LENZ & STAEHELIN

Lenz & Staehelin
Attorneys at Law
Bleicherweg 58
CH-8027 Zurich
Telephone +41 58 450 80 00
Fax +41 58 450 80 01

CH-1211 Geneva 17
Route de Chêne 30
Telephone +41 58 450 70 00
Fax +41 58 450 70 01

CH-1005 Lausanne
Avenue du Tribunal-Fédéral 34
Telephone +41 58 450 70 00
Fax +41 58 450 70 01

www.lenzstaehelin.com

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

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Ladies and Gentlemen

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

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

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

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

1. Terms of Reference and Definitions

1.1 Subject as provided at paragraph 1.2, this opinion is given in respect of: 1

1.1.1 generally, in respect of Parties which are a corporation incorporated under the Swiss Code of Obligations ("**CO**")[1] and having its registered seat in Switzerland. For the purposes of this legal opinion, corporations include (a) joint stock corporations (*Aktiengesellschaft*) subject to Art. 620 et seq. CO, (b) companies with unlimited partners (*Kommanditaktiengesellschaft*) subject to Art. 764 et seq. CO, (c) limited liability companies (*Gesellschaft mit beschränkter Haftung*) subject to Art. 772 et seq. CO, and (d) cooperatives (*Genossenschaft*) subject to Art. 828 et seq. CO; or 2

1.1.2 a partnership organized under the CO and having its registered seat in Switzerland. For the purposes of this legal opinion, partnerships include (a) general partnerships (*Kollektivgesellschaft*) subject to Art. 552 et seq. CO, and (b) limited partnerships (*Kommanditgesellschaft*) subject to Art. 594 CO; and 3

1.1.3 generally, in respect of a Swiss branch (*Zweigniederlassung*) of a foreign corporation established in Switzerland (a "**Swiss Branch**"). 4

1.1.4 a banking institution licensed under the Swiss Federal Act on Banks and Savings Banks ("**Banking Act**")[2], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Bank**"); 5

1.1.5 a securities dealer licensed under the Swiss Federal Act on Stock Exchanges and Securities Trading ("**SESTA**")[3], organized in the form of a corporation or a partnership, in each case having its registered seat in Switzerland (a "**Securities Dealer**"); 6

1.2 This opinion is also given in respect of Parties that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule, but to the exclusion of any entities subject to public law, such as the Swiss confederation, cantons, municipalities, any subdivisions thereof, public 7

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1 Schweizerisches Obligationenrecht (OR), SR 220.

2 Bundesgesetz über Banken und Sparkassen (BankG), SR 952.0.

3 Bundesgesetz über die Börsen und den Effektenhandel (BEHG), SR 954.1.

utility companies and similar institutions, public law pension funds, and to the exclusion of Cantonal banks within the meaning of Art. 3a of the Banking Act, organized under private or public law:

1.2.1 an insurance company licensed under the Swiss Federal Act on the Supervision of Insurance Companies ("**SIL**")[4], organized in the form of a joint stock corporation (*Aktiengesellschaft*) or a cooperative (*Genossenschaft*) and having its registered seat in Switzerland (an "**Insurance Company**") (see Schedule 1); 8

1.2.2 a collective investment vehicle licensed under the Swiss Federal Act on Collective Investment Schemes ("**CISA**")[5], organized under Swiss law as (a) a contractual fund (*Vertraglicher Anlagefonds*) subject to Art. 25 et seq. CISA ("**Contractual Fund**"), (b) an investment company with variable capital (*Investmentgesellschaft mit variablem Kapital, SICAV*) subject to Art. 36 et seq. CISA ("**SICAV**"), (c) a limited partnership for collective capital investments (*Kommanditgesellschaft für kollektive Kapitalanlagen*) subject to Art. 98 et seq. CISA, or (d) as an investment company with fixed capital (*Investmentgesellschaft mit festem Kapital, SICAF*) subject to Art. 110 et seq. CISA, in each case having its registered seat or being organized in Switzerland (a "**Collective Investment Scheme**") (see Schedule 2); 9

1.2.3 an individual to the extent such individual is subject to bankruptcy or composition proceedings under the Swiss Federal Act on Debt Enforcement and Bankruptcy ("SDEBA")[6]. For the purposes of this legal opinion, an individual is (a) a person operating a trading, manufacturing or other type of commercial business (*Inhaber einer Einzelfirma*) subject to Art. 934 et seq. CO, (b) a partner of a general partnership (*Kollektivgesellschaft*) subject to Art. 552 et seq. CO, (c) a general partner with unlimited liability of a limited partnership (*Kommanditgesellschaft*) subject to Art. 594 CO, and (d) a director of a company with unlimited partners (*Kommanditaktiengesellschaft*) and where such individual is not acting for its personal needs but for the needs of its business; 10

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4 Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen (VAG), SR 961.01. The analysis and the conclusions contained in this legal opinion do not necessarily apply to other types of insurance companies and in particular not to insurance companies established under Swiss federal or cantonal public law.

5 Bundesgesetz über die kollektiven Kapitalanlagen (KAG), SR 951.31.

6 Bundesgesetz über die Schuldbetreibung und Konkurs (SchKG), SR 281.1.

1.2.4 a pension fund registered pursuant to the Swiss Federal Act on Occupational Benefit Plans ("**OBPA**")[7] as a foundation (*Stiftung*) subject to Art. 80 et seq. of the Swiss Civil Code (*Schweizerisches Zivilgesetzbuch (ZGB), SR 210*) ("**CC**") or as a cooperative (*Genossenschaft*) subject to Art. 828 et seq. CO, in each case having its registered seat in Switzerland (a "**Pension Fund**") (see Schedule 3); and 11

1.2.5 a Swiss branch of a foreign bank ("**Bank Branch**"), a foreign securities dealer ("**Securities Dealer Branch**") or a foreign insurance company (an "**Insurance Branch**") established and duly licensed in Switzerland under the Banking Act or, as the case may be, the SESTA (a "**Special Insolvency Regime Branch**"). 12

1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the Netting Agreement and the Clearing Agreement are expressed to be governed by English law. 13

1.4 This opinion is given in respect of only such of those Transactions which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision. 14

1.5 In this opinion, references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge, other than avoidance as discussed herein in case of an Insolvency (see n. 116 et seq. below). We do not opine on the availability of any judicial remedy. 15

1.6 **Definitions**

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the FOA Netting Agreement or the Clearing Agreement, unless the context specifies otherwise. Where, in an FOA Netting Agreement or, as the case may be, a Clearing Agreement, a defined term has been changed but the changed term corresponds to a term defined in a FOA Published Form Agreement or, as the case may, the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or this opinion letter, this opinion letter may be read as if terms used herein were the terms as so changed. 16

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7 Bundesgesetz über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVG), SR 831.40.

1.6.1 "**FOA Member**" means a member (excluding associate members) of the Futures and Options Association which subscribes to the Futures and Options Association's Netting Analyser service (and whose terms of subscription give access to this opinion); 17

1.6.2 "**Insolvency Proceedings**" means the procedures discussed in paragraph 3.1 as supplemented by the respective Schedules with respect to some Special Insolvency Regime Entities and Special Insolvency Regime Branches and the terms "**Insolvency**" and "**Insolvent**" shall be understood accordingly; 18

1.6.3 "**Insolvency Representative**" means a liquidator, administrator, administrative receiver or analogous or equivalent official in this jurisdiction; 19

1.6.4 "**Margin Provider**" means the party transferring Margin under the Title Transfer Provisions. 20

1.6.5 "**Margin Taker**" means the Party receiving Margin under the Title Transfer Provisions. 21

1.6.6 "**Special Insolvency Regime Entity**" means each of a Bank or a Securities Dealer (see paragraph 3.1.9, n. 135 et seq. below), an Insurance Company (see Schedule 1), a Collective Investment Scheme (see Schedule 2); 22

1.6.7 "**Swiss Clearing Member**" means a Bank, a Bank Branch, a Securities Dealer or Securities Dealer Branch. 23

1.6.8 "**Swiss Firm**" means a Bank, a Bank Branch, a Securities Dealer or Securities Dealer Branch. 24

1.6.9 "**Swiss Party**" means each of the persons listed in paragraphs 1.1 and 1.2. 25

1.6.10 A reference to a "**paragraph**" is to a paragraph of this opinion letter. 26

Annex 3 contains further definitions of terms relating to the FOA Netting Agreement and the Clearing Agreement. 27

2. Assumptions

We assume:

2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary 28

for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.

2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws. 29

2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement. 30

2.4 That each Party has obtained, complied with the terms of and maintained all authorizations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction. 31

2.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any Insolvency Proceedings against either Party. 32

2.6 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment. 33

2.7 The FOA Netting Agreement or, as the case may be, the Clearing Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the Parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses. 34

2.8 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party. 35

2.9 That the obligations assumed under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are 'mutual' between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party. 36

2.10 That, insofar as the Title Transfer Provisions are concerned, all obligations to be netted or set-off under the Netting Provisions and Set-off Provisions respectively are claims for a sum of money in a convertible currency. 37

2.11 In relation to the opinions set out at paragraphs 237, 249 and 3.5 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set. 38

2.12 That each Party, when transferring Margin pursuant to the Title Transfer Provisions, has full legal title to such Margin at the time of transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system). 39

2.13 That all Margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of Margin pursuant to the Title Transfer Provisions will have been effectively carried out. 40

2.14 That any cash provided as Margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions. 41

2.15 That, insofar as the Title Transfer Provisions are concerned, any cash provided as Margin is transferred to an account of the Margin Taker with its account bank. 42

2.16 That, insofar as the Title Transfer Provisions are concerned, Margin consists of cash or Securities only. 43

2.17 That, insofar as the Title Transfer Provisions are concerned, Non-cash Margin is held in the form of fungible securities ("**Securities**"), whereby: 44

- the Securities qualify as *securities*, i.e. financial instruments capable of being 45

credited to a securities account with an intermediary within the meaning of Art. 1 (a) of the Hague Convention;

46 - the Securities are indirectly held through an intermediary and booked into a securities account outside of Switzerland within the meaning of Art. 1 (b) of the Hague Convention ("**Securities Account**") with an intermediary that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity under Art. 1 (c) of the Hague Convention ("**Qualifying Intermediary**"); and

47 - in the context of the Title Transfer Provisions such Securities are securities held in a Securities Account and transferred to a Securities Account of the Collateral Taker held with a Qualifying Intermediary

and as a result qualify as *intermediated securities* within the meaning of the Hague Convention.

3. Opinion

A. Preliminary Remarks

(a) Netting / Set-off absent Insolvency

(i) Netting / Set-off under Swiss substantive law

48 Close-out netting is neither a clear-cut concept nor specifically addressed in Swiss substantive law. It can, in particular, not be clearly distinguished from a contractual set-off arrangement. Subject to limitations of general principles of law, parties are free, however, to determine the conditions for and the effects of any termination of their contracts.

49 Under Swiss substantive law, the termination of an agreement and the determination of one single net lump-sum termination amount (in lieu of all amounts otherwise owed under various transactions entered into thereunder ("**Single Net Amount**") (which are the characteristic elements of what is generally referred to as close-out netting) ("**Close-out Netting**") would in our view be treated as a pre-agreed contractual liquidation of all such transactions in certain circumstances agreed upon by the parties. Under Swiss substantive law, the procedure of liquidating contractual claims can be agreed upon in advance and a close-out netting provision would, hence, be recognized under Swiss law.

As a matter of Swiss substantive law, the parties may also by contract stipulate a set-off of mutual claims and thereby deviate from the requirements that would otherwise apply to a unilateral right of set-off under Swiss substantive law. Such requirements that would, in the absence of a contractual agreement to the contrary, apply to a unilateral right of set-off are: 50

- the parties have to be each others' mutual creditor and debtor (mutuality requirement); 51
- the mutual claims must be of the same kind (e.g. monetary claims)[8]; 52
- the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid); and 53
- the counterclaim must be due. 54

(ii) Netting / Set-off under Swiss conflict of laws rules 55

Art. 148 of the Swiss Private International Law Act ("**PILA**")[9] deals with set-off in an international context and addresses both the unilateral right of set-off and the contractual set-off. 56

In respect of the unilateral right of set-off, it is first to be noted that the PILA regards such right as a substantive right as opposed to a mere procedural right. Hence, it is not the *lex fori* that applies. Rather, Art. 148 para. 2 PILA refers to the law applicable to the claim owed by the party having first declared the set-off. Such claim is referred to as the main claim (*Hauptforderung*), whereas the other claim is referred to as the set-off claim (*Verrechnungsforderung*) and the law applicable to the unilateral set-off pursuant to Art. 148 PILA is referred to as the set-off statute (*Verrechnungsstatut*). 57

Pursuant to Art. 148 para. 2 PILA, the set-off statute determines, *inter alia*, (i) the 58

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8 Monetary claims expressed in different currencies are treated as being of the same kind if the currencies are freely convertible and unless the parties specifically agreed or it is customary that an obligation must be effectively discharged in the agreed currency (effective clause). Even if there is such an effective clause, the parties may agree that different currencies may be set-off and this latter agreement would for the purposes of set-off prevail over the effective clause (BGE 130 II 318).

9 Bundesgesetz über das Internationale Privatrecht (IRPG), SR 291.

requirements of a unilateral right of set-off (e.g. whether reciprocity/mutuality is required and what constitutes reciprocity/mutuality), (ii) how the right of set-off is exercised, and (iii) its effects.

59 Still, it is the law that governs the main claim and the set-off claim respectively (the contract statute) which determines whether the claim satisfies such requirements (e.g. whether a claim is due if that is required and it is also the contract statute that determines who is the creditor/debtor of the respective claims). We are further of the view that the question whether a claim may be subject to set-off at all is also governed by the contract statutes of the respective claims and not the set-off statute.

60 There is some controversy in Swiss doctrine as to whether the set-off statute governs the effects of the set-off on the main claim only or whether it also governs the effects on the set-off claim, i.e. whether it is also applicable as to the question of extinction of the latter. The prevailing view seems to be that it applies to both, unless the law applicable to the set-off claim does not know the concept of set-off at all.

61 Art. 148 para. 3 PILA, by reference to Art. 116 PILA, provides that a contractual right of set-off is governed by the law chosen by the parties in the set-off agreement. In the absence of a choice of law, a Swiss court would need to determine and apply the law of such jurisdiction that is most closely related to such agreement. Again, such law would determine the requirements for set-off, but also the extent to which such requirements may be freely agreed between the parties and the effects on the respective claims.

62 The parties are, hence, free to choose the law to govern their contractual set-off arrangement.

63 A Swiss court would, hence, look to the law chosen by the parties to determine the requirements for set-off. However, once the Swiss court has established such requirements, it may then well have to look to another law that may be applicable to the question as to whether a particular claim satisfies such requirements. It is important to note that such other laws would again be determined by the Swiss conflict of laws rules and not any conflict rules to which the law chosen by the parties as the set-off statute may further direct.

64 In our view, typical Close-out Netting provisions are best analyzed not as a mere modification of a unilateral right of set-off, but as a comprehensive contractual

set-off arrangement.

