

# FOA Clearing Module Training Event

## 18 October 2013

CLIFFORD  
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# Agenda

Introduction and overview

The architecture of the FOA Documentation Library

Key provisions of the FOA Clearing Module

Refreshments

The FOA Clearing Module and the ISDA/FOA Addendum

Key elections in the Annex to the FOA Clearing Module

The FOA Clearing Module and the FOA Legal Opinions

Q&A



# CPD Points

Please sign our register and take one of our CPD Forms.

You will need to inform your CPD points administrator of your attendance.

ATTENDANCE REGISTER			
PLEASE PASS THIS FORM TO THE NEXT PERSON IN THE LECTURE			
<i>Please return to Samantha Odell at 265.18 if register is found with completed information.</i>			
LOCATION: LONDON			
COURSE CODE/ TYPE:			
DATE OF COURSE/MEETING: 18 October 2013			
START TIME: 1:30pm			
FINISH TIME: 4:30pm			
TOTAL CPD HOURS: 3 Hours			
COURSE TITLE: FOA Clearing Module Training Event			
Speakers:	Preparation Time	Speaking Time	Accredited
NAME	SIGNATURE	INSTITUTION (Clifford Chance employees: please write practice group and employee ID)	

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18 October 2013

**CPD Form**

It is your responsibility to claim your CPD points for attendance at seminars. For your convenience, we have listed the information you are required to keep on your personal file or give to the relevant CPD points administrator at your institution.

DATE OF SEMINAR: 18 October 2013  
SEMINAR TITLE: FOA Clearing Module Training Event  
DURATION: 3 hours (qualifies for 3 CPD points)  
SPEAKERS: Mitja Siraj, Hugo Jenkins, Dermot Turing, Jeremy Walter, Will Winterton

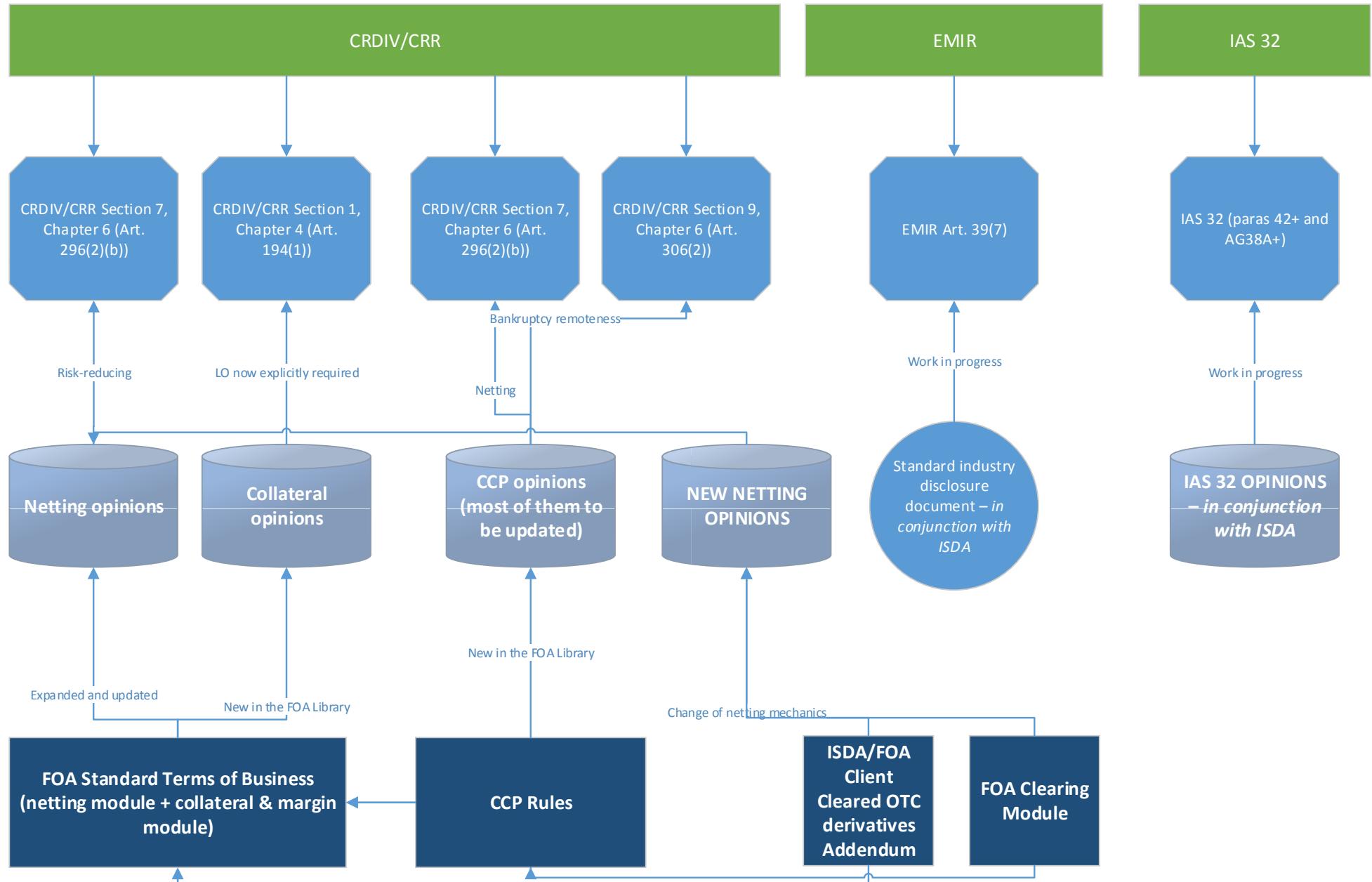
CLIFFORD CHANCE authorisation reference: ARO/CLCH

