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FOA - NETTING UPDATE PROJECT
Pro forma legal opinion for netting agreement

The Futures & Options Association
2nd Floor
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December 19, 2013

Dear Sirs,

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

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

We understand that your fundamental requirement is for the enforceability and validity of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision to be substantiated by a written and reasoned opinion.

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

1. TERMS OF REFERENCE AND DEFINITIONS

1.1 Unless specified otherwise, this opinion is given in respect of:

1.1.1 individuals resident in the United States ("**Individuals**");

1.1.2 corporations and partnerships (including limited liability companies, limited partnerships, general partnerships, and business trusts[1]) established under the laws

[1] Under the Bankruptcy Code, a "business trust" specifically qualifies as a corporation. See 11 U.S.C. § 101(9)(A)(v). Although the Bankruptcy Code does not define "business trust", courts have adopted several different interpretations of, and criteria for, the term. See, e.g., *White Family Cos. v. Dayton Title Agency, Inc.*, 284 B.R. 238, 255 (S.D. Ohio 2002) (adopting the Sixth Circuit's test in *In re Kenneth Allen Knight Trust*, 121 F.3d 708 (6th Cir. 1997) that a business trust must have "the primary purpose of transacting business or carrying on commercial activity for the benefit of investors ..."); *In re Wayson Trust*, 29 B.R. 58, 59 (Bankr. D. Md. 1982) (describing a business trust as "a voluntary pooling of capital by a number of people who are the holders of freely transferable certificates evidencing beneficial interests in the trust estate"); *In re Parade Realty, Inc.*, 134

of any state of the United States, the District of Columbia, Puerto Rico, or any territory or possession of the United States that are subject to the U.S. Bankruptcy Code (the "**Bankruptcy Code**") but not subject to any specialized regulatory scheme ("**Specified Companies**" and, together with Individuals, "**Code Parties**");

1.1.3 banks (including savings associations), established under the laws of any state of the United States, any territory of the United States, the District of Columbia, Puerto Rico, the Virgin Islands (or any other governmental unit defined as a "state" in the FDIA) or under the federal laws of the United States, and which take deposits insured by the FDIC ("**Banks**");

1.1.4 branches of a non-U.S. bank established in the United States under the federal laws of the United States ("**Federal Branches**"); and

1.1.5 branches of a non-U.S. bank established and licensed under the laws of the State of New York ("**New York Branches**").

1.2 This opinion is also given in respect of Parties that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable Schedule:

1.2.1 Broker-dealers (Schedule 1); and

1.2.2 Covered Financial Companies and Receivership Covered Subsidiaries (Schedule 2).

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

1.4 Unless otherwise specified, this opinion covers all Transactions which are Safe Harbor Transactions (each as defined under 1.8 below).

1.5 References to a "**paragraph**" are (except where the context otherwise requires) to a paragraph of this letter.

1.6 Unless the context clearly indicates to the contrary, references to the plural include the singular and references to the singular include the plural.

1.7 In this letter, 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

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B.R. 7, 11 (Bankr. D. Haw. 1991) (stating that a business trust "must have some of the significant attributes of a corporation, primarily the transferability of interests in the trust"); *In re Universal Clearing House Co.*, 60 B.R. 985 (D. Utah 1986) (finding a business trust to apply where profit was the primary apparent motive, even in the presence of gross mismanagement and fraud).

without risk of successful challenge. We do not opine on the availability of any judicial remedy.

1.8 **Definitions**

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

1.8.1 "**Agreement**" means an FOA Netting Agreement or a Clearing Agreement, as applicable;

1.8.2 "**Bankruptcy Code**" means the U.S. Bankruptcy Code, as amended;[2]

1.8.3 "**CEA**" means the U.S. Commodity Exchange Act of 1936, as amended;[3]

1.8.4 "**CFTC**" means the U.S. Commodity Futures Trading Commission;

1.8.5 "**CFTC Cleared Swap Contract**" means a "swap", as such term is defined under Section 1a(47) of the CEA and the relevant CFTC Regulations, which has been cleared by a central counterparty;

1.8.6 "**CFTC Futures Contract**" means a contract for future delivery within the meaning of the CEA (a "**futures contract**"), an option on a futures contract or a commodity option, each listed for trading on a designated contract market under Section 5c(c) of the CEA, CFTC Regulation 38.4(a) and CFTC Regulation 40.3, but does not include a "security future" as such term is defined under Section 1a(44) of the CEA;[4]

1.8.7 "**CFTC Regulations**" means the rules promulgated by the CFTC under the CEA;

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[2] 11 U.S.C. §§ 101 *et seq.*

[3] 7 U.S.C. §§ 1 *et seq.*

[4] Under the CEA, the term "**security future**" means "a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof, except an exempted security under section 3(a)(12) of the Securities Exchange Act of 1934 as in effect on the date of the enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Securities Exchange Act of 1934 as in effect on the date of the enactment of the Futures Trading Act of 1982). The term "security future" does not include any agreement, contract, or transaction excluded from [the CEA] under section 2(c), 2(d), 2(f), or 2(g) of [the CEA] (as in effect on the date of the enactment of the Commodity Futures Modernization Act of 2000) or title IV of the Commodity Futures Modernization Act of 2000". 7 U.S.C. § 1a(44).

1.8.8 "**Cleared Contract**" means a CFTC Cleared Swap Contract, CFTC Futures Contract, or Foreign Futures Contract as applicable;

1.8.9 "**Code QFC**" means a Swap Agreement, Repurchase Agreement, Securities Contract, Commodity Contract, or Forward Contract, as applicable.

1.8.10 "**Commodity Broker**" means a "commodity broker" as such term is defined under the Bankruptcy Code;[5]

1.8.11 "**Commodity Contract**" means a "commodity contract" (as such term is defined under the Bankruptcy Code);[6]

1.8.12 "**DCO**" means a central counterparty organized under the laws of this jurisdiction and registered as a derivatives clearing organization;

1.8.13 "**Eligible Code Party**" means (i) with respect to a Forward Contract, a Forward Contract Merchant or Financial Participant, (ii) with respect to a Swap Agreement, a Swap Participant or a Financial Participant; (iii) with respect to a Securities Contract, a Financial Institution, Stockbroker, Financial Participant, or Securities Clearing Agency, (iv) with respect to a Repurchase Agreement, a Repo Participant" or Financial Participant, and (v) with respect to a Commodity Contract, a Commodity Broker or a Financial Participant;

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[5] "**Commodity broker**" means "futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer with respect to which there is a customer". See 11 U.S.C. § 101(6).

[6] Under the Bankruptcy Code, the term "**commodity contract**" means "(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade; (B) with respect to a foreign futures commission merchant, foreign future; (C) with respect to a leverage transaction merchant, leverage transaction; (D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; (E) with respect to a commodity options dealer, commodity option; (F)(i) any other contract, option, agreement, or transaction that is similar to a contract, option, agreement, or transaction referred to in this paragraph; and (ii) with respect to a futures commission merchant or a clearing organization, any other contract, option, agreement, or transaction, in each case, that is cleared by a clearing organization; (G) any combination of the agreements or transactions referred to in this paragraph; (H) any option to enter into an agreement or transaction referred to in this paragraph; (I) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H), together with all supplements to such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this paragraph, except that the master agreement shall be considered to be a commodity contract under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H); or (J) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this paragraph, including any guarantee or reimbursement obligation by or to a commodity broker or financial participant in connection with any agreement or transaction referred to in this paragraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562". See 11 U.S.C. § 761(4).

1.8.14 "**FDIA**" means Federal Deposit Insurance Act, as amended;[7]

1.8.15 "**FDIA Party**" means a Party subject to Insolvency Proceedings under FDIA and for which the FDIC has been appointed as a receiver or conservator;

1.8.16 "**FDIA QFC**" has the meaning set out in paragraph 6.2 below;

1.8.17 "**FDIC**" means the Federal Deposit Insurance Corporation;

1.8.18 "**FDICIA**" means the Federal Deposit Insurance Corporation Improvement Act of 1991;[8]

1.8.19 "**FDICIA Clearing Organization**" means a "clearing organization" as such term is defined under FDICIA;[9]

1.8.20 "**Financial Institution**" means a "financial institution" as such term is defined under the Bankruptcy Code;[10]

1.8.21 "**Financial Participant**" means "financial participant" as such term is defined under the Bankruptcy Code;[11]

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7 12 U.S.C. §§ 1811 *et seq.*

8 12 U.S.C. §§ 4401 *et seq.*

9 Under FDICIA, the term "clearing organization" means a "clearinghouse, clearing association, clearing corporation, or similar organization (A) that provides clearing, netting, or settlement services for its members and (i) in which all members other than the clearing organization itself are financial institutions or other clearing organizations; or (ii) which is registered as a clearing agency under the Securities Exchange Act of 1934, or is exempt from such registration by order of the Securities and Exchange Commission; or (B) that is registered as a derivatives clearing organization under section 5b of the Commodity Exchange Act, that has been granted an exemption under section 4(c)(1) of the Commodity Exchange Act." See 12 U.S.C. § 4402.

10 "**Financial institution**" means (A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidation agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidation agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer" as defined in Section 741 of the Code) in connection with a securities contract (as defined in Section 741of the Code) such customer; (B) in connection with securities contracts (as defined in Section 741 of the Code) an investment company registered under the Investment Company Act of 1940. See 11 U.S.C. § 101(22).

11 "**Financial participant**" means an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions which are securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements (as all those terms are defined in the Code), with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day

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

1.8.23 "**Foreign Futures Contract**" means a futures contract, an option on a futures contract or a commodity option made, or to be made, on or subject to the rules of any foreign board of trade as defined under CFTC Regulations 30.1(a) and 30.1(b), but does not include a "security future" as such term is defined under Section 1a(44) of the CEA;[12]

1.8.24 "**Forward Contract**" means a "forward contract" as such term is defined under the Bankruptcy Code;[13]

1.8.25 "**Forward Contract Merchant**" means a "forward contract merchant" as such term is defined under the Bankruptcy Code;[14]

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during the 15-month period preceding the date of the filing of the petition; or a clearing organization (as defined in section 402 of FDICIA (12 U.S.C. § 4402)). See 11 U.S.C. § 101 (22A).

[12] See fn. 4.

[13] Under the Bankruptcy Code, the term "**forward contract**" means "(A) a contract (other than a commodity contract as defined in paragraph 761 of the Bankruptcy Code) for the purchase, sale, or transfer of a commodity, as defined in paragraph 761(8) of the Bankruptcy Code, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in this Section), consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement; (B) any combination of agreements or transactions referred to in subparagraphs (A) and (C); (C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B); (D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or (E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with Section 562 of the Code." See 11 U.S.C. § 101(25).

[14] "**Forward contract merchant**" means a Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in Section 761 of the Code) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade. See 11 U.S.C. § 101(26).

Under Section 761 of the Code, "commodity" has the meaning assigned to that term in the Commodity Exchange Act (the "**CEA**"). See 11 U.S.C. § 761. In the CEA, the term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes),

1.8.26 "**House Account**" means a "proprietary account" of an FCM as defined under CFTC Regulation 1.3(y);

1.8.27 "**Insolvency Proceedings**" means the procedures listed in paragraph 3;

1.8.28 "**Netting Provision**" means the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, as applicable;

1.8.29 "**Repo Participant**" means a "repo participant" as such term is defined under the Bankruptcy Code;[15]

1.8.30 "**Repurchase Agreement**" means a "repurchase agreement" as such term is defined under the Bankruptcy Code;[16]

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wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in Section 13-1 of the CEA, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in. See 7 U.S.C. § 1a(4).

[15] Under the Bankruptcy Code, the term "**repo participant**" means an entity that, at any time before the filing of the petition, has an outstanding repurchase agreement with the debtor. See 11 U.S.C. § 101(46).

[16] Under the Bankruptcy Code, the term "**repurchase agreement**" (which definition also applies to a reverse repurchase agreement) (A) means (i) an agreement, including related terms, which provides for the transfer of one or more certificates of deposit, mortgage related securities (as defined in section 3 of the Securities Exchange Act of 1934), mortgage loans, interests in mortgage related securities or mortgage loans, eligible bankers' acceptances, qualified foreign government securities (defined as a security that is a direct obligation of, or that is fully guaranteed by, the central government of a member of the Organization for Economic Cooperation and Development), or securities that are direct obligations of, or that are fully guaranteed by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests, with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, securities, mortgage loans, or interests of the kind described in this clause, at a date certain not later than 1 year after such transfer or on demand, against the transfer of funds; (ii) any combination of agreements or transactions referred to in clauses (i) and (iii); (iii) an option to enter into an agreement or transaction referred to in clause (i) or (ii); (iv) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), or (iii), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a repurchase agreement under this paragraph, except that such master agreement shall be considered to be a repurchase agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), or (iii); or (v) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in clause (i), (ii), (iii), or (iv), including any guarantee or reimbursement obligation by or to a repo participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of the Code; and (B) does not include a repurchase obligation under a participation in a commercial mortgage loan. See 11 U.S.C. § 101(47).

1.8.31 "**Safe Harbor Transaction**" means a Code QFC or an FDIA QFC, as applicable;[17]

1.8.32 "**Securities Clearing Agency**" means a "securities clearing agency" as such term is defined under the Bankruptcy Code;[18]

1.8.33 "**Securities Contract**" means a "securities contract" as such term is defined under the Bankruptcy Code; [19]

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[17] We note that under SIPA, the terms "swap agreement", "repurchase agreement", "forward contract", "securities contract", and "commodity contract" have the same meaning as under the Bankruptcy Code. See 15 U.S.C. § 78(eee)(b)(2)(c).

[18] "**Securities clearing agency**" means a person that is registered as a clearing agency under Section 17A of the Securities Exchange Act of 1934, or exempt from such registration under such Section pursuant to an order of the SEC, or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in Section 3(a)(12) of such Act for the purposes of such Section 17A. See 11 U.S.C. § 101(48).