(b) Netting / Set-off in the context of Insolvency

(i) Termination in case of Insolvency

(A) Step-in Right (Art. 211 para. 2 SDEBA)

65 Insolvency does not as a rule *per se* result in a termination of the Insolvent's contracts. Subject to the Step-in Right (as defined and discussed below), though, all non-monetary claims against the Insolvent are converted into monetary claims in case of a declaration of bankruptcy (*Konkurseröffnung*) or a ratification of a composition agreement with assignment of claims (*Genehmigung Nachlassvertrag mit Vermögensabtretung*). In turn, parties are free to stipulate in their contract that an Insolvency shall give rise to a termination of such contract, be it automatically or by notice.

66 In a bankruptcy, the receiver in bankruptcy may pursuant to Art. 211 para. 2 SDEBA request the fulfillment of any undischarged obligations resulting from bilateral contracts by the other contractual party provided that the bankruptcy estate also fully fulfills its obligations under the relevant contract (the "**Step-in Right**"). The Step-in Right is by analogy available to the liquidator in case of a composition agreement with assignment of assets.

(B) Waiver of Step-in Right

67 The Step-in Right is held by the prevailing doctrine to constitute a mere procedural provision, which based on such qualification, may be validly excluded by the parties in an agreement entered into prior to the commencement of an Insolvency Procedure. The calculation of a Single Net Amount under a Close-out Netting provision under such circumstances is also valid and binding as discussed below.

68 As per the legislative history, the introduction of the Statutory Close-out (as defined and discussed under n. 70 and 71 below) of Art. 211 para. 2bis SDEBA did neither aim at altering the qualification of Art. 211 para. 2 SDEBA as a procedural provision nor limit close-out netting to contracts specifically addressed in Art. 211 para. 2bis SDEBA.

69 Hence, it is our view, that the Step-in Right of Art. 211 para. 2 SDEBA may be validly waived by the parties for agreements which are not Qualifying Contracts

(as defined and discussed under n. 70 and 71 below) within the meaning of Art. 211 para. 2bis SDEBA. Note, however, that no precedents are available to the very point of the non-mandatory character of Art. 211 para. 2 SDEBA.

(C) Statutory Close-out

70 Art. 211 para. 2bis SDEBA excludes the Step-in Right in respect of certain types of agreements, i.e. (i) fixed term agreements (*Fixgeschäfte*) within the meaning of Art. 108 CO[10], and (ii) certain financial derivative transactions, including financial swaps, forward agreements and options (each, a "**Qualifying Contract**") and in turn provides for automatic termination of such contracts in case of bankruptcy[11] and the abstract calculation of a liquidation amount based on market or exchange quoted prices as compared to the contractual value (the "**Statutory Close-out**"). Such calculation does not as per its wording, however, take into account any further damages or costs of either party.

71 In the context of an Insolvency Proceeding, a contractual termination right and a close-out netting provision amount to an exclusion of the Step-in Right, and in case of Qualifying Contracts, the Statutory Close-out, the validity of which need to be analyzed pursuant to Art. 211 para. 2 SDEBA and Art. 211 para. 2bis SDEBA, respectively.

(D) Waiver or Modification of Statutory Close-out

72 Art. 211 para. 2bis SDEBA was introduced in the light of close-out netting agreements that had become customary in the financial community and primarily aimed at backing the viability of close-out netting in an Insolvency Proceeding. This, in our view, needs to be borne in mind when interpreting Art. 211 para. 2bis SDEBA which, as outlined above, does not limit itself to excluding the Step-in Right of Art. 211 para. 2 SDEBA, but provides for a Statutory Close-out in that it stipulates that the relevant contracts are automatically terminated and lays down an abstract calculation of a liquidation amount, which is similar but not identical to typical Close-out Netting provisions and may be more restrictive as to, for

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10 Any agreement in which the parties agree that specific performance should only be permissible on or up to a certain date or at least would only be permitted if the other party were to specifically agree to it, qualifies as such fixed term agreement (*Fixgeschäft*). Furthermore, the predominant view is that the exclusion of the Step-in Right pursuant to Art. 211 para. 2bis SDEBA applies to all fixed term agreements rather than to financial agreements only.

11 And again by analogy in case of a confirmation of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*).

instance, further costs and damages. It may also impact on the scope of claims that would otherwise be subject to the Close-out Netting (including agreed sub-sets of claims under a Close-out Netting provision).

This raises the question whether Art. 211 para. 2bis SDEBA may be modified, most noteworthy as to the automatic character of a termination and the calculation method of the amount to be paid following such termination. What we view as the prevailing opinion (in the albeit scarce doctrine), is that like Art. 211 para. 2 SDEBA the more recent Art. 211 para. 2bis SDEBA does not constitute mandatory law either and may, hence, be modified by advance agreement. There is one dissenting scholarly opinion, which holds that Art. 211 para. 2bis SDEBA in its entirety constitutes substantive law rather than a procedural rule and as such substantive rule is mandatory. In its report to the revision of the Step-in Right in the SDEBA, though, the Federal Office of Justice specifically stated that the proposed provisions aimed at procedural aspects only and not at aspects of substantive law. 73

In addition, a qualification as a substantive rather than as a procedural rule does not in our view *eo ipso* exclude its modification by contract, which view is also supported by a recent scholarly opinion. Other qualifying opinions hold, that while a different contractual calculation method is permissible, the automatic character of the termination is to be viewed as mandatory or at least to limit optional termination to a termination with effect prior to the declaration of bankruptcy. One scholarly opinion holds that in the absence of a termination by the opening of bankruptcy, the Statutory Close-out becomes mandatory. Consequently, there seems to be more controversy as to whether an optional termination taking place after the opening of bankruptcy should be effective or replaced by the automatic termination upon the opening of bankruptcy in the light of Art. 211 para. 2bis SDEBA than as to the dispositive nature of the calculation method. Note in this context that already in respect of Art. 211 para. 2 SDEBA an optional termination is fraught with uncertainties (see n. 76 and 77 below). If contrary to our views expressed above and thereby contrary to what we view as the prevailing opinion a Swiss court were to hold that both the calculation method and the automatic termination pursuant to Art. 211 para. 2bis SDEBA are mandatory, then the Statutory Close-out would apply to all Transactions that are Qualifying Contracts and automatically terminate them and one would calculate one single liquidation amount in respect of all such terminated Transactions rather than to calculate a Cleared Set Termination Amount for each Cleared Transaction Set (see n. 190 below). 74

(E) Applicability to Special Insolvency Regime Entities

While the relevant acts do not contain any specific rules regarding Close-out Netting in insolvency procedures and thus in this respect the general SDEBA rules should also be applicable to Special Insolvency Regime Entities and Special Insolvency Regime Branches, Art. 27 para. 3 of the Banking Act clearly states that netting arrangements shall not be affected by protective measures, reorganization and liquidation procedures. 75

(F) Optional Termination

While optional termination is valid and binding on the Parties prior to an Insolvency, the effectiveness of optional termination is more questionable in case of an Insolvency. Doctrine holds that optional termination would allow a counterparty to speculate to the detriment of other creditors of the insolvent debtor in the absence of a pre-agreed short notice period and should, therefore, be disregarded. It is also held that if the termination notice provides for an effective date which is later than the date of the opening of bankruptcy or the confirmation of a composition agreement with assignment of assets, then notwithstanding any designation of another date, all calculations may need to be made as of such date. 76

As mentioned above, the Statutory Close-out for Qualifying Contracts, if viewed as mandatory, could overrule the optional termination and the calculation of the amount owed by the Parties pursuant to their close-out netting provisions. 77

(G) Automatic Termination

Automatic termination is valid and binding under Swiss law and we strongly recommend to elect automatic termination rather than to provide for a short term period within which optional termination would need to be declared. 78

(ii) Determination of Single Net Amount

Close-out Netting by means of calculating a Single Net Amount constitutes a valid pre-agreed contractual liquidation of all transactions subject to such Close-out Netting. Such Close-out Netting would be upheld in an Insolvency, subject to the discussion of Close-out Netting and termination under n. 48 et seq. above. In particular, any calculation and valuation to be made in the context of the Close-out Netting, which pursuant to the relevant terms has been made as of a date after the adjudication of bankruptcy (*Konkurseröffnung*) or the confirmation of a composition agreement with assignment of assets (*Bestätigung Nachlassvertrag* 79

mit Vermögensabtretung) is likely to be disregarded in case it proves to be to the detriment of the bankruptcy estate and adjusted for a calculation of such more favorable amount as of the date of the adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets.

80 Pursuant to the SDEBA, the exercise of a set-off right remains possible post-insolvency. However, post-insolvency set-off is subject to the limitations of Art. 213 and 214 SDEBA (see n. 97 below). As a result, set-off is permissible only to the extent that the claims to be set-off have existed prior to the Insolvency and were mutual between the Insolvent and the counterparty prior to the Insolvency and are of the same kind (as to the latter see n. 51 et seq. above). We have, for purposes of this legal opinion, assumed the satisfaction of the above requirements and, in particular, that the claims are mutual (i.e. no intermediate assignment nor inclusion of affiliate claims) (see n. 36).

81 As mentioned under n. 64 above, Close-out Netting provisions are best analyzed as a comprehensive contractual set-off. This question, which eventually would have to be decided under the laws chosen by the parties to govern such Close-out Netting provisions, has, however, no impact in our view on our conclusion that the determination of a Single Net Amount is enforceable following an adjudication of bankruptcy or the confirmation of a composition agreement with assignment of assets against the background of the discussion under n. 65 et seq. above.

(iii) Currency of filing

82 Claims in a foreign currency against an insolvent party initially remain unaffected by the institution of Insolvency Proceedings. Foreign currency claims must, however, be converted into Swiss Francs in order to participate in the distribution of the liquidation proceeds, if any. A claim of the solvent party for a Net Single Amount denominated in a currency other than Swiss Francs would thus only be enforceable in an Insolvency Proceeding if converted into Swiss Francs as of the date of the adjudication of bankruptcy (in case of a bankruptcy) or as of the confirmation of the composition agreement (in case of a composition agreement with assignment of assets).

(iv) Date

83 The calculations to be made in determining a Net Single Amount may have to be made as of the date of the adjudication of bankruptcy or the confirmation of a

composition agreement with assignment of assets in order to ascertain equal treatment of all creditors of the Insolvent.

(v) Accrual of Interest

Unless a claim is secured by collateral, interest stops to accrue following the adjudication of bankruptcy or the grant of a moratorium. Any interest element would, hence, under such premises be disallowed for purposes of calculating a Net Single Amount or applying a set-off and no interest would be allowed on a Net Single Amount. In case of secured claims, only an excess of the realization of the collateral over the principal amount may be applied against interest and any uncovered interest amount would be disregarded. 84

B. Opinion

On the basis of the foregoing terms of reference and assumptions, the preliminary remarks and subject to the qualifications set out in paragraph 4 below, we are of the following opinion. 85

3.1 Insolvency Proceedings

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party would be subject in this jurisdiction and that are relevant for the discussion in this opinion are the debt enforcement and bankruptcy proceedings under the SDEBA as discussed below and, in respect of the Special Insolvency Regime Entities and Special Insolvency Regime Branches, as supplemented or modified by the respective special proceedings under the relevant acts[12], as discussed in this paragraph 3.1 and/or in the relevant Schedule applicable to such Special Insolvency Regime Entity or Special Insolvency Regime Branch. 86

3.1.1 Insolvency Proceedings (*Insolvenzverfahren*)

Enforcement of contractual obligations is generally subject to limitations in case of insolvency proceedings being instituted against a Swiss Party under applicable 87

[12] Some specific rules of a more technical nature are applicable to certain specific entities such as cooperatives (*Genossenschaften*) and railway and marine shipping companies (*Eisenbahn- und Schiffahrtsunternehmungen*).

Swiss law. In a nutshell, the various insolvency proceedings against a Swiss Party and their main impact on the Swiss Party's ability to abide by its obligations under its contractual agreements can be summarized as follows:

3.1.2 Bankruptcy (*Konkurs*)

88 The legal framework as regards the enforcement of claims and the questions relating to insolvency and bankruptcy is as a rule set by the SDEBA. By way of exception, the insolvency and bankruptcy of Special Insolvency Regime Swiss Entities will not be governed by the SDEBA only, but by the specific laws which apply in these cases.

89 The enforcement of claims follows different proceedings depending on the status of the debtor. As a rule, claims against Swiss Parties have to be pursued in enforcement proceedings leading to the declaration of bankruptcy (*Konkurs*) and, hence, a general liquidation of all assets and liabilities of the debtor, except that, unless a bankruptcy has been declared, creditors who are secured by a pledge must follow a special enforcement proceeding limited to the liquidation of the relevant collateral (*Betreibung auf Pfandverwertung*).

90 However, if a bankruptcy is declared while such a proceeding is pending, the proceeding is ceased and the creditor participates with the other creditors in the bankruptcy proceedings.

91 Bankruptcy is declared by the court either on the initiative of a creditor or on the debtor's request. It is declared with effect as of a specific date and time of the day. All assets of the bankrupt entity at the time of declaration of bankruptcy, and all assets acquired or received subsequently, form together the bankruptcy estate, which after deduction of costs and certain other expenses, is to satisfy proportionally the creditors.

92 As a rule, the declaration of bankruptcy by the competent court needs to be preceded by a prior debt enforcement procedure (*Konkurs mit vorgängiger Betreibung*). Any creditor or purported creditor may apply for the commencement of debt enforcement proceedings against a debtor. Upon a creditor's request, in which the creditor need not evidence its claim, the competent debt enforcement authority (*Betreibungsamt*) will issue a payment summons (*Zahlungsbefehl*). The debtor may object to the payment summons by simple declaration (*Rechtsvorschlag*). If the debtor does so object, the creditor needs to lift such objection by a court procedure.