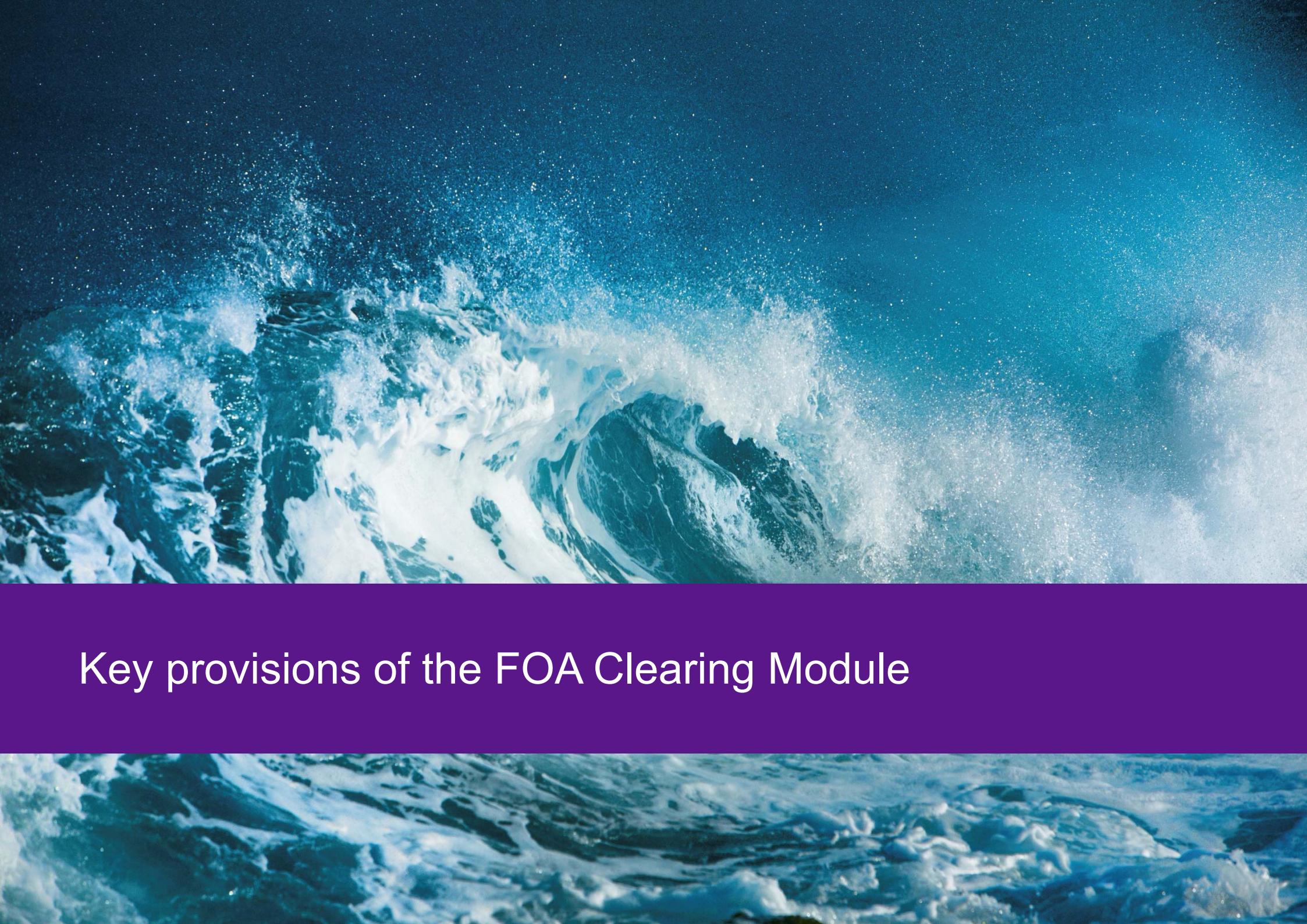
PLEASE KEEP THIS FORM FOR YOUR RECORDS



# The architecture of the FOA Documentation Library







## Key provisions of the FOA Clearing Module

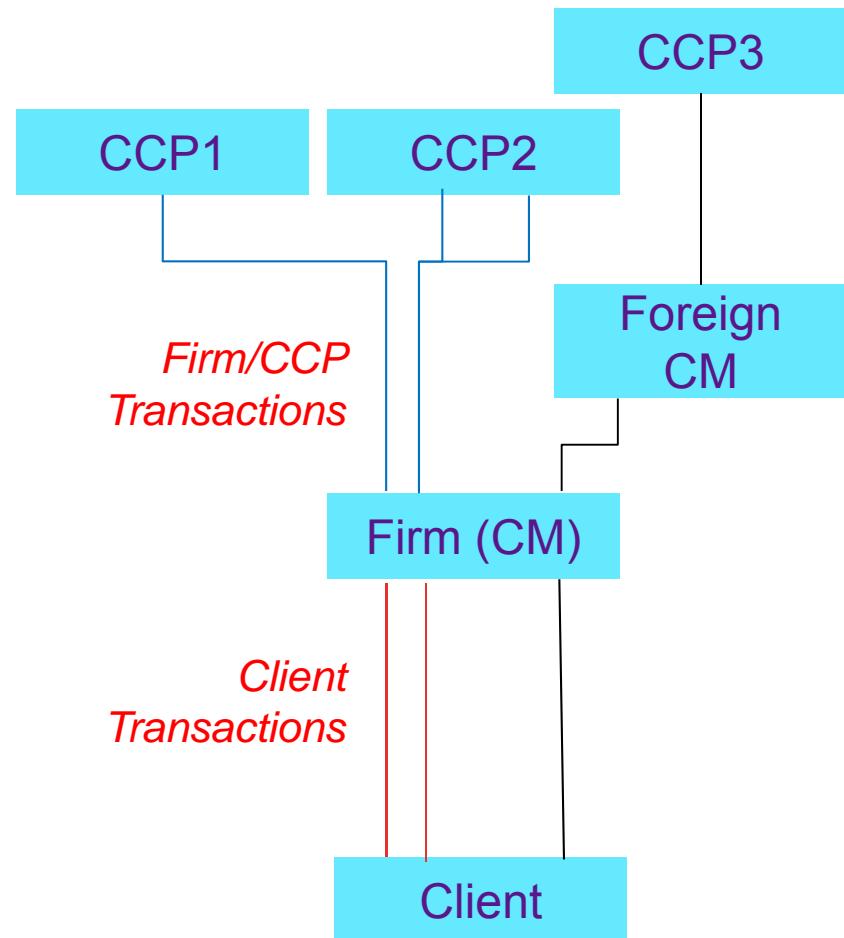


# Background

- Central purpose of the Clearing Module
  - Compliance with EMIR
  - Create separate netting set for each “Agreed CCP Service”
- Also include helpful supplementary provisions
  - FATCA
  - limited recourse

# The FOA Clearing Module

- Used together with FOA standard terms such as Professional Client Agreement
- Scope is transactions cleared through an “Agreed CCP Service”
  - some CCPs may have multiple services
  - direct clearing
- Changes how Client Transactions are dealt with if Firm or CCP defaults
- Main purpose is to provide for separate net sums for each Agreed CCP Service



**[FIRM'S DETAILS]****FOA CLEARING MODULE****Dated as of .....**

This FOA Clearing Module (this "Module"), including the Module Annex, supplements and forms part of the Agreement between you and us.

Client Transactions will be governed by, and be subject to, the terms of the Agreement as supplemented by this Module (the "Clearing Agreement"). Transactions between you and us which are not Client Transactions (irrespective of whether they are uncleared or cleared transactions) may also be governed by, and be subject to, the Agreement. The parties agree that this Module will apply solely in respect of Client Transactions and that the elections set out in Table A of the Module Annex (including, without limitation, as to segregation) shall apply to Client Transactions.

Notwithstanding that the Clearing Agreement constitutes a single agreement, each Cleared Transaction Set will be treated separately for certain purposes, including, without limitation, termination of transactions in certain circumstances, as further described in this Module.

**1. INTERPRETATION****1.1 *Definitions:***

- 1.1.1 Capitalised terms not otherwise defined in this Module have the meanings specified in the Agreement.
- 1.1.2 Notwithstanding any provision of the Agreement to the contrary, in respect of Client Transactions, the defined term "Market" in the Agreement shall be read to include each Agreed CCP; provided that this Clause 1.1.2 shall not affect the reading of the Agreement as it relates to transactions other than Client Transactions.

**1.2 *Inconsistency:***

- 1.2.1 The provisions of the Agreement will apply to the Client Transactions unless otherwise specified in this Module. To the extent of any inconsistency between the provisions of this Module and the other provisions of the Agreement, this Module will prevail for the purposes of the Client Transactions only. To the extent of any inconsistency between the provisions of the Module Annex and the other provisions of this Module, the Module Annex will prevail.



1.2.2 To the extent of any inconsistency between the terms of the Clearing Agreement and any Mandatory CCP Provision, such Mandatory CCP Provision will prevail in respect of the relevant Cleared Transaction Set.

## 2. REPRESENTATIONS

On the date on which this Module or any amendment to it is entered into, any representations, warranties, covenants or undertakings which were given pursuant to the Agreement on the date of entering into the Agreement are each hereby deemed repeated or given, as applicable, by Client.

## 3. CLIENT TRANSACTIONS AND PAYMENT NETTING

3.1 *Client Transactions:* In relation to a Clearing Eligible Trade, a Client Transaction will arise between Firm and Client under this Module without the need for any further action by either party upon such Clearing Eligible Trade being Cleared through an Agreed CCP Service. Subject to the other provisions of this Module and the terms of any other relevant agreement between Firm and Client, the terms of each Client Transaction will be identical to those of the related Firm/CCP Transaction, except that (i) each Client Transaction will be governed by, and be subject to, the terms of the Clearing Agreement (including, without limitation, in relation to margin and collateral) and (ii) under each Client Transaction, Firm will take the opposite position to the position it has under the related Firm/CCP Transaction.

3.2 *Transferred transactions:* If a transaction in relation to an Agreed CCP Service between another clearing member of an Agreed CCP and such Agreed CCP credited to the client account of that other clearing member for the account of Client is Transferred to Firm for credit to the Client Account in accordance with the relevant Rule Set as a result of agreement by Firm, then:

- (i) such transaction will be deemed to be a Clearing Eligible Trade which has been Cleared through the relevant Agreed CCP Service so that there is a related Firm/CCP Transaction between Firm and the relevant Agreed CCP; and
- (ii) a Client Transaction will arise between Firm and Client in accordance with Clause 3.1,

in each case, immediately at the time at which the related Firm/CCP Transaction arises in accordance with the relevant Rule Set for the account of Client.

3.3 *Payment Netting:* If "Payment Netting" is specified in the Module Annex as applying, then, to the extent permitted by Applicable Law, if on any date amounts would otherwise be payable:

- (i) in the same currency; and
- (ii) in respect of one or more Specified Netting Contracts,

by each party to the other, then, on such date, each party's obligation to make payment of any such amount will, without prejudice to the rights and obligations of a party under the applicable Specified Netting Contracts and if payment is not made by



the other party, be settled if the aggregate amount that would otherwise have been payable by one party exceeds the aggregate amount that would otherwise have been payable by the other party, upon the payment by the party by which the larger aggregate amount would have been payable to the other party of an amount equal to the excess of the larger aggregate amount over the smaller aggregate amount.

The election for "Payment Netting" may be made separately for different groups of transactions.

#### 4. MARGIN AND COLLATERAL

4.1 ***Margin Calls:*** Without prejudice to the generality of the provisions of the Agreement relating to Firm's rights to make margin calls on Client and the rights and consequences arising upon the occurrence of an Event of Default, the parties agree that Firm may, in its sole and absolute discretion, make a separate margin call on Client in relation to each Agreed CCP Service and/or Firm may make aggregated margin calls in relation to two or more Agreed CCP Services. Client acknowledges and agrees that Firm may, in its sole and absolute discretion, make two or more margin calls on Client on a particular day.

4.2 ***Excess Margin Posting:*** If "Excess Margin Posting" is specified in the Module Annex as applying then Client and Firm agree that Excess Margin posted by Client to Firm shall be posted by Firm to the relevant Agreed CCP in accordance with the Excess Margin Posting Provisions specified in the Module Annex.

4.3 ***Client Money Margin:*** If:

4.3.1 "Client Money Margin" is specified in the Module Annex as applying;

4.3.2 Firm receives cash from Client which is subject to the Client Money Rules in accordance with the Agreement; and

4.3.3 an amount of margin is required from Client under the Agreement for one or more Client Transactions for which the Rule Set of the applicable Agreed CCP Service does not enable Firm to use cash subject to the Client Money Rules as margin for the corresponding Firm/CCP Transaction(s),

then, to the extent that the margin requirement under Clause 4.3.3 is to be settled in whole or in part with cash, Client shall be obliged to transfer to Firm cash in the requisite amount on a title transfer basis. Client hereby instructs Firm to transfer such amount of cash from any client money held by Firm for Client subject to the Client Money Rules to Firm which shall transfer from Client full ownership of such amount of cash absolutely to Firm and satisfy Client's transfer obligation hereunder. The Title Transfer Provisions shall apply to the amount so transferred to Firm.

4.4 ***Non-Cash Security Interest Margin:*** If:

4.4.1 "Non-Cash Security Interest Margin" is specified in the Module Annex as applying;



- 4.4.2 Firm receives non-cash assets from Client which remain in Client's beneficial ownership ("Non-Cash Security Interest Assets") in accordance with the Agreement; and
- 4.4.3 an amount of margin is required from Client under the Agreement for one or more Client Transactions for which the Rule Set of the applicable Agreed CCP Service does not enable Firm to use Non-Cash Security Interest Assets as margin for the corresponding Firm/CCP Transaction(s),

then, to the extent that the margin requirement under Clause 4.4.3 is to be settled in whole or in part with non-cash assets, Client shall be obliged to transfer to Firm non-cash assets in the requisite amount on a title transfer basis. Client hereby instructs Firm to transfer the requisite amount of Non-Cash Security Interest Assets to Firm which shall transfer from Client all right, title and interest in such Non-Cash Security Interest Assets to Firm and satisfy Client's transfer obligation hereunder. The Title Transfer Provisions shall apply to the Non-Cash Security Interest Assets so transferred.