[19] Under the Bankruptcy Code, the term "**securities contract**" means (A)(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in section 101 of the Code); (ii) any option entered into on a national securities exchange relating to foreign currencies; (iii) the guarantee (including by novation) by or to any securities clearing agency of a settlement of cash, securities, certificates of deposit, mortgage loans or interests therein, group or index of securities, or mortgage loans or interests therein (including any interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such settlement is in connection with any agreement or transaction referred to in clauses (i) through (xi)); (iv) any margin loan; (v) any extension of credit for the clearance or settlement of securities transactions; (vi) any loan transaction coupled with a securities collar transaction, any prepaid forward securities transaction or any total return swap transaction coupled with a securities sale transaction; (vii) any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph; (viii) any combination of the agreements or transactions referred to in this subparagraph; (ix) any option to enter into any agreement or transaction referred to in this subparagraph; (x) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix) together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a securities contract under this subparagraph, except that such master agreement shall be considered to be a securities contract under this subparagraph only with respect to each agreement or transaction under such master agreement that is referred to in clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), or (ix); or (xi) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this subparagraph, including any guarantee or reimbursement obligation by or to a stockbroker, securities clearing agency, financial institution, or financial participant in connection with any agreement or transaction referred to in this subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562 of the Code; and (B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan. See 11 U.S.C. § 741(7).

Under 11 U.S.C. § 101(49), "**security**":

1.8.34 "**SIPA**" means the Securities Investor Protection Act of 1970, as amended;[20]

1.8.35 "**Stockbroker**" means a "stockbroker" as such term is defined under the Bankruptcy Code;[21]

1.8.36 "**Swap Agreement**" means a "swap agreement" as such term is defined under the Bankruptcy Code;[22] and

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"(A) includes a (i) note; (ii) stock; (iii) treasury stock; (iv) bond; (v) debenture; (vi) collateral trust certificate; (vii) pre-organization certificate or subscription; (viii) transferable share; (ix) voting-trust certificate; (x) certificate of deposit; (xi) certificate of deposit for security; (xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act of 1933, or is exempt under Section 3(b) of such Act from the requirement to file such a statement; (xiii) interest of a limited partner in a limited partnership; (xiv) other claim or interest commonly known as "security", and (xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

(B) does not include a (i) currency, check, draft, bill of exchange, or bank letter of credit; (ii) leverage transaction, as defined in paragraph 761 of the Code; (iii) commodity futures contract or forward contract; (iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract; (v) option to purchase or sell a commodity; (vi) contract or certificate of a kind specified in subparagraph A(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under Section 3(b) of the Securities Act of 1933 from the requirement to file such a statement; or (vii) debt or evidence of indebtedness for goods sold and delivered or services rendered."

[20] 15 U.S.C. §§ 78aaa – 78lll.

[21] "**Stockbroker**" means a person (A) with respect to which there is a customer, as defined in Section 741 of the Code; and (B) that is engaged in the business of effecting transactions in securities (i) for the account of others; or (ii) with members of the general public, from or for such person's own account. See 11 U.S.C. § 101(53A). "**Stockbroker**" includes both brokers and dealers.

Under 11 U.S.C. § 741(2), "**customer**" includes (A) an entity with whom a person deals as principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account or accounts of such entity (i) for safekeeping; (ii) with a view to sale; (iii) to cover a consummated sale; (iv) pursuant to a purchase; (v) as collateral under a security agreement; or (vi) for the purpose of effecting registration of transfer; and (B) an entity that has a claim against a person arising out of (i) a sale or conversion of a security received, acquired, or held as specified in subparagraph (A) of this paragraph; or (ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security.

To our knowledge, there is no case law as to whether the term "stockbroker" or the term "customer" would include non-U.S. stockbrokers or non-U.S. customers. As a rule, the Code does not distinguish between claimants on the basis of nationality or domicile. Therefore, we believe that the better view is that non-U.S. entities would qualify under these provisions.

[22] Under the Bankruptcy Code, the term "**swap agreement**" means "(A) (i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is (I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; (II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other

1.8.37 **"Swap Participant"** means a "swap participant" as such term is defined under the Bankruptcy Code.[23]

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

2. ASSUMPTIONS

We assume:

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

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commodity agreement; (III) a currency swap, option, future, or forward agreement; (IV) an equity index or equity swap, option, future, or forward agreement; (V) a debt index or debt swap, option, future, or forward agreement; (VI) a total return, credit spread or credit swap, option, future, or forward agreement; (VII) a commodity index or a commodity swap, option, future, or forward agreement; (VIII) a weather swap, option, future or forward agreement; (IX) an emissions swap, option, future, or forward agreement; or (X) an inflation swap, option, future, or forward agreement; (ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that— (I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference therein); and (II) is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value; (iii) any combination of agreements or transactions referred to in this subparagraph; (iv) any option to enter into an agreement or transaction referred to in this subparagraph; (v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements; to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or (vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and (B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, and the securities laws (as such term is defined in Section 3(a)(47) of the Securities Exchange Act." See 11 U.S.C. § 101(53B).

[23] **"Swap participant"** means "an entity that . . . has an outstanding [Swap Agreement] with the [Debtor]." See 11 U.S.C. § 101(53C).

2.2 That each Agreement and the Transactions are legally binding and enforceable against both Parties under their governing laws.

2.3 That each Netting Provision and Title Transfer Provision is valid, binding and enforceable under English law and does not contravene any fundamental public policy in this jurisdiction.

2.4 That each Party has the capacity, power and authority under all applicable law(s) to enter into each Agreement and the Transactions; to perform its obligations under each relevant Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform each relevant Agreement.

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

2.6 That each Agreement is entered into prior to the commencement of any Insolvency Proceedings against either Party.

2.7 That no provision of any Agreement, or a document of which an Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.

2.8 That each Agreement has been entered into, and each of the Transactions 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.

2.9 That each Agreement accurately reflects the true intentions of each Party.

2.10 That the obligations assumed under each Agreement and the Transactions are "mutual" between the Parties, in the sense that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party.

2.11 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts a "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates.

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

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

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

2.15 That each Transaction is a Safe Harbor Transaction and, with respect to any Transaction where the Defaulting Party is subject to Code Proceedings, the Non-Defaulting Party is an Eligible Code Party.

2.16 That each Transaction is capable, under its governing law, of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.

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

2.18 That at the time at which a Transaction is entered into or Margin is transferred under the relevant Agreement, neither Party has actual notice of the insolvency of the other Party.

2.19 That the requirements of applicable law with respect to the transfer of securities and cash have been complied with in connection with the relevant transferors to the Defaulting Party under the Agreement.

2.20 That in the event of Insolvency Proceedings with respect to a Bank, the FDIC will be appointed as conservator or receiver (as further discussed in paragraph 3.2 below).

3. INSOLVENCY PROCEEDINGS

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

3.1.1 with respect to a Code Party, voluntary or involuntary cases under the Bankruptcy Code ("**Code Proceedings**");[24]

[24] In litigation, a federal or state court may appoint a receiver to protect the rights of the parties. Federal courts may appoint a receiver for a financial firm at the request of the Securities and Exchange Commission or the CFTC if there have been violations of the securities or commodities laws. See, e.g., *SEC v. American Board of*

3.1.2 with respect to a Bank, a receivership (whereby a receiver is appointed to liquidate and wind up the affairs of a Bank) or a conservatorship (whereby a conservator is appointed to operate the Bank as a going concern) proceeding under the FDIA;

3.1.3 with respect to a Federal Branch, a receivership instituted by the Office of the Comptroller of the Currency ("**OCC**"); and

3.1.4 with respect to a New York Branch, an insolvency proceeding under (i) the New York State Banking Law ("**NYBL**") if the New York Branch does not take deposits insured by the FDIC (or, if it takes FDIC-insured deposits and the FDIC nonetheless is not appointed as conservator or receiver), or (ii) the FDIA with the FDIC acting as conservator or receiver if the New York Branch takes FDIC-insured deposits, in which case the resulting proceedings would be the same as they apply to Banks with the FDIC as a receiver.

3.2 **Banks.** For a federally-chartered Bank, the FDIC must be appointed as a receiver and may be appointed as a conservator at the option of its primary bank regulatory agency, such as the OCC for national banks.[25] The relevant state banking authority may appoint the FDIC as conservator or receiver of a state-chartered Bank. If the FDIC is not so appointed, the FDIC can override that authority, as may other federal banking agencies, in specified circumstances so that the FDIC is the sole conservator or receiver of the Bank.

3.3 **Federal Branches and New York Branches.**

3.3.1 Under the International Banking Act of 1978, as amended (the "**IBA**"), the OCC is given authority to appoint a receiver in respect of the property and assets in the United States of any foreign bank that has a Federal Branch, in the event the foreign bank becomes insolvent or under certain other circumstances (such as the revocation of the Federal Branch's license). Thus, not only where a foreign bank has solely a Federal Branch, but also where it has a Federal Branch as well as a New York Branch, insolvency proceedings may be commenced by the OCC under the IBA. If any of the branches takes deposits that are FDIC-insured, and if the OCC appoints a receiver, then such receiver will be the FDIC, in which case the proceedings in respect of the branch (and, potentially, in respect of all assets of the foreign bank in the United States) will be as described above in respect of a Bank. If the Federal branch does not accept FDIC-insured deposits, the receiver appointed by the OCC may "exercise the same rights, privileges, powers, and authority with respect thereto as are now exercised by receivers of

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Trade, 830 F.2d 431 (2nd Cir. 1987). Because such receiverships are a response to litigation rather than a general insolvency proceeding, they are beyond the scope of this letter.

[25] See 12 U.S.C. §§ 1821(c)(2)(A)(i) and (ii), 1821(c)(6).

national banks appointed by the [OCC]."[26] The National Bank Act and federal law govern the winding up of a national bank and distribution of its assets.[27]

3.3.2 In the event of an insolvency of an FDIC-insured New York Branch (a "**N.Y. Insured Branch**"), the New York Superintendent of Banks (the "**Superintendent**") may elect to appoint the FDIC as a receiver for such branch, and the resulting proceedings would be the same as they apply to Banks with the FDIC as a receiver.

3.3.3 The OCC-appointed receiver is permitted to "ring-fence" the U.S.-based assets and apply those assets to satisfy the claims of creditors who have entered into transactions with the Federal Branch or any branch or agency of such foreign bank located in the United States.[28]

3.4 Furthermore, where a Specified Company is a Commodity Broker, the relevant bankruptcy proceedings would be the liquidation proceedings under Subchapter IV of Chapter 7 of the Bankruptcy Code as supplemented by Part 190 of the CFTC Regulations ("**Commodity Broker Proceedings**"). Commodity Broker Proceedings would apply to (i) a DCO (a DCO subject to Commodity Broker Proceedings, a "**Debtor DCO**") and (ii) any FOA Member organized under the laws of this jurisdiction and registered as a "futures commission merchant" (an "**FCM**") under the CEA (an FCM subject to Commodity Broker Proceedings, a "**Debtor FCM**" and together with a Debtor DCO, "**Debtor Commodity Brokers**").

3.5 As a general note, if a Party to an Agreement is a Commodity Broker and all Parties to the Agreement and the Agreement fall under the netting protections under the FDICIA (as discussed below in Schedule 3 on *Financial Institutions Subject to FDICIA*), both the provisions of the FDICIA and the Bankruptcy Code would apply to any close-out under the Agreement and, to the extent the FDICIA provisions are inconsistent with any provisions of the Bankruptcy Code, FDICIA would generally override such Bankruptcy Code provisions, subject to limitations set out in Schedule 3 (*Financial Institutions Subject to FDICIA*).

3.6 We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions

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[26] 12 U.S.C. § 3102(j)(1).

[27] See *American Surety Co. v. Bethlehem Nat'l Bank,* 314 U.S. 314 (1941); Cook County National Bank v. United States, 107 U.S. 445 (1883).

[28] 12 U.S.C. § 3102(j)(2). Claims from other offices, or branches or agencies of, and wholly-owned subsidiaries of, such foreign bank are excluded from the ring-fence.

4. RECOGNITION OF CHOICE OF LAW

4.1 We confirm that, as a general matter, Section 1-105 of the New York Uniform Commercial Code (the "**NYUCC**") provides that the choice of the law of a particular jurisdiction to govern an agreement will be respected if the agreement or the transactions documented thereunder bear a reasonable relationship to the chosen jurisdiction and violate no fundamental public policy of the State of New York. We are not aware of any fundamental public policy of the State of New York that would be violated by any Agreement. Where the Parties have elected English law to govern an Agreement, a reasonable relationship with England would exist if any Party or Margin is located in England or any of the Transactions are entered into in England. Subject to the above, the choice of English law to govern the Agreement would be recognized by a New York court even if neither Party is incorporated or established in England, as appropriate.

5. OPINIONS

5.1 Enforceability of the FOA Netting Provision

5.1.1 In relation to an FOA Netting Agreement, or in relation to a Clearing Agreement where the Defaulting Party acts as Client, the enforceability of the FOA Netting Provision following an Event of Default occurring other than as a result of the opening of Insolvency Proceedings with respect to the Defaulting Party should be determined as a matter of English law.[29]

5.1.2 In relation to an FOA Netting Agreement, or in relation to a Clearing Agreement where the Defaulting Party acts as Client, following an Event of Default occurring as a result of the opening of Insolvency Proceedings:

(a) the Non-Defaulting Party would not be stayed from exercising its rights under the FOA Netting Provision or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, such that, in particular, the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions in accordance with the FOA Netting Provision, **provided** that with respect to the Defaulting Party that is an FDIA Party, the opinions

[29] As each Agreement is governed by English law, the validity of the contractual netting and set-off provisions in each Agreement should be determined as a matter of English law. See *Grund v. Delaware Charter Guarantee & Trust Co.*, 788 F.Supp.2d 226, 243 (S.D.N.Y. 2011) (New York courts "will enforce a choice of law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction") (citation omitted); see *Finance One Public Co. Ltd. v. Lehman Brothers Special Financing, Inc.*, 414 F.3d 325, 336 (2d Cir. 2005) (analyzing choice of law issues for extra-contractual setoff rights and noting that had the parties' contract created a set-off right, the choice of law clause in the contract would govern).

expressed in this paragraph 5.1 are subject to the limitations set out under paragraph 5.8.