If the creditor has a written debt acknowledgment of the debtor, it can start a special summary procedure (*provisorische Rechtsöffnung*). Otherwise, full fledged litigation on the merits may need to be commenced. If the creditor prevails in the special summary procedure, but the debtor still wants to contest the claim, it is up to the debtor to commence full fledged litigation on the merits. If the creditor prevails, the payment summons comes into legal effect and the creditor may request the continuation of enforcement proceedings and the competent debt enforcement authority (*Betreibungsamt*) would then notify the debtor that bankruptcy proceedings will be opened by the court upon a respective request of the creditor unless payment of the debt will be performed within 20 days. After the lapse of such deadline without payment of the debt, the creditor may request that the competent court open bankruptcy proceedings. 93

The competent court may declare a debtor bankrupt without prior enforcement proceedings (*Konkurs ohne vorgängige Betreibung*) under the following circumstances: at the request of the debtor if (i) the debtor's board of directors declares that the debtor is over-indebted (*überschuldet*) within the meaning of Art. 725 para. 2 CO or (ii) if the debtor declares to be insolvent (*zahlungsunfähig*), and at the request of a creditor if (i) the debtor commits certain acts to the detriment of its creditors or (ii) the debtor either ceases to make payments (*Zahlungseinstellung*) or if certain events happen, in either case during composition proceedings. 94

The bankruptcy proceedings are carried out and the bankruptcy estate is managed by the receiver in bankruptcy. 95

The bankrupt party loses its capacity to dispose of its assets and any mandate or power of attorney by the bankrupt party is automatically deemed revoked with the declaration of bankruptcy. 96

A set-off in a bankruptcy is, pursuant to Art. 213 SDEBA, limited to situations where the debtor of the bankrupt party willing to set-off a claim has become the creditor of the bankrupt entity prior to the declaration of bankruptcy and even in such situations a set-off may be subject to challenge pursuant to Art. 214 SDEBA by any other creditor establishing that (i) a claim has been acquired prior to the declaration of bankruptcy, but upon knowledge of the bankrupt party's insolvency and (ii) with the purpose of gaining an advantage by virtue of such set-off to the detriment of other creditors. These provisions are supplemented by the general avoidance actions provided for in the SDEBA (n. 116 et seq. below). 97

For the final distribution there is a ranking of creditors in three classes. The first and the second class, which are privileged, comprise claims under e.g. employment contracts, accident insurance, pension plans and family law. Certain privileges can further result for the government and its subdivisions based on specific provisions of federal law. All other creditors are treated equally in the third class. 98

3.1.3 Reorganization (Nachlassverfahren – Nachlassvertrag mit Vermögensabtretung)

The SDEBA also provides for reorganization procedures by composition with the debtor's creditors. Reorganization is initiated by the debtor lodging a request with the competent court for a stay (*Nachlassstundung*) pending negotiation of the composition agreement with the creditors and confirmation of such agreement by the competent court. 99

A distinction is made between a composition agreement providing for the assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) which leads to a private liquidation and in many instances has an effect analogous to bankruptcy, and a dividend composition (*Dividenden-Vergleich*) providing for the payment of a certain percentage on the creditors' claims and the continuation of the debtor. Further, there is the possibility of a composition in the form of a mere payment term extension (*Stundungsvergleich*). 100

The grant of a moratorium has, *inter alia*, the following effects:

Stay of Debt Collection Proceedings: No debt collection proceedings can be initiated for the duration of the moratorium and pending proceedings are stayed. Procedural steps taken before the moratorium, however, remain in effect until a decision is taken on a composition agreement, except for (a) collection proceedings for claims of employees arising in the course of the preceding six months and certain claims based on social security laws and family law (so-called first class claims), (b) collection proceedings for debt secured by real property, and (c) collection proceedings for new debt arising out of the permitted continuation of the debtor's business. Further permitted are sequestration and other measures of securing assets for creditors. The moratorium does not preclude initiating lawsuits and continuing pending litigations. 101

During the moratorium, the debtor's power to dispose of its assets and to manage its affairs is restricted. While the debtor may - under the supervision of the administrator - effect the necessary transactions for its daily business as long as 102

any instruction of the administrator is observed, the debtor is barred from performing certain acts. Acts may be prohibited by law, by order of the court, or by instruction of the administrator. Without approval, the debtor is prohibited by law from (a) disposing of or pledging any fixed assets (such as holdings in other companies or real property), (b) creating new security interests, (c) issuing guarantees, and (d) entering into transactions which are not at arm's length. Such acts performed without court approval are invalid. If the debtor has entered into such a transaction, the counterparty is not entitled to any dividend or liquidation proceeds resulting for the creditors. The counterparty's claims for rescission of the contract must be recorded and treated just like any other creditors' claim. Such counterparty will therefore only be entitled to receive a dividend from or a share in the liquidation proceeds of the debtor.

103 In case of a regular pledge, the secured party is, furthermore, not entitled to proceed with a private liquidation until the competent court has approved the composition agreement. The private liquidation may also be stayed for a further period. In case of an irregular pledge, however, the sale of the pledged assets may take place without delay. A secured creditor participates in the settlement only for the amount of its claim not covered by proceeds from the sale of the collateral or, if the collateral is appropriated, the amount by which its claim exceeds the value ascribed to the collateral.

104 *Interest*: Unsecured debts become non-interest bearing as of the date the moratorium is granted. If the moratorium is withdrawn at a later time, the interest period will be deemed to have run during the moratorium.

105 *Due Dates*: The moratorium does not affect the agreed due dates of debts (contrary to bankruptcy, in which case all debts become immediately due upon adjudication). Should the moratorium proceedings end in a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) for the benefit of creditors, then all debt will fall due to allow a general liquidation.

106 *Set-off*: Set-off is allowed, subject to the same limitations as in a bankruptcy (see n. 97 above), whereby the date of the publication of the grant of the moratorium is relevant for determining which claims qualify for set-off.

107 The moratorium aims at facilitating the conclusion of one of the above composition agreements. As mentioned, the composition agreement needs to be approved by the creditors and confirmed by the competent court. With the

judicial confirmation, the composition agreement becomes binding on all creditors, whereby secured claims are only subject to the composition agreement to the extent that the collateral proves to be insufficient to cover the secured claims.

3.1.4 Emergency moratorium

108 The SDEBA further confers the right to the cantonal governments to stay certain procedures under the SDEBA, including the declaration of bankruptcy, at the debtor's request if the debtor's inability to pay its debts is temporary and due to extraordinary circumstances of general implication (e.g. a general economic crisis). The competent authority can order that the grant of any security interest during such stay be subject to its prior approval. This so-called emergency moratorium (*Notstundung / sursis extraordinaire*) is an exceptional remedy, which has rarely been applied in the past.

3.1.5 Rules applicable to Swiss Branches

109 Two proceedings are to be distinguished in connection with insolvency proceedings against Swiss Branches: (i) the branch insolvency (*Zweigniederlassungskonkurs*) pursuant to Art. 50 para. 1 SDEBA (see n. 110 below) and (ii) the ancillary insolvency (*Hilfskonkurs*) pursuant to Art. 166 et seq. PILA (see n. 111 et seq. below).

110 If a foreign debtor has a branch (*Zweigniederlassung*) in Switzerland, claims against this debtor can, to the extent they are derived from the operations of such branch, be enforced directly at the place where the branch is located in a branch insolvency (*Zweigniederlassungskonkurs*) (Art. 50 para. 1 SDEBA). Note that Swiss substantive law determines whether an office established in Switzerland qualifies as a branch (*Zweigniederlassung*) within the meaning of Swiss law. Under Swiss substantive law, a branch is a commercial operation which pursues activities similar to those of the principal office on its own premises. It enjoys a certain degree of autonomy from, but is not a separate legal entity to, the principal office. Accordingly, under Swiss substantive law, branch employees with signatory rights also bind the principal office and, in turn, agreements entered into by the principal office in accordance with applicable law are binding also on the branch.

111 Art. 166 et seq. PILA, on the other hand, provide for the ancillary insolvency (*Hilfskonkurs*) pursuant to which a foreign bankruptcy decree is recognized in

Switzerland, if (i) the decree has been issued in the state of incorporation of the debtor, (ii) it is enforceable in the state where it was rendered, (iii) there is no ground to deny recognition based on formal and material principles of Swiss public policy (*ordre public*), and (iv) if the state where the decision was rendered grants reciprocity. The same conditions apply to the recognition of a foreign composition agreement (Art. 175 PILA).

112 If the above requirements are met, on application of the foreign receiver in bankruptcy or any creditor, the courts recognize the decree and subsequently the competent Swiss authorities open (based on the court's decision) ancillary bankruptcy proceedings regarding all assets located in Switzerland. Such ancillary insolvency proceedings are then governed by Swiss insolvency law, including the provisions on avoidance actions (Art. 285 et seq. SDEBA see n. 116 et seq. below) or limitations on abusive set-off (Art. 213 and 214 SDEBA see n. 97).

113 While any creditor can request the recognition of a foreign insolvency and the opening of an ancillary insolvency, once opened, only (i) secured creditors (foreign and Swiss) and only to the extent that the collateral forming part of the ancillary insolvency estate covers such claims, and (ii) Swiss privileged creditors (claims ranking first and second pursuant to Art. 219 SDEBA) may directly file claims in such ancillary insolvency. If there is an excess, then such excess would be made available to the foreign receiver or the creditor having requested the recognition. The Swiss excess assets can, however, only be remitted if the plan establishing the recognition of filed claims in the foreign insolvency proceeding has been recognized by the competent Swiss court and such recognition can be denied if the Swiss court finds that the unprivileged Swiss creditors are not appropriately recognized. In such case, or if the plan is not timely submitted, the excess is used to satisfy the unprivileged Swiss creditors.

114 A branch insolvency can be opened after an ancillary insolvency has been declared, but only until the ancillary insolvency reaches the state in which the ranking of the creditors is ascertained and listed in a collocation plan (*Kollokationsplan*), and if opened would then take precedent over the ancillary insolvency, but only in respect of the Swiss branch assets, while the other assets located in Switzerland would remain in the ancillary insolvency proceeding.

115 If the Swiss Branch is a Special Insolvency Regime Branch, the special rules discussed in the respective Schedules are applicable.

3.1.6 Avoidance of Transactions

116 The receiver in bankruptcy and certain creditors may, by means of an appropriate lawsuit (*actio pauliana*), challenge certain arrangements or dispositions made by the insolvent during a period (*suspect period*) preceding the declaration of bankruptcy or, in case of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*), the grant of the moratorium. The grounds for a possible challenge are (i) gifts and other gratuitous transactions (*Schenkungspauliana*), (ii) certain acts of a debtor (described in more detail below), undertaken at such time as the debtor was over-indebted (*Überschuldungspauliana*), and/or (iii) dispositions made by the debtor with the intention of disadvantaging its creditors or to preferring certain of its creditors to the detriment of other creditors (*Absichtspauliana*) (all as described below).

(A) Avoidance of Gifts and Gratuitous Transactions

117 Art. 286 SDEBA allows the avoidance of gifts and other gratuitous transactions (as well as some additional categories of specified transactions, which are, however, not relevant in the context of this memorandum of law), which the debtor made within a suspect period of the 12 months prior to the declaration of bankruptcy in respect of such debtor or the granting of the moratorium in respect of such debtor, as applicable. Gratuitous transactions include transactions where the obligations of the parties (measured in economic terms) are disproportionate to the detriment of the bankrupt debtor, but only to the extent of such disproportion.

118 Any such gratuitous transaction can be challenged based on the objective elements of (i) the gratuitous nature of such transaction and (ii) the established damages resulting therefrom (such damages being determined from the perspective of the other creditors of the debtor).

(B) Avoidance due to Over-Indebtedness

119 Contrary to Art. 286 SDEBA, Art. 287 SDEBA targets specific acts of the insolvent debtor within the suspect period of 12 months prior to the declaration of bankruptcy or the granting of a moratorium (as applicable) in respect of the insolvent debtor, where such insolvent debtor was already over-indebted (*überschuldet*) at the time the relevant act was undertaken by the debtor. The term "over-indebted" refers to the fact that the debtor's assets do not cover its liabilities. The existence of such over-indebtedness at the time of the relevant

transaction or act is, as a rule, to be proven by whoever challenges the transaction or act based on the existence thereof.

120 The acts mentioned above that are specifically listed by Art. 287 SDEBA are acts that prefer one creditor over the others in the light of such over-indebtedness. Such acts include (i) the posting of collateral for an existing but unsecured obligation with no pre-existing undertaking to post collateral for such obligation, (ii) settlement of monetary claims other than in cash or commonly used payment means and (iii) the settlement of claims prior to their stated maturity.

121 Art. 287 SDEBA has been recently amended by the addition of a new para. 3 specifying that no challenge is possible if: (1) the collateral consists of securities, book-entry securities or other financial instruments traded on a representative market (*repräsentativer Markt*) and (2) the collateral provider had previously (i) agreed to provide additional collateral in case of a diminution of the collateral value or an increase in the value of the obligation to be secured and/or (ii) had reserved the right to substitute other collateral.

122 The acts specified above must additionally result in damages to the creditors. Such damages are presumed in the context of avoidance where the creditors have suffered final losses (*Verlustscheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges an act. It is then up to the defendant to prove that the challenged act did not lead to such damages.

123 There is a defence to any such challenge if the applicable counterparty can prove that it did not and, being diligent, could not have known about the debtor's over-indebtedness (such knowledge or deemed knowledge being one of the subjective tests). While, as mentioned above, the over-indebtedness as such needs to be proven by the challenging party, once established, the applicable counterparty is, subject to proof to the contrary, presumed to have been aware of the over-indebtedness. It will not be possible for a counterparty to prove it was unaware of the over-indebtedness if the over-indebtedness was reflected in financial statements made available to such counterparty. In our view the applicable counterparty would also be unable to prove that it could not have known about the debtor's over-indebtedness, if the counterparty did not request financial statements in respect of the debtor, despite due diligence warranting that it do so in the light of the nature and the magnitude of the transaction contemplated, provided that the financial statements would have revealed the debtor's over-indebtedness.

(C) Avoidance for Intent

124 Art. 288 SDEBA subjects any act of an insolvent debtor within the suspect period, being the 5 years prior to the declaration of bankruptcy or the granting of a moratorium (as applicable) in respect of such insolvent debtor, to challenge to the extent that (i)such act was taken by the insolvent debtor with the intention of preferring certain creditors over others or disadvantaging certain of its creditors and (ii) this intention known by the applicable counterparty or would have been known to such counterparty had it done the appropriate amount due diligence.

125 As with the other avoidance actions, the act of the insolvent debtor must have led to damages to creditors (the presence of such damages being one of the objective tests). While the SDEBA does not specifically mention this prerequisite, it nevertheless follows from the nature and aim of an avoidance action. Pursuant to Swiss jurisprudence, such damages are presumed in the context of the avoidance for intent, where the challenging creditor has suffered final losses (*Verlust-scheingläubiger*) in a debt collection procedure or if the bankruptcy estate challenges the act. It is then up to the defendant to prove that the challenged act did not in the case at hand lead to such damages, i.e. the burden of proof is shifted to the defendant in such cases. The term "act" must be read in a very broad sense. It is not limited to the conclusion of contracts, but includes any act of the debtor, in particular also any act which the SDEBA specifically targets in one of the other two avoidance actions, if such act meets the further requirements of the particular avoidance for intent pursuant to Art. 288 SDEBA.

126 The subjective tests for an 'avoidance for intent' are (i) the actual or presumed presence of an intention of the insolvent debtor to prefer or to disadvantage creditors and (ii) such intention having been recognizable to the counterparty of the relevant act. The debtor is presumed to have such an intention where the debtor recognized or using the diligence required in the circumstances should have recognized that the challenged act would prefer or disadvantage creditors. It is sufficient if the debtor, even while not directly aiming for such preference or disadvantage to occur as a result of its act, merely accepted such preference or disadvantage was a possible consequence of its act.

127 Jurisprudence holds that such intent is recognizable to a counterparty, if the counterparty, using the diligence warranted under the specific circumstances, should have foreseen a disadvantage to the other creditors as the consequence of the act of the debtor. If there are signs of a potential disadvantage to other

creditors, then the counterparty has to discuss this with the debtor and make the necessary further inquiries.