In respect of Non-Cash Security Interest Assets by way of securities the right, title and interest of which have been transferred to Firm pursuant to this Clause 4.4 ("Outright Transfer Securities") and where the Rule Set of the applicable Agreed CCP Service allows the Agreed CCP to redeliver to Firm securities of a different type and description to the securities which Firm has posted to the Agreed CCP, then notwithstanding any provision of the Title Transfer Provisions requiring Firm to redeliver to Client securities of the same type and description as Outright Transfer Securities, Firm may redeliver to Client securities of other types and descriptions provided that the aggregate value of redelivered securities is no less than the value of the Outright Transfer Securities.

## 5. EARLY TERMINATION FOLLOWING DEFAULT

- 5.1 *Termination by Firm and Automatic Termination:* Any provisions of the Agreement that (1) would entitle Firm to withhold any payment or delivery as a result of the occurrence of an Event of Default or any event which may become (with the passage of time, the giving of notice, the making of any determination, or any combination thereof) an Event of Default in respect of Client or (2) (A) would entitle Firm to terminate transactions upon the occurrence of an Event of Default or other similar event, howsoever described, or would automatically terminate transactions upon the occurrence of any such event in respect of Client, or (B) provide for the consequences of, and rights arising upon or pursuant to, the occurrence of any such event (including, without limitation, the provisions relating to the calculation of, and obligation to pay, any amount payable by either party following such early termination), will continue to apply in respect of Client Transactions.

### 5.2 *Firm Events:*

- 5.2.1 Any provisions of the Agreement that (1) would entitle Client to withhold any payment or delivery as a result of the occurrence of an Event of Default or any event which may become (with the passage of time, the giving of notice, the making of any determination, or any combination thereof) an Event of Default, in respect of Firm or (2) subject to Client's right to terminate Client



Transactions subject to Clause 5.2.2, (A) would entitle Client to terminate transactions early upon the occurrence of an Event of Default or other similar event, howsoever described, in respect of Firm or Client, as applicable, or would automatically terminate transactions early upon the occurrence of any such event in respect of Firm or (B) provide for the consequences of, and rights arising upon or pursuant to, the occurrence of any such event (including, without limitation, the provisions relating to the calculation of, and obligation to pay, any amount payable by either party following such early termination), will not apply in respect of Client Transactions.

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

- (a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate upon the occurrence of a Firm Trigger Event and, following such termination, no further payments or deliveries in respect of such Client Transaction or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this Clause 5.2.2;
- (b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant Firm/CCP Transaction Value or the relevant part thereof;
- (c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a Firm Trigger Event, the date on which the Firm Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a Firm Trigger Event, the day on which the relevant Client Transactions had all been terminated (in either case, provided that, if Firm 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 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 to Client and as a negative amount if such unpaid amount is due from Client to Firm), (C) an amount (which may be zero) equal to the Relevant Collateral Value in respect of the



relevant Client Transactions and (D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement, pro-rated where necessary if such amount can be partially attributed to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in Clauses 5.2.2(c)(A) to 5.2.2(c)(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 to Client and as a negative amount if such unpaid amount is due from Client to Firm);

- (d) if a Cleared Set Termination Amount is a positive number, it will be due from Firm 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, and in each case will be payable in accordance with this Module;
- (e) the applicable Cleared Set Termination Amount will be payable (A) if there were no outstanding Client Transactions immediately prior to the occurrence of a Firm Trigger Event, in the currency in which the Liquidation Amount would be payable under the Agreement and (B) if there were outstanding Client Transactions immediately prior to the occurrence of a Firm Trigger Event, in the same currency as the termination amount payable by Firm or the relevant Agreed CCP, as applicable, in respect of the related terminated Firm/CCP Transaction(s) in accordance with the relevant Rule Set (and any amount included in Clause 5.2.2(c) not denominated in such currency will be included as the Currency Equivalent Amount thereof);
- (f) the party determining the Cleared Set Termination Amount pursuant to Clause 5.2.2(c) will notify the other party in writing of the applicable Cleared Set Termination Amount promptly following the relevant party's determination of such amount pursuant to Clause 5.2.2(c);
- (g) the applicable Cleared Set Termination Amount will:
  - (i) if (x) payable by Client or (y) payable by Firm and there were no outstanding Client Transactions immediately prior to the occurrence of a Firm Trigger Event, be payable on: (I) if Client is determining the amount, the first Business Day after the day on which Firm receives notification of such amount from Client pursuant to Clause 5.2.2(f) or (II) if Firm is determining the amount, the first Business Day after the date on which Client receives notification of such amount from Firm pursuant to Clause 5.2.2(f), provided in either case, that if such notification pursuant to Clause 5.2.2(f) is delivered on a date that is not a Business Day or after the Payment Notification Cut-Off Time on any Business Day, such notification will be deemed to have been delivered on the first following day that is a Business Day;



- (ii) if payable by Firm and there were outstanding Client Transactions immediately prior to the occurrence of a Firm Trigger Event, be payable on the first Business Day after the date on which any portion of the termination amount receivable by Firm in respect of all relevant terminated Firm/CCP Transactions is received, subject to the application of Clause 8 and in particular, but without limitation, any pro rata allocation between Client and other clients of Firm in relation to the relevant Agreed CCP Service. For the purposes of any such pro rata allocation in relation to a Cleared Set Termination Amount, Firm will only be obliged to determine such pro rata allocation to the extent that it has information of the termination amounts for all clients (including Client) in relation to the relevant Agreed CCP Service and Firm agrees that it will use reasonable efforts to obtain such information or otherwise determine the termination amount in accordance with the terms of the clearing agreement with each such client;
- (h) any outstanding obligation of Firm or Client under the Agreement to return or transfer Title Transfer Collateral to the extent that the value of such Title Transfer Collateral has been taken into account for the purposes of Clause 5.2.2(c)(C) will not be required to be performed; and
- (i) if, following a Firm Trigger Event, any Firm/CCP Transaction is Transferred from Firm to another clearing member of the Agreed CCP Service through which that Firm/CCP Transaction is Cleared along with all collateral or margin relating to such Firm/CCP Transaction which has been posted to the relevant Agreed CCP, pursuant to the Rule Set of such Agreed CCP Service, then for the purposes of Clause 5.2.2(b), the value of the corresponding Client Transaction shall be zero and for the purposes of Clause 5.2.2(c)(C) the Relevant Collateral Value in respect of that Client Transaction shall be zero. If any Firm/CCP Transaction is so Transferred but along with only a proportion of the collateral or margin relating to such Firm/CCP Transaction, then for the purposes of Clause 5.2.2(b) the value of the corresponding Client Transaction shall be zero but for the purposes of Clause 5.2.2(c)(C) the Relevant Collateral Value in respect of that Client Transaction shall be reduced by the value of the collateral or margin so transferred as at the date it was transferred by the Agreed CCP as determined by Firm.

### 5.3 *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 Rule Set, be dealt with as set out below:

- 5.3.1 each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related Firm/CCP Transaction and following such termination no further payments or deliveries in respect of



such Client Transaction or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this Clause 5.3;

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



Agreed CCP, as applicable, in respect of the related terminated Firm/CCP Transaction(s) in accordance with the relevant Rule Set (and any amount included in Clause 5.3.3 not denominated in such currency will be included as the Currency Equivalent Amount thereof);

5.3.6 Firm will notify Client in writing of the applicable Cleared Set Termination Amount promptly following Firm's determination of such amount pursuant to Clause 5.3.3;

5.3.7 the applicable Cleared Set Termination Amount will:

(a) if (x) payable by Client or (y) payable by Firm and there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, be payable on the later of (A) the date on which the termination amount payable by Firm in respect of the terminated Firm/CCP Transaction(s) is payable in accordance with the relevant Rule Set and (B) the first Business Day after the date on which Client receives notification of such Cleared Set Termination Amount pursuant to Clause 5.3.6, provided that, if such notification pursuant to Clause 5.3.6 is delivered on a date that is not a Business Day or after the Payment Notification Cut-Off Time on any Business Day, such notification will be deemed to have been delivered on the first following day that is a Business Day; or

(b) if payable by Firm, be payable, subject to the application of Clause 8, on the first Business Day after the date on which any portion of the termination amount receivable by Firm in respect of all relevant terminated Firm/CCP Transactions is received; and

5.3.8 any outstanding obligation of Firm or Client under the Agreement to return or transfer Title Transfer Collateral to the extent that the value of such Title Transfer Collateral has been taken into account for the purposes of Clause 5.3.3(3) will not be required to be performed.

5.4 *Hierarchy of Events:*

5.4.1 Subject to Clause 5.4.2, if Client Transactions are capable of being terminated pursuant to more than one of Clause 5.1, Clause 5.2 or Clause 5.3, then the clause 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.

5.4.2 If each of a Firm Trigger Event and a CCP Default occurs, either Clause 5.2.2 or Clause 5.3, as the case may be, will take priority in accordance with the order of priority, if any, given to such events in the relevant Rule Set, provided that, if no such order of priority is given in the relevant Rule Set, Clause 5.4.1 will apply.

5.4.3 If a Cleared Set Termination Amount is determined pursuant to Clause 5.2 or Clause 5.3 and before such Cleared Set Termination Amount is paid an event



occurs that would entitle Firm to terminate all other outstanding transactions under the Clearing Agreement, such Cleared Set Termination Amount will remain payable in accordance with Clause 5.2 or Clause 5.3, as applicable, and will not be taken into account in the determination of the termination amount as a result of such event.

- 5.4.4 If a Market Action Clause is specified in the Module Annex then upon the occurrence of a CCP Default the provisions of Clause 5.3 shall apply to the exclusion of the Market Action Clause so specified but only to the extent of and in relation to matters expressly provided for in Clause 5.3. Nothing in this Clause 5.4.4 shall affect or prejudice the application or effectiveness of the Market Action Clause specified in the Module Annex in any other circumstances.
- 5.4.5 Without prejudice to the terms of the Clearing Agreement, nothing in this Module will prevent Firm or Client exercising any right to terminate any transactions under the Agreement which are not Client Transactions.