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

5.2.1 In relation to a Clearing Agreement which includes the Clearing Module Netting Provision:

(a) the enforceability of the Clearing Module Netting Provision following a Firm Trigger Event occurring other than as a result of the opening of Insolvency Proceedings should be determined as a matter of English law;[30]

(b) the enforceability of the Clearing Module Netting Provision following a Firm Trigger Event occurring as a result of the opening of Commodity Broker Proceedings with respect to the Firm would be determined in accordance with the Bankruptcy Code, CFTC Regulations and default rules of the relevant CCP (as discussed under paragraph 7 hereof);

(c) following a Firm Trigger Event occurring as a result of the opening of Insolvency Proceedings (other than Commodity Broker Proceedings), the Non-Defaulting Party would not be stayed from exercising its rights under the Clearing Module Netting Provision or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, such that, in particular, the Parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of the relevant Client Transactions which are Safe Harbor Transactions in accordance with the Clearing Module Netting Provision, **provided, however** that with respect to the Defaulting Party that is an FDIA Party, the opinions expressed in this paragraph 5.2 are subject to the limitations set out under paragraph 5.8;

(d) the enforceability of the Clearing Module Netting Provision following a CCP Default occurring other than as a result of the opening of Insolvency Proceedings with respect to the CCP would be determined in accordance with the rules of the CCP (if the CCP is a FDICIA Clearing Organization) or other applicable law (if the CCP is not a FDICIA Clearing Organization); and

(e) the enforceability of the Clearing Module Netting Provision following a CCP Default occurring as a result of the opening of

[30] See fn. 29.

Insolvency Proceedings with respect to the CCP would be determined in accordance with the Bankruptcy Code, CFTC Regulations (if the CCP is a DCO organized under the laws of this jurisdiction) and the rules of the CCP (if the CCP is a FDICIA Clearing Organization) (as discussed under Section 8 hereof) or other applicable law (if the CCP is not a FDICIA Clearing Organization).

5.3 Enforceability of the Addendum Netting Provision

5.3.1 In relation to a Clearing Agreement which includes the Addendum Netting Provision:

(a) the enforceability of the Addendum Netting Provision following a CM Trigger Event occurring other than as a result of the opening of Insolvency Proceedings with respect to the Defaulting Party should be determined as a matter of English law;[31]

(b) the enforceability of the Addendum Netting Provision following a CM Trigger Event occurring as a result of the opening of Commodity Broker Proceedings with respect to the Firm would be determined in accordance with the Bankruptcy Code, CFTC Regulations and default rules of the relevant CCP (as discussed under paragraph 7 hereof);

(c) following a CM Trigger Event occurring as a result of the opening of Insolvency Proceedings with respect to the Firm (other than Commodity Broker Proceedings), the Non-Defaulting Party would not be stayed from exercising its rights under the Addendum Netting Provision or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, such that, in particular the Parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of the relevant Client Transactions which are Safe Harbor Transactions in accordance with the Addendum Netting Provision, **provided** that with respect to the Firm that is an FDIA Party, the opinions expressed in this paragraph 5.3.1 are subject to the limitations set out under paragraph 5.8;

(d) the enforceability of the Addendum Netting Provision following a CCP Default occurring other than as a result of the opening of Insolvency Proceedings with respect to the CCP would be

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[31] See fn. 29.

determined in accordance with the rules of the CCP (if the CCP is a FDICIA Clearing Organization) or other applicable law (if the CCP is not a FDICIA Clearing Organization); and

(e) the enforceability of the Addendum Netting Provision following a CCP Default occurring as a result of the opening of Insolvency Proceedings with respect to the CCP would be determined in accordance with the Bankruptcy Code, CFTC Regulations (if the CCP is a DCO organized under the laws of this jurisdiction) and the rules of the CCP (if the CCP is a FDICIA Clearing Organization) (as discussed under Section 8 hereof) or other applicable law (if the CCP is not a FDICIA Clearing Organization).

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

5.4.1 In relation to a Clearing Agreement, the opinions expressed at paragraph 5.1 above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement. In a case where a Party, who would (but for the use of the FOA Clearing Agreement or the ISDA/FOA Clearing Agreement) be the Defaulting Party for the purposes of the FOA Netting Agreement, acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the question as to whether the FOA Netting Provision will, to the extent inconsistent with the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, be superseded by the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision should be determined under the governing law of the Clearing Agreement.[32]

5.5 Enforceability of the FOA Set-off Provisions

5.5.1 In relation to an FOA Netting Agreement which includes the FOA Set-Off Provisions,

(a) the enforceability of the FOA Set-Off Provisions following an Event of Default occurring other than as a result of the opening of Insolvency Proceedings with respect to the Defaulting Party should be determined as a matter of English law;[33]

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[32] See fn. 29.

[33] See fn. 29.

(b) the enforceability of the FOA Set-Off Provisions following an Event of Default occurring as a result of the opening of Commodity Broker Proceedings with respect to a Firm would be determined in accordance with the Bankruptcy Code, CFTC Regulations and default rules of the relevant CCP (as discussed under paragraph 7 hereof);

(c) following an Event of Default occurring as a result of the opening of Insolvency Proceedings (other than the opening of Commodity Broker Proceedings), the Non-Defaulting Party would not be stayed from exercising its rights under either or both of the FOA Set-Off Provisions or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, such that, in particular:

(1) where the FOA Set-Off Provisions include the General Set-Off Clause, (i) the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Defaulting Party); or (ii) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or

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

provided that with respect to the Client that is an FDIA Party, the opinions expressed in this paragraph 5.5.1 are subject to the limitations set out under paragraph 5.8.

5.5.2 In relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, the enforceability of the FOA Set-Off Provisions following an Event of Default occurring other than as a result of the opening of Insolvency

Proceedings with respect to the Defaulting Party would be determined as a matter of English law.[34]

5.5.3 In relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, following an Event of Default occurring as a result of the opening of Insolvency Proceedings with respect to the Client, the Firm or, as the case may be, the Clearing Member, would not be stayed from exercising its rights under either or both of the FOA Set-Off Provisions or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, such that, in particular, upon the exercise of such rights:

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

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

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

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

provided, however, that with respect to the Defaulting Party that is an FDIA Party, the opinions expressed in this paragraph 5.5.3 are subject to the limitations set out under paragraph 5.8.

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

5.6.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions are Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement),

(a) the enforceability of the Clearing Module Set-Off Provision following an Event of Default occurring other than as a result of the

[34] See fn. 29.

opening of Insolvency Proceedings with respect to the Defaulting Party should be determined as a matter of English law;[35]

(b) the enforceability of the Clearing Module Set-Off Provision following a Firm Trigger Event occurring as a result of the opening of Commodity Broker Proceedings with respect to the Firm would be determined in accordance with the Bankruptcy Code, CFTC Regulations and default rules of the relevant CCP (as discussed under paragraph 7 hereof);

(c) following a Firm Trigger Event occurring as a result of the opening of Insolvency Proceedings with respect to the Firm (other than Commodity Broker Proceedings) or an Event of Default occurring as a result of the opening of Insolvency Proceedings with respect to the Client (other than Commodity Broker Proceedings), the Non-Defaulting Party would not be stayed from exercising its rights under Clearing Module Set-Off Provision (and under the FOA Set-Off Provision to the extent that set-off is not already covered by the Clearing Module Set-Off Provision) or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, such that, in particular, upon the exercise of such rights the value of any cash balance owed by the Firm to the Client would be set off against any Liquidation Amount owed by the Defaulting Party to the Non-Defaulting Party in accordance with the Clearing Module Set-Off Provision, **provided, however,** that with respect to the Defaulting Party that is an FDIA Party, the opinions expressed in this paragraph 5.6.1 are subject to the limitations set out under paragraph 5.8;

(d) a CCP Default occurring other than as a result of the opening of Insolvency Proceedings with respect to the CCP would be determined in accordance with the rules of the CCP (if the CCP is a FDICIA Clearing Organization) or other applicable law (if the CCP is not a FDICIA Clearing Organization); and

(e) a CCP Default occurring as a result of the opening of Insolvency Proceedings would be determined in accordance with the Bankruptcy Code, CFTC Regulations (if the FDICIA Clearing Organization is a DCO organized under the laws of this jurisdiction) and the default rules of the FDICIA Clearing Organization (if the CCP is a FDICIA Clearing Organization) (as discussed under

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[35] See fn. 29.

Section 8 hereof) or other applicable law (if the CCP is not a FDICIA Clearing Organization).

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

5.7.1 In relation to a Clearing Agreement which includes the Addendum Set-Off Provision:

(a) the enforceability of the Addendum Set-Off Provision following a CM Trigger Event occurring other than as a result of the opening of Insolvency Proceedings with respect to the Defaulting Party should be determined as a matter of English law;[36]

(b) the enforceability of the Addendum Set-Off Provision following a CM Trigger Event occurring as a result of the opening of Commodity Broker Proceedings would be determined in accordance with the Bankruptcy Code, CFTC Regulations and default rules of the relevant CCP (as discussed under paragraph 7 hereof);

(c) following a CM Trigger Event occurring as a result of the opening of Insolvency Proceedings with respect to the Clearing Member (other than the opening of Commodity Broker Proceedings), the Client (as defined in the ISDA/FOA Clearing Addendum) would not be stayed from exercising its rights under the Addendum Set-Off Provision or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, such that, in particular, upon exercise of such rights, any Available Termination Amount would be reduced by its set-off against any cash balance which constitutes a termination amount payable by (or to) the Party which is owed (or owes) the Available Termination Amount, insofar as not already brought into account as part of the Relevant Collateral Value in accordance with the Addendum Set-Off Provision, **provided, however,** that with respect to the Defaulting Party that is an FDIA Party, the opinions expressed in this paragraph 5.7 are subject to the limitations set out under paragraph 5.8.

(d) the enforceability of the Addendum Set-Off Provision following a CCP Default occurring other than as a result of the opening of Insolvency Proceedings would be determined in accordance with the rules of the CCP (if the CCP is a FDICIA Clearing Organization) or other applicable law (if the CCP is not a FDICIA Clearing Organization); and

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[36] See fn. 29.

(e) the enforceability of the Addendum Set-Off Provision following a CCP Default occurring as a result of the opening of Insolvency Proceedings would be determined in accordance with the Bankruptcy Code, CFTC Regulations (if the CCP is a DCO organized under the laws of this jurisdiction) and the rules of the CCP (if the CCP is a FDICIA Clearing Organization) (as discussed under paragraph 8 hereof) or other applicable law (if the CCP is not a FDICIA Clearing Organization).

5.8 **Limitations Applicable to FDIA Parties**

With respect to any FDIA Party, our opinions expressed in paragraphs 5.1 through 5.6 are subject to the following limitations:

5.8.1 If the FDIC has been appointed as a receiver: an FDIA QFC with an FDIA Party may not be terminated, liquidated or netted based solely on the appointment of a receiver for the FDIA Party until 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the receiver or after the Non-Defaulting Party has received notice that the FDIA QFC has been transferred pursuant to the FDIA.

5.8.2 If the FDIC has been appointed as a conservator: an FDIA QFC with an FDIA Party may not be terminated, liquidated or netted based solely on the appointment of a conservator for that FDIA Party.

5.8.3 "Walkaway clauses" are not enforceable in FDIA QFCs with an FDIA Party as the Defaulting Party. Section 11(e)(8)(G) of the FDIA provides that "walkaway"clauses are not enforceable in FDIA QFCs with an FDIA Party in default. A "walkaway"clause is defined as any provision in an FDIA QFC that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of such party's status as a non-defaulting party in connection with the insolvency of an insured depository institution that is a party to the contract or the appointment of or the exercise of rights or powers by a conservator or receiver of such depository institution, and not as a result of a party's exercise of any right to offset, set-off, or net obligations that exist under the contract, any other contract between those parties, or applicable law.

5.9 No amendments to any Netting Provision are necessary in order for the opinions expressed in paragraphs 5.1 through 5.7 to apply.

6. DISCUSSION

We are of the opinions set out under paragraphs 5.1 through 5.9 because:

6.1 Code Parties

6.1.1 Section 555 of the Bankruptcy Code provides that the contractual right of a Financial Institution, Stockbroker, Securities Clearing Agency or Financial Participant to cause the liquidation, termination or acceleration of a Securities Contract, because of the bankruptcy or financial condition of a Code Party[37] is not to be stayed, avoided, or otherwise limited by operation of any provision of the Bankruptcy Code or by the order of a court in any proceeding under the Bankruptcy Code.[38]

6.1.2 Section 556 of the Bankruptcy Code provides that the contractual right of a Commodity Broker or Financial Participant to cause the liquidation, termination or acceleration of a Commodity Contract because of the bankruptcy or financial condition of the entity subject to Code Proceedings, and the right to a variation or maintenance margin payment received from a trustee with respect to open Commodity Contracts, is not to be stayed, avoided, or otherwise limited by operation of any provision of the Bankruptcy Code or by the order of a court in any proceeding under the Bankruptcy Code.