128 In respect of counterparties that are banks, Swiss legal doctrine holds that the suspicion of the bank that the debtor when transacting with the bank may accept that such act disadvantages its creditors generally, is sufficient to deem such bank having recognized the debtor's intent. Furthermore, pursuant to such scholarly opinions, the intent is deemed recognizable not only if a bank knows about the distressed financial situation of the debtor but also if there are indications of a distressed financial situation.

129 While these subjective elements have to be proven by the challenging creditor, who obviously would need to gather the requisite information, one should not in our view underestimate the impact of the presumptions which work into the hands of such creditors as discussed above and it is, hence, important to focus on the objective elements.

130 Neither Art. 286 SDEBA nor Art. 288 SDEBA (unlike Art. 287 SDEBA) require over-indebtedness of the insolvent debtor at the moment when the challenged act is undertaken. However, as the acts which can potentially be challenged under Art. 288 SDEBA are only very generically addressed by the finality of such acts, one nevertheless in our view needs to distinguish two different scenarios:

131 Under the first scenario, there is insufficient indication of financial difficulties when the debtor acts. In such scenario, the act must be such that its very nature is targeted to achieve an undue preference of, or a disadvantage to, certain creditors if and when the debtor should be declared bankrupt or granted a moratorium (e.g. posting of collateral only concurrently or immediately preceding the declaration of bankruptcy, so that in fact the intention is that the counterparty should only be granted a preferential right over an asset if and when the debtor is declared bankrupt, but with no intent to treat the counterparty as a secured party other than in bankruptcy or an artificial creation of an overstated claim upon such declaration of bankruptcy in order to achieve a higher basis for a bankruptcy dividend or the like).

132 The second scenario is where the debtor is in financial difficulties at the time the act occurs. The scope of acts that can be challenged under such circumstances is significantly broader and, in respect of a debtor on the verge of a bankruptcy at the time such act occurs, eventually would include the payment of a matured claim or providing collateral, if the counterparty must have recognized that the

debtor would have had to file for bankruptcy and, by making such payment outside the bankruptcy or by providing collateral, prefers or is deemed to have preferred such counterparty over other creditors (as Insolvency Proceedings require proportional satisfaction of claims of the same class) who will end up with a dividend that will not cover their full claims and who thereby are not getting the same *pro rata* share as the counterparty.[13]

3.1.7 Jurisdiction Clauses and Insolvency Actions

133 As a matter of Swiss law, jurisdiction clauses have no effect on actions brought under the SDEBA, i.e. to issues that relate to Swiss bankruptcy or insolvency law rather than to contractual law. These actions must be brought before the court at the place of the applicable Insolvency Proceedings. Accordingly, jurisdiction clauses to the contrary would not be effective in case of actions relating to Insolvency Proceedings. With respect to avoidance actions (see n. 116 through 132 above), it seems noteworthy in this context that, contrary to earlier precedents, recent precedents hold that the forum provided for in Art. 289 SDEBA (place of defendant) may be disposed of, but only after the adjudication of Insolvency by an agreement entered into by the non-defaulting party with either the administrator or the creditors.

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[13] In its decision NR. 5A.892/2010 of August 22, 2011 c.4., the Federal Supreme Court first confirmed that an avoidance action under Art. 288 SDEBA was independent of the other avoidance actions and, hence, could also, if the further qualified conditions are met, affect acts that could not be challenged under such other avoidance actions. It then held in the context of a collateralized total return swap documented under a 1992 ISDA Master Agreement and presumably an English law CSA-Transfer, that in the case at hand collateral was transferred for *existing obligations* and without *pre-existing obligation* to do so and, hence, caused damages for the other creditors and thereby subject to avoidance. The decision is in our view not properly reasoned, in particular as it denies the existence of a pre-existing obligation to transfer collateral on the basis of a perceived lack of predictability of the amount that would need to be collateralized when the parties entered into the agreement. At the same time it held that periodic balancing payments that the parties had agreed in longer intervals than the ones for the transfer of collateral with the last such payment having been made after the last transfer of collateral were part of the exchange of payments agreed by the parties at the outset and, hence, not subject to avoidance. As both the balancing payments and the transfer of collateral aim at the same reduction of exposure, are to be calculated on the same basis and were agreed at the outset, the different treatment seems inconsistent. So what in essence seems to be the immediate conclusion from this decision for derivative transactions (with secured amounts that necessarily will fluctuate), is that the risk perceived in our opinion that collateral posted under an existing security undertaking could be clawed back under Art. 288 SDEBA notwithstanding the existence of a security undertaking providing for additional collateral calls during the life of transaction(s) is confirmed by the decision, albeit with a less than convincing reasoning.

3.1.8 Pending Developments

We note that Swiss parliament passed an amendment of the SDEBA that shall come into force as from January 1, 2014. The amendment mainly concerns the reorganization proceedings (*Nachlassverfahren*) and aims at facilitating access to such proceedings and a shift of the focus of such proceedings. Such proceedings will not necessarily focus on a liquidation of the debtor but could be confined to the grant of a temporary moratorium and such moratorium will not necessarily need to be published. The moratorium could also result in a composition agreement that besides a debt rescheduling or dividend agreement may also comprise the formation of a new company (*Auffanggesellschaft*) to receive part of the business of the debtor. Finally, creditors may be forced to accept a participation in the debtor or a newly formed company in lieu of a dividend payment in satisfaction of their claims (bail in). 134

3.1.9 Insolvency Proceedings: Banks and Securities Dealers

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Bank or a Securities Dealer could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows: 135

The Banking Act and the BIO-FINMA set forth a detailed regime governing bankruptcy and insolvency proceedings against Banks. Pursuant to Art. 36a SESTA, the same rules apply to Securities Dealers established in Switzerland. 136

In relation to Banks and Securities Dealers, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the Banking Act and/or the BIO-FINMA. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Banks and Securities Dealers. 137

It should be noted further that the Swiss Financial Market Supervisory Authority ("**FINMA**")[14] may deviate from the rules of the SDEBA where it deems it 138

[14] With effect from January 1, 2009, the former Swiss Federal Banking Commission (*Eidgenössische Bankenkommission (EBK)*) was merged into the Swiss Financial Market Supervisory Authority (*Eidgenössische Finanzmarktaufsicht (FINMA)*) in accordance with the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) (Bundesgesetz über die Eidgenössische Finanzmarktaufsicht (FINMAG), SR 956.1).

appropriate. Yet, according to the 2004 Message and gathering from the BIO-FINMA, such derogation is mostly of a formal nature.

139 The Banking Act grants broad powers to the FINMA which is entitled to handle the insolvency proceedings against Banks and Securities Dealers. In particular, the FINMA has the authority to implement (i) protective measures (*Schutzmassnahmem*) in case of justified concern of insolvency, (ii) reorganization proceedings (*Sanierungsmassnahmen*), or (iii) solvent or insolvent liquidation proceedings relating to banks (*Bankenkonkurse*).

140 Protective measures may include a broad variety of measures such as, in particular, a bank moratorium (*Stundung*) or a maturity postponement (*Fälligkeitsaufschub*) and may be ordered by the FINMA either on a stand-alone basis or in connection with reorganization or liquidation proceedings. Such measures are largely handled by the FINMA.

141 Under the 2011 amendment of the Banking Act, the FINMA has the additional power, by ordering reorganization proceedings, to order the transfer of all or part of the business with assets, liabilities and contracts to another existing bank or a newly established bridge bank, with such transfer becoming effective upon the ratification of the reorganization plan by FINMA. Pursuant to Art. 57 of the BIO-FINMA, this transfer could be coupled with a temporary stay of any contractual termination right of a counterparty with respect to finance contracts (*Finanzverträge*) for up to 48 hours if such contractual termination right would otherwise be triggered by officially ordered restructuring or protective measures.

142 We note that such power granted to the FINMA pursuant to the BIO-FINMA may contradict and, being a mere implementing ordinance that is subordinate to the Banking Act, violate Art. 27 para. 3 of the Banking Act as the temporary stay could affect netting under the netting arrangements while said Art. 27 para. 3 of the Banking Act provides that netting arrangements shall not be affected by protective measures, reorganization measures and liquidation procedures.

Art. 57 provides that the temporary stay:

- 143 may only be ordered by the FINMA for finance contracts which provide for early termination rights in case of reorganisation proceedings (Sanierungsmassnahmen) or protective measures (*Schutzmassnahmen*) ordered by an official authority;

- is limited to a maximum of 48 hours; and that 144

- the rights of the counterparty to terminate the relevant finance contracts remains unaffected if the acting of the Insolvent triggers another Event of Default or Termination Event before, during or after the transfer, or if the transferee bank triggers an independent Event of Default or Termination Event after such transfer which is not linked to the protective measures or the reorganisation proceedings ordered by FINMA. 145

The termination rights affected by a temporary stay ordered by the FINMA can be exercised immediately upon the expiration of the relevant 48 hours period (or, if the Agreement is not transferred, as soon as the counterparty becomes aware that the Agreement remains with the Insolvent). 146

For completeness sake, we note that no precedents are available as of the date hereof with respect to the application of Art. 57 para. 2 of the BIO-FINMA. 147

A reorganization plan can also provide for a debt for equity swap. Where a reorganization plan affects creditors' rights, the FINMA has to set a deadline within which creditors can reject the reorganization plan, and if third class creditors (unsecured unprivileged creditors) that represent more than 50 per cent of the amounts of third class claims in the books of the bank reject such plan, then the reorganization plan has failed and the FINMA has to order the bankruptcy[15]. 148

According to the 2004 Message, the rules regarding the insolvency proceedings of banks are not meant to affect netting arrangements and, in particular, in a liquidation proceeding ordered by the FINMA, the relevant provisions of the SDEBA governing netting arrangements shall remain applicable. Art. 27 para. 3 Banking Act provides that netting arrangements shall not be affected by protective measures, reorganization measures and liquidation procedures. For completeness sake, we note that no precedents are available as of the date hereof. 149

It seems noteworthy that the prerequisites for actions for the avoidance of transactions are somewhat different from the ones in the SDEBA in that such actions can also be brought in case of a reorganization of a Bank or a Securities Dealer. Further, in the first instance, the Bank or the Securities Dealer itself is competent to challenge these arrangements or dispositions once the 150

[15] Pursuant to an amendment of the Banking Act in 2012, the reorganization plan cannot be rejected by the creditors with respect to a systemic bank.

reorganization plan has been approved by the FINMA. If the reorganization plan does not provide for the challenge of these actions by the Bank or the Securities Dealer itself, the creditors of the Bank or the Securities Dealer may initiate these actions.

Finally, under the 2011 amendment of the Banking Act, the FINMA has the competence to recognize foreign insolvency decisions (whether rendered in the country of such bank's legal or the country of its effective seat) and to put assets located in Switzerland at the disposition of a foreign insolvency estate without having to open separate Swiss Insolvency Proceedings pursuant to Art. 166 et seq. PILA, subject to the foreign insolvency proceedings (i) ascertaining equal treatment to Swiss creditors who are secured or would be privileged creditors under Swiss law, and (ii) providing for adequate consideration of other claims of Swiss creditors. 151

Otherwise, the insolvency procedure as such is governed by the general rules of the SDEBA. 152

3.2 Recognition of choice of law

3.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England. 153

We are of this opinion because:

Pursuant to Art. 116 PILA the general principle is that parties are free in the choice of the law that should govern their agreement. A Swiss court, therefore, would have to recognize the choice of English law with respect to any claim made under the FOA Netting Agreement or, as the case may be, the Clearing Agreement. 154

The application of the chosen law would, however, be subject to Swiss public policy (*ordre public*) pursuant to Art. 17 and 18 PILA. 155

We express no opinion on the binding effect of the choice of law provisions in the Agreement insofar as they relate to non-contractual obligations arising from or connected with the Agreement. 156

3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to 157

English law, as the governing law of the FOA Netting Agreement or, as the case may be, of the Clearing Agreement, in determining the enforceability or effectiveness of the FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision. For the Title Transfer Provisions (see para. 3.2.3, n. 160 et seq.).

We are of this opinion because:

158 English law as the law chosen by the Parties to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement, would also govern the enforceability of the (i) FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision contained in the FOA Netting Agreement or, as the case may be, the Clearing Agreement. See n. 56 et seq. for a more in depth discussion of such choice of law and n. 59-60 and 63 with respect to limitations thereof.

159 The application of the chosen law would, again, be subject to Swiss public policy (*ordre public*) pursuant to Art. 17 and 18 PILA. On the face of the FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision we have not identified any provisions therein that we would view as contrary to the general principles of Swiss public policy (*ordre public*).

3.2.3 The choice of English law to govern the Title Transfer Provisions

(a) Cash

160 Based on the assumption that cash will not be remitted physically (see para. 2.15 n. 42), but that any disposition of cash will be conducted by way of wire-transfer from the Margin Provider's bank account with its account bank to designated cash accounts of the Margin Taker with its account bank neither a transfer of a movable asset nor an assignment of a claim will take place. Therefore, the act of disposition under the Title Transfer Provisions does not consist of assigning or pledging a claim that the Margin Provider holds as against its account bank, but rather of a wire-transfer resulting in a debit on the Margin Provider's bank

account, i.e. in the discharge of the Margin Provider's bank from paying the respective amount, and in a credit on the bank account of the Margin Taker. Thus, in our view, the act of disposition consists of a chain of payments, i.e. wire-transfers that have to comply with the law(s) applicable to such wire-transfers. In the relationship between the Parties, only a claim that is governed by the Title Transfer Provisions remains and the Margin Taker's rights to claim the transfer of cash and to use the cash as collateral will be governed by English law as the law applicable to the Agreement and the Title Transfer Provisions thereunder (subject to any failed wire-transfer that would trigger any claims for restitution under the law(s) applicable to such wire-transfer).

(b) Securities

161 Several elements to a collateral transaction need to be addressed for purposes of determining the applicable law(s) under Swiss conflict of laws rules, i.e. under the PILA. First, the contractual aspect, addressing the parties' obligation to provide collateral, i.e. the security undertaking ("**Security Undertaking**") , secondly the act of disposition, i.e. the creation of the rights in the collateral and, thirdly, one may address enforceability as against third parties as the perfection of a security interest ("**Act of Disposition**").

(i) Security Undertaking

162 Pursuant to Art. 116 PILA, the parties are free to choose the law applicable to the Security Undertaking and in the context of the Securities Collateral discussed herein, irrespective of the interest that the parties agree to create as per such Security Undertaking. The choice of English law to govern the Title Transfer Provisions with respect to the Security Undertaking embedded therein would, hence, be recognized and an Insolvency Representative or court in this jurisdiction would have regard to English law, as the governing law of the Title Transfer Provisions.

(ii) Act of Disposition - Creation of security interest

163 With effect as from January 1, 2010 Switzerland has implemented the Hague Convention by adding Art. 108(a) through (d) PILA.[16]

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[16] Until the Hague Convention comes into force, the provisions that are incorporated into the PILA by reference constitute autonomous Swiss private law conflict rules.