#### 5.5 *Set-off*

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 5.5 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 5.5 shall prejudice or affect such Disapplied Set-off Provisions in so far as they relate to transactions other than Client Transactions under the Agreement.

### 6. PAYMENT ADJUSTMENT

- 6.1 Without prejudice to Clause 6.2, Client will notify Firm as soon as reasonably practicable after becoming aware that (i) it has been, or will be, paid (or has otherwise received, or will otherwise receive credit for) any amount or (ii) it has received, or will receive any asset under the relevant Rule Set from an Agreed CCP in relation to an Agreed CCP Service in connection with one or more Client Transactions and the related Firm/CCP Transactions.
- 6.2 If any amount has been paid, or is payable, to Client (or Client has otherwise received or will otherwise receive credit for any amount) or if any asset has been received, or shall be received, by Client from an Agreed CCP in relation to an Agreed CCP Service under the relevant Rule Set and such amount or asset is attributable to amounts that would otherwise be determined and/or payable under the Clearing Agreement and is not otherwise already taken into account in the determination of amounts payable under the Clearing Agreement, then Firm will make such adjustment to the payment or other terms of the Clearing Agreement (which may include, without limitation, an obligation on Client to pay to Firm any amount (i) received by Client from an Agreed CCP and/or (ii) corresponding to the value of an asset received by Client from an Agreed CCP, that exceeds the amount due to Client from Firm in



respect of that Agreed CCP Service under the Clearing Agreement) as Firm determines appropriate to account for any Losses that Firm may otherwise incur as a result of such amount being paid, or payable, to Client, or Client otherwise receiving credit for such amount, or such asset being received, or to be received, by Client from the relevant Agreed CCP. Following the receipt of an asset by the Client in the circumstances referred to in Clause 6.1 above, and when making the necessary adjustments to the payment or other terms of the Clearing Agreement referred to above, Firm shall take into account, for the purposes of such adjustment, the value of the asset so received by the Client at the time that the Agreed CCP determines that such asset is to be transferred to Client in accordance with the relevant Rule Set of that Agreed CCP (irrespective of when such asset is actually received by Client).

## 7. INFORMATION COLLECTION, FATCA AND REPORTING

- 7.1 *Collection of Information:* Client shall promptly provide Firm with such information as Firm may reasonably require from time to time, and shall update that information as required by Firm from time to time, to enable Firm or any Affiliate of Firm to comply with any Applicable Law. Client shall notify Firm in writing within 30 days of any material change in the validity of, or information contained in, any information that Client has previously provided to Firm further to this Clause 7.1.
- 7.2 *Withholding:* Client or Firm may make any FATCA Deduction it is required by FATCA to make, and any payment required in connection with that FATCA Deduction. Notwithstanding any provision of the Agreement to the contrary, neither Client nor Firm shall be required to increase any payment in respect of which it makes such a FATCA Deduction or otherwise compensate the recipient of the payment for that FATCA Deduction.
- 7.3 *FATCA Reporting:* Firm, its Affiliates and its and their agents and service providers may collect, store and process information obtained from Client or otherwise in connection with the Clearing Agreement and the Client Transactions for the purpose of complying with FATCA or other Applicable Law, including disclosures between themselves and to Governmental Authorities. Client acknowledges that this may include transfers of information to jurisdictions which do not have strict data protection, data privacy laws or banking secrecy laws. Client shall ensure that, before it or anyone on its behalf discloses information relating to any third party to Firm, its Affiliates or its or their agents or service providers in connection with the Clearing Agreement or Client Transactions that third party has been provided with such information and has given such consents or waivers as are necessary to allow Firm, its Affiliates and its or their agents and service providers to collect, store, process and disclose his, her or its information as described in this Clause 7.3.
- 7.4 *Other Reporting:* Without prejudice to any provision of the Agreement relating to information or data or its disclosure, Client consents to the disclosure by Firm, its Affiliates and its and their agents and service providers of any information or data in connection with or relating to Client, the Clearing Agreement and/or any Client Transaction (including, without limitation, pricing data) (i) to the extent that the Firm determines it required, permitted or desirable to comply with Applicable Law and (ii) to the extent not permitted by Clause 7.4(i) above, if such disclosure is made to any trade repository registered in accordance with Article 55 of EMIR or recognised in



accordance with Article 77 of EMIR or one or more systems or services operated by any such trade repository.

#### 8. LIMITED RE COURSE

- 8.1 Client agrees that performance and payment obligations by Firm to Client under or in respect of Client Transactions are limited by and contingent on the actual performance or payment by the relevant Agreed CCP to Firm in relation to the related Firm/CCP Transactions or any related collateral arrangements and Firm will only be obliged to perform its obligations to Client under or in respect of Client Transactions to the extent that the Agreed CCP actually performs its obligations to Firm in relation to the related Firm/CCP Transactions or any related collateral arrangements; provided that amounts that would have been paid by the Agreed CCP to Firm but for the application of (i) netting or set-off in accordance with the relevant Rule Set and/or Applicable Law or (ii) any provision of the relevant Rule Set and/or Applicable Law that allows the Agreed CCP to make payments directly to Client or Transfer related Firm/CCP Transactions upon the occurrence of a Firm Trigger Event will, for the purposes of this provision and without prejudice to Clause 6.2, be considered to have been paid.
- 8.2 Firm will give notice in writing to Client of any deduction, withholding or other reduction from any payment or performance effected under this Clause 8, in each case as soon as reasonably practicable following the relevant event.

#### 9. MISCELLANEOUS

- 9.1 *Accounting:* No provision of this Module is intended to address the accounting treatment of the relationships between Client, Firm and any Agreed CCP.
- 9.2 *Counterparts:* This Module may be executed and delivered in counterparts (including by facsimile transmission and by electronic messaging system), each of which will be deemed to be an original.
- 9.3 *Other Provisions:* If any Other Provisions are included in the Module Annex, they will constitute terms of this Module.
- 9.4 *Mandatory CCP Provisions:* Client agrees to be bound by and comply with the Mandatory CCP Provisions of each Agreed CCP Service.
- 9.5 *Electronic Notices:* For the purposes of this Module, a communication, notice or document delivered by email or an electronic messaging system or made available on an electronic platform will be treated as being in writing.

#### 10. GOVERNING LAW AND JURISDICTION

The governing law, jurisdiction and dispute resolution provisions of the Agreement will apply to this Module.



## 11. DEFINITIONS

As used in this Module:

**"Additional Excluded Termination Amounts"** means the amounts (if any) specified as such in part 1 of the Module Annex.

**"Admitted for Clearing"** means, in respect of a Clearing Eligible Trade, such Clearing Eligible Trade being admitted (whether automatically or otherwise and which process may follow a give-up to the Firm) to an Agreed CCP for clearing in an Agreed CCP Service with the intention that the related Firm/CCP Transaction is recorded in the Client Account at the Agreed CCP Service.

**"Affiliate"** means, unless otherwise defined in the Agreement (in which case, notwithstanding Clause 1.2 of this Module, the definition of Affiliate in the Agreement will prevail), in relation to any person, any entity controlled, directly or indirectly, by the person, any entity that controls, directly or indirectly, the person or any entity directly or indirectly under common control with the person. For this purpose, "control" of any entity or person means ownership of a majority of the voting power of the entity or person.

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

**"Agreed CCP"** means (a) any clearing organisation specified as such in Table A and (b) any Trading Agreed CCP.

**"Agreed CCP Service"** means (a) any central counterparty clearing service specified in Table A from time to time and (b) any Trading Agreed CCP Service; *provided that*, any Trading Agreed CCP Service that is subsequently specified in Table A shall cease to be a Trading Agreed CCP Service but will be an Agreed CCP Service by virtue of (a) of this definition.

**"Agreement"** means the contractual arrangement between Firm and Client, as specified in part 1 of the Module Annex and as may be amended as between the parties from time to time.

**"Applicable Law"** means any applicable national, federal, supranational, state, regional, provincial, local or other statute, law, ordinance, regulation, rule, code, guidance, order, published practice or concession, judgment or decision of a Governmental Authority or any agreement entered into with or between any Governmental Authority or Governmental Authorities.

**"Available Termination Amount"** means any Cleared Set Termination Amount or other termination amount payable by Client to Firm under the Clearing Agreement which is not an Excluded Termination Amount at such time.



**"Business Day"** has the meaning given to it in Part 1 of the Module Annex.

**"CCP Default"** means the occurrence of a default, termination event or other similar event in respect of an Agreed CCP that, under the relevant Rule Set, entitles Firm to terminate, or results in automatic termination of, Firm/CCP Transactions.

**"Cleared"** means that (a) a Clearing Eligible Trade has been Admitted for Clearing and (b) the relevant Agreed CCP has become a party to a Firm/CCP Transaction in respect of such Clearing Eligible Trade in accordance with the relevant Rule Set. Any reference in this Module to the time at which a Clearing Eligible Trade is "Cleared" means the time at which the related Firm/CCP Transaction arises in accordance with the relevant Rule Set for the account of Client.

**"Cleared Set Termination Amount"** means the termination amount (which may be positive or negative) payable by one party to the other in accordance with the Clearing Agreement in respect of the termination of one or more Client Transactions of a Cleared Transaction Set in accordance with the Clearing Agreement.

**"Cleared Transaction Set"** means all Client Transactions in respect of which the related Firm/CCP Transactions are cleared through the same Agreed CCP Service.

**"Clearing Eligible Trade"** means, with respect to an Agreed CCP and an Agreed CCP Service, a transaction of any type which is capable of being Cleared by Firm on behalf of Client using such Agreed CCP Service and which is not of an Excluded Transaction Type in respect of such Agreed CCP Service.

**"Client"** means the entity specified as such in Part 1 of the Module Annex.

**"Client Account"** means (a) with respect to an Agreed CCP Service other than a Trading Agreed CCP Service, an account of the type specified as such in respect of such Agreed CCP Service in Table A and (b) with respect to a Trading Agreed CCP Service, an account of the type specified as the Trading Type of Client Default Election in the Module Annex. References in this Module to transactions being credited to or recorded in the Client Account are to such transactions being so credited or recorded for the account of Client.