6.1.3 Section 556 of the Bankruptcy Code provides that the contractual right of a Forward Contract Merchant or Financial Participant to cause the liquidation, termination or acceleration of a Forward Contract, because of the bankruptcy or

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[37] Under Sections 560, 559, 556, 555 and 561 of the Bankruptcy Code, the right of the participant in a Swap Agreement, Repo Participant, Forward Contract Merchant, Stockbroker, Financial Institution, Financial Participant, Securities Clearing Agency or Master Netting Agreement Participant to cause the liquidation of a Swap Agreement, Repurchase Agreement, Forward Contract, Securities Contract or Master Netting Agreement respectively, because of a condition of the kind specified in Section 365(e)(1) of the Bankruptcy Code shall not be stayed or avoided under the Bankruptcy Code. The conditions listed in Section 365(e)(1) are: (A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a case under the Bankruptcy Code; or (C) the appointment of or taking possession by a trustee in a case under the Bankruptcy Code or a custodian before such commencement. See 11 U.S.C. § 365(e)(1). In the context of Securities Contracts and Swap Agreements several courts have relied on this language to look to the non-Defaulting Counterparty's reasons for terminating a Swap Agreement and/or a Securities Contract, and have made determinations that the automatic stay provisions of the Bankruptcy Code remain in force if the non-Defaulting Counterparty is liquidating the contract in question for reasons other than one of the conditions listed in Section 365(e)(1). *In re Enron Corp.*, 306 B.R. 465 (Bankr. S.D.N.Y. 2004) (with respect to Swap Agreements); and *In re Amcor Funding Corporation,* 117 B.R. 549 (D. Ariz. 1990) (with respect to Securities Contracts). The statutory language analyzed in these cases also is identical to the relevant statutory language newly added with respect to Master Netting Agreements.

[38] Sections 555 and 556 of the Bankruptcy Code are also subject to any order authorized by SIPA or a statute administered by the SEC. We are not aware of any statute administered by the SEC that would be applicable to close-out of the Agreement with a Specified Company.

financial condition of a Code Party, and the right to a variation or maintenance margin payment received from a trustee with respect to open Forward Contracts, is not to be stayed, avoided, or otherwise limited by operation of any provision of the Bankruptcy Code or by the order of a court in any proceeding under the Bankruptcy Code.

6.1.4 Section 560 of the Bankruptcy Code provides that the contractual right of a Swap Participant or Financial Participant to cause the liquidation, termination or acceleration of a Swap Agreement, because of the bankruptcy or financial condition of a Code Party, or to offset or net out any termination values or payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more Swap Agreements is not to be stayed, avoided, or otherwise limited by operation of any provision of the Bankruptcy Code or by the order of a court in any proceeding under the Bankruptcy Code.

6.1.5 Section 559 of the Bankruptcy Code provides that the exercise of a contractual right of a Repo Participant or Financial Participant to cause the liquidation, termination or acceleration of a Repurchase Agreement because of the bankruptcy or financial condition of a Code Party is not to be stayed, avoided, or otherwise limited by operation of any provision of the Bankruptcy Code or by the order of a court in any proceeding under the Bankruptcy Code.

6.1.6 In addition, Section 362(b)(6) of the Bankruptcy Code excepts from the automatic stay the exercise by (i) a Stockbroker, Financial Institution, Financial Participant or Securities Clearing Agency of any contractual right (as defined in section 555 of the Bankruptcy Code) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more Securities Contracts, including any master agreement for such contracts, and (ii) a Forward Contract Merchant or Financial Participant of any contractual right (as defined in section 556 of the Bankruptcy Code) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more Forward Contracts.

6.1.7 Section 362(b)(17) of the Bankruptcy Code excepts from the Bankruptcy Code's automatic stay the exercise by a Swap Participant of any contractual right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more Swap Agreements.

6.1.8 Section 362(b)(7) of the Bankruptcy Code excepts from the Bankruptcy Code's automatic stay the exercise by a Repo Participant or Financial Participant of any contractual right (as defined in Section 559 of the Bankruptcy Code) under any security agreement or arrangement or other credit enhancement forming a part of or related to any Repurchase Agreement, or of any contractual right to offset or net out any termination value, payment amount, or other transfer obligation

arising under or in connection with one or more such agreements, including any master agreement for such agreements.

6.2 Banks

6.2.1 The FDIA creates special protections for certain contracts that are termed "qualified financial contracts" and which include "commodity contracts",[39] "forward contracts",[40] "repurchase agreements",[41] "securities contracts"[42] and "swap agreements"[43] (each as defined in the FDIA, an "**FDIA QFC**"). The FDIA provides that the right to terminate, liquidate or accelerate an FDIA QFC based on the appointment of a receiver or a default by a Bank in a conservatorship may be exercised,[44] subject to the following limitations:

(a) an FDIA QFC with a Bank may not be terminated, liquidated or netted based solely on the appointment of a receiver for the Bank until 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the receiver or after the Non-Defaulting Party has

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[39] Under the FDIA, the term "**commodity contract**" means "(I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade; (II) with respect to a foreign futures commission merchant, a foreign future; (III) with respect to a leverage transaction merchant, a leverage transaction; (IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; (V) with respect to a commodity options dealer, a commodity option; (VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause; (VII) any combination of the agreements or transactions referred to in this clause; (VIII) any option to enter into any agreement or transaction referred to in this clause; (IX) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), (IV), (V), (VI), (VII), or (VIII); or (X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause." See 12 U.S.C. § 1821(e)(8)(iii).

[40] The definition of the term "**forward contract**" in the FDIA is substantially similar to the definition of Swap Agreement in the Bankruptcy Code.

[41] The definition of the term "**repurchase agreement**" in the FDIA is substantially similar to the definition of Repurchase Agreement in the Bankruptcy Code.

[42] The definition of the term "**securities contract**" in the FDIA is substantially similar to the definition of Securities Contract in the Bankruptcy Code.

[43] The definition of the term "**swap agreement**" in the FDIA is substantially similar to the definition of Swap Agreement in the Bankruptcy Code.

[44] 12 U.S.C. §§ 1821(e)(8)(A)(i) and (E)(i).

received notice that the FDIA QFC has been transferred pursuant to the FDIA;[45] and

(b) an FDIA QFC with a Bank may not be terminated, liquidated or netted based solely on the appointment of a conservator for that Bank.[46]

These exceptions allow the receiver or conservator to transfer the FDIA QFCs of the insolvent Bank to another financial institution.[47] Any such transfer must include all the FDIA QFCs with an individual counterparty or any affiliate of such counterparty. Therefore, the FDIC may only disaffirm or repudiate the FDIA QFCs to which a Bank is party if it does so with respect to all FDIA QFCs with an individual counterparty or any affiliate of such counterparty.[48] Furthermore, in the case of an FDIA QFC with a Bank in default, any payment or delivery obligations otherwise due from a party pursuant to the FDIA QFC shall be suspended from the time the receiver is appointed until the earlier of (i) the time such party receives notice that such contract has been transferred pursuant to the FDIA or (ii) 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the receiver.

FDIC's authority to transfer or disaffirm or repudiate FDIA QFCs is not limited by FDICIA (as discussed in Schedule 3).[49]

6.2.2 The FDIA also provides, subject to the limitations noted in 6.2.1 above, that:

(a) in case of a receivership with respect to a Bank, a party to an FDIA QFC with the Bank shall not be stayed or prohibited from exercising:

(i) any rights under any security agreement or arrangement or other credit enhancement related to one or more FDIA QFCs; and

(ii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under

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[45] 12 U.S.C. § 1821(e)(10)(B)(i).

[46] 12 U.S.C. § 1821(e)(10)(B)(ii).

[47] For purposes of this discussion, the term "financial institution" means a broker-dealer, a depository institution, a futures commission merchant, or any other institution determined by the FDIC by regulation to be a financial institution. 12 U.S.C. § 1821(e)(9)(D).

[48] 12 U.S.C. § 1821(e)(11).

[49] 12 U.S.C. § 1821(e)(8)(F).

or in connection with one or more FDIA QFCs, including any master agreement for such FDIA QFCs;[50] and

(b) in case of a conservatorship with respect to a Bank, a party to an FDIA QFC with the Bank shall not be stayed or prohibited from exercising:

(i) any rights under any security agreement or other arrangement or other credit enhancement related to one or more FDIA QFC; and

(ii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with such FDIA QFC.[51]

6.2.3 Furthermore, the FDIA provides that notwithstanding any laws relating to the avoidance of preferential or fraudulent transfers, the FDIC (as conservator or receiver of a Bank) may not avoid any transfer in connection with an FDIA QFC unless the FDIC finds that the transferee had actual intent to hinder, delay or defraud the Bank, creditors of such Bank, or any such conservator or receiver appointed for such Bank.

6.3 Federal Branches

6.3.1 The protections of FDIA QFCs and the limitations thereof provided by the FDIA for Banks are directly applicable to Federal Branches.[52] Therefore, the proceedings with respect to a Federal Branch (and potentially in respect of all assets of the foreign bank in the United States) would be as described in respect of Banks above and our discussions under paragraph 6.2 above in respect of Banks will apply.

6.4 New York Branches

6.4.1 In the event the New York Superintendent of Banks (the "**Superintendent**") elects to appoint the FDIC as a receiver for the N.Y. Insured Branch, our discussions with respect to Banks (as set out above) would apply.[53] In the event of an insolvency of a New York Branch which is not FDIC insured or if the Superintendent does not elect to appoint the FDIC as a receiver or conservator of

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[50] 12 U.S.C. § 1821(e)(8)(A)(ii)-(iii).

[51] 12 U.S.C. § 1821(e)(8)(E)(ii)-(iii).

[52] 12 U.S.C. § 4407(a).

[53] We further note that the FDIC may also appoint itself as a receiver or conservator for a N.Y. Insured Branch or replace a receiver or conservator appointed by the Superintendant under certain circumstances. See 12 U.S.C. § 1821(c)(4), (10).

a N.Y. Insured Branch, our opinions in Section 5 hereof would apply if and to the extent the Transactions qualify as QFCs.

6.4.2 Under Section 606(4)(a) of the NYBL, the Superintendent may take possession of the business and property in New York of a foreign bank with a N.Y.-licensed branch when the foreign bank is insolvent, in liquidation in its home jurisdiction, or under certain other circumstances. The Superintendent is permitted to satisfy the claims of creditors of the foreign bank who have entered into transactions with a New York Branch of the foreign bank out of such business and property of the foreign bank in New York (referred to herein as "**ring-fencing**").[54]

6.4.3 Section 619.1(d)(2)(i) of the NYBL provides that the Superintendent's taking possession of a New York Branch does not operate as a stay or as an injunction against the termination of a "qualified financial contract" ("**NYBL QFC**")[55] which include "securities contracts", "repurchase agreements" and "forward contracts" (each as used in the NYBL), in accordance with its terms. In addition, Section 619.1(d)(2)(i) of the NYBL provides that the Superintendent's taking possession of a New York Branch shall not act as an injunction against "any right to offset or net out any termination value, payment amount, or other transfer obligation arising under. . .qualified financial contracts . . ."

6.4.4 Under Section 618-a.1 of the NYBL, after taking possession of a New York Branch, the Superintendent may "repudiate" any contract to which the institution is a party if the Superintendent in his or her discretion determines that the performance of that contract is burdensome and the repudiation of that contract would promote the orderly administration of the institution's affairs.[56] The NYBL specifies that any master agreement for NYBL QFCs, together with all supplements thereto, shall be treated as one NYBL QFC.[57] Thus, if the Superintendent repudiates any of the Transactions under an Agreement, the Superintendent would be required to repudiate all of them.

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[54] Where the N.Y. Branch takes FDIC-insured deposits, the Superintendent may elect to appoint the FDIC as a receiver and the resulting proceedings would be the same as those applicable to a Bank. Claims from other offices, agencies or branches of, and affiliates of the foreign bank are excluded from the ring-fence.

[55] Under § 618-a(2)(e)(i) of the NYBL, the term "**qualified financial contract**" means any securities contract, commodity contract, forward contract (including spot and forward foreign exchange), repurchase agreement, swap agreement, and any similar agreement, any option to enter into any such agreement. (None of the foregoing terms is defined in N.Y. banking law or regulation). Under the NYBL a "qualified financial contract" also includes any combination of the foregoing, and any master agreement for such agreements, as well as other agreements determined by the Superintendent of Banks to be "qualified financial contracts", provided that such agreements satisfy certain documentary requirements.

[56] The Superintendent however has no authority either to assume or repudiate any qualified financial contract that is subject to a multi-branch netting agreement.

[57] NYBL § 618-a.2(e)(i).

6.4.5 The liability of the Superintendent in respect of a repudiated contract is generally limited to "actual direct compensatory damages" of the parties to the contract as of the date on which the Superintendent took possession of the institution. With respect to NYBL QFCs, however, the NYBL states that the "actual direct compensatory damages" arising in respect of the Superintendent's repudiation of such a contract is "deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized among participants in the market for qualified financial contract claims, calculated as of the date of repudiation . . . of such qualified financial contract in accordance with its terms".[58] Accordingly, it is possible that the amount payable by the parties to the Agreement in respect of such repudiation may not be calculated as provided in the Netting Provisions of the relevant Agreement.

6.4.6 The NYBL does not grant the conservator or receiver of a New York Branch any special powers to avoid any transfers made by such N. Y. Branch before the commencement of an insolvency proceeding. Accordingly, conservator or receiver of a New York Branch would not have the power to avoid or rescind any payment made by the New York Branch prior to the commencement of Insolvency Proceedings, **provided that** the payment is not made with the actual intent to hinder, delay or defraud the present or future creditors of the New York Branch.

7. NETTING AND SET-OFF IN CODE PROCEEDINGS WITH RESPECT TO A DEBTOR FCM (ENFORCEABILITY OF THE CLEARING MODULE NETTING PROVISION AND THE ADDENDUM NETTING PROVISION)

Upon occurrence of a Firm Trigger Event as a result of the commencement of Code Proceedings with respect to the Defaulting Party that is an FCM, termination of Transactions which are Cleared Contracts and calculation, netting and set-off of the relevant close-out amounts would be effected in accordance with the relevant provisions of the Bankruptcy Code and CFTC Regulations applicable in the event of Commodity Broker Proceedings as well as the relevant rules of the applicable DCO irrespective of any contractual arrangements between the Client and the Firm, such as the Clearing Module Netting Provision or the Addendum Netting Provision.

As further discussed below, pursuant to the Bankruptcy Code and the CFTC Regulations, upon the commencement of Code Proceedings with respect to a Debtor FCM, any debts (including, without limitation, amounts payable under Cleared Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Debtor FCM to a Customer shall be set off against any mutual debt (including, without limitation, amounts payable under Cleared Contracts in accordance with their terms

[58] NYBL § 618-a.2(b).

including, where applicable, termination amounts) owed by the Customer to the Debtor FCM by virtue of prescribed calculation of claim amounts under the Bankruptcy Code.