Art. 108 (a) PILA defines Intermediated Securities as securities that are held with an intermediary within the meaning of the Hague Convention and Art. 108 (c) stipulates that the Hague Convention applies as to the law applicable to Intermediated Securities. 164

Pursuant to the Hague Convention any securities, such as any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein, which are held with an intermediary qualify as Intermediated Securities under the Hague Convention. The Hague Convention defines Intermediated Securities ("*securities held with an intermediary*") as the rights of an account holder resulting from the credit of securities to a securities account. 165

The Hague Convention and thereby Art. 108 (a)-(d) PILA solely deal with the creation of a security interest (act of disposition) in Intermediated Securities not the Security Undertaking, which remains governed by Art. 116 PILA. Where security collateral consists of Intermediated Securities, Art. 108 (a)-(d) PILA are applicable to the exclusion of the other provisions of the PILA dealing with the creation of security interests in security collateral other than Intermediated Securities. 166

Hence, for purposes of the conflicts of law analysis, the first question is whether the security collateral consists of Intermediated Securities: 167

Art. 108 (c) PILA states that the law applicable to Intermediated Securities is determined in accordance with the Hague Convention. 168

The key provision of the Hague Convention is Art. 4 where it is stated that, in principle, if the accountholder and the intermediary have expressly agreed on a law in their account agreement, the chosen law governs all the issues that are covered by the Hague Convention, which is the law applicable to the creation of a security interest in intermediated securities.[17] 169

[17] Art. 4 of the Hague Convention thereby applies a modified version of the place of relevant intermediary approach (PRIMA). Not the law of the state of the location of the securities account, which in practice often times can hardly be determined, but the law the accountholder and the intermediary have agreed on in the account agreement is the law applicable. Though probably of little practical relevance, according to this article, the accountholder and the intermediary could alternatively agree that a different law than the law agreed to govern the account agreement shall govern specifically all those issues that fall within the scope of the Hague Convention.

In both instances, though, such law only applies if at the time of such choice of law the intermediary has an office qualifying under the Hague Convention in the country of the chosen law (so-called *reality test*). For purposes of the Hague Convention, hence, the choice of law is limited and it is legally speaking a choice made between the accountholder and the intermediary, not between the parties to the security undertaking. 170

In the context of this legal opinion, the relevant account to be considered is the securities account of the Margin Provider where the intermediated securities remain booked to the Margin Provider's securities account, whereas it is the securities account of the Collateral Taker where the intermediated securities are transferred to the account of the Collateral Taker to create such security interest. 171

If no law has been chosen or if the chosen law does not satisfy the requirements of the Hague Convention (see n. 170 above) there is a cascade of laws that may apply in the following order: 172

- the law applicable at the place of the particular office through which the intermediary acted when entering into the account agreement; 173
- the law of the relevant intermediary's incorporation or organisation; 174
- the law of the relevant intermediary (principal) place of business (Art. 4 and 5 Hague Convention). 175

3.3 Enforceability of FOA Netting Provision

Based on and subject to the discussion of Close-out Netting and the calculation of a Net Single Amount outside an Insolvency (see n. 48-64 above) and in the context of an Insolvency (see n. 65-84 above) and in relation to an FOA Netting Agreement, or in relation to a Clearing Agreement where the Defaulting Party being a Swiss Party acts as Client, the FOA Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, following an Event of Default, including as a result of the opening of any Insolvency Proceedings: 176

3.3.1 the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and 177

3.3.2 the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual 178

Transactions.

We are of this opinion because:

(A) Outside the Insolvency of the Swiss Party

179 The termination of all Transactions under a FOA Netting Agreement, or in relation to a Clearing Agreement due to an Event of Default is enforceable under Swiss law.

180 The calculation of the Liquidation Amount and payment thereof by the Defaulting Party (if the net amount is positive) or by the Non-Defaulting Party (if the net amount is negative) under the FOA Netting Provision is enforceable under Swiss law.

(B) In the context of an Insolvency of the Swiss Party

181 In our view and as discussed in further detail (see n. 65 et seq. and 72et seq. above) such termination is also enforceable where the Event of Default is the result of the opening of an Insolvency Proceeding against the Swiss Party.

182 We note the uncertainty discussed with respect to an optional termination, though and recommend to have automatic early termination apply with respect to Insolvency related Events of Default, such that the FOA Netting Agreement or Clearing Agreement would be automatically terminated upon the opening of an Insolvency Proceeding.

183 In our view and as discussed in further detail (see n. 72 and 79 et seq. above), the calculation of the Liquidation Amount is also enforceable where the Event of Default is the result of the opening of an Insolvency Proceeding against the Swiss Party.

184 We note, though, that (i) the calculation of the Liquidation Amount may need to be made as of the time of the opening of a bankruptcy (*Konkurseröffnung)* or the confirmation of a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*) (see n. 79 above), (ii) a claim of the solvent party under the Agreement for a Liquidation Amount denominated in a currency other than Swiss Francs would need to be converted into Swiss Francs as of the date of the adjudication of bankruptcy (in case of bankruptcy) or as of the date of confirmation of the composition agreement (in case of a composition

agreement with assignment of assets) and (iii) no interest may be charged on the Liquidation Amount (see n. 84 above).

Further, except in respect of a Bank or a Securities Dealer (see n. 141 et seq.) 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. 185

No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 3.3 to apply. 186

3.4 Enforceability of the Clearing Module Netting Provision

Based on and subject to the discussion of Close-out Netting and the calculation of a Net Single Amount outside an Insolvency (see n. 48-64 above) and in the context of an Insolvency (see 65-84 above) and 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: 187

3.4.1 a Firm Trigger Event with respect to a Swiss Firm, 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. 188

We are of this opinion because:

(A) Outside an Insolvency in respect of the Swiss Firm and in the absence of temporary stay order

Outside an Insolvency and in the absence of a temporary stay ordered by the FINMA with respect to such termination rights (see n. 141 et seq.) with respect to the Swiss Firm, the termination of individual Client Transactions following the occurrence of a Firm Trigger Event in accordance with Clearing Module Netting Provision, i.e. Client Transactions in a relevant Cleared Transaction Set, and the underlying agreement of the Parties to thereby override the termination provisions applicable to the Client Transactions outside a Firm Trigger Event, are enforceable under Swiss law. 189

Outside an insolvency of the Swiss Firm, the calculation of the Cleared Set Termination Amount in respect of the Client Transactions in a relevant Cleared 190

Transaction Set, and the agreement that for calculating the applicable Cleared Set Termination Amount the value of each such terminated Client Transaction shall be equal to the relevant Firm/CCP Transaction Value, and the underlying agreement of the Parties to thereby override the valuation provisions applicable to the Client Transactions outside a Firm Trigger Event, are enforceable under Swiss law.

(B) In the context of an Insolvency with respect to the Swiss Firm or in case of a temporary stay order

191 In our view and as discussed in further detail (see n. 65 et seq. and 72et seq. above) a termination is also enforceable where the Firm Trigger is the result of the opening of an Insolvency Proceeding against the Swiss Firm.

192 In case of a corresponding order by the FINMA, such termination could, however, be subject to the temporary stay in accordance with Art. 57 BIO-FINMA (see n. 141 et seq.).

193 We note the uncertainty discussed with respect to an optional termination, though, (see n. 76) and recommend to have automatic early termination apply with respect to Insolvency related Firm Trigger Event, such that the Firm/CCP Transactions and thereby the corresponding Client Transactions would be automatically terminated upon the opening of an Insolvency Proceeding in respect of the Swiss Firm. While the termination of the individual Client Transactions is the automatic result of a termination by the CCP of the corresponding Firm/CCP Transaction as a result of a Firm Event Trigger, unless such termination is an automatic early termination as of the date of the opening of bankruptcy with respect to the Swiss Firm, such termination would in our view need to be treated as an optional termination both for the Firm/CCP Transaction and for the corresponding Client Transaction.

194 In our view and as discussed in further detail (see n. 72 and 79 et seq. above) above the calculation of the Cleared Set Termination Amount in respect of the Client Transactions in the Cleared Transaction Set is also enforceable where the Firm Trigger Event is the result of the opening of an Insolvency Proceeding against the Swiss Firm.

195 We note, though, that (i) the calculation of the Cleared Set Termination Amount may need to be made as of the time of the opening of the bankruptcy (*Eröffnung Bankenkonkurs)* (see n. 79 above), (ii) a claim of the solvent party for a Cleared

Set Termination Amount denominated in a currency other than Swiss Francs would need to be converted into Swiss Francs as of the date of the adjudication of bankruptcy of the Swiss Firm and (iii) no interest may be charged on the Cleared Set Termination Amount (see n. 84 above) (see n. 65 above as to the discussion about the dispositive nature of the calculation method set out by Art. 211 para. 2bis SDEBA).

3.4.2 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. 196

We are of this opinion because:

Assuming that there is only a CCP Default but no Insolvency related Firm Trigger Event, the reasons set-out above (n. 189) apply. 197

In case of both a CCP Default and an Insolvency related Firm Trigger Event, the reasons set-out above (n. 191-196) apply. We note that where the CCP Default determines the timing of the termination and netting under the Hierarchy of Events, the Client Transactions may already be terminated and the calculation of the Cleared Set Termination Amount may already have occurred when the Insolvency is opened in respect of the Swiss Firm. Still any Liquidation Amount to be paid to the Client and is filed in the Swiss Firm's Insolvency Proceeding, would remain subject to the obligation to translate any non Swiss franc amount into a Swiss franc amount as of the opening of bankruptcy and no interest would be payable on such Liquidation Amount. 198

3.5 Enforceability of the Addendum Netting Provision

Based on and subject to the discussion of Close-out Netting and the calculation of a Net Single Amount outside an Insolvency (see n. 48-64 above) and in the context of an Insolvency (see 65-84 above) and 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: 199

3.5.1 CM Trigger Event with respect to a Swiss Clearing Member, the Parties would be entitled to receive or obliged to pay only the net sum of the positive and negative 200

mark-to-market values of the relevant individual Client Transactions that are terminated in accordance with the Clearing Agreement.

We are of this opinion because:

(A) Outside an Insolvency in respect of the Swiss Clearing Member and in the absence of temporary stay order

201 Outside an Insolvency and in the absence of a temporary stay ordered by the FINMA with respect to such termination rights (see n. 141 et seq.) with respect to the Swiss Clearing Member, the termination of individual Client Transactions following the occurrence of a CM Trigger Event in accordance with the Addendum Netting Provision, i.e. Client Transactions in a relevant Cleared Transaction Set, and the underlying agreement of the Parties to thereby override the termination provisions applicable to the Client Transactions outside a CM Trigger Event, are enforceable under Swiss law.

202 Outside an insolvency of the Swiss Clearing Member, the calculation of the Cleared Set Termination Amount in respect of the Client Transactions in a relevant Cleared Transaction Set, and the agreement that for calculating the applicable Cleared Set Termination Amount the value of each such terminated Client Transaction shall be equal to the relevant CM/CCP Transaction Value or the relevant part thereof, and the underlying agreement of the Parties to thereby override the valuation provisions applicable to the Client Transactions outside a CM Trigger Event, are enforceable under Swiss law.

(B) In the context of an Insolvency with respect to the Swiss Clearing Member or in case of a temporary stay order

203 In our view and as discussed in further detail (see n. 65 et seq. and 72et seq. above) a termination is also enforceable where the Firm Trigger is the result of the opening of an Insolvency Proceeding against the Swiss Clearing Member.

204 In case of a corresponding order by the FINMA, such termination could, however, be subject to the temporary stay in accordance with Art. 57 BIO-FINMA (see n. 141 et seq.).

205 We note the uncertainty discussed with respect to an optional termination, though, (see n. 76) and recommend to have automatic early termination apply with respect to Insolvency related CM Trigger Event, such that the CM/CCP Transactions and thereby the corresponding Client Transactions would be

automatically terminated upon the opening of an Insolvency Proceeding in respect of the Swiss Clearing Member. While the termination of the individual Client Transactions is the automatic result of a termination of a CM/CCP Transaction or if such CM/CCP Transaction is Transferred by the CCP as a result of a Firm Event Trigger, unless such termination is an automatic early termination as of the date of the opening of bankruptcy with respect to the Swiss Clearing Member, such termination would in our view need to be treated as an optional termination both for the Firm/CCP Transaction and for the corresponding Client Transaction.

206 In our view and as discussed in further detail (see n. 72 and 79 et seq. above) above the calculation of the Cleared Set Termination Amount in respect of the Client Transactions in the Cleared Transaction Set is also enforceable where the CM Trigger Event is the result of the opening of an Insolvency Proceeding against the Swiss Clearing Member.

207 We note, though, that (i) the calculation of the Cleared Set Termination Amount may need to be made as of the time of the opening of the bankruptcy (*Eröffnung Bankenkonkurs)* (see n. 79 above), (ii) a claim of the solvent party for a Cleared Set Termination Amount denominated in a currency other than Swiss Francs would need to be converted into Swiss Francs as of the date of the adjudication of bankruptcy of the Swiss Clearing Member and (iii) no interest may be charged on the Cleared Set Termination Amount (see n. 84 above) (see n. 65 above as to the discussion about the dispositive nature of the calculation method set out by Art. 211 para. 2bis SDEBA).

3.5.2 208 a CCP Default, the Parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of the relevant individual Client Transactions that are terminated in accordance with the Clearing Agreement.

We are of this opinion because:

209 Assuming that there is only a CCP Default but no Insolvency related CM Trigger Event, the reasons set-out above (n. 189 apply 190).

210 In case of both a CCP Default and an Insolvency related CM Trigger Event , the reasons set-out above (n. 191-196) apply. We note that where the CCP Default determines the timing of the termination and netting under the Hierarchy of Events, the Client Transactions may already be terminated and the calculation of

the Cleared Set Termination Amount may already have occurred when the Insolvency is opened in respect of the Swiss Clearing Member. Still any Liquidation Amount to be paid to the Client and is filed in the Swiss Clearing Member's Insolvency Proceeding, would remain subject to the obligation to translate any non Swiss franc amount into a Swiss franc amount as of the opening of bankruptcy and no interest would be payable on such Liquidation Amount.

