

NETTING ANALYSER LIBRARY

The Futures & Options Association
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12 February 2013

Dear Sirs

FOA Collateral Opinion

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

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

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

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

1. TERMS OF REFERENCE AND DEFINITIONS

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

1.1.1 persons which are companies established pursuant to the UAE Commercial Companies Law No.(8) of 1984 (as amended by Law No.(13) of 1988 (the "**CCL**") ; and

1.1.2 in respect of paragraph 3.3, the entities referred to in such paragraph, insofar as each may act as a counterparty (a "**Counterparty**") providing Collateral (as defined in paragraph 1.3) to a member firm of the Futures and Options Association (each a "**Firm**") under an Agreement.

1.2 However, this opinion is also given in respect of Counterparties providing Collateral to a Firm that are any of the following:

1.2.1 Banks/financial institutions incorporated under the CCL and regulated by the UAE Central Bank (the "**Central Bank**");

- 1.2.2 Investment firms/broker dealers incorporated under the CCL and regulated by the Central Bank or the UAE Securities and Commodities Authority ("SCA"), as the case may be;
- 1.2.3 Partnerships organised under the CCL;
- 1.2.4 Insurance companies/providers incorporated under the CCL and regulated by the UAE Insurance Authority;
- 1.2.5 Individuals;
- 1.2.6 Sovereign and public sector entities;

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

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

1.4 In this opinion letter:

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

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

- (a) which is governed by the law of England and Wales;
- (b) which has broadly similar function to any of the Agreements listed in Annex 1;
- (c) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and
- (d) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments);

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

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

1.4.4 "**Insolvency Proceedings**" means bankruptcy and preventative composition proceedings in accordance with Part 1 of Volume V of the UAE Commercial Transactions Law Federal Law No.(18) of 1993 (the "**Commercial Code**"),

which applies to individuals which are traders, and companies; protective arrangements proceedings as set out in Part 2 of Volume V of the Commercial Code, which applies to individuals which are traders and companies; and with respect to the liquidation of companies, Chapter 2 of Part Ten of the CCL (the provision of the CCL apply to liquidations generally and are not restricted to insolvent liquidations);

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

- (i) sale and application of proceeds of the sale of Collateral against monies owed, or
- (ii) appropriation of the Collateral,

in either case in accordance with the Security Interest Provisions.

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

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

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

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

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

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

2. **ASSUMPTIONS**

We assume the following:

- 2.1 That the Agreements are legally binding and enforceable against both Parties under their governing laws.
- 2.2 That the Security Interest Provisions are enforceable under the governing law of the Agreement to create a Security Interest.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the Agreement; to perform its obligations under the Agreement; and that

each Party has taken all necessary steps to execute, deliver and perform the Agreement.

- 2.4 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.
- 2.5 That the Agreement has been properly executed by both Parties.
- 2.6 That the Agreement is entered into prior to the commencement of any Insolvency Proceedings in respect of either Party.
- 2.7 The Agreement has been entered into, and each of the transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.8 That the Agreement accurately reflects the true intentions of each Party.
- 2.9 That no provisions of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or effectiveness of the Security Provisions or the Rehypothecation Clause under the governing law of the Agreement.
- 2.10 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement.
- 2.11 That no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in an "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.
- 2.12 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.
- 2.13 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.
- 2.14 That, except with respect to our opinion at paragraph 3.3, any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions may be located either within or outside this jurisdiction.
- 2.15 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.

3. **OPINIONS**

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

3.1 **Valid Security Interest**

- 3.1.1 The Security Interest Provisions would create a valid security interest over the Collateral.
- 3.1.2 Following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.
- 3.1.3 There is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the right of the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.
- 3.1.4 Following exercise of the Firm's rights under the Security Interest Provisions, the Firm's rights in respect of the proceeds of realisation of the Collateral would rank ahead of the interests of the Counterparty and any other person therein.

3.2 **Further acts**

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

3.3 **Foreign Collateral Providers**

Moreover, the opinions given at paragraphs 3.1 and 3.2 also apply in respect of any Counterparty that is not established or resident in this jurisdiction, where any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Provisions are located within this jurisdiction.