7.1 Termination of Client Transactions; Transfers

7.1.1 The Bankruptcy Code and the CFTC Regulations require that upon commencement of Code Proceedings with respect to a Debtor FCM, open Cleared Contracts and related property held by or on behalf of the Debtor FCM are liquidated or offset, unless such Cleared Contracts and property either qualify as "specifically identifiable property" (as defined under CFTC Regulation 1.3(ll)) ("**Specifically Identifiable Property**")[59] with respect to an

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[59] Under the Bankruptcy Code and CFTC Regulations, the term "**specifically identifiable property**" means:

"(1) With respect to the following property received, acquired, or held by or for the account of the debtor from or for the account of a customer to margin, guarantee or secure an open commodity contract:

(i) Any security which as of the filing date is: (A) held for the account of a customer; (B) registered in such customer's name; (C) not transferable by delivery; and (D) not a short term obligation; or

(ii) Any warehouse receipt, bill of lading or other document of title which as of the filing date: (A) Can be identified on the books and records of the debtor as held for the account of a particular customer; and (B) Is not in bearer form and is not otherwise transferable by delivery.

(2) With respect to open commodity contracts, and except as otherwise provided in [paragraph (7)], any such contract which: (i) as of the filing date is identified on the books and records of the debtor as held for the account of a particular customer; (ii) is a bona fide hedging position or transaction as defined in [CFTC Regulation 1.3] or is a commodity option transaction which has been determined by the registered entity to be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise pursuant to rules which have been approved by the [CFTC] pursuant to section 5c(c) of the CEA; and (iii) is in an account designated in the accounting records of the debtor as a hedging account in accordance with [CFTC Regulation 190.04(e)(1).]

(3) With respect to warehouse receipts, bills of lading or other documents of title, or physical commodities received, acquired, or held by or for the account of the debtor for the purpose of making or taking delivery or exercise from or for the account of a customer, any such document of title or commodity which as of the entry of the order for relief can be identified on the books and records of the debtor as received from or for the account of a particular customer as held specifically for the purpose of delivery or exercise.

(4) Any cash or other property deposited prior to the entry of the order for relief to pay for the taking of physical delivery on a long commodity contract or for payment of the strike price upon exercise of a short put or a long call option contract on a physical commodity, which cannot be settled in cash, in excess of the amount necessary to margin such commodity contract prior to the notice date or exercise date, which cash or other property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of payment of the notice price upon taking delivery or the strike price upon exercise, respectively, and such customer takes delivery or exercises the option in accordance with the applicable designated contract market rules.

(5) The cash price tendered for any property deposited prior to the entry of the order for relief to make physical delivery on a short commodity contract or for exercise of a long put or a short call option contract on a physical

individual "customer" (a "**Customer**")[60] of such Debtor FCM or are held for a Customer for hedging purposes. A Customer may prohibit liquidation of any Cleared Contract that qualifies as Specifically Identifiable Property of such Customer (a "**Specifically Identifiable Contract**") or is held for hedging purposes (together with any Specifically Identifiable Contracts, "**Transferrable Contracts**") and may instruct the bankruptcy trustee of the Debtor FCM to transfer any such Transferrable Contract to another solvent FCM.[61] In addition, a bankruptcy trustee of a Debtor FCM may elect, with the consent of the CFTC, to transfer any Customer accounts held by the Debtor FCM if the liquidation would otherwise adversely affect the market or the estate of the Debtor FCM.

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commodity, which cannot be settled in cash, to the extent it exceeds the amount necessary to margin such contract prior to the notice date or exercise date, which property is identified on the books and records of the debtor as received from or for the account of a particular customer on or after three calendar days before the first notice date or three calendar days before the exercise date specifically for the purpose of a delivery or exercise, respectively, and such customer makes delivery or exercises the option in accordance with the applicable contract market rules.

(6) Notwithstanding [paragraph (1) above], fully paid, non-exempt securities identified on the books and records of the [Debtor Commodity Broker] as held by the [Debtor Commodity Broker] for or on behalf of the commodity contract account of a particular customer for which, according to such books and records as of the filing date, no open commodity contracts were held in the same capacity.

(7) Open commodity contracts transferred in accordance with the provisions of [CFTC Regulation 190.06].

(8) Except as is otherwise specified in this paragraph (ll), no customer property may be treated as specifically identifiable property.

(9) Notwithstanding any other provision of this paragraph (ll), security futures products, and any money, securities or property held to margin, guarantee or secure such products, or accruing as a result of such products, shall not be considered specifically identifiable property for the purposes of Subchapter IV of the Bankruptcy Code or this part 190, if held in a securities account." CFTC Regulation 190.01(ll).

60 Under the Bankruptcy Code, the term "**customer**" means:

(a) with respect to an FCM, "(i) entity for or with whom such [FCM] deals and that holds a claim against such [FCM] on account of a commodity contract made, received, acquired, or held by or through such [FCM] in the ordinary course of such [FCM's] business as [an FCM] from or for a commodity contract account of such entity; or (ii) entity that holds a claim against such [FCM] arising out of— (I) the making, liquidation, or change in the value of a [Commodity Contract]; (II) a deposit or payment of cash, a security, or other property with such [FCM] for the purpose of making or margining such a [Commodity Contract]; or (III) the making or taking of delivery on such a [Commodity Contract]; and

(b) with respect to a "clearing organization," such as a DCO, a "clearing member of such clearing organization with whom such clearing organization deals and that holds a claim against such clearing organization on account of cash, a security, or other property received by such clearing organization to margin, guarantee, or secure a [Commodity Contract] in such clearing member's proprietary account or customer account." See 11 U.S.C. §§ 761(9)(A), (D).

61 See 11 U.S.C. § 765; CFTC Regulation 190.02.

7.1.2 Pursuant to CFTC Regulation 190.02(f)(1), the following Cleared Contracts and other property held by or for the account of a Debtor FCM are not Transferrable Contracts and must be liquidated[62] or offset by the bankruptcy trustee of the Debtor FCM promptly upon commencement of Code Proceedings:

(a) *Open Cleared Contracts.* All open Cleared Contracts except (i) dealer option contracts, if the dealer option grantor is not the Debtor FCM, and (ii) Specifically Identifiable Contracts with respect to which a Customer has provided a prior instruction prohibiting liquidation. Further, the bankruptcy trustee is required to liquidate all Cleared Contracts in any House Accounts and offset certain Cleared Contracts held on behalf of Customers which cannot be settled in cash.

(b) *Specifically Identifiable Property other than open Cleared Contracts.* Specifically Identifiable Property other than open Specifically Identifiable Contracts to the extent that:

(i) the fair market value of such property is less than 90% of its fair market value on the date of entry of the order for relief with respect to the Debtor FCM; or

(ii) the trustee has not received instructions to return, or has not returned, such property upon the terms contained in the CFTC Regulations.

(c) *All other property.* All other property not required to be transferred or returned pursuant to Customer instructions which has not been otherwise liquidated.

Any transfer of a Transferrable Contract from a Debtor FCM to another solvent FCM must be approved by the CFTC.

7.2 Netting and Set-off under the Bankruptcy Code

7.2.1 Pursuant to the Bankruptcy Code and the CFTC Regulations, upon the commencement of Commodity Broker Proceedings with respect to a Debtor FCM, any debts (including, without limitation, amounts payable under Cleared Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Debtor FCM to a Customer shall be set off against any mutual debt (including, without limitation, amounts payable under

[62] Liquidation of open Contracts held for a House Account or Customer account by or on behalf of a Debtor FCM shall be accomplished pursuant to the rules of the relevant DCO, designated contract market, or swap execution facility, as applicable. Such rules must ensure that the process for liquidating open Contracts results in competitive pricing, to the extent feasible under market conditions See CFTC Regulation 190.04(d).

Cleared Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Customer to the Debtor FCM by virtue of prescribed calculation of claim amounts under the Bankruptcy Code.[63] paragraph 766(h) of the Bankruptcy Code and CFTC Regulation 190.07 provide that the bankruptcy trustee of the Debtor FCM subject to Commodity Broker Proceedings shall distribute any "customer property"[64] ratably to Customers on the basis and to the extent of such Customers' "allowed net equity", which is a total claim of a Customer against the estate of the Debtor FCM based on the Cleared Contracts held by the Debtor FCM for or on behalf of such Customer less any indebtedness of the Customer to the Debtor FCM.[65]

7.2.2 For purposes of the Bankruptcy Code, "**net equity**" means with respect to the aggregate of all of a Customer's accounts of the same class held by the Customer in the same capacity:

(a) the balance remaining in such Customer's accounts with the Debtor FCM immediately after (i) all Cleared Contracts of such Customer have been transferred, liquidated or become identified for delivery; and (ii) all obligations of such Customer to the Debtor FCM have been offset;[66] ***plus***

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[63] See 11 U.S.C. §§ 761(17), 766(h); CFTC Regulation 190.07.

[64] Under the Bankruptcy Code, the term "**customer property**" means "cash, a security, or other property, or proceeds of such cash, security, or property, received, acquired, or held by or for the account of the debtor, from or for the account of a customer— (A) including (i) property received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract; (ii) profits or contractual or other rights accruing to a customer as a result of a commodity contract; (iii) an open commodity contract; (iv) specifically identifiable customer property; (v) warehouse receipt or other document held by the debtor evidencing ownership of or title to property to be delivered to fulfill a commodity contract from or for the account of a customer; (vi) cash, a security, or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the account of a customer; (vii) a security held as property of the debtor to the extent such security is necessary to meet a net equity claim based on a security of the same class and series of an issuer; (viii) property that was unlawfully converted from and that is the lawful property of the estate; and (ix) other property of the debtor that any applicable law, rule, or regulation requires to be set aside or held for the benefit of a customer, unless including such property as customer property would not significantly increase customer property; but (B) not including property to the extent that a customer does not have a claim against the debtor based on such property." See 11 U.S.C. § 761(10).

[65] CFTC Regulation 190.07(b).

[66] Under CFTC Regulation 190.07(b)(1), the equity balance of each Customer account is determined by computing the sum of: (i) the ledger balance, (ii) the open trade balance, and (iii) the current realizable market value, determined as of the close of the market on the last preceding market day, of any securities or other property held by or for the Debtor FCM from or for such account, plus accrued interest, if any. The "ledger balance" of a Customer account is calculated by (A) adding (i) cash deposited to purchase, margin, gurantee, secure or settle a Commodity Contract; (ii) the cash proceeds of such cash, or of securities or other property held from or for the Customer by or for the account of the Debtor FCM; and (iii) gains realized on trades, and (B) subtracting from the result (i) losses realized on trades; (ii) disbursements to or on behalf of the Customer; and (iii) the normal costs attributable to the payment of commissions, brokerage, interest, taxes, storage, transaction fees, insurance

(b) the value of any Specifically Identifiable Property actually returned to such Customer; ***plus***

(c) the value, as of the date of the transfer, of (i) any Cleared Contract to which such Customer is entitled that is transferred to another FCM and (ii) any cash, security, or other property of such Customer transferred to another FCM to margin or secure such transferred Cleared Contract.

7.2.3 In addition, pursuant to CFTC Regulation 190.07(b)(3), any obligation which is not required to be included in computing the "net equity" of a Customer as set out in sub-paragraphs (a) through (c) above, but which is owed by such Customer to the Debtor FCM, must be deducted from any obligation not required to be included in computing the equity of a Customer which is owed by such Debtor FCM to the Customer. If the former amount exceeds the latter, the excess must be deducted from the equity balance of the Customer obtained after performing the preceding calculations of "net equity". Furthermore, a negative balance obtained with respect to one customer account class must be set off against a positive equity balance in any other account class of such customer held in the same capacity. Pursuant to CFTC Regulation 190.07(b)(3), the net equity of one Customer account may not be offset against the net equity of any other Customer of a Debtor FCM.

8. NETTING AND SET-OFF IN INSOLVENCY PROCEEDINGS WITH RESPECT TO A FDICIA CLEARING ORGANIZATION

Upon commencement of Insolvency Proceedings with respect to a FDICIA Clearing Organization, termination of Client Transactions and calculation, netting and set-off of the relevant close-out amounts would be effected in accordance with the relevant rules of the FDICIA Clearing Organization irrespective of any contractual arrangements between the Client and the Firm, such as the Clearing Module Netting Provision, the Addendum Netting Provision, FOA Set-Off Provisions, Clearing Module Set-Off Provision or Addendum Set-Off Provision. Furthermore, we note that in this jurisdiction while a FDICIA Clearing Organization typically requires its clearing members to deposit margin on behalf of their customers in connection with Cleared Contracts, the FDICIA Clearing Organization would look only to such clearing members in assuring the financial integrity of cleared transactions, and the contractual privity would not exist between the FDICIA Clearing Organization and any individual customers of the FDICIA Clearing Organization's clearing members.[67]

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and other costs and charges lawfully incurred in connection with the purchase, sale, exercise, or liquidation of any Contract in such account.

[67] See *Mt. Morris Bank v. Twenty-Third Ward Bank*, 172 N.Y. 244 (1902); *Leist v. Simplot*, 638 F.2d 283, 287 (C.A.N.Y., 1980) ("The clearinghouse treats FCM's as principals in trading transactions.")

8.1 **FDICIA**

FDICIA provides that, subject to certain limitations, notwithstanding any provision of federal or state law, in the event of a FDICIA Clearing Organization insolvency, the members of such insolvent FDICIA Clearing Organization would not be stayed from netting all payment obligations with respect to the FDICIA Clearing Organization if the rules of the FDICIA Clearing Organization provide for such netting.[68] Therefore, if the rules of a FDICIA Clearing Organization subject to Insolvency Proceedings contain a provision that would allow a clearing member of such FDICIA Clearing Organization to apply close-out netting or debt set-off in respect of its positions with, and obligations owed to or by, the FDICIA Clearing Organization (the "**Netting Contract**"), the calculation, netting, and set-off of the relevant close-out amounts with respect to any Transactions entered into by or for the account of the clearing member of the FDICIA Clearing Organization would generally be effected in accordance with such provision.