3.6 Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision 211

In relation to a Clearing Agreement, the opinions expressed at paragraph 3.3 above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement. In a case where a Party, who would (but for the use of the FOA Clearing Agreement or the ISDA/FOA Clearing Agreement) be the Defaulting Party for the purposes of the FOA Netting Agreement, acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the 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 (see n. 189 through 190, n. 201 and 208 respectively). 212

3.7 Enforceability of the FOA Set-Off Provisions 213

Based on and subject to the discussion of set-off outside an Insolvency (see n. 48-64 above) and in the context of an Insolvency (see n. 80 above): 214

3.7.1 in relation to a FOA Netting Agreement which includes the FOA Set-Off Provisions, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their 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: 215

(a) where the FOA Set-Off Provisions include the General Set-Off Clause: 216

(i) 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 217

(ii) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or 218

(b) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client). 219

We are of this opinion because:

(A) Outside the Insolvency of the Swiss Party

Set-off under a FOA Netting Agreement, or in relation to a Clearing Agreement is enforceable under Swiss law. 220

This is subject to the assumption that the claims of the Parties to be set-off are mutual (see paragraph 2.9, n. 36) and are claims for a sum of money. 221

(B) In the context of an Insolvency of the Swiss Party

Set-off remains available in case of an Insolvency of a Swiss Party subject to the requirements of a Swiss law unilateral set-off are satisfied (see n. 51), i.e. the claims of the Parties to be set-off are mutual (as is assumed see paragraph 2.9, n. 36) and are claims for a sum of money, the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid) and the counterclaim must be due. 222

Set-off is further subject to the particular limitations that such mutuality must have been in place at such time as a bankruptcy was opened (*Konkurseröffnung*) or a composition agreement with assignment of assets was confirmed (*Bestätigung Nachlassverfahren mit Vermögensabtretung*) and such mutuality may not have been achieved fraudulently within the meaning of Art. 213 and 214 SDEBA (see n. 80 above). 223

No amendments to the General set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 to apply. 224

Based on and subject to the discussion of set-off outside an Insolvency (see n. 48-64 above) and in the context of an Insolvency (see 80 above): 225

3.7.2 in relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default in respect of the Client, the Firm or, as the case may be, the Clearing Member as 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 226

(a) where the FOA Set-Off Provisions includes the General Set-Off Clause: 227

(i) the value of any cash balance owed by the Firm or, as the case may be, the Clearing Member to the Client would be set off against the Liquidation Amount (where such liquidation amount is owed by the Client); or 228

(ii) the value of any cash balance owed by the Client to the Firm or, as the case may be, the Clearing Member would be set off against the Liquidation Amount (where such liquidation amount is owed by the Firm or, as the case may be, the Clearing Member); or 229

(b) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm or, as the case may be, the Clearing Member to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client). 230

We are of this opinion because: 231

(A) Outside the Insolvency of the Swiss Party

Set-off under a FOA Netting Agreement, or in relation to a Clearing Agreement is enforceable under Swiss law. 232

This is subject to the assumption that the claims of the Parties to be set-off are mutual (see paragraph 2.9, n. 36) and are claims for a sum of money. 233

(B) In the context of an Insolvency of the Swiss Party

Set-off remains available in case of an Insolvency of a Swiss Party subject to the requirements of a Swiss law unilateral set-off are satisfied (see n. 51), i.e. the claims of the Parties to be set-off are mutual (as is assumed see paragraph 2.9, n. 234

36) and are claims for a sum of money, the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid) and the counterclaim must be due.

Set-off is further subject to the particular limitations that such mutuality must have been in place at such time as a bankruptcy was opened (*Konkurseröffnung*) or a composition agreement with assignment of assets was confirmed (*Bestätigung Nachlassverfahren mit Vermögensabtretung*) and such mutuality may not have been achieved fraudulently within the meaning of Art. 213 and 214 SDEBA (see n. 80 above). 235

No amendments to the General set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.2 to apply. 236

3.8 Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision 237

Based on and subject to the discussion of set-off outside an Insolvency (see n. 48-64 above) and in the context of an Insolvency (see n. 80 above): 238

3.8.1 in relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provision is a Disapplied Set-Off Provision, 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: 239

(a) if the Client is a Defaulting Party, so that the value of any cash balance owed by the Firm to the Client would be set-off against any Liquidation Amount owed by the Client to the Firm; and 240

(b) if there has been a Firm Trigger Event or a CCP Default, so that the value of any cash balance owed by one Party to the other would, insofar as not already brought into account as part of the Relevant Collateral Value, be set off against any Available Termination Amount owed by the Party entitled to receive the cash balance. 241

We are of this opinion because:

(A) Outside the Insolvency of the Swiss Party

Set-off under the Clearing Module Set-Off Provision is enforceable under Swiss 242

law.

This is subject to the assumption that the claims of the Parties to be set-off are mutual (see paragraph 2.9, n. 36) and are claims for a sum of money. 243

(B) In the context of an Insolvency of the Swiss Party

Set-off remains available in case of an Insolvency of a Swiss Party subject to the requirements of a Swiss law unilateral set-off are satisfied (see n. 51), i.e. the claims of the Parties to be set-off are mutual (as is assumed see paragraph 2.9, n. 36) and are claims for a sum of money, the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid) and the counterclaim must be due. 244

Set-off is further subject to the particular limitations that such mutuality must have been in place at such time as a bankruptcy was opened (*Konkurseröffnung*) or a composition agreement with assignment of assets was confirmed (*Bestätigung Nachlassverfahren mit Vermögensabtretung*) and such mutuality may not have been achieved fraudulently within the meaning of Art. 213 and 214 SDEBA (see n. 80 above). 245

No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 239 to apply. 246

Based on and subject to the discussion of set-off outside an Insolvency (see n. 48-64 above) and in the context of an Insolvency (see n. 80 above): 247

3.8.2 in relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision for which the FOA Set-Off Provision (insofar as constituting part of the FOA Netting Agreement) is not a Disapplied Set-Off Provision, the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 239 above; and the FOA Set-Off Provision will, to the extent that set-off is not already covered by the Clearing Module Set-Off Provision, be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 3.7.1 above. 248

3.9 Set-Off under a Clearing Agreement with an Addendum Set-Off Provision 249

Based on and subject to the discussion of set-off outside an Insolvency (see n. 48-64 250

above) and in the context of an Insolvency (see n. 80 above):

3.9.1 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 CM Trigger Event (as defined in the ISDA/FOA Clearing Addendum) or a CCP Default (as defined in the ISDA/FOA Clearing Addendum): 251

(a) in the case of a CM Trigger Event, the Client (as defined in the ISDA/FOA Clearing Addendum); or 252

(b) in the case of a CCP Default, either Party (the "**Electing Party**"), 253

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. 254

We are of this opinion because: 255

(A) Outside the Insolvency of the Swiss Party

Set-off under the Addendum Set-Off Provision is enforceable under Swiss law. 256

This is subject to the assumption that the claims of the Parties to be set-off are mutual (see paragraph 2.9, n. 36) and are claims for a sum of money. 257

(B) In the context of an Insolvency of the Swiss Party

Set-off remains available in case of an Insolvency of a Swiss Party subject to the requirements of a Swiss law unilateral set-off are satisfied (see n. 51), i.e. the claims of the Parties to be set-off are mutual (as is assumed see paragraph 2.9, n. 36) and are claims for a sum of money, the party invoking the set-off must be entitled to discharge its obligation (e.g. debt must be due or may be pre-paid) and the counterclaim must be due. 258

Set-off is further subject to the particular limitations that such mutuality must have been in place at such time as a bankruptcy was opened (*Konkurseröffnung*) 259

or a composition agreement with assignment of assets was confirmed (*Bestätigung Nachlassverfahren mit Vermögensabtretung*) and such mutuality may not have been achieved fraudulently within the meaning of Art. 213 and 214 SDEBA (see n. 80 above).

No amendments to the Addendum Set-Off Provision are necessary in order for the opinions expressed in this paragraph 249 to apply. 260

3.10 Enforceability of the Title Transfer Provisions 261

3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision. 262

We are of this opinion because: 263

(A) Outside the Insolvency of the Swiss Party as Margin Provider

Prior to an Insolvency of the Swiss Party, the Margin Taker would in our view be free to foreclose on the Margin transferred under the Title Transfer Provisions and to liquidate such Margin under the Title Transfer Provisions. In particular the Margin Taker would be free to sell the Margin, including to itself to the extent a market value for such Margin can be established (e.g. if it is of a type customarily sold on a recognized market), outside any statutory procedure and without need to obtain a prior court order to this end. 264

Where the Margin Taker is based on the above free to liquidate the Margin prior to an Insolvency of the Margin Provider, it is our view that the Margin Taker would also be permitted to take into account the Default Margin Amount as calculated pursuant to the terms of the Title Transfer Provisions when determining the Liquidation Amount under the Title Transfer Provisions. The Margin Taker would have to account for any excess Margin. 265

(B) In the context of an Insolvency of the Swiss Party as Margin Provider

Based on the assumptions made with respect to cash, the Swiss Party as Margin Provider would have no rights with respect to such cash other than a contractual claim against the Margin Taker. Hence only the latter claim (for an excess) against the Margin Taker but not the cash as such would constitute an asset in the Insolvency estate of the Swiss Party and the cash Transferred under the Title Transfer Provisions could, hence, still be realized outside the Insolvency Proceedings of the Swiss Party and, therefore, could still be accounted for as Default Margin Amount in the calculation of the Liquidation Amount following an Insolvency of the Swiss Party. The Margin Taker would have to account for any excess Margin. 266

Securities Margin that has been Transferred under the Title Transfer Provisions would for purposes of the Swiss law analysis (Swiss insolvency law and conflicts of laws) be treated as the equivalent of a Swiss law full right transfer for security purposes (if no right of re-hypothecation or use is granted to the Margin Taker and the Margin Taker has to return identical rather than equivalent Securities) or an irregular pledge (if a right of re-hypothecation or use is granted to the Margin Taker and the Margin Taker merely has to return equivalent Securities) and in both instances the Securities Transferred under the Title Transfer Provisions would not constitute assets of the Insolvency estate of the Swiss Party and, hence, could still be realized outside the Insolvency Proceedings of the Swiss Party. 267

Where the Margin Taker is based on the above free to liquidate the Securities Margin outside the Insolvency Proceedings, Securities Margin could still be accounted for as Default Margin Amount in the calculation of the Liquidation Amount following an Insolvency of the Swiss Party. The Margin Taker would have to account for any excess Margin to the relevant administration and participates in such procedures to the extent of its exposure remaining unpaid after the liquidation of the Margin. 268

3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value. 269

We are of this opinion because:

(A) Outside the Insolvency of the Swiss Firm/Swiss Clearing Member as Margin Provider

The agreement of the Parties to waive any return obligation and instead taking account of Margin as part of the Relevant Collateral Value is enforceable under Swiss law outside a Swiss Insolvency Proceeding. The Margin Taker would have to account for any excess Margin. 270

(B) In the context of an Insolvency of the Swiss Firm/Swiss Clearing Member as Margin Provider

Based on the assumptions made with respect to cash, the Swiss Firm/Swiss Clearing Member would have no rights with respect to such cash other than a contractual claim against the Margin Taker. Hence only the latter claim (for an excess) against the Margin Taker but not the cash as such would constitute an asset in the Insolvency estate of the Swiss Firm/Swiss Clearing Member and the cash Transferred under the Title Transfer Provisions could, hence, still be realized outside the Insolvency Proceedings of the Swiss Firm/Swiss Clearing Member and, therefore, could still be accounted for as part of the Relevant Collateral Value following an Insolvency of the Swiss Firm/Swiss Clearing Member. The Margin Taker would have to account for any excess Margin. 271

Securities Margin that has been Transferred under the Title Transfer Provisions would for purposes of the Swiss law analysis (Swiss insolvency law and conflicts of laws) be treated as the equivalent of a Swiss law full right transfer for security purposes (if no right of re-hypothecation or use is granted to the Margin Taker and the Margin Taker has to return identical rather than equivalent Securities) or an irregular pledge (if a right of re-hypothecation or use is granted to the Margin Taker and the Margin Taker merely has to return equivalent Securities) and in both instances the Securities Transferred under the Title Transfer Provisions would not constitute assets of the Insolvency estate of the Swiss Firm/Swiss Clearing Member and, hence, could still be realized outside the Insolvency Proceedings of the Swiss Firm/Swiss Clearing Member. 272

Where the Margin Taker is based on the above free to liquidate the Margin outside the Insolvency Proceedings, Securities Margin could still be accounted for as part of the Relevant Collateral Value following an Insolvency of the Swiss Firm/Swiss Clearing Member. 273

The Margin Taker would have to account for any excess Margin to the relevant administration and participates in such procedures to the extent of its exposure remaining unpaid after the liquidation of the Margin. 274

3.10.3 The courts of this jurisdiction may recharacterise Transfers of Margin under the Title Transfer Provisions of a FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest, but this would not adversely affect the opinions given at para. 3.2.3, 3.10.1 or 3.10.2. 275

We are of this opinion because:

Under Swiss substantive law, a contractual agreement is characterized not primarily according to the wording chosen by the parties but rather according to the real intentions of the parties as mutually understood or to be understood in good faith. In view of the fact that the economic purpose of the Transfer of Margin is to provide for security in favor of the Margin Taker, it cannot be excluded that a Swiss court might consider the real intention of the parties to be the creation of a security interest. While such recharacterization might otherwise be relevant for determining the appropriate conflict of laws issues, it is not relevant in the case of Margin in the form of cash or the Securities being intermediated securities within the meaning of the Hague Convention. 276

The question of a recharacterization and, if applicable, its consequences will be governed by the substantive rules of the law applicable pursuant to the provisions of the PILA. If Swiss substantive law were to apply, such recharacterization would not have any negative consequences as an outright transfer of ownership, and an outright assignment of a claim, conferring full rights and title to the transferee, with the right of the transferee to dispose of the relevant assets, is regarded as a valid means to create a security interest by means of an irregular pledge. 277

3.10.4 A Party shall be entitled to use or invest for its own benefit, as outright owner and without restriction, any Margin Transferred to it pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions. 278

We are of this opinion because:

Such rights are governed by the laws governing the Title Transfer Provisions, i.e. English law, and if legal, valid binding and enforceable between the Parties as a matter of English law would also enforceable in this jurisdiction. 279

No amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.10 to apply. 280

3.11 Use of security interest margin not detrimental to Title Transfer Provisions 281

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 261 (*Enforceability of the Title Transfer Provisions*) in relation to the Title Transfer Provisions are not affected by the use of the Security Interest Provisions (whether in respect of non-cash margin and/or cash margin) as part of a FOA Netting Agreement (with Title Transfer Provisions), or as part of a Clearing Agreement which includes the Title Transfer Provisions, provided always that: 282

(i) a provision in the form of, or with equivalent effect to, Clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest provisions or the Title Transfer Provisions apply in respect of any given item of margin so that it is not possible for both the security interest provisions and the Title Transfer Provisions to apply simultaneously to the same item of margin; and 283

(ii) the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated. 284

Being understood that our opinion in paragraph 261 (*Enforceability of the Title Transfer Provisions*) remains limited to Margin in the form of cash or Securities Transferred under the Title Transfer Provisions. 285

3.12 Single Agreement

Under the laws of this jurisdiction it is not necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision to be enforceable. In our view, if under English law governing the FOA Netting Agreement or, as the case may be, the Clearing Agreement, the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions are part of a single agreement, this would also be recognized in this jurisdiction. 286

3.13 Automatic Termination

Based on what is set out above under n. 76 through n. 78 (including by way of reference), 287

it is strongly recommended for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision to ensure the effectiveness of netting under the FOA Netting Agreement or, as the case may be, the Clearing Agreement in the event of bankruptcy, liquidation, or other similar circumstances.