3.4 **Right of re-use**

With respect to the Eligible Counterparty Agreement 2011, the Retail Client Agreement 2011, the Professional Client Agreement 2011 (or an Equivalent Agreement in the form of one of the foregoing), the Rehypothecation Clause would be effective in accordance with its terms, such that that Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes all non-cash Collateral, subject to the further rights and obligations set out in the Rehypothecation Clause.

The opinion given at this paragraph 3.4 does not apply in respect of an Equivalent 2011 Agreement without Core Rehypothecation Clause.

4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications. The qualifications at paragraphs 4.1 to 4.8 only apply with respect of Collateral compromising accounts and assets located in this jurisdiction. Qualifications apply to entities established in the UAE and entities acting through branches in the UAE.

4.1 UAE law

UAE case law is not, in our opinion, capable of conclusive interpretation, as there exists no general system of judicial precedent. This means that the decisions of a court (including the Dubai Court of Appeal, Abu Dhabi Court of Appeal and Court of Cassation) in one case will have no binding authority in respect of another case. There is no system of reporting the decisions of the UAE Courts.

Laws may come into effect as UAE laws without being published in the Official Gazette. Therefore there may be laws (including regulations, orders and directives having the force of law) that are in effect of which we are not aware.

4.2 Bank accounts – security assignment

With regard cash collateral, a security interest would normally be taken in the UAE by way of assignment of an account and the amounts deposited therein from time to time. A security assignment can also be effected with respect to receivables (i.e., debts, unsettled transactions or other monetary obligations owed to the Counterparty).

Articles 1106 to 1132 of the Civil Code provide for assignments of obligations but not of rights. Notwithstanding this, the UAE courts have found themselves able to allow assignments of rights in a number of cases and there has arisen a market practice of attempting to take security by way of an assignment of rights with a promise to re-assign upon discharge of the secured obligation.

The following considerations arise when taking take security by way of an assignment of rights:

- 4.2.1 Whether the assignment has legal effect, given the absence of law underpinning it. However, we are aware of a judicial judgment of the Dubai Court of Cassation which notes that whilst there is no express provision in UAE legislation regarding assignments of rights, an assignment of rights is valid and binding once agreed between the assignor and assignee and notified to the relevant party.
- 4.2.2 Whether the consent of the third party debtor is required for the assignment to take effect. The Dubai Court of Cassation also noted that the third party debtor need not be informed officially; notice delivered to the relevant third party debtor would be sufficient. The Dubai Court of Cassation also did not state that the consent of the third party debtor would be required to create or perfect the assignment. Notwithstanding this judgement, it is our view that consent be obtained.
- 4.2.3 Whether the subject matter of the assignment must be inexistence at the time the arrangement is entered into and must be identifiable. The position in

relation to the assignment of future receivables under UAE law is unclear; however, it is our view that where the identity of the receivables is uncertain (i.e., future receivables, irrespective of whether the payment obligation giving rise to the future receivable is in existence or not at the time the assignment is undertaken), that this would prevent such an assignment being recognised.

4.3 Bank accounts – commercial pledge of cash

Regarding bank accounts, the UAE courts have not treated the security as a pledge of a debt, instead they have held the proper security to be a pledge of cash – as if the asset constituted by the bank account was a tangible movable or commodity (cash), as opposed to a promise to pay.

In order to create security over cash in a bank account, security must be by way of pledge of cash. The pledge the property must be transferred into the effective possession of the pledgee, achieved through effecting one of the following:

- 4.3.1 by transferring the cash out of the pledgor's account into an account of the pledgee; or
- 4.3.2 by converting the pledgor's account into a joint account with the pledgee (whose instructions are then necessary to deal with the account (i.e. *"it is placed in common possession in a manner which makes the pledgor unable to dispose of it in isolation from the pledgee"* (Article 165(1) of the Commercial Code)); or
- 4.3.3 by transferring control of the pledgor's account away from the pledgor and to the pledgee.

As a practical matter, it is likely necessary to have a written pledge agreement.