8.2 In the event the rules of a FDICIA Clearing Organization do not contain a Netting Contract and the FDICIA Clearing Organization is a Debtor DCO, in the event of commencement of Code Proceedings with respect to such Debtor DCO, any debts (including, without limitation, amounts payable under Cleared Contracts in accordance with their terms including, where applicable, termination amounts) owed by the Debtor DCO to its clearing members shall be set off against any mutual debt (including, without limitation, amounts payable under Cleared Contracts in accordance with their terms including, where applicable, termination amounts) owed by the clearing members to the Debtor DCO by virtue of prescribed calculation of claim amounts under the Bankruptcy Code and the CFTC Regulations. paragraph 766(i) of the Bankruptcy Code and CFTC Regulation 190.07 provide that the bankruptcy trustee of the Debtor DCO subject to Code Proceedings shall distribute any "customer property" ratably to the Debtor DCO's clearing members on the basis and to the extent of such clearing members' "allowed net

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[68] See 12 U.S.C. §4404. In particular, FDICIA provides that, with certain limited exceptions:

(a) notwithstanding any other provision of Federal or state law (other than Section 1(e) of the Federal Deposit Insurance Act, Section 207(c) of the Federal Credit Union Act, and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970, the "covered contractual payment obligations" and "covered contractual payment entitlements" of a member of a clearing organization to and from all other members of the clearing organization shall be netted in accordance with and subject to the conditions of the applicable Netting Contract (except as provided in Section 561(b)(2) of the Bankruptcy Code);

(b) the only obligation, if any, of a member of a clearing organization to make payment with respect to a "covered contractual payment obligation" arising under a single Netting Contract to any other member of a clearing organization shall be equal to its net obligation arising under that Netting Contract, and no such obligation shall exist if there is no net obligation; and

(c) the only right, if any, of a member of a clearing organization to receive payment with respect to a "covered contractual payment entitlement" arising under a single Netting Contract from other members of a clearing organization shall be equal to its net entitlement arising under that Netting Contract, and no such right shall exist if there is no net entitlement (provisions in sub-paragraphs (a) through (c) above.

equity", which is a total claim of an individual clearing member against the estate of the Debtor DCO based on the Cleared Contracts held by the Debtor DCO for or on behalf of such clearing member (including any Customers of such clearing member) less any indebtedness of the clearing member to the Debtor DCO.

The "net equity" with respect to a Debtor DCO would be calculated in the same manner as with respect to a Debtor FCM (see paragraph 7.2.2).

9. ENFORCEABILITY OF THE TITLE TRANSFER PROVISIONS

9.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, the enforceability of the Title Transfer Provisions following the specification or deemed occurrence of a Liquidation Date occurring other than as a result of the opening of Insolvency Proceedings with respect to the Defaulting Party should be determined as a matter of English law.[69]

9.2 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date occurring upon commencement of Insolvency Proceedings, the Non-Defaulting Party should not be stayed from exercising its rights under the Title Transfer Provisions or otherwise be subject to any further condition under the laws of this jurisdiction to exercising such rights, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount in accordance with the FOA Netting Provision.

9.2.1 With respect to Specified Companies, Section 362(b)(6) of the Bankruptcy Code protects from stay the exercise by a Commodity Broker or Financial Participant of any contractual right under any security agreement or arrangement or other credit enhancement forming a part of or related to any Commodity Contract to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one more such agreements, including any master agreement for such agreements. Furthermore, Section 546(e) of the Bankruptcy Code protects a pre-petition transfer from avoidance as a preference or constructive fraudulent transfer if the transfer is made by or to (or for the benefit of) a Commodity Broker or Financial Participant in

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[69] As each Agreement is governed by English law, the validity of the contractual netting and set-off provisions in each Agreement should be determined as a matter of English law. See *Grund v. Delaware Charter Guarantee & Trust Co.*, 788 F.Supp.2d 226, 243 (S.D.N.Y. 2011) (New York courts "will enforce a choice of law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction") (citation omitted); see *Finance One Public Co. Ltd. v. Lehman Brothers Special Financing, Inc.*, 414 F.3d 325, 336 (2d Cir. 2005) (analyzing choice of law issues for extra-contractual setoff rights and noting that had the parties' contract created a set-off right, the choice of law clause in the contract would govern).

connection with a Commodity Contract. The foregoing provision does not protect from avoidance a fraudulent transfer made with actual intent to hinder, delay, or defraud creditors. In addition, Section 546(e) of the Bankruptcy Code also protects a pre-petition margin payment (as defined in the Bankruptcy Code)[70] or settlement payment (as defined in the Bankruptcy Code)[71] made in connection with a Commodity Contract from avoidance as a preference or constructive fraudulent transfer if such margin or settlement payment is made by or to (or for the benefit of) a Commodity Broker, or Financial Participant. The foregoing provision does not protect from avoidance a fraudulent transfer made with actual intent to hinder, delay, or defraud creditors. Courts have not been entirely consistent in their interpretation of "settlement payment" and "margin payment".[72] However, we believe that a transfer of securities or cash under the Agreement as part of a Transaction or a close-out under the Agreement would be a "settlement payment" if the Transaction were a transaction of a type common in the market. The relevant payment will, however, not be protected as a

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[70] Under Section 101(38) of the Bankruptcy Code the term "margin payment" means "for purposes of the forward contract provisions of the Bankruptcy Code, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments." See 11 U.S.C. § 101(38).

Under paragraph 761(15) of the Bankruptcy Code the term "margin payment" means "payment or deposit of cash, a security or other property, that is commonly known in the commodities trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, settlement payments, variation payments, daily settlement payments, and final settlement payments made as adjustments to settlement prices." 11 U.S.C. § 761(15).

[71] Under paragraph 741(8) of the Bankruptcy Code the term "settlement payment" means "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8).

[72] See *Bevill, Bresler & Schulman Asset Management Corp. v. Spencer Sav. & Loan Ass'n.*, 878 F.2d, 742, 752 (3rd Cir.1989) (cited in *Enron Corp. v. Bear Stearns (In re Enron Corp.)* 323 B.R. 857 (Bankr. S.D.N.Y., April 27, 2005) and *In re Kaiser Steel Corporation,* 952 F.2.d at 1239) holding that delivery of securities under a repurchase agreement was part of the settlement process and, therefore, a "settlement payment " (applying a previous version of Section 546(f) of the Bankruptcy Code which included a reference to "settlement payments "); *Biggs v. Smith Barney, Inc. (In re David*), 193 B.R. 935 (Bankr. C.D. Cal. 1996); *Wyle v. Howard, Weil, Labouisse, Freidrichs (In re Hamilton Taft & Co.*), 176 B.R. 895 (Bankr. N.D. Cal. 1995); In re Kaiser Steel Corp., 952 F.2d 1230 (10th Cir. 1991); *Brandt v. B.A. Capital Co (in Re Plassein Int'l Corp*), 2007 Bankr. Lexis 1343 (Bankr. D. Del. April 20, 2007); *Enron Creditors Recovery Corp v. J.P. Morgan* (*In re Enron Creditors Recovery Corp.*) 325 B.R.671 (Bankr., S.D.N.Y., June 15, 2005) and *Enron Creditors Recovery Corp v. J.P. Morgan* (*In re Enron Creditors Recovery Corp.*) 407 B.R. 17 (Bankr. S.D.N.Y., June 29, 2009) [on appeal] (both cases holding that the relevant payment has to be "common in the securities trade " to be a "settlement payment"; but see *Official Comm. Of Unsecured Creditors of Norstan Apparel Shops, Inc. v. Lattman (In re Norstan Apparel Shops),* 2007 Bankr. LEXIS 1012 (Bankr. E.D.N.Y. March 30, 2007) (holding that transfers which do not involve publicly traded securities or otherwise implicate the public securities market are not entitled to take advantage of the "settlement payment " safe harbor provisions of Section 546(e) of the Bankruptcy Code).

"settlement payment" under Section 546(e) of the Bankruptcy Code, if the underlying transaction is void (pursuant to applicable law).[73]

9.2.2 With respect to Banks and Federal Branches, FDIA exempts from stay any right under any security agreement or arrangement or other credit enhancement related to one or more FDIA QFCs.[74]

9.2.3 With respect to New York Branches subject to Insolvency Proceedings under NYBL, Section 618-a of the NYBL which provides that a party to an NYBL QFC with a New York Branch may apply all collateral in which such party has a perfected security interest in satisfaction of any claims secured by the collateral in connection with the termination or liquidation of that NYBL QFC in accordance with the terms thereof, **provided that** such amount may not exceed the total net payment obligation of the New York Branch under the "qualified financial contract".

9.3 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and upon commencement of Insolvency Proceedings:

9.3.1 with respect to a Debtor FCM, the value of the Transferred Margin would be taken into account as part of the Relevant Collateral Value in accordance with the relevant provisions of the Bankruptcy Code and CFTC Regulations (as discussed under 7.2. above); and

9.3.2 with respect to a Firm that is not a Debtor FCM, the value of the Transferred Margin should be taken into account in accordance with Title Transfer Provisions (as discussed under paragraph 6).

9.4 A Party that is an FCM or a DCO should be entitled to use or invest any margin transferred to it in connection with any CFTC Futures Contracts and CFTC Cleared Swaps Contracts pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions only in accordance with the relevant CFTC Regulations.[75]

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[73] See *Kippermann v. Circle Trust F.B.O. (In re Grafton Partners L.P)*. 321 B.R. 527 (B.A.P. 9th Cir. 2005) (holding that a nonpublic trade of an illegal unregistered security does not qualify as a "settlement payment" under section 546(e) of the Bankruptcy Code); *Enron Corp. v. Bear Stearns (In re Enron Corp.)* 323 B.R. 857 (Bankr. S.D.N.Y., April 27, 2005) and *Enron Corp. v. Credit Suisse First Boston Int'l (In re Enron Corp.)* 328 B.R. 58 (Bankr. S.D.N.Y 2005) (both cases holding that, if an underlying transaction is void under Oregon state law, there would be no securities transaction from which a protected "settlement payment"could result).

[74] 12 U.S.C. § 1821(e)(8)(E)(ii).

[75] CFTC Regulations 1.20 and 30.1.

9.5 The legal characterization of a transfer is a question of contract law and, therefore, a New York court would normally apply the law governing an Agreement, that is English law, to the question of the legal characterization of such a transfer of Margin. In the event a New York court does not uphold the choice of English law in the FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions, and, instead, New York law were chosen to govern transfers of Margin, it is likely that a New York court applying New York law would characterize each Transfer of Margin according to its terms (as an unconditional transfer of ownership in the assets transferred), rather than as a secured loan, absent a manifest intent of the Parties to create a security interest in Margin pledged under the Title Transfer Provisions, although the risk of recharacterization would exist, as further discussed below. If a recharacterization will occur with respect to the transfer of margin, the enforcement of any security interest in margin would be subject to the NYUCC or other applicable Uniform Commercial Code, which would generally require (i) commercially reasonable disposition of the collateral and (ii) that reasonable notice be given to the debtor unless the collateral is of a type customarily sold on a recognized market.

9.5.1 To our knowledge, there are no New York law cases that directly address the risk of recharacterization with regard to transfers of collateral in agreements similar to the Agreements. In the context of repurchase agreements, however, in Granite Partners L.P. v. Bear Stearns & Co., a New York federal district court applying New York law held that where a transfer document clearly and unambiguously states that all transactions have been intended as sales and purchases, rather than secured loans, the court would conclude that the parties' intent was to structure the transfers as purchases and sales of investment property and would give effect to such expressed intent. In addition, several other recent court decisions generally have found, in the context of commercial law and federal securities law, repurchase agreements to be purchases and sales, particularly where the agreement sets forth the intent of the parties to treat the transactions as purchases and sales. However, we are aware of at least one court decision in another U.S. jurisdiction where the court considered economic substance of the transaction, rather than its form or intent of the parties, in determining whether a transaction intended by the parties as a sale and purchase would be characterized as a secured loan under the law of that jurisdiction.

9.5.2 The Title Transfer Provisions contain unequivocal language of purchase and sale, as set forth under which is evidence of the parties' intention to structure the transfers as purchases and sales. If a court applying New York law follows the approach in Granite Partners, it is highly probable that it would characterize a transfer under the Transfer Annex as effecting an unconditional transfer of ownership in the assets transferred. However, there remains a risk that a court applying New York law may characterize the transfer of Margin comprised of securities under the Transfer Annex as a secured loan because, unlike a

repurchase agreement, there is no cash consideration passing at the time of delivery or redelivery of the securities in connection with the Transfer of Margin under the Title Transfer Provisions. In the event that a New York court were to recharacterize a Transfer of Margin under the Title Transfer Provisions as a secured transaction and find that the parties intended to enter into such a secured transaction despite the express language to the contrary employed under the Title Transfer Provisions, the provisions of Article 9 of the NYUCC would apply.

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

In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions, the opinions expressed above in paragraphs 9.1 through 9.4 (in relation to the Title Transfer Provisions) should not be affected by the use also in the same agreement of the Non-Cash Security Interest Provisions (used with or without the Rehypothecation Clause) and/or the Client Money Additional Security Clause, **provided always that**:

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

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

10. SINGLE AGREEMENT

10.1 Under the laws of this jurisdiction, it is not necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision to be enforceable. In our view, the FOA Netting Agreement and Transactions thereunder are part of a single agreement. Similarly, the Clearing Agreement and Transactions thereunder are part of a single agreement.[76]

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[76] We note that Section 11(e)(8)(D)(vii) of the FDIA provides that any master agreement for any commodity contract or swap agreement (as those terms are defined in the FDIA) or any master agreement for such master agreement or agreements, together with all supplements to such master agreement, shall be treated as a single agreement and a single FDIA QFC. Further, if a master agreement contains provisions relating to agreements or transactions that are not themselves FDIA QFCs, the master agreement shall be deemed to be an FDIA QFC with respect to those transactions that are themselves FDIA QFCs. Similarly, NYBL provides that any master

11. AUTOMATIC TERMINATION

11.1 It is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under any Netting Provision to ensure the effectiveness of netting under the FOA Netting Agreement or, as the case may be, the Clearing Agreement in the event of bankruptcy, liquidation, or other similar circumstances. We note, however, that undue delay in exercising the termination and liquidation rights under a Netting Provision may compromise the effectiveness of the relevant safe harbor provisions.[77]

12. MULTIBRANCH PARTIES

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

13. INSOLVENCY OF FOREIGN PARTIES

13.1 Where the Defaulting Party is incorporated or formed under the laws of another jurisdiction (a "**foreign Defaulting Party**"), Insolvency Proceedings may be commenced with respect to such foreign Defaulting Party if it has any property in the United States[78] and a U.S. court grants the foreign Defaulting Party the status of a debtor under Chapter 11 of the Bankruptcy Code with all of the rights, privileges, powers, and responsibilities associated therewith.