**"Client Transaction"** means, with respect to a Firm/CCP Transaction, the related transaction that arises between Firm and Client pursuant to Clause 3, as may be modified from time to time in accordance with the Agreement.

**"Currency Equivalent Amount"** means the amount of the currency in which a termination amount is payable in accordance with a Rule Set required to purchase any relevant amount denominated in a currency other than such currency at the spot rate of exchange determined by the party determining the termination amount on any relevant date of determination.

**"Disapplied Set-off Provisions"** means the provisions specified as such in Part 1 of the Module Annex.

**"EMIR"** means Regulation (EU) No. 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories dated 4 July 2012.



"Excess Margin" has the meaning (if any) given to it in Part 3 of the Module Annex.

"Excess Margin Posting Provisions" means the provisions (if any) specified as such in Part 3 of the Module Annex.

"Excluded Termination Amount" means, at any time: (a) any Cleared Set Termination Amount payable by Client to Firm under the Clearing Agreement the rights of Firm in respect of which are at such time subject to any mortgage, pledge, lien, charge, assignment security interest or arrangement having a similar effect; and (b) any Additional Excluded Termination Amounts (if applicable).

"Excluded Transaction Type" means, with respect to an Agreed CCP Service, any type of transaction specified as an Excluded Transaction Type in respect of such Agreed CCP Service in Table A.

"FATCA" means (a) sections 1471 to 1474 of the U.S. Internal Revenue Code of 1986 or any associated regulations or other official guidance; (b) any treaty, law, regulation or other official guidance enacted in any other jurisdiction, or relating to an intergovernmental agreement between the US and any other jurisdiction, which (in either case) facilitates the implementation of paragraph (a); or (c) any agreement pursuant to the implementation of paragraphs (a) or (b) above with any Governmental Authority.

"FATCA Deduction" means a deduction or withholding from a payment under the Clearing Agreement required by or otherwise in accordance with FATCA.

"Firm" means the entity specified as such in Part 1 of the Module Annex.

"Firm/CCP Transaction" means a transaction between Firm and an Agreed CCP that arises when the terms of a Clearing Eligible Trade are Cleared through the relevant Agreed CCP Service, as may be modified in accordance with the relevant Rule Set or Applicable Law.

"Firm/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/CCP Transaction or group of related Firm/CCP Transactions in accordance with the relevant Rule Set following a Firm 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/CCP Transaction(s) under the relevant Rule Set reflects a positive value for Firm *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 (and will constitute a positive amount for any determination under this Module) and, if the value determined in respect of or otherwise ascribed to the related terminated Firm/CCP Transaction(s), under the relevant Rule Set reflects a positive value for the relevant Agreed CCP *vis-à-vis* Firm, the value determined in respect of such terminated Client Transaction(s) will reflect a positive value for Firm *vis-à-vis* Client (and will constitute a negative amount for any determination under this Module). The value determined in respect of or otherwise ascribed to the related Firm/CCP Transaction(s) under the relevant Rule Set may be equal to zero.



**"Firm Trigger Event"** means, with respect to an Agreed CCP Service, an event that (a) the applicable Agreed CCP formally declares to Firm constitutes a default in respect of Firm or (b) results in the automatic termination of all relevant Firm/CCP Transactions (or would result in the automatic termination of all relevant Firm/CCP Transactions if there were Firm/CCP Transactions outstanding at that time), in each case in accordance with the relevant Rule Set.

**"Governmental Authority"** means any governmental, inter-governmental or supranational body, agency, department or regulatory, self-regulatory or other authority or organisation anywhere in the world with competent jurisdiction.

**"Individual Client Account"** means, with respect to an Agreed CCP and an Agreed CCP Service, an account relating to Client (including any Affiliates or principals of Client) individually at such Agreed CCP in respect of such Agreed CCP Service.

**"Losses"** means any losses, claims, injuries, damages, judgments, interest on judgments, assessments, taxes, costs, fees, charges, amounts paid in settlement or other liabilities (including, without limitation, reasonable attorneys' fees, costs of collection and any reasonable cost incurred in successfully defending against any claim), provided that a person's Losses will not include any injuries, costs, losses and expenses which are directly caused by the relevant person's fraud, wilful default or gross negligence.

**"Mandatory CCP Provisions"** means, with respect to an Agreed CCP Service (a) the provisions, if any, specified as such in respect of such Agreed CCP Service in Table A (which such specification may be by reference to a website of the relevant Agreed CCP) or (b) if no such provisions are specified in respect of such Agreed CCP Service in Table A, each provision, if any, specified by an Agreed CCP in respect of an Agreed CCP Service as mandatory for inclusion in the terms of transactions between clearing members of that Agreed CCP Service and their respective clients (to the extent such clients are of the same classification for the purposes of the relevant Rule Set as Client) and, in either case, which such provisions may, without limitation, be intended to be applicable and binding as between such clearing members and their respective clients or to create rights of the relevant Agreed CCP against such clients or liabilities of such clients to that Agreed CCP and which may be (i) published from time to time by the relevant Agreed CCP on its website in a form that is accessible without any subscription or payment of any fee and (ii) amended and supplemented from time to time by the relevant Agreed CCP.

**"Market Action Clause"** has the meaning given to it in Part 1 of the Module Annex.

**"Module"** means this FOA Clearing Module.

**"Module Annex"** means the annex to this Module, as may be amended between the parties from time to time.

**"Omnibus Client Account"** means, with respect to an Agreed CCP and an Agreed CCP Service, an account relating to Client together with other clients of Firm at such Agreed CCP in respect of such Agreed CCP Service.



**"Other Provisions"** means the provisions (if any) specified as such in Part 8 of the Module Annex.

**"Payment Notification Cut-Off Time"** has the meaning given to it in Part 1 of the Module Annex.

**"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) of all collateral that:

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

(**"Title Transfer Collateral"**).

The Relevant Collateral Value will constitute a positive amount if the relevant Title Transfer Collateral has been transferred by Client to Firm 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 Clearing Agreement and a negative amount if the relevant Title Transfer Collateral has been transferred by Firm 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 Clearing Agreement.

**"Rule Set"** means, with respect to an Agreed CCP Service, the rules, conditions, and procedures, regulations, standard terms, membership agreements, collateral addenda, notices, guidance, policies or other such documents promulgated by the Agreed CCP in respect of the relevant Agreed CCP Service as amended and supplemented from time to time.

**"Specified Netting Contracts"** has the meaning given to it in Part 2 of the Module Annex.

**"Table A"** means the table set out in part 8 of the Module Annex, as may be amended in writing between the parties from time to time.

**"Tax"** means any present or future tax, levy, impost, duty, charge, assessment or fee of any nature (including interest, penalties and additions thereto) that is imposed by any government or other taxing authority other than any Other Tax.

**"Title Transfer Collateral"** has the meaning given to it in the definition of **"Relevant Collateral Value"**.

**"Title Transfer Provisions"** means the provisions (if any) specified as such in Part 6 of the Module Annex.



"**Trading Agreed CCP**" means, in relation to a Trading Agreed CCP Service, the clearing organisation that offers that Trading Agreed CCP Service.

"**Trading Agreed CCP Service**" means a central counterparty clearing service which meets both of the following requirements:

- (a) it is not a central counterparty clearing service that is specified as an "Agreed CCP Service" in Table A; and
- (b) the parties have entered into a transaction (the "New Service Transaction") which is intended to be a Client Transaction and Firm will clear the corresponding Firm/CCP Transaction (assuming the New Service Transaction were a Client Transaction) through that central counterparty clearing service.

A central counterparty clearing service that meets both of the foregoing requirements will become a Trading Agreed CCP Service from and including the date that the parties enter into the relevant New Service Transaction.

"**Trading Mandatory CCP Provisions**" means, in relation to a Trading Agreed CCP Service, each provision, if any, specified by the relevant Trading Agreed CCP in respect of that Trading Agreed CCP Service as mandatory for inclusion in the terms of transactions between clearing members of that Trading Agreed CCP Service and their respective clients (to the extent such clients are of the same classification for the purposes of the relevant Rule Set as Client) and, in either case, those of such provisions which may, without limitation, be intended to be applicable and binding as between such clearing members and their respective clients or to create rights of the relevant Trading Agreed CCP against such clients or liabilities of such clients to that Trading Agreed CCP and which may be (i) published from time to time by the relevant Trading Agreed CCP on its website in a form that is accessible without any subscription or payment of any fee and (ii) amended and supplemented from time to time by the relevant Trading Agreed CCP.

"**Trading Type of Client Default Election**" has the meaning given to it in Part 7 of the Module Annex.

"**Trading Type of Client Account Default Election**" has the meaning given to it in Part 7 of the Module Annex.

"**Transfer**" means, in respect of a Firm/CCP Transaction, to transfer Firm's rights, obligations and interest in or under such transaction, including by way of assignment, novation or termination and replacement, and "**Transferred**" will be construed accordingly.



[In witness whereof, the parties have executed this Module to the Agreement on the respective dates specified below with effect from the date specified on the first page of this Module.]

[Firm]

[Client]

.....  
(Name of Party)

.....  
(Name of Party)

By: .....

By: .....

Name: .....

Name: .....

Title: .....

Title: .....

Date: .....

Date: ..... ]<sup>1</sup>

---

<sup>1</sup> Changes may be required to the signature blocks. Execution requirements may differ in different jurisdictions and for different entities and parties should therefore satisfy themselves as to applicable legal requirements and amend the signature block if necessary.



## SCHEDULE 1 MODULE ANNEX

### 1. Definitions

"Additional Excluded Termination Amounts" means [•]

"Agreement" means [•].

"Business Day"

[has the meaning given to it in the Agreement.]

[means:

(a) in relation to notices, [•]; and

(b) in relation to payments, [•].]

"Client" means [•].