The security interest will extend to the "fruits" or "yield" of the property, so it will cover interest or income paid on the account whilst the pledge is in effect (see Article 1464 of the Law of Civil Transactions Federal Law No.(1) of 1987 (the "**Civil Code**") and Article 169 of the Commercial Code).

UAE law does not allow for an effective security interest to be created over an account which is used as a current account with withdrawals and payments being made on a regular basis, the pledge will therefore state that it covers money credited to the account from time to time but this may not be effective under UAE law.

In order to perfect the pledge against the interests of third parties it is necessary for the third party to be aware of the fact that the money has been pledged and is no longer the unencumbered property of the pledgor.

The provisions of Article 172 of the Commercial Code applying to commercial pledges generally apply equally to pledges of cash. Accordingly, strictly speaking, the pledgee must, seven days after notice to the obligor to pay the secured obligation and default in payment, apply to the court for leave to sell the pledged asset.

Article 176(2) of the Commercial Code provides (as an exception to the requirement for a court ordered sale) that once the secured obligation or an instalment of it has

fallen due it can be agreed between the pledgor and pledgee that the pledged property may be ceded to the pledgee in settlement of all or some of the debt. This, however, is an agreement that may only be made after the secured obligation has become due; it is not permissible for the parties to agree in advance of the secured obligation becoming due that the requirements of Article 172 be disapplied.

Set-off may not possible with cash that is the subject of a pledge.

4.4 Pledge of shares

Article 164 of the CCL provides for a pledge of shares in a joint stock company and states *"Shares may be pledged by delivering them to the pledgee after applying the formalities mentioned in Article 162. The pledg[or] shall have the right to receive the dividends and utilise the rights related to the share unless otherwise agreed in the pledge deed."*

To effect the security Article 164 of the CCL (by reference to the requirements for a transfer of shares in Article 162) requires:

- 4.4.1 delivery of the share certificates to the pledgee; and
- 4.4.2 entry of the pledge in the company's register; and
- 4.4.3 notation on the share certificate stating that it is held as security for the secured obligations.

Where the shares are listed on a financial market (such as the Dubai Financial Market ("DFM") and the Abu Dhabi Securities Exchange ("ADX")) the pledge must also be registered with such financial market and other considerations apply.

The CCL does not contain any provisions governing the enforcement of a share pledge. However, it is our view that Article 450 of the Commercial Code applies to the pledging of a "nominative" instrument, including shares in a joint stock company and thus the provisions of Article 453 which provides for the pledgee to apply to the Court for authority to sell the shares at public auction or at the stock exchange price would apply.

It is not certain whether Article 453 is mandatory; however, attempts to enforce a share pledge outside of the Article 453 mechanism may be the subject of challenge.

Whilst the CCL specifically provides for a pledge to be taken over shares in a joint stock company, there is nothing permitting security to be taken over the interest a shareholder holds in a limited liability company.

4.5 Insolvency

In the case of Insolvency of a UAE Counterparty, pursuant to Article 652(1) of the Commercial Code, a Court may order that measures be taken to safeguard or manage a debtor's property until the declaration in bankruptcy is made. Such measures could include a stay or freeze on all of the assets of the debtor. However, it should be noted that there have been no Court driven insolvencies in the UAE that we are aware of.

As a result, there are no practical examples in the UAE of how a Court would manage an insolvency.

Once a declaration in bankruptcy has been made, the bankrupt is no longer allowed to manage or dispose of its assets (Article 685(1) of the Commercial Code) and the trustee in bankruptcy takes over.

4.6 Risk of Collateral being set aside

Collateral is at risk of being set aside by a UAE Court on a number of grounds, including:

- 4.6.1 if the arrangement falls within the definition of a contract based upon "personal considerations", then the contract could be rescinded pursuant to Article 721 of the Commercial Code by any trustee in bankruptcy. There is no guidance as to what constitutes "personal considerations". As there is no guidance as to the suspect period that applies to Article 721, we assume that this concept applies irrespective of the date of the contract. However, it is unlikely that the arrangements contemplated in the Agreements would fall within such a provision.
- 4.6.2 Article 696 of the Commercial Code provides that a party, who is the subject of bankruptcy proceedings, may not enter *inter alia* the following transactions if the same are made after the date of cessation of payment of such party's commercial debts but before the declaration in bankruptcy:
 - (a) the payment of a term debt prior to its due date; and
 - (b) the payment of an immediate payment other than in an agreed form.