In addition to a plenary proceeding under Chapter 11 of the Bankruptcy Code, Chapter 15 of the Bankruptcy Code also provides for an ancillary proceeding with respect to a foreign Defaulting Party and applies where: (i) a non-US court or foreign

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agreement for NYBL QFCs, together with all supplements thereto, shall be treated as one NYBL QFC. See NYBL § 618-a.2(i).

[77] We note two recent cases where the court held that Section 560 of the Bankruptcy Code only protects termination rights that are exercised "fairly contemporaneously" with a bankruptcy filing. See *In re Enron Corp., 2005 WL 3874285* (Bankr. S.D.N.Y. 2005); Transcript, *In re Lehman Brothers Holding Inc. Chap. 11 Case No. 08-13555 (JMP)* (September 15, 2009 morning session in relation to Metavante Corporation) at 109-112. The rationale for these decisions is that Section 560 of the Bankruptcy Code only protects terminations that occur because of a bankruptcy or the financial condition of the debtor.

[78] 11 U.S.C. § 109.

representative[79] seeks assistance in the United States; (ii) a U.S. bankruptcy case is pending and assistance is sought in a country other than the United States; (iii) the same debtor is subject to both a foreign proceeding and a U.S. bankruptcy case; or (iv) non-U.S. creditors or other interested persons have an interest in commencing or participating in a U.S. bankruptcy case.[80]

Upon recognition of a foreign main proceeding, Chapter 15 of the Bankruptcy Code automatically provides certain relief.[81] For example, the provisions of the Bankruptcy Code governing adequate protection and the automatic stay apply to the debtor and its property within the territorial jurisdiction of the United States.[82] Provisions governing turnover and the use, sale, or lease of the debtor's property within the territorial jurisdiction of the United States are also applicable, as are the provisions governing the avoidance of post-petition transactions and the post-petition effect of a security interest with respect to such property.[83]

We are not aware of any federal case law limiting the application of the safe harbor provisions discussed under paragraph 6 with respect to a foreign Defaulting Party subject to Insolvency Proceedings under Chapter 15 of the Bankruptcy Code. As a result, our opinions under paragraphs 5.1 through 5.7 and related discussion under paragraph 6 with respect to Specified Companies should apply to the property located within the territorial jurisdiction of the United States of a foreign Defaulting Party subject to Insolvency Proceedings under Chapter 15 of the Bankruptcy Code.

14. SPECIAL LEGAL PROVISIONS FOR MARKET CONTRACTS

14.1 Other than as discussed herein, there are no special provisions of law which would affect the opinion which would apply to a Transaction between two Parties as a result of the fact that such Transaction was entered into on, or is back-to-back with a Transaction entered into on an exchange (in this or another jurisdiction), or is cleared at, or is back-to-back with a transaction to be cleared by a central counterparty.

15. QUALIFICATIONS

This opinion and other matters in this letter are subject to the following qualifications.

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[79] A "**foreign representative**" is defined as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

[80] 11 U.S.C. § 1501(b).

[81] 11 U.S.C. § 1520.

[82] 11 U.S.C. § 1520(a)(1).

[83] 11 U.S.C. § 1520(a)(2).

15.1 We are members of the bar of the State of New York and are not members of the bar of any other state, and this opinion is qualified by this fact and is limited to the laws of this jurisdiction.

15.2 This opinion does not address whether the Non-Defaulting Party may compel the Defaulting Party holding Margin or any other party to transfer Margin to (or at the direction of) the Non-Defaulting Party if the Margin is held by the Defaulting Party.

15.3 The unenforceability or illegality of any provision of an Agreement would not undermine the efficacy of the remainder of the Agreement generally under the laws of this jurisdiction, so long as the unenforceable or illegal provision is incidental to the legal aspects of the Agreement and is not the main objective of the Agreement.[84]

15.4 This opinion relates only to the entities specified herein. We express no opinion with respect to the effect of the Trading with the Enemy Act, 50 U.S.C. app. §1 *et seq.*, or the International Emergency Economic Powers Act, 50 U.S.C. §1701 *et seq.*, on the rights or obligations of the Parties.

15.5 Our views are in all cases subject to equitable principles, whether applied in a proceeding at law or in equity.

15.6 This letter is effective as of the date hereof. No expansion of our opinions may be made by implication or otherwise, and we provide no opinions other than the opinions herein expressly set forth. We do not undertake to advise you of any matter within the scope of this letter that comes to our attention after the date hereof and disclaim any responsibility to advise you of any future changes in law, regulations, Rules or fact that may affect the above opinions.

15.7 There is no necessity for the set-off effected under any Agreement to be reflected in the records of the Parties for it to be effective and no other action is required including, without limitation, any filing or registration, for the set-off to be effective, except that with respect to a Bank, the written agreement requirements of Sections 11(d)(9), 11(n)(4)(I), and 13(e) of the FDIA, as interpreted in the FDIC Statement of Policy on Qualified Financial Contracts issued by the Board of Directors of the FDIC on December 12, 1989 must be met. An agreement to provide for the lawful collateralization of one or more FDIA QFCs shall not be deemed invalid solely because such agreement was not executed contemporaneously with the acquisition of the collateral or because of pledges, delivery, or substitution of collateral made in accordance with such agreement.[85]

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[84] See *Donnell v. Stogel*, 161 A.D.2d 93, 97-98 (N.Y. App. Div. 1990); *Artache v. Goldin*, 133 A.D.2d 596, 599 (N.Y. App. Div. 1987). See *also Ferro v. Bologna*, 31 N.Y.2d 30, 35-36 (1972).

[85] 12 U.S.C. §§ 1821(d)(9), 1821(n)(4)(I), and 1823(e)(2)(D).

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

This letter 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 letter (each a "subscribing member").

This letter may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

(a) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, auditors and professional advisers of such affiliate;

(b) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings;

(c) the officers, employees, auditors and professional advisers of any addressee; and

(d) any competent authority supervising a subscribing member or its affiliates in connection with their compliance with their obligations under prudential regulation

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made and in preparing this opinion we have only had regard to the interests of our client.

We accept responsibility to the Futures and Options Association and subscribing members in relation to the matters opined on in this letter. However, the provision of this letter is not to be taken as implying that we assume any other duty or liability to the Futures and Options Association's members or their affiliates. The provision of this letter does not create or give rise to any client relationship between this firm and the Futures and Options Association's members or their affiliates.

Yours faithfully,

Clifford Chance US LLP

SCHEDULE 1

BROKER-DEALERS

Subject to the modifications and additions set out in this Schedule 1 (*Broker-dealers*), the opinions, assumptions and qualifications set out in this letter will also apply in respect of Parties which are Broker-dealers. For the purposes of this Schedule 1 (*Broker-dealers*), "**Broker-dealers**" means broker-dealers established under the laws of any state of the United States, the District of Columbia, Puerto Rico, or any territory or possession of the United States, regardless of whether they are members of the Securities Investor Protection Corporation ("**SIPC**").[86]

The only bankruptcy, composition, rehabilitation (*e.g.*, administration, receivership or voluntary arrangement) or other insolvency proceedings to which a Broker-dealer would be subject under the federal laws of the United States are (i) proceedings under SIPA, if the Broker-dealer is subject to SIPA (as discussed below); or (ii) proceedings under the Bankruptcy Code.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

"**Insolvency Proceedings**" means the proceedings listed in section 3 of Schedule 1 (*Broker-dealers*).

2. ADDITIONAL ASSUMPTIONS

None.

3. OTHER MODIFICATIONS

3. INSOLVENCY PROCEEDINGS

3.1. The only bankruptcy, composition, rehabilitation (*e.g.*, administration, receivership or voluntary arrangement) or other insolvency proceedings to which a Broker-dealer would be subject under the federal laws of the United States are (i) proceedings under SIPA, if the Broker-dealer is subject to SIPA (as discussed under 3.1.2); or (ii) proceedings under the Bankruptcy Code.

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[86] SIPC is a membership corporation the members of which are:

All broker-dealers registered under Section 15(b) of the Securities Exchange Act of 1934, as amended, (the "**Exchange Act**"), other than (i) broker-dealers whose principal business, in the determination of SIPC, taking into account business of affiliated entities, is conducted outside the United States and its territories and possessions, (ii) broker-dealers whose business consists exclusively of (a) the distribution of shares of registered open end investment companies or unit investment trusts, (b) the sale of variable annuities, (c) the business of insurance, or (d) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts, and (iii) broker-dealers who are registered under Section 15(b)(11)(A) of the Exchange Act. See 15 U.S.C. § 78ccc(a)(2)(A).

3.1.1 Broker-dealers (Bankruptcy Code Proceedings)

In the event that an insolvency proceeding has been initiated against a Broker-dealer under the Bankruptcy Code, subchapter III of Chapter 7 of the Bankruptcy Code will apply in addition to the Bankruptcy Code provisions discussed above. Subchapter III of Chapter 7 of the Bankruptcy Code does not affect the operation of the Bankruptcy Code provisions discussed above with respect to Specified Companies. As a result, our discussions with respect to Specified Companies also apply to Broker-dealers whose liquidations are conducted under the Bankruptcy Code.

However, paragraph 742 of the Bankruptcy Code provides (a) that the filing for a protective decree by SIPC under SIPA against a Broker-dealer will stay all proceedings against such Broker-dealer under the Bankruptcy Code unless and until such SIPA application is dismissed[87] and (b) that the Bankruptcy Code proceedings against such Broker-dealer will be dismissed if the liquidation of such Broker-dealer will be completed under SIPA.[88] If SIPC has applied for a protective decree under SIPA and such decree has been issued by the court, the relevant Broker-dealer will be subject to SIPA proceedings (as discussed below).

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions.

3.1.2 Broker-dealers (SIPA Proceedings)

If the Insolvent Party is a Broker-dealer, which is a member of SIPC, such Broker-dealer is subject to SIPA[89] and SIPC has the authority, in specified circumstances that include insolvency, to file an application for a protective decree to be issued by any Federal district court with jurisdiction over such Broker-dealer. If the court issues the decree then the liquidation proceeding is conducted by a federal bankruptcy court under SIPA.

In a liquidation proceeding under SIPA, the provisions of chapters 1, 3, and 5, and subchapters I and II of chapter 7 of the Bankruptcy Code apply except where they are inconsistent with SIPA.

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[87] SIPC may apply for a protective decree under SIPA with respect to a Broker-dealer (a) which is a member of SIPC or (b) has been a member of SIPC within 180 days prior to SIPC making the determination that the conditions for the filing of a protective decree apply to such (prior) member. See 15 U.S.C. § 78(eee)(a)(3).

[88] SIPA also provides that the application of a protective decree under SIPA stays any bankruptcy or insolvency proceedings. See 15 U.S.C § 78(eee)(b)(2)(B)(i).

[89] SIPC may apply for a protective decree under SIPA with respect to a Broker-dealer (a) which is a member of SIPC (as to the membership in SIPC see fn. 86 above) or (b) has been a member of SIPC within 180 days prior to SIPC making the determination that the conditions for the filing of a protective decree apply to such (prior) member. See 15 U.S.C. § 78(eee)(a)(3).

6. **DISCUSSION**

We are of the opinions set out under paragraphs 5.1 through 5.7 because:

SIPA provides that neither the filing of an application for a protective decree by SIPC nor any court order or decree obtained by SIPC shall operate as a stay of any contractual rights to liquidate, terminate or accelerate a Commodity Contract or Swap Agreement, to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more of such contracts or agreements, or to foreclose on any cash collateral pledged, whether or not with respect to one or more of such contracts or agreements.[90]

In cases where the Broker-dealer becomes subject to a liquidation proceeding under the Bankruptcy Code, our discussion with respect to Specified Companies will apply, **provided however** that the provisions of SIPA will apply upon the filing for a protective decree by SIPC under SIPA which filing will suspend any Bankruptcy Code proceeding against the same Broker-dealer until such SIPA application is dismissed or until the liquidation of such Broker-dealer is completed under SIPA. Subchapter III of Chapter 7 does not affect the operation of the Bankruptcy Code provisions discussed above. As a result, our discussions with respect to Specified Companies (above) also apply to Broker-dealers whose liquidations are conducted under the Bankruptcy Code.

In cases where the Broker-dealer is subject to a liquidation proceeding under SIPA, our discussion with respect to Specified Companies will apply subject to the limitation that a stay may apply for any foreclosure on, or disposition of, securities collateral pledged or transferred by the Broker-dealer under any such agreement. In a liquidation proceeding under SIPA, the provisions of chapters 1, 3, and 5, and subchapters I and II of chapter 7 of the Bankruptcy Code apply except where they are inconsistent with SIPA.

9. **ENFORCEABILITY OF THE TITLE TRANSFER PROVISIONS**

9.2.1 With respect to Broker-dealers, the conclusions above are based upon a SIPA provision that exempts from stay upon commencement of a SIPA proceeding the foreclosure on, or disposition of, securities collateral pledged by the Broker-dealer that is subject to a liquidation proceeding under SIPA, with respect to one or more Commodity Contracts or Swap Agreements.[91]

4. **ADDITIONAL QUALIFICATIONS**

None.