3.14 Multibranch Parties

Subject to the discussion under n. 109 through 115, we do not consider that the use of the FOA Netting Agreement or, as the case may be, the Clearing Agreement by a party with branches in a number of different jurisdictions, including some where netting may not be enforceable would jeopardise the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions in so far as the laws of this jurisdiction are concerned. In particular, there is no danger that an Insolvency Representative of a defaulting party could treat the obligations in respect of Transactions entered into in this jurisdiction separately from other obligations arising under the FOA Netting Agreement or, as the case may be, the Clearing Agreement or other Transactions. 288

3.15 Insolvency of Foreign Parties

Subject to the discussion under 109 through 115, where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default or a Firm Trigger Event or, as the case may be, a CM Trigger Event occurs in respect of such Party (a "**Foreign Defaulting Party**") the Foreign Defaulting Party can be subject to Insolvency Proceedings in this jurisdiction. 289

3.16 Special legal provisions for market contracts

There are to date no special provisions of law which would affect the opinions given in this paragraph 3 which would apply to a Transaction between two Parties as a result of the fact that such Transaction was entered into on, or is back-to-back with a Transaction entered into on an exchange (in this or another jurisdiction), or is cleared at, or is back-to-back with a transaction to be cleared by a central counterparty. 290

4. Qualifications

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

a) The opinions expressed at paragraph 3B in this opinion letter are to be read in conjunction with and shall be deemed qualified by the discussion of the relevant opinion items at paragraph 3A and 3B. 291

b) This memorandum of law is limited to Swiss law as in force and interpreted at the date hereof. 292

c) The meaning and sense of certain concepts of Swiss law and expressions which are used herein and on which this memorandum of law is based do not necessarily equal the meaning and sense of concepts and expressions in the reader's jurisdiction. It is assumed by us that all words and expressions in the FOA Netting Agreements, FOA Clearing Module and/or ISDA/FOA Clearing Addendum are to be understood in accordance with their plain meaning and without regard of any import they may have under any other applicable laws and in particular the laws of England. 293

d) This memorandum of law is limited to matters of law and does neither address any factual circumstances or statements of the Parties to FOA Netting Agreements, FOA Clearing Module and/or ISDA/FOA Clearing Addendum, whether contained in representations or warranties of the Parties thereunder or otherwise, nor any tax matters, including without limitation any tax, regulatory or accounting consequences of the entering into, execution and delivery of, and performance under FOA Netting Agreements, FOA Clearing Module and/or ISDA/FOA Clearing Addendum. 294

e) We have not reviewed the terms of any Transaction and consequently no opinion whatsoever is expressed in relation thereto. We note, in particular, that a wide variety of Transactions can be entered into under the FOA Netting Agreements, FOA Clearing Module and/or ISDA/FOA Clearing Addendum. 295

f) This memorandum of law assumes that no law other than Swiss law would affect or qualify the opinions expressed herein. 296

g) While a qualification of Art. 211 para. 2bis SDEBA as a substantive rather than as a procedural rule does not in our view *eo ipso* exclude its modification by contract, if the calculation method and automatic termination as set out in Art. 211 para. 2bis SDEBA, against our view and against what we view as the prevailing opinion, would be held to be mandatory by a Swiss court, this would trigger mandatory 297

Close-out for all Cleared Transaction Sets (see n. 190 above), i.e. be applicable for the calculation of the Cleared Set Termination Amount in respect of all the Client Transactions, and, therefore, terminate all transactions as per the opening of bankruptcy.

h) The exercise of a termination right and as a consequence netting and set-off Clearing discussed at para. 3.3, 3.4 and 3.5 could be subject to the temporary stay referred to above (see n. 141-146). 298

i) Netting and set-off discussed at para. 3.3, 3.4 and 3.5 could be affected by a debt-equity swap referred to above (see n. 148). 299

There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention. 300

This legal opinion is governed by and construed in accordance with Swiss law and shall be subject to the exclusive jurisdiction of the ordinary courts of Zurich, Canton of Zurich, Switzerland. 301

This opinion is given for the sole benefit of the Futures and Options Association and FOA Members. This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation on the basis that we assume no responsibility to such parties or any other person as a result. 302

Yours faithfully,

Lenz & Staehelin

Patrick Hünerwadel

SCHEDULE 1
Insurance Companies

Subject to the modifications and additions set out in this Schedule 1 (*Insurance Companies*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurance Companies as defined under n. 8 and taking into account the exception under n. 7. 303

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule. 304

1. Modifications to Terms of Reference and Definitions

Paragraph 1.6.2 is deemed deleted and replaced with the following: 305

"*"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 1 (Insurance Companies)*".

2. Additional Assumptions

We assume the following:

2.1 It is assumed that separate documents are used in relation to Transactions of each particular pool of an Insurance Company's Allocated Assets (as defined in n. 319) and an Insurance Company's Free Assets (as defined in n. 319) and provide for the necessary waiver of set-off for claims outside a particular pool of Allocated Assets. 306

3. Modifications to Opinions

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion. 307

3.1 Insolvency Proceedings: Insurance Companies

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an Insurance Company could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows: 308

As from January 1, 2006, the regulatory legal framework for Insurance Companies, which used to consist of several separate acts and ordinances, has been merged into the ISA and the implementing ordinance thereto ("**ISO**")[18]. The regulatory treatment of the various business lines of Insurance Companies has thereby been largely harmonized. 309

The ISA and the new Ordinance of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Insurance Companies[19] ("**IBO-FINMA**") that came into force on January 1, 2013 provides for a special bankruptcy and insolvency regime applicable to Insurance Companies. 310

In relation to Insurance Companies, the SDEBA only applies to the extent that there are no applicable special rules pursuant to the ISA and/or IBO-FINMA. The SDEBA rules regarding composition proceedings (*Nachlassstundung*) within the meaning of Art. 293 et seq. SDEBA are disapplied altogether with respect to Insurance Companies. 311

Pursuant to the ISA, bankruptcy is declared and made public by the FINMA if it has reasonable grounds of concern that an Insurance Company is over-indebted *(Begründete Besorgnis der Überschuldung*) and there is no prospect of restructuring the Insurance Company (*Aussicht auf Sanierung*). The bankruptcy proceedings are carried out and the bankruptcy estate is managed by a special liquidator which is to be appointed by the FINMA (*Konkursliquidator*). 312

In addition, the FINMA is granted the competence to deviate from the SDEBA rules where it deems it appropriate. 313

We note in particular that the IBO-FINMA grants a liquidator appointed by the FINMA (*Konkursliquidator*) the power to challenge certain arrangements or dispositions made by the insolvent Insurance Company. The liquidator has to examine *ex officio* whether certain arrangements or dispositions made by the insolvent Insurance Company may be subject to challenge. In calculating the lapse of the suspect period, the duration of a preceding reorganization (*Sanierung*) or of preceding reorganization measures (*Sanierungsmassnahmen*) as per Art. 51 ISA are not counted. If the liquidator concludes that certain arrangements or dispositions may be subject to challenge, the liquidator requires the approval of the FINMA in order to initiate the respective court proceedings. If 314

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[18] Verordnung über die Beaufsichtigung von privaten Versicherungsunternehmen (AVO), SR 961.011.

[19] Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von Versicherungsunternehmen (Versicherungskonkursverordnung-FINMA, VKV-FINMA), SR 961.015.2.

FINMA refuses to approve, or the liquidator declines to initiate, such proceedings, the respective claims are to be offered to the creditors for assignment, all in accordance with Art. 260 SDEBA.

315 The ISA further provides for comprehensive rights of the FINMA to order or take precautionary measures in case an Insurance Company does not comply with the solvency requirements or if it seems otherwise warranted in the circumstances to safeguard the interests of the insured persons.

316 Pursuant to Art. 51 ISA, the FINMA can, *inter alia*, take the following protective measures, which are of interest in the context discussed herein:

- limit the right of an Insurance Company to dispose of its assets;
- order a freezing of assets or order that such assets be deposited with a third party (freezing);
- transfer the powers of corporate bodies of an Insurance Company to third parties;
- order that an insurance portfolio be transferred to another insurance company together with the pertaining Allocated Assets (transfer of assets);
- order the liquidation of a pool of Allocated Assets (liquidation of allocated assets);
- allocate free assets to a pool of Allocated Assets;
- in the case of a threatening insolvency order a moratorium and payment deferral.

317 Finally, with regard to the recognition of foreign insolvency decisions, Art. 54d ISA refers to the relevant provision of the Banking Act (see n. 151 above).

318 Such measures could affect the Insurance Company's ability to provide collateral, irrespective of whether the underlying security agreement is to be qualified as an unconditional transfer of title in the assets or as an irregular or regular pledge.

319 An Insurance Company must at all times allocate qualifying assets to a segregated pool of assets in order to cover insurance claims (Art. 17 ISA). While in the past the rules on the security fund of a Swiss life insurance and on the allocated assets (*gebundenes Vermögen*) of a Swiss casualty insurance were not totally identical, the rules applicable to, and the designation as allocated assets (*gebundenes Vermögen*) (the "**Allocated Assets**") have now in respect of the issues relevant in this context, been harmonized for all insurance categories. An Insurance Company has to form separate pools of Allocated Assets in respect of certain business lines (Art. 77 ISO) and we understand from the regulator (prior to January 2009, the Swiss Federal Office of Private Insurance, merged into the FINMA

with effect as from January 2009), that an Insurance Company is also free to voluntarily further sub-divide its insurance portfolio and create separate pools of Allocated Assets for each such sub-divided insurance portfolio. Hence, an Insurance Company may have several pools of Allocated Assets. Any assets, which are not so segregated in a particular pool of Allocated Assets, are referred to herein as "**Free Assets**".

320 Due to the particular function of the Allocated Assets as security for insurance claims, only assets which are unencumbered and which are not subject to any right of set-off may as a rule be part of the Allocated Assets (Art. 84 para. 2 ISO)[20]. However, Art. 91 para. 3 ISO explicitly reserves netting in respect of financial derivatives, which form part of one and the same pool of Allocated Assets. While the ISO is not very clear on the point, it was the aim throughout the preparatory work on the ISO that collateral required to secure financial derivatives under a master agreement may also be provided out of the particular pool of Allocated Assets without need to replace such encumbered assets in the Allocated Assets. Pursuant to the FINMA, the above netting exception is, hence, to be read in a broader sense and also allows for collateral for such financial derivatives to be provided from the respective Allocated Assets. The FINMA has confirmed this view in its investment guidelines for Allocated Assets, as last amended December 6, 2012 ("**IGA**")[21]. IGA note 506 et seq. permit the use of Allocated Assets as collateral for derivative transactions forming part of the same pool of Allocated Assets entered into under a qualifying master documentation. A series of documentation requirements have to be met, though.[22]

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20 Art. 84 para. 2 AVO literally stipulates that liabilities which do not form part of Allocated Assets may not be set-off against assets of the Allocated Assets. There are some doubts, though, that such a prohibition to set-off in a mere ordinance is a sufficient legal basis. So it is more likely to be interpreted as a prerequisite for an asset to qualify for the Allocated Assets that it indeed is not exposed to a right of set-off. The FINMA, therefore, also requests that the parties to an ISDA Master Agreement clearly exclude a set-off of claims under an ISDA Master Agreement for Allocated Assets with claims outside such ISDA Master Agreement and that this waiver is meant to be applicable prior and after insolvency of a party (IGA note 495).

21 FINMA Rundschreiben 2008/18 (Anlagerichtlinien Versicherer).

22 Thresholds and minimal transfer amounts need to be kept low and need to take into account the counterparty's rating (IGA note 508-510). Collateral needs to be deposited either in Switzerland or in a foreign jurisdiction that the FINMA has approved for such purposes on the basis of such jurisdiction respecting the particular allocation of Allocated Assets in case of an insolvency of an Insurance Company (for the time being Luxembourg and Belgium) (IGA note 133). Collateral posted by an Insurance Company from its Allocated Assets is still accounted for as part of the Allocated Assets and the Credit Support Document needs to specifically address the fact that the claim for a return of collateral which is part of a pool of Allocated Assets belongs to such pool of Allocated Assets (IGA note 495). Collateral posted by the counterparty is legally attributed to the Allocated Assets and IGA note 513 requires that this be made evident for third parties, but no value may be allocated to it as it constitutes a mere security. Finally, there is a need to keep the various Allocated Assets separate. Hence, the collateral

Furthermore, IGA note 506 provides that if the parties agree on collateral, care be taken that such arrangement be bilateral. Finally, IGA note 499 stipulates that in case of a foreign counterparty, an Insurance Company has to request that such foreign counterparty provide collateral for derivative transactions, if such derivative transactions are to be part of a pool of Allocated Assets. 321

To the extent that the pools of Allocated Assets are not being transferred to another insurance company together with the respective insurance portfolio, but rather liquidated, the proceeds of such liquidation are to be utilized in first priority to discharge the insurance claims secured by such pools of Allocated Assets. As for a bankruptcy (see below), we are of the view, that the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying master agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such Allocated Assets and not from its Free Assets only. 322

The Allocated Assets are also liquidated in the context of the bankruptcy. As mentioned above, though, the proceeds from the liquidation of the Allocated Assets are first to be used to cover the insurance claims secured by the particular Allocated Assets and only the excess becomes part of the bankruptcy estate (Art. 54a and 17 ISA). 323

By allowing that financial derivatives directly form part of a certain pool of Allocated Assets, the new regulatory framework implicitly also allows that there are claims derived from such financial derivatives against the Allocated Assets. This is in particular recognized in Art. 91 para. 3 ISO dealing with netting of derivatives in that it requires that any negative amount be deducted from the value of the Allocated Assets. Hence, in our view the claim of a counterparty of an Insurance Company resulting from a financial derivative entered into under a qualifying master agreement for the purposes of the particular pool of Allocated Assets, is also to be satisfied from such pool's Allocated Assets and recovery therefore is in our view possible from both the specific Allocated Assets on a *pari passu* basis with the respective policyholders and if insufficient from the Free Assets which form part of the bankruptcy estate *pari passu* with all other unsecured and unprivileged creditors of the Insurance Company. 324

The regime applicable to the Allocated Assets of an Insurance Branch is different in that the SIL stipulates that the insurance takers that are to be secured by a particular pool of 325

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needs to be put up for and from a clearly identified pool of Allocated Assets under a separate Master Agreement and Addendum which is specific to such Allocated Assets.

Allocated Assets have an outright pledge at law on such Allocated Assets in accordance with Art. 57 SIL. Any insurance taker or policy holder that wishes to enforce its insurance claim against an Insurance Branch has to prosecute any debt collection proceedings initiated against such Insurance Branch by means of the particular proceeding for the realization of a pledge (*Betreibung auf Pfandverwertung*) and if not paid within an applicable grace period the FINMA will decide as to what assets of the Allocated Assets shall be realized to cover such claim.

Otherwise, the insolvency procedure as such is governed by the general rules of the SDEBA. 326

SCHEDULE 2
Contractual Funds and SICAV

Subject to the modifications and additions set out in this Schedule 2 (*Contractual Funds and SICAV*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Contractual Funds or SICAVs as defined under n. 9 and taking into account the exception under n. 7. 327

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule. 328

1. Modifications to Terms of Reference and Definitions

Paragraph 1.6.2 is deemed deleted and replaced with the following: 329

"*"Insolvency Proceedings" means the procedures listed in section 2.1 of Schedule 2 (Contractual Funds and SICAV)*".