In relation to (a), it is our view that this would not prevent a creditor accelerating a "term debt" in accordance with the provisions of the agreement between the debtor and the creditor. In relation to (b), it is our view that this provision is intended to prevent a debt being discharged other than a manner agreed. The date of cessation of payment of the bankrupt party's debts is, generally speaking, determined by the applicable civil Court. In any event, the date of cessation cannot be more than two years before the declaration of bankruptcy (Article 659(2) of the Commercial Code).

- 4.6.3 Article 697 of the Commercial Code provides that any disposal made by the bankrupt during the period between the date of cessation of payments and prior to bankruptcy judgement (save for a limited number of exceptions) may be judged unenforceable vis-a-vis other creditors if such a disposal is harmful to them and if the party taking the disposal was made aware at the time the bankrupt was insolvent.
- 4.6.4 Article 699(1) of the Commercial Code states that a pledge or lien over the property of the bankrupt shall be ineffective in opposition to the combined creditors if recorded after the date of cessation of payments.

- 4.6.5 Furthermore, Article 701(1) of the Commercial Code states that the bankruptcy trustee may apply to the Court to set aside transactions by the bankrupt that are in breach of specific insolvency provisions contained in the Civil Code.
- 4.6.6 Finally, Article 775(1) of the Commercial Code provides that a deed of arrangement will be binding on all ordinary creditors (save for those whose debts arise after the declaration of bankruptcy) whether they agree with it or not.

4.7 Additional or replacement security interests

Any additional or replacement security would need to be perfected.

Furthermore, such substitution could result in the security being vulnerable under the following provisions:

- 4.7.1 Article 696 of the Commercial Code provides that a party, who is the subject of bankruptcy proceedings, may not enter a pledge or other security as a guarantee for an existing debt if such pledge or other security is made after the date of cessation of payment of such party's commercial debts but before the declaration of bankruptcy;
- 4.7.2 Article 697 of the Commercial Code provides that any disposal made by the bankrupt during the period between the date of cessation of payments and prior to the bankruptcy judgement (save for a limited number of exceptions) may be judged unenforceable vis-a-vis other creditors if such disposal is harmful to them and if the party taking the disposal was made aware at the time the bankrupt was insolvent; and
- 4.7.3 Article 699(1) of the Commercial Code states that a pledge or lien over the property of the bankrupt shall be ineffective in opposition to the combined creditors if recorded after the date of cessation of payments.

4.8 Effectiveness of security

Although it is not clear as a matter of UAE law, it is our view that a properly secured creditor will not form part of the general pool of creditors for insolvency purposes and could therefore be paid out from realisation of assets secured.

Article 1504 of the Civil Code confers a priority status on the holder of a lien for the satisfaction of a debt owed to it. There is no further guidance as to what "priority status" is. It is our view that it is likely to be considered similar to the priority afforded to a holder of a pledge in that it gives a first claim on the asset as against other creditors in respect of a debt owed to the holder (although, unlike a pledge, only to retain the asset until repayment, not to apply for its sale). Furthermore, the Civil Code does not specify whether such lien takes priority over a pledge or other forms of security.

The Commercial Code gives the following debts preferential status (although it is unclear whether these take preference over secured and ordinary creditors or ordinary creditors alone):

- 4.8.1 certain costs relating to the declaration of bankruptcy (Article 667 of the Commercial Code);
- 4.8.2 employee's wages for 30 days prior to the declaration of bankruptcy (Article 713 of the Commercial Code);
- 4.8.3 the amount of any debt paid by the trustee personally (Article 714 of the Commercial Code);
- 4.8.4 a lessor may recover monies for both the year preceding the issue of the declaration of bankruptcy and for the current year (Article 715 of the Commercial Code);
- 4.8.5 government taxes due from the bankrupt for the two years preceding the issue of the declaration of bankruptcy (Article 716 of the Commercial Code); and
- 4.8.6 debts due to creditors who have a lien on the moveable property of the bankrupt (Article 717 of the Commercial Code).

4.9 **Collateral held outside the UAE**

UAE law should not be applicable, generally speaking (subject to any law to the contrary in the jurisdiction in which the Collateral is located), not be applicable where the Collateral is (a) governed by a law other than UAE law, and (b) located outside the UAE. This is subject to the following qualifications:

- 4.9.1 In the event of an insolvency of the UAE Counterparty, there is a possibility that a liquidator could seek to attach assets held under collateral arrangements abroad. It is our view that such an event would be unlikely; however, it should be noted that there have been no Court driven insolvencies in the UAE that we are aware of. As a result, there are no practical examples in the UAE of how a Court would manage an insolvency. It is our recommendation that it be verified in the jurisdiction in which the Collateral is located whether the liquidator would be permitted to attach assets.
- 4.9.2 There is a possibility that the UAE Counterparty could file a claim in the UAE Courts disputing the validity of the transaction and the right to enforce the Collateral. Whilst such an action could be contested in the UAE Courts, it should be verified in the jurisdiction where the Collateral is held whether the Courts would recognise such an action in the event that they have already assumed jurisdiction.

4.10 **Statutory corporations**

It is a generally held view that UAE companies law, including the Commercial Code, does not apply to statutory corporations, i.e., companies established by law (or "decree", and such entities are often referred to as "**Decree Companies**") because they are not an example of the type of corporate form that is contemplated by that Federal legislation. The Dubai World Restructuring Decree passed by the Rule of Dubai is an example of a special legal regime, rather than the general regime under the Commercial Code, being applied to a Decree Company. As such specialist insolvency regimes are promulgated in respect of specific Decree Companies on an *ad*

hoc basis, the priority of creditors under such specialist regimes cannot be commented on.

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

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

Yours faithfully,

Clifford Chance LLP

ANNEX 1
FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2007**")
2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2009**")
3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2011**")
4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2007**")
5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2009**")
6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2011**")
7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2007**")
8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2009**")
9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

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

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

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

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).
2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).
3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).
4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.
5. "**Core Provisions**" means:
 - (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and
 - (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.
6. "**Rehypothecation Clause**" means:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (*Rehypothecation*);
 - (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (*Rehypothecation*);
 - (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (*Rehypothecation*); and
 - (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
7. "**Security Interest Provisions**" means:
 - (a) the "**Security Interest Clause**", being:

- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (*Security interest*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (*Security interest*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (*Security interest*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (*Security interest*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (*Security interest*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (*Security interest*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (*Security interest*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (*Security interest*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (*Security interest*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (b) the "**Power to Charge Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (*Power to charge*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (*Power to charge*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (*Power to charge*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (*Power to charge*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (*Power to charge*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (*Power to charge*);

- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (*Power to charge*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (*Power to charge*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (*Power to charge*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (c) the "**Power of Sale Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (*Power of sale*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (*Power of sale*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (*Power of sale*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (*Power of sale*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (*Power of sale*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (*Power of sale*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (*Power of sale*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (*Power of sale*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (*Power of sale*); and
 - (x) in relation to an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (d) the "**Power of Appropriation Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (*Power of appropriation*);

- (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (*Power of appropriation*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (*Power of appropriation*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (*Power of appropriation*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (*Power of appropriation*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (*Power of appropriation*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (*Power of appropriation*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (*Power of appropriation*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (*Power of appropriation*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (e) the "**Lien Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (*General lien*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (*General lien*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (*General lien*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (*General lien*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (*General lien*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (*General lien*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (*General lien*);

- (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (*General lien*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (*General lien*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and
- (f) the "**Client Money Additional Security Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as the clauses referred to in any of the

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

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

ANNEX 3 NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as "you", "Counterparty", "Party A/Party B") provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.
4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.
5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.
6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.
7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).

8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.