"Disapplied Set-off Provisions" means [insert provisions of the Agreement which may affect Cleared Transaction Sets and the operation of, in particular, Clause 5 and otherwise as required].

"Firm" means [•].

"Market Action Clause" means clause [•] of the Agreement.

"Payment Notification Cut-Off Time" means [•],[•] time.

### 2. Payment Netting

"Payment Netting" [will][will not] apply.

If "Payment Netting" applies, the following will constitute "Specified Netting Contracts" for the purpose of this Module in respect of the specified transactions or groups of transactions:

[include descriptions of relevant agreements/services/documents in respect of which Client Transactions and/or other payments will be subject to payment netting, if applicable]

### 3. Excess Margin Posting

"Excess Margin Posting" [will][will not] apply.

If "Excess Margin Posting" applies then:

"Excess Margin" means [•]; and

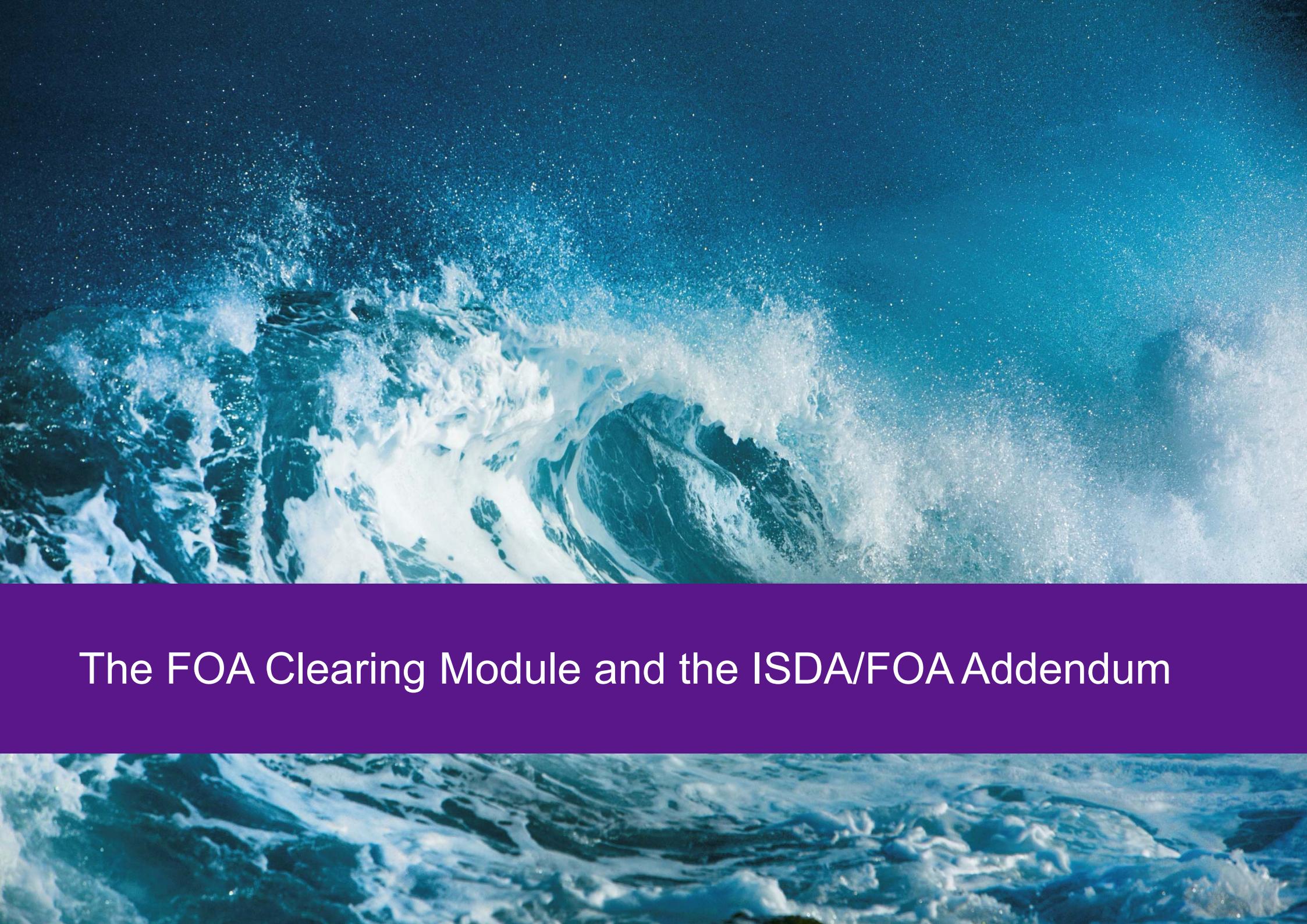
The following will constitute the "Excess Margin Posting Provisions" for the purpose of this Module:



- [•]
- 4. **Client Money Margin**  
"Client Money Margin" [will][will not] apply.
- 5. **Non-Cash Security Interest Margin**  
"Non-Cash Security Interest Margin" [will][will not] apply.
- 6. **Title Transfer Provisions**  
"Title Transfer Provisions" means [•].
- 7. **Trading Default Elections**  
"Trading Type of Client Default Election" means [•].  
"Trading Type of Client Account Default Election" means [•].
- 8. **Other Provisions**  
[•].

**Table A**

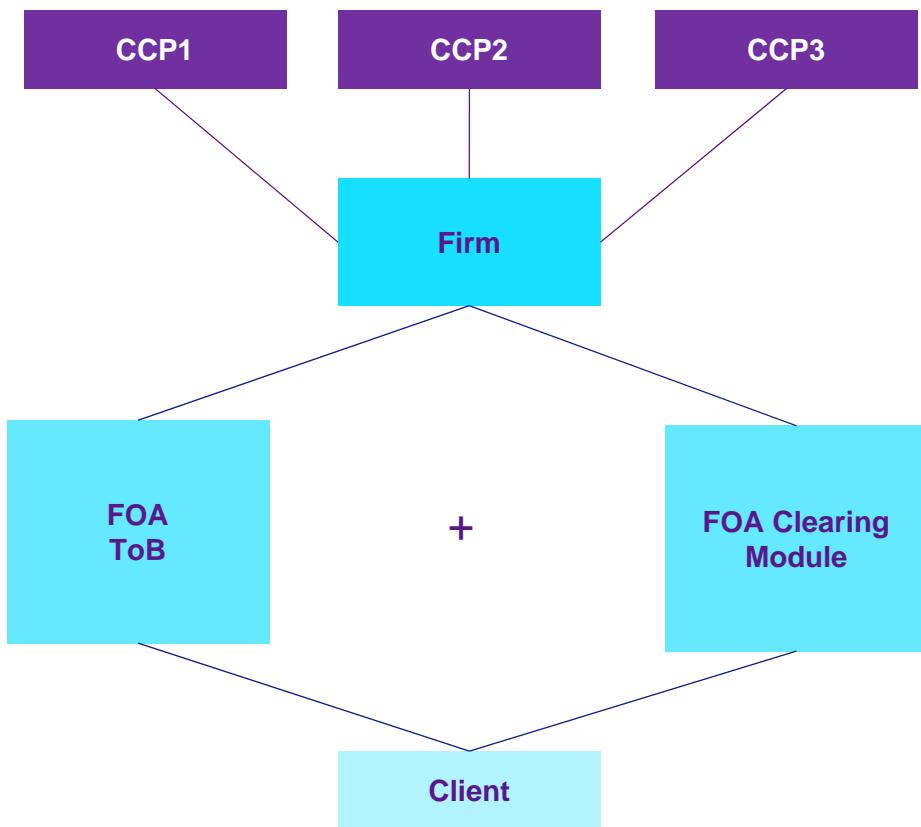
<b>"Agreed CCP"</b>	<b>"Agreed CCP Service"</b>	<b>Mandatory CCP Provisions</b>	<b>"Excluded Transaction Type"</b>	<b>Type of Client</b>	<b>Type of Client Account and Custodian Details (if applicable)</b>
[Insert name of CCP]	[As a Cleared Transaction Set will comprise all Client Transactions relating to a particular Agreed CCP Service, "Agreed CCP Service" as specified here should reflect the netting set resulting from the Rule Set of the Agreed CCP]	[Insert Mandatory CCP Provisions of the relevant Agreed CCP Service]		[Individual Client Account / Omnibus Client Account]	[Net Omnibus/Gross Omnibus/Full Physical Segregation/Tri- or Quad-Partite Arrangement/Details of any applicable Custodian(s)]
The Trading Agreed CCP relating to the relevant Trading Agreed CCP Service	Each Trading Agreed CCP Service	The Trading Mandatory CCP Provisions relating to the relevant Trading Agreed CCP Service	As agreed between the parties from time to time	The Trading Type of Client Default Election	The Trading Type of Client Account Default Election