330

2. Modifications to Opinions

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion. 331

2.1 Insolvency Proceedings: Contractual Funds and SICAV

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a Contractual Fund or SICAV could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are as follows: 332

Pursuant to the 2011 amendment to the CISA, and in particular Art. 137 CISA, the FINMA shall declare the bankruptcy of any person licensed under Art. 13 CISA (which, *inter alios*, includes Contractual Funds and SICAVs as discussed below) if there are reasonable concerns (*begründete Besorgnis*) that such person is over-indebted (*überschuldet*) or has serious liquidity problems (*ernsthafte Liquiditätsprobleme*) and if a mere reorganization (*Sanierung*) is not viable or has failed. As for the Insolvency Proceedings, the respective rules applicable to banks and securities dealers pursuant to Art. 33 to 37g Banking Act 333

apply by analogy (Art. 137 para. 3 CISA), and the SDEBA rules regarding composition proceedings (*Nachlassstundung*) pursuant to Art. 293-336 SDEBA are expressly disapplied altogether (Art. 137 para. 2 CISA).

334 The Ordinance of the Swiss Financial Market Supervisory Authority on the Bankruptcy of Collective Investment Vehicles ("**CISBO-FINMA**") came into force on January 1, 2013[23] and provides for a more detailed legal framework in respect of insolvency proceedings of Contractual Funds and SICAVs. Having said this, the CISBO-FINMA adapts the general insolvency regime set by the SDEBA to the particularities of Swiss collective investment vehicles.

335 SICAVs are, following the 2011 amendment of the CISA, subject to the particular insolvency regime of the CISA.

336 A Contractual Fund is not a separate legal entity but merely a separate asset pool. As such, it does not have legal capacity to act and is represented by a Swiss fund management company (the "**Fund Management Company**") in accordance with Art. 28 et seq. CISA. A Fund Management Company must be organized as a joint stock corporation (*Aktiengesellschaft*) and is, following the 2011 amendment of the CISA, subject to the particular insolvency regime of the CISA. A Contractual Fund's assets are held on a fiduciary basis by the applicable Fund Management Company on behalf of such Contractual Fund's investors. Art. 35 CISA accordingly provides that, in case of a bankruptcy of the Fund Management Company, the Contractual Fund's assets are segregated from the Fund Management Company's bankruptcy estate, whereas the bankruptcy estate of the fund management company may withhold assets required to cover any claim that the fund management company has acquired in the due performance of its duties.[24] Whether or not Insolvency proceedings can be initiated against the Contractual Fund itself (as opposed to Insolvency proceedings against the Fund Management Company) is not discussed in Swiss legal doctrine and we are not aware of any precedents. As a general rule under Swiss law, Insolvency proceedings with respect to entities lacking the legal capacity to act are to be sought against the legal entity representing the entity. An exception is made for certain of those entities, however, and Insolvency proceedings can be instituted directly against them notwithstanding they lack legal capacity to act. It is common to all those exceptions though that the law explicitly provides that such entities

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23 Verordnung der Eidgenössischen Finanzmarktaufsicht über den Konkurs von kollektiven Kapitalanlagen (Kollektivanlagen-Konkursverordnung-FINMA, KAKV-FINMA), SR 951.315.2.

24 The CISBO-FINMA provides for the possibility to transfer a contractual investment vehicle to a solvent fund management company.

are (deemed to be) vested with legal capacity to act. This is not the case for a Contractual Fund. We, therefore, believe that Insolvency proceedings sought against a Contractual Fund directly would have to be rejected. We note that this question is of no relevance if, and we recommend that, the documentation for transactions with such counterparties is drafted such that an event of default is triggered if the relevant event arises with respect to either the Contractual Fund itself or with respect to the applicable Fund Management Company (e.g. by making the Fund Management Company a Specified Entity in relation to the Contractual Fund).

337 The CISA provides for an array of supervisory instruments that seem noteworthy in the context of Transactions entered into with Collective Investment Vehicles.

338 The FINMA, as the supervisory authority, has the general right to provide measures necessary to address any irregularities of Collective Investment Vehicles with a view to restore the proper state of affairs. While the law does not provide for a catalogue of possible measures it does provide that the FINMA can, in the sense of an *ultima ratio* measure, withdraw authorizations and approvals and can order the dissolution (e.g. if the minimum assets fall below the required amount).

339 We further note that according to the CISO[25], the FINMA may, in case of a dissolution of a Contractual Fund or of a SICAV respectively (e.g. as a result of a withdrawal of approval), order the transfer of the assets and in the case of a Contractual Fund the fund contract to a suitable new Fund Management Company or custodian bank.

340 While, as mentioned above, no precedents are available as of the date hereof with respect to the supervisory instruments available under the CISA, we believe that the FINMA will largely continue the practice developed under the predecessor law. In particular, the general administrative law principles (e.g. principle of proportionality) must be adhered to and, most importantly, we do not believe that the CISA provides for a legal basis that would warrant the authorities' ignoring agreements otherwise valid and enforceable.

341 Umbrella fund structures are possible under the CISA, with each sub-fund only being liable for its own liabilities under such structure, although such limitation is disregarded in respect of a SICAV, if its limited liability was not disclosed when entering into the applicable transaction. In such circumstances, the SICAV is liable with its entire assets.[26]

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25 Verordnung über die kollektiven Kapitalanlagen (KKV), SR 951.311.

The CISA delegates the power to set rules on the granting of collateral by a Collective Investment Vehicle to the Federal Council, who set out in the CISCO the quantitative limitations listed below to control the amount of collateral that a fund may provide. 342

Collective Investment Vehicles qualifying (i) as securities funds (*Effektenfonds*) may provide collateral up to 25% of their net assets (Art. 77 para. 1 (b) CISO); (ii) as other funds for traditional investments (*Übrige Fonds für traditionelle Anlagen*) up to 60% of their net assets (Art. 100 para. 1 (b) CISO); and (iii) as other funds for alternative investments (*Übrige Fonds für alternative Anlagen*) up to 100% of their net assets (Art. 100 para. 2 (b) CISO). These provisions contemplate both a security interest in the form of a pledge or a transfer of title. For umbrella fund structures, i.e a subdivision in several sub-funds, these rules apply to each sub-fund and the collateral must be provided out of the respective sub-fund's assets. More generally, we note, in relation to umbrella fund structures, that a Master Agreement and the pertaining addendum would need to be concluded in respect of each particular sub-fund. 343

These limitations are accompanied by limitations applicable to each of the above funds on short term borrowings that such funds can take up. Collective Investment Vehicles qualifying: (i) as securities funds (*Effektenfonds*) may borrow up to 10% of their net assets (Art. 77 para. 2 CISO); (ii) as other funds for traditional investments (*Übrige Fonds für traditionelle Anlagen*) may borrow up to 25% of their net assets (Art. 100 para. 1 (a) CISO); and (iii) as other funds for alternative investments (*Übrige Fonds für alternative Anlagen*) may borrow up to 50% of their net assets (Art. 100 para. 2 (a) CISO). 344

The provisions on collateral do not, however, specifically address collateralization of a Collective Investment Fund's obligations under financial derivatives. To the extent that such obligations are permitted under the applicable legal framework, though, it must in our view also be permissible to collateralize such obligations. This view has been confirmed in an informal discussion with the FINMA provided that any such posted collateral is within the overall collateral limits referred to under n. 343 above. 345

Otherwise, the insolvency procedure as such is governed by the general rules of the SDEBA. 346

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[26] We note that no precedents and doctrine is available yet as of the date hereof with respect to the effects negative net assets of one sub-fund have on other sub-fund and on the Collective Investment Vehicle as such, in particular with respect to insolvency law issues.

3. Additional Limitations

We note that umbrella fund structures (as defined in n. 341 and 343 above) should use separate documents in relation to Transactions of each particular sub-fund and provide for the necessary waiver of set-off for claims outside a particular sub-fund with assets of such sub-fund. 347

SCHEDULE 3
Pension Funds

Subject to the modifications and additions set out in this Schedule 3 (*Pension Funds*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Pension Funds as defined under n. 11 and taking into account the exception under n. 7. 348

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule. 349

1. Modifications to Terms of Reference and Definitions

Paragraph 1.6.2 is deemed deleted and replaced with the following: 350

"*"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 3 (Pension Funds)*".

2. Modifications to Opinions

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion. 351

2.1 Insolvency Proceedings: Pension Funds

The OBPA and the OBPO 2[27] do not provide for a special insolvency regime with respect to Pension Funds under the OBPA. Hence, in principle, the rules set forth in the SDEBA are applicable to insolvency proceedings against a Pension Fund which pursuant to Art. 39 SDEBA are subject to bankruptcy (*Konkurs*) or a composition agreement with assignment of assets (*Nachlassvertrag mit Vermögensabtretung*). The following seems noteworthy, though, in the context of this memorandum of law. 352

Broadly speaking, the OBPA and the implementing ordinances provide for a number of measures to be taken in case of underfunding (*Unterdeckung*) (i.e. net asset coverage of actual and estimated liabilities to beneficiaries). 353

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27 Verordnung vom 18. April 1984 über die berufliche Alters-, Hinterlassenen- und Invalidenvorsorge (BVV2), SR 831.441.1.

With respect to foundations (as defined in Art. 80 et seq. of the CC), it is to be noted that the foundation's supervisory authority (*Stiftungsaufsicht*) has, where a foundation is over-indebted or insolvent, (i) the right to order remedial measures and (ii) initiating insolvency proceedings against the foundation, if necessary (Art. 84a CC). Further, the consent of the applicable supervisory authority is required before a foundation may declare itself insolvent (*Insolvenzerklärung*). 354

The restrictions described under n. 353 or n. 354 above do not, in our view, affect the conclusions reached in this memorandum of law. 355

Whether a Pension Fund is permitted to provide collateral is not addressed in either the OBPA, the OBPO 2 or any publicly available guidelines issued by the Federal Social Insurance Office for non real estate assets. 356

Art. 56a OBPO 2 permits the use of derivatives by Pension Funds and correspondingly allows a Pension Fund to incur liabilities relating to derivatives. In guidelines and explanatory notes (in particular, the Derivatives Recommendations[28]) it is made clear, though, that such use should not result in a leverage of the Pension Fund's overall assets. Correspondingly, any position of the Pension Fund needs to be covered (either by respective assets or liquidity in case of mere monetary obligations). This also implies a general prohibition on a Pension Fund leveraging it's assets, including the leveraged financing of investments. 357

In the context of permitted liabilities, however, and in the absence of an explicit prohibition or limitation to post collateral from a Pension Fund's assets, we do not see any reason under Swiss law, why a Pension Fund would not be allowed to post collateral for liabilities lawfully incurred under derivative transactions. This view has been confirmed in an informal discussion with the Federal Social Insurance Office 358

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[28] Fachempfehlung zum Einsatz und zur Darstellung der derivativen Finanzinstrumente (Art. 56a BVV 2) vom 15. Oktober 1996).

ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

1. Master Netting Agreement - One-Way (1997 version) (the "**One-Way Master Netting Agreement 1997**")

2. Master Netting Agreement - Two-Way (1997 version) (the "**Two-Way Master Netting Agreement 1997**")

3. Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Long-Form One-Way Clauses 2007**")

4. Short Form Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Short-Form One-Way Clauses 2007**")

5. Short Form Default, Netting and Termination Module (One-Way Netting) (2009 version) (the "**Short-Form One-Way Clauses 2009**")

6. Short Form Default, Netting and Termination Module (One-Way Netting) (2011 version) (the "**Short-Form One-Way Clauses 2011**")

7. Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Long-Form Two-Way Clauses 2007**")

8. Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Long-Form Two-Way Clauses 2009**")

9. Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Long-Form Two-Way Clauses 2011**")

10. Short Form Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Short-Form Two-Way Clauses 2007**")

11. Short Form Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Short-Form Two-Way Clauses 2009**")

12. Short Form Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Short-Form Two-Way Clauses 2011**")

13. Professional Client Agreement (2007 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2007**")

14. Professional Client Agreement (2009 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2009**")

15. Professional Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2011**")

16. Professional Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2007**")

17. Professional Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2009**")

18. Professional Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2011**")

19. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2007**")

20. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2009**")

21. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2011**")

22. Retail Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2007**")

23. Retail Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2009**")

24. Retail Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2011**")

25. Eligible Counterparty Agreement (2007 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2007**")

26. Eligible Counterparty Agreement (2009 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2009**")

27. Eligible Counterparty Agreement (2011 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2011**")

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

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

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

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

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

ANNEX 2
List of Transactions

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

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

(i) a contract made on an exchange or pursuant to the rules of an exchange;

(ii) a contract subject to the rules of an exchange; or

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

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

(iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or

(v) any other Transaction which the parties agree to be a Transaction;

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

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

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

(E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC[29], 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

[29] Non-EU counsel should discuss with Clifford Chance if clarification is needed.

a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

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

"**Addendum Netting Provision**" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum) Clause 8(b) (*Clearing Member Events*), 8(c) (*CCP Default*) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum, 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) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement, 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) Clause 5.2 (*Firm*

Events), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module, 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 5.5 (*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 Annex 4:

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

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

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

(d) for the purposes of paragraph 3.7.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;

(e) for the purposes of paragraph 3.7.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;

(f) for the purposes of paragraph 3.8.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;

(g) for the purposes of paragraph 3.8.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provision;

(h) for the purposes of paragraph 3.9 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;

(i) for the purposes of paragraph 3.10.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions;

(j) for the purposes of paragraphs 3.10.3 and 3.10.4, the Title Transfer Provisions;

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

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

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

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

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

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

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

(c) 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;

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

(e) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provision, and with or without the Title Transfer Provisions, with no Adverse Amendments.

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

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

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

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

(c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;

(d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (***Liquidation Date***), Clause 10.3 (***Calculation of Liquidation Amount***) and Clause 10.4 (***Payer***);

(e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***); and

(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***).

"**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***); 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***); and

(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***).

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

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

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

(ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);

(iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);

(iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive); and

(v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); and

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

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

(iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);

(v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d).

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

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

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

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

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

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

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

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

"**Professional Client Agreements**" means each of the Professional Client 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***); and

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

(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***); and

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

(x)

(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); and

(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).

"**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:**

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

"The following shall constitute Events of Default:

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];

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;

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."

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

"The following shall constitute Events of Default:

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];

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:

"**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.

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:

[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:

each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/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/Section];

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;

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 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 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 a) (3) (A) to (C) above, 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]);

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].

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:

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/Section];

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;

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 (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 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[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 b) 3. (A) to (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]);

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].

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.]

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 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.

31. "**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:

31.1 is attributable to such Client Transactions;

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

is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

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

7. Clearing Module Set-Off Provision

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

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

8. Addendum Set-Off Provision

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

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

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

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

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

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

PART 2
NON-MATERIAL AMENDMENTS

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

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

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

4. Any change to the scope of the agreement clarifying that certain transactions (e.g., OTC derivatives governed by an ISDA Master Agreement) shall not be transactions or contracts for purposes of the agreement.

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

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

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

8. 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.

9. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

10. 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.

11. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.

12. 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.

13. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.

14. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.

15. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).

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

more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision

more than one FOA Clearing Module or Clearing Module Netting Provision

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

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

17. 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.

18. 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).

19. 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).

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

ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS