2004 an actuarial valuation which verifies that the Pension Scheme's protected liabilities exceed its assets,***

provided that in each case, there will not be an Event of Default if prior to the date on which the Event of Default would otherwise occur the PPF has executed and delivered to us an irrevocable deed in a form satisfactory to us that it will not, following the issue of a transfer notice pursuant to section 160 of the Pensions Act 2004, use its powers under section 161 of that Act (or any regulations made thereunder) to disapply or amend any terms or conditions of the Agreement or terminate the Agreement (unless

such disapplication, amendment or termination is permitted under the express terms of the Agreement);

iii. ***the Board of the PPF issues a determination under section 143 of the Pensions Act 2004 during an Assessment Period which is reasonably likely to have a material adverse consequence on your ability to make payments or meet obligations (including future payments or obligations) under the Agreement;***

iv. ***following an Assessment Period, the Board of the PPF determines that the Pension Scheme is not an eligible scheme for the purposes of the Part 2 of the Pensions Act 2004 unless the Pension Scheme is so determined not to be an eligible scheme because it has sufficient assets to fully secure benefits on wind-up;***

v. ***any replacement or additional trustee of the Pension Scheme fails to accede to and adopt all of your obligations and liabilities under the Agreement within 5 Business Days of appointment or you are prohibited, suspended or disqualified from acting as trustee of the Pension Scheme within the meaning and for the purposes of the Pensions Act 1995 or pursuant to the governing documents of the Pension Scheme;***

vi. ***if any change in applicable law or regulations or in the governing documents of the Pension Scheme, would give the beneficiaries of the Pension Scheme priority over us in the event of a full or partial winding up of the Pension Scheme;***

vii. ***[if a petition is lodged with a competent court for the appointment of a judicial factor to the Pension Scheme and, as a result, you are unable to perform any of your material obligations under the Agreement;]***

viii. ***you lose the right to apply the assets of the Pension Scheme in order to discharge any obligation undertaken by or liability of you under the Agreement whether as a result of a change of law or otherwise;"***

And, accordingly, we recommend the inclusion of the following additional definition:

""Pension Scheme" means the [insert name of pension scheme] governed by [insert description of the governing documents, e.g. the trust deed and rules dated [·] as amended from time to time]."

10. Desirable amendments for FOA members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Local Authority as Administering Authority of a Local Authority Pension Fund:

For the purposes of our opinion at Schedule 8 where it is given in relation to an Administering Authority, the following amendments to the Insolvency Events of Default Clause:

"*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,* ***factor*** *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;

iv. ***an order is made by the competent Secretary of State or the Scottish Ministers or primary or secondary legislation is passed requiring, effecting or authorising your dissolution, winding up or re-organisation."***

Additional Wording to be treated as part of the Core Provisions

None