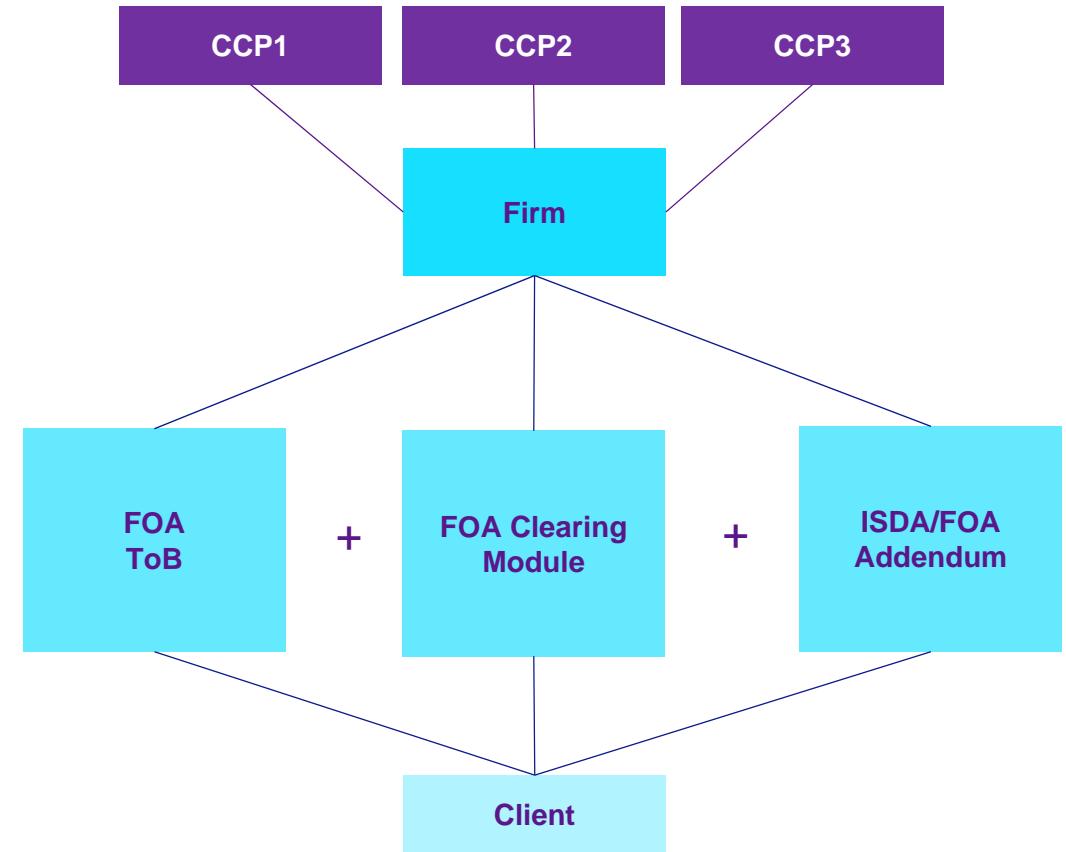
# The FOA Clearing Module and the ISDA/FOA Addendum

# Possible Documentation Structures

ETD only or ETD and OTC Option #1



ETD and OTC Option #2





# FOA Clearing Module vs ISDA/FOA Addendum: Key Similarities

## Client Default

- Both look to provisions of the Terms of Business and portfolio netting

## Firm Trigger Event and CCP Default

- Both override the Terms of Business and create netting sets per Agreed CCP Service



# FOA Clearing Module vs ISDA/FOA Addendum: Key Differences

## **Deletion of provisions from Addendum:**

- All ISDA-specific language
- “Service Provider” provisions
- Valuation of Client Transactions following Client Default
- Pre-Default Porting rights

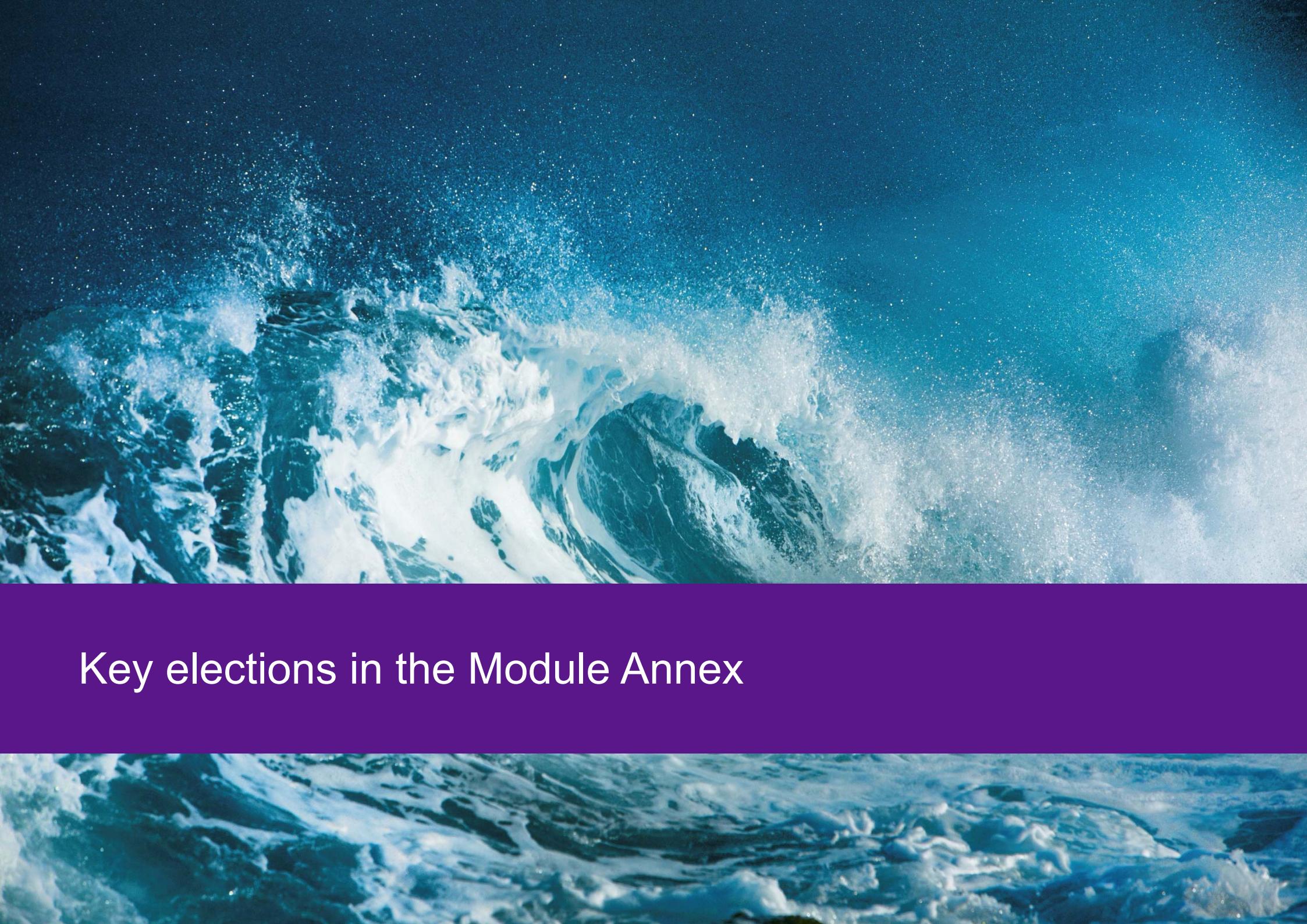
## **Futures Terms of Business - specific margin provisions:**

- Allowing multiple daily margin calls
- Excess margin posting arrangements
- Security interest margin converted into title transfer margin, if necessary

## **Other regulatory provisions:**

- FATCA (withholding and disclosure)
- Trade repository reporting confidentiality waiver

## **General tailoring**



# Key elections in the Module Annex



## SCHEDULE 1 MODULE ANNEX

### 1. Definitions

**"Additional Excluded Termination Amounts"** means [•]

**"Agreement"** means [•].

**"Business Day"**

[has the meaning given to it in the Agreement.]

[means:

(a) in relation to notices, [•]; and

(b) in relation to payments, [•].]

**"Client"** means [•].

**"Disapplied Set-off Provisions"** means [*insert provisions of the Agreement which may affect Cleared Transaction Sets and the operation of, in particular, Clause 5 and otherwise as required*].

**"Firm"** means [•].

**"Market Action Clause"** means clause [•] of the Agreement.

**"Payment Notification Cut-Off Time"** means [•],[•] time.

### 2. Payment Netting

**"Payment Netting"** [will][will not] apply.

If **"Payment Netting"** applies, the following will constitute "Specified Netting Contracts" for the purpose of this Module in respect of the specified transactions or groups of transactions:

[*include descriptions of relevant agreements/services/documents in respect of which Client Transactions and/or other payments will be subject to payment netting, if applicable*]

### 3. Excess Margin Posting

**"Excess Margin Posting"** [will][will not] apply.

If **"Excess Margin Posting"** applies then:

**"Excess Margin"** means [•]; and

The following will constitute the "Excess Margin Posting Provisions" for the purpose of this Module:



[•]

4. **Client Money Margin**

"Client Money Margin" [will][will not] apply.

5. **Non-Cash Security Interest Margin**

"Non-Cash Security Interest Margin" [will][will not] apply.

6. **Title Transfer Provisions**

"Title Transfer Provisions" means [•].

7. **Trading Default Elections**

"Trading Type of Client Default Election" means [•].

"Trading Type of Client Account Default Election" means [•].

8. **Other Provisions**

[•].

**Table A**

<b>"Agreed CCP"</b>	<b>"Agreed CCP Service"</b>	<b>Mandatory CCP Provisions</b>	<b>"Excluded Transaction Type"</b>	<b>Type of Client</b>	<b>Type of Client Account and Custodian Details (if applicable)</b>
[Insert name of CCP]	[As a Cleared Transaction Set will comprise all Client Transactions relating to a particular Agreed CCP Service, "Agreed CCP Service" as specified here should reflect the netting set resulting from the Rule Set of the Agreed CCP]	[Insert Mandatory CCP Provisions of the relevant Agreed CCP Service]		[Individual Client Account / Omnibus Client Account]	[Net Omnibus/Gross Omnibus/Full Physical Segregation/Tri- or Quad-Partite Arrangement/Details of any applicable Custodian(s)]
The Trading Agreed CCP relating to the relevant Trading Agreed CCP Service	Each Trading Agreed CCP Service	The Trading Mandatory CCP Provisions relating to the relevant Trading Agreed CCP Service	As agreed between the parties from time to time	The Trading Type of Client Default Election	The Trading Type of Client Account Default Election



# The FOA Clearing Module and the FOA Legal Opinions





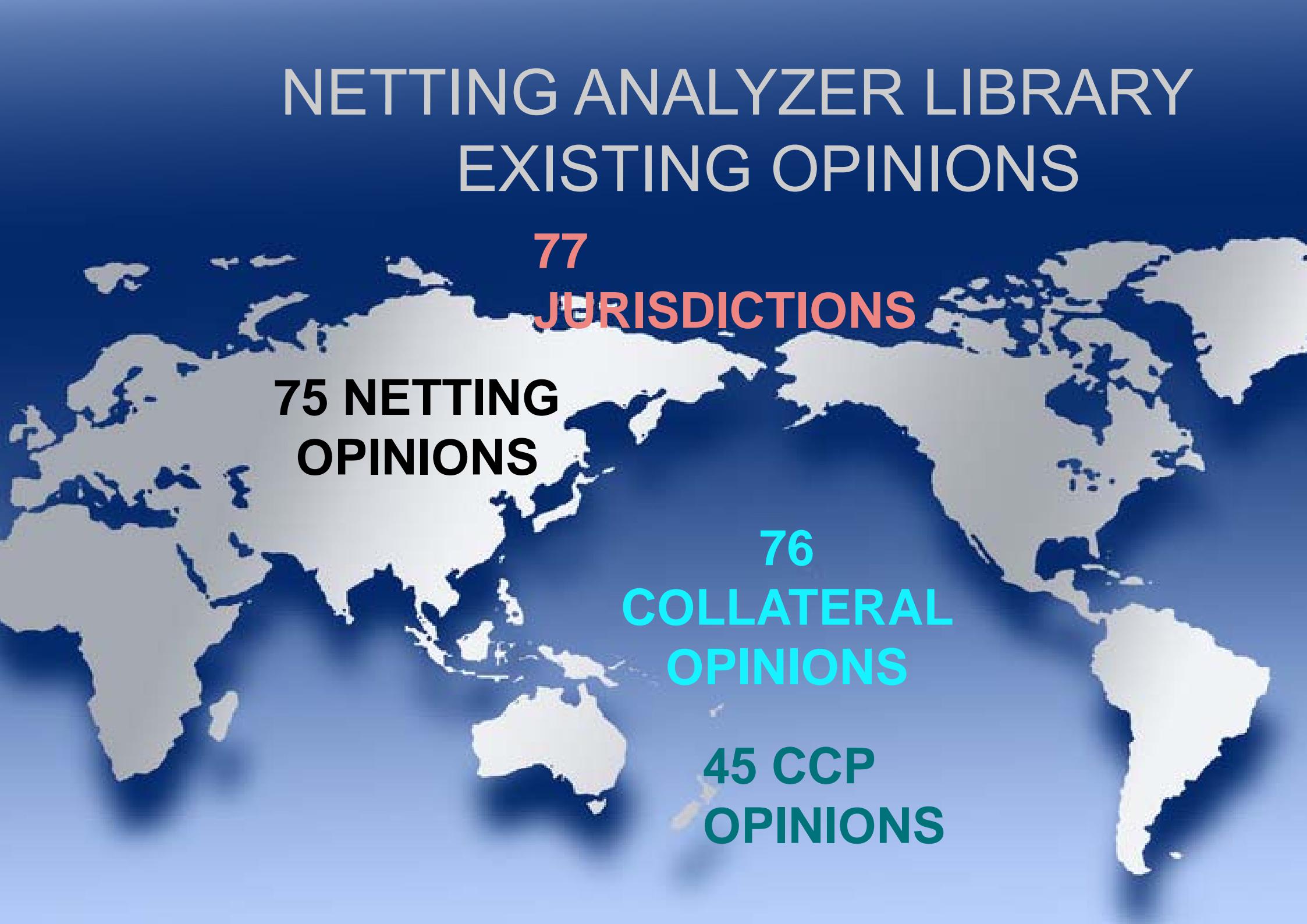
# BACKGROUND

- Existing set of netting opinions
- Why a new set of netting opinions?
  - FOA Clearing Module and ISDA/FOA Client Cleared OTC Derivatives Addendum
    - 1. EMIR mandates clearing of certain OTC derivatives, but also imposes requirements on CCPs and clearing members (CMs) for exchange-traded derivatives
    - 2. EMIR rules include:
      - i. segregation of house and client accounts
      - ii. understood to require separate net sums for each CCP service
      - iii. “porting” (transfer) of positions/margin if CM defaults
      - iv. “leapfrog” of net payment to Clients if CM defaults
    - 3. Capital Requirements Regulation
      - i. reinforces need for netting opinions for counterparty exposures
      - ii. introduces capital requirement for exposures to CCPs (not covered by the present project)
      - iii. allows capital relief for CMs where CCP defaults but CM is not liable to Client



## Jurisdictional Scope

# NETTING ANALYZER LIBRARY EXISTING OPINIONS



77

**JURISDICTIONS**

75 NETTING  
OPINIONS

76

**COLLATERAL  
OPINIONS**

45 CCP  
OPINIONS

# NETTING ANALYZER LIBRARY NEW OPINIONS – PHASE 1

**34 JURISDICTIONS**

**34 NETTING  
OPINIONS**

**More to come  
under Phase 2**

**CCP OPINIONS:  
7 CCPs**



# New Set of Opinions

- Phase 1 of the Netting Opinions Update:
  - 34 jurisdictions  
(Australia, Austria, Bahamas, Belgium, Bermuda, British Virgin Islands, Canada – Quebec, Canada – Ontario, Cayman Islands, Denmark, Finland, France, Germany, Greece, Guernsey, Hong Kong, Ireland, Israel, Italy, Japan, Jersey, Luxembourg, Malta, Netherlands, Norway, Portugal, Scotland, Singapore, Spain, Sweden, Switzerland, Turkey and US)
  - All existing opinions except Norway
- Phase 2 of the Netting Opinions Update:  
Jurisdictions covered by the existing opinions and not already covered by Phase 1.
- CCP Opinions 2013
  - 7 CCPs covered: Eurex, ICE Clear, LCH Ltd, LCH SA, Nasdaq OMX, CME Clearing Europe and ECC AG
  - Detailed questionnaire
  - Scope will be extended



New terminology –  
more flexibility



# TERMINOLOGY OF NEW OPINIONS

## ■ FOA Netting Agreement and Clearing Agreement

- FOA Netting Agreement = FOA documentation used alone
- Clearing Agreement = FOA documentation + FOA Clearing Module and/or ISDA/FOA Client Cleared OTC Derivatives Addendum

## ■ Core Provisions and Non-material Amendments

- Core Provisions: narrower and now specific to certain opinions
- NMA: more extensive

➡ More flexibility for FOA members



## Default scenarios



# DEFAULT SCENARIOS DEALT WITH IN THE NEW OPINIONS

## ■ Under an FOA Netting Agreement

- ✓ Client = Defaulting Party
- ✓ Firm = Defaulting Party (Two-Way)
- In both cases, the FOA Netting Provision and FOA Set-Off Provisions would apply

## ■ Under a Clearing Agreement

- ✓ Client = Defaulting Party
- The FOA Netting Provision and FOA Set-Off Provisions apply
- ✓ Firm Trigger Event / CM Trigger Event
- ✓ CCP Default
- In both cases, the netting and set-off provisions of the FOA Module and/or ISDA/FOA Addendum would apply



## Structure of the opinions



# STRUCTURE OF THE OPINIONS (1/2)

## ■ Structure common to the existing and new opinions

- Body of the opinions deal with corporates and banks (incorporated in the jurisdiction of the opinion or with a branch in such jurisdiction)
- Schedules deal with the entities listed in paragraph 1.2 of the opinion (e.g. insurance companies, individuals, pension funds...)
- Paragraph 1: Terms of reference
- Paragraph 2: Assumptions
- Paragraph 3: Opinions
- Paragraph 4: Qualifications
- Annexes: Definitions



## STRUCTURE OF THE OPINIONS (2/2)

### ■ What's new in the new opinions?

- Paragraph 3 is more extensive because it now has to deal with default scenarios under the FOA Module and the ISDA/FOA Addendum
- Paragraph 3 also requires from local counsel that they indicate whether:
  - any amendments to the documentation are necessary/desirable
  - whether any additional wording should be treated as part of the Core Provisions
- Annex 4 is more extensive as well
  - in existing opinions: only the NMA
  - in new opinions: Core Provisions + NMA
- New Annex 5: for ease of reference, aggregates in one place all the necessary/desirable amendments and additions to the Core Provisions



## List of opinions



# List of opinions of the new set of opinions

Opinions deal with “enforceability” of the applicable netting, set-off and title transfer provisions i.e. self-help remedies, not judicial remedies

- ✓ Paragraph 3.1: Insolvency Proceedings applicable to the entity incorporated or established in the jurisdiction (in most jurisdictions, could be the Client or the Firm/CM)
- ✓ Paragraph 3.2: Recognition of choice of law
- ✓ Paragraph 3.3: Enforceability of FOA Netting Provisions (applies to the default of any Party under an FOA Netting Agreement and default of the Client under a Clearing Agreement)
- ✓ Paragraph 3.4 and 3.5: Enforceability of the netting provisions of the FOA Module and ISDA/FOA Addendum (under a Clearing Agreement only)
- ✓ Paragraph 3.6: do-no-harm opinion
- ✓ Paragraph 3.7: Enforceability of FOA Set-Off Provisions (under an FOA Netting Agreement and under a Clearing Agreement)
- ✓ Paragraph 3.8: Enforceability of the set-off provision of the FOA Module and FOA Set-Off Provisions (where not disappplied by the FOA Module) under a Clearing Agreement
- ✓ Paragraph 3.9: Enforceability of the set-off provision of the ISDA/FOA Addendum
- ✓ Paragraph 3.10: Enforceability of the Title Transfer Provisions under an FOA Netting Agreement or a Clearing Agreement
- ✓ Paragraph 3.11: Do-no-harm opinion in relation to Title Transfer Provisions used in combination with security interest margin
- ✓ Paragraphs 3.12 to 3.16: These opinions deals with issues that have been identified in the past as possibly problematic for Reg Cap purposes



## Possible issues



## Possible issues

- Statutory insolvency set-off (creation of separate netting sets?)
- Effect of special legislation giving effect to EMIR, protection of CCP default management (eg Settlement Finality Directive)?
- Netting legislation requiring the close-out of all transactions under the agreement
- Timing of close-out (automatic termination jurisdictions)
- Combined use of title transfer and security interest clauses?

# Questions

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