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[90] 15 U.S.C. § 78eee(b)(2)(C)(i).

[91] 15 U.S.C. § 78eee(b)(2)(C)(ii).

5. MODIFICATIONS TO QUALIFICATIONS

None.

SCHEDULE 2

COVERED FINANCIAL COMPANIES, RECEIVERSHIP COVERED SUBSIDIARIES AND COVERED BROKER-DEALERS

Subject to the modifications and additions set out in this Schedule 2 (*Covered Financial Companies, Receivership Covered Subsidiaries and Covered Broker-dealers*), the opinions, assumptions and qualifications set out in this letter will also apply in respect of Parties which are Covered Financial Companies and Receivership Covered Subsidiaries. For the purposes of this Schedule 2 (*Covered Financial Companies, Receivership Covered Subsidiaries and Covered Broker-dealers*), "**Covered Financial Company**" means a "Financial Company" (defined below) for which a Systemic Risk Determination (discussed under paragraph 3.1) has been made by the Secretary of the U.S. Treasury Department ("**Treasury Secretary**") and a court does not determine that the Systemic Risk Determination (as defined below) was arbitrary and capricious. Covered Financial Companies do not include Banks.

A "**Financial Company**" is a company that (i) is organized under U.S. state or Federal law and (ii) is (A) a bank holding company; (B) a non-bank financial company supervised by the Board of Governors of the Federal Reserve System (the "**Federal Reserve**");[92] or (C) a company predominantly engaged in activities that are financial in nature for purposes of the Bank Holding Company Act of 1956 (the "**BHCA**"), as determined by the Federal Reserve.[93]

A "**Receivership Covered Subsidiary**" is a subsidiary of a Covered Financial Company subject to FDIC receivership, which is organized under U.S. federal or state law[94] and for which the

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[92] A "**non-bank financial company supervised by the Federal Reserve**" is a company that is predominantly engaged in financial activities and supervised by the Federal Reserve but does not include a bank holding company, a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971, a national securities exchange (or parent thereof), a clearing agency (or parent thereof, unless the parent is a bank holding company), a security-based swap execution facility, or a security-based swap data repository registered with the Securities and Exchange Commission, a board of trade designated as a contract market (or parent thereof), a derivatives clearing organization (or parent thereof, unless the parent is a bank holding company), swap execution facility or a swap data repository registered with the Commodity Futures Trading Commission. Pub. L. No. 111-203, § 102(a)(4)(C), (D).

[93] Pub. L. No. 111-203, § 201(a)(11). A company is not "predominantly engaged" in financial activities if "the consolidated revenues of such company from such activities constitute less than 85 percent of the total consolidated revenues of such company, as [the FDIC], in consultation with [the Treasury Secretary] shall establish by regulation." In determining whether a company is a financial company, the consolidated revenues derived from the ownership or control of a depository institution shall be included. *Id.*, at § 201(b).

Under Section 4(k) of the BHCA, activities deemed to be "financial in nature" include, among others, (i) lending, exchanging, transferring, investing for others, or safeguarding money or securities, (ii) insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, (iii) providing financial, investment, or economic advisory services, (iv) underwriting, dealing in, or making a market in securities, and (v) engaging in any activity that is determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto (subject to the same terms and conditions contained in such order or regulation, unless modified by the Board). 12 U.S.C. § 1843k.

[94] Pub. L. No. 111-203, § 201(a)(1)(E).

FDIC has appointed itself as a receiver following a determination by the Treasury Secretary (discussed below).[95]

A **"Covered Broker-Dealer"** is a Covered Financial Company that is a Broker-dealer (registered with the SEC and a member of SIPA).

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

"Insolvency Proceedings" means the procedures listed in paragraph 3 of Schedule 2 (*Covered Financial Companies, Receivership Covered Subsidiaries and Covered Broker-Dealers*)".

2. ADDITIONAL ASSUMPTIONS

We assume the following:

Paragraph 2.14 is deemed deleted and replaced with the following:

That each Transaction is a "qualified financial contract" ("**OLA QFCs**"), which includes "swap agreements,"[96] "commodity contracts,"[97] "securities contracts," "repurchase

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[95] Pub. L. No. 111-203, § 201(a)(9).

[96] Under OLA, the term "**swap agreement**" means "(I) any agreement, including the terms and conditions incorporated by reference in any such agreement, which is an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total return, credit spread or credit swap, option, future, or forward agreement; a commodity index or commodity swap, option, future, or forward agreement; weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement; (II) any agreement or transaction that is similar to any other agreement or transaction referred to in this clause and that is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference in such agreement) and that is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value; (III) any combination of agreements or transactions referred to in this clause; (IV) any option to enter into any agreement or transaction referred to in this clause; (V) a master agreement that provides for an agreement or transaction referred to in subclause (I), (II), (III), or (IV), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this clause, except that the master agreement shall be considered to be a swap agreement under this clause only with respect to each agreement or transaction under the master agreement that is referred to in subclause (I), (II), (III), or (IV); and (VI) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in any of subclauses (I) through (V), including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in any such clause." Pub. L. No. 111-203, § 210(c)(8)(d)(iv).

agreements", and "forward contracts" (each as defined in the Orderly Liquidation Authority ("**OLA**") set out in Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act).[98]

3. OTHER MODIFICATIONS

3. INSOLVENCY PROCEEDINGS

3.1 The only bankruptcy, composition, rehabilitation or other insolvency or reorganization procedures to which a Party which is a Covered Financial Company, Receivership Covered Subsidiary or Covered Broker-Dealer could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this letter, are as follows:

3.1.1 General

The insolvency proceeding applicable to a Covered Financial Company will be an FDIC receivership under OLA unless a court finds that the Systemic Risk Determination (described below) was arbitrary and capricious. If a court found that the Systemic Risk Determination was arbitrary and capricious, it appears that relevant company would cease to be a Covered Financial Company, although the statute does not explicitly address this topic. If the FDIC is appointed as a receiver under OLA, there will be a liquidation of the Covered Financial Company, rather than a reorganization, and the Bankruptcy Code will not apply.[99]

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[97] Under OLA, the term "**commodity contract**" - (I) with respect to a futures commission merchant, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade; (II) with respect to a foreign futures commission merchant, a foreign future; (III) with respect to a leverage transaction merchant, a leverage transaction; (IV) with respect to a clearing organization, a contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization; (V) with respect to a commodity options dealer, a commodity option; (VI) any other agreement or transaction that is similar to any agreement or transaction referred to in this clause; (VII) any combination of the agreements or transactions referred to in this clause; (VIII) any option to enter into any agreement or transaction referred to in this clause; (IX) a master agreement that provides for an agreement or transaction referred to in any of subclauses (I) through (VIII), together with all supplements to any such master agreement, without regard to whether the master agreement provides for an agreement or transaction that is not a commodity contract under this clause, except that the master agreement shall be considered to be a commodity contract under this clause only with respect to each agreement or transaction under the master agreement that is referred to in any of subclauses (I) through (VIII); or (X) any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause. See Pub. L. No. 111-203, § 210(c)(8)(d)(iii).

[98] Pub. L. No. 111-203.

[99] Pub. L. No. 111-203 § 202(c).

3.1.2 Systemic Risk Determination

If an entity is determined to be a Financial Company, the procedure for determining whether it is a Covered Financial Company subject to OLA is as follows. The FDIC and the Federal Reserve must both recommend an OLA proceeding. The U.S. Treasury Secretary (in consultation with the President of the United States) must then determine whether (1) the Financial Company is in default or danger of default[100]; (2) the failure of the Financial Company and its resolution under otherwise applicable Federal or state law would have serious adverse effects on financial stability in the United States; (3) no viable private sector alternative is available to prevent the default of the Financial Company; (4) any effect on the claims or interests of creditors, counterparties, and shareholders of the Financial Company and other market participants as a result of actions to be taken under OLA is appropriate, given the impact that any action taken under OLA would have on financial stability in the United States; (5) the remedial actions under OLA would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the U.S. Treasury, and the potential to increase excessive risk-taking on the part of creditors, counterparties, and shareholders in the Financial Company; and (6) a federal regulatory agency has ordered the Financial Company to convert all of its convertible debt instruments that are subject to the regulatory order (a "**Systemic Risk Determination**").[101] Once the Systemic Risk Determination is made with respect to a Financial Company, the U.S. Treasury Secretary is required to present all relevant findings and the recommendation to the United States District Court for the District of Columbia (the "**Court**") and provide notice to the Financial Company. After a hearing, in which the Financial Company may oppose the petition, absent the Court finding that the Systemic Risk Determination was arbitrary and capricious, the Court will issue an order authorizing the U.S. Treasury Secretary to appoint the FDIC as a receiver.[102]

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[100] A Financial Company would be deemed to be in default or danger of default if: (i) a bankruptcy case has been, or likely will be, commenced with respect to a Financial Company; (ii) the Financial Company has incurred, or is likely to incur losses that will deplete all or substantially all of the Financial Company's capital with no reasonable prospect to avoid such depletion; (iii) the obligations of the Financial Company to creditors and others exceed, or are likely to exceed, its assets, or (iv) the Financial Company is, or is likely to be, unable to pay its obligations in the normal course of business. Pub. L. No. 111-203 §§ 203(c)(4)(A)-(D).

[101] Pub. L. No. 111-203 § 203.

[102] Pub. L. No. 111-203 § 202(a)(1). If the Court does not make a determination within 24 hours of receipt of the petition - (I) the petition shall be granted by operation of law; (II) the U.S. Treasury Secretary shall appoint the FDIC as receiver; and (III) liquidation under OLA shall automatically and without further notice or action be commenced and the FDIC may immediately take all actions authorized under OLA.

3.1.3 Receivership Covered Subsidiaries

The FDIC may appoint itself the receiver of a Covered Subsidiary of a Covered Financial Company if the Covered Subsidiary is (A) organized under U.S. federal or state laws and (B) the FDIC and the Treasury Secretary jointly determine that (i) the Covered Subsidiary is in default or danger of default; (ii) a receivership would mitigate serious adverse effects on the U.S. economy; and (iii) the receivership would facilitate orderly liquidation of the Covered Financial Company.[103]

If the FDIC appoints itself as a receiver as described above, the relevant Covered Subsidiary will be considered a Covered Financial Company under OLA, and the FDIC will have all the powers and rights with respect to the Receivership Covered Subsidiary that it has with respect to a Covered Financial Company.[104]

3.1.4 Covered Broker-Dealers

If the Defaulting Party is a Covered Broker-Dealer, such Covered Broker-Dealer will be subject to OLA, which provides that upon the appointment of the FDIC as a receiver for any Covered Broker-Dealer, the FDIC shall appoint, without any need for court approval, SIPC to act as trustee for the liquidation of the Covered Broker-Dealer under SIPA.[105] Upon its appointment as trustee, SIPC must file an application for a protective decree to be issued by any Federal district court with jurisdiction over such Covered Broker-Dealer, which application must be accepted and approved immediately upon filing. Following the issuance of the protective decree the liquidation proceeding will be conducted under SIPA by SIPC, as trustee for the Covered Broker-Dealer.[106] SIPC will have all of the powers and duties provided by SIPA, except with respect to assets and liabilities of the Covered Broker-Dealer that may be transferred by the FDIC to a bridge financial company prior to the appointment of SIPC.[107] However, any rights and obligations of any party to an OLA QFC, which includes "swap agreements" and "commodity contracts" (each as defined under OLA), with a Covered Broker-Dealer will be governed exclusively by OLA.[108]

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[103] Pub. L. No. 111-203, § 210(a)(1)(E).

[104] Pub. L. No. 111-203, § 210(a)(1)(E).

[105] Pub. L. No. 111-203, § 205(a)(1).

[106] Pub. L. No. 111-203, § 205(a)(2).

[107] Pub. L. No. 111-203, § 205(b)(1).

[108] Pub. L. No. 111-203, § 205(b)(4).

3.1.5 **Insurance Companies**

Notwithstanding the discussions above, insurance companies that are Covered Financial Companies will be subject to state insolvency law.[109] As discussed above, this letter does not cover insurance companies.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, without the need for any additions.

5.1. **Netting and Set-off where the Defaulting Party acts as Client**

The following paragraph 5.1.7 is added:

5.1.7 The opinions expressed in paragraphs 5.1 through 5.7 are subject to the following limitations ("**OLA Limitations**"):

(i) An OLA QFC with a Covered Financial Company may not be terminated, liquidated or netted based solely on the appointment of a receiver for the Covered Financial Company (i) until 5:00 p.m. (Eastern Time) on the business day following the date of the appointment of the receiver or (ii) after the Non-Defaulting Party has received notice that the OLA QFC has been transferred pursuant to OLA (and the FDIC must deliver this notice no later than 5:00 p.m. (Eastern Time) on the business day following appointment of the FDIC as a receiver).[110]

"Walkaway clauses" are not enforceable in OLA QFCs with a Covered Financial Company as the Defaulting Party.[111]

(ii) Any judicial action brought by a party to an OLA QFC against the FDIC or the defaulting Covered Financial Counterparty is subject to a stay of 90 days if requested by the FDIC.[112] Nothing in the

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[109] Pub. L. No. 111-203, § 203(e).

[110] Pub. L. No. 111-203, § 210(c)(9).

[111] Under OLA, the term "**walkaway clause**" means any provision in a qualified financial contract that suspends, conditions, or extinguishes a payment obligation of a party, in whole or in part, or does not create a payment obligation of a party that would otherwise exist, solely because of the status of such party as a non-defaulting party in connection with the insolvency of a covered financial company that is a party to the contract or the appointment of or the exercise of rights or powers by the [FDIC] as a receiver for such covered financial company, and not as a result of the exercise by a party of any right to offset, setoff, or net obligations that exist under the contract, any other contract between those parties, or applicable law. Pub. L. No. 111-203, § 210(c)(8)(F).

[112] Pub. L. No. 111-203, § 210(c)(8), 210(a)(8).

Agreement requires judicial action to enforce set-off or netting rights of the Non-Defaulting Party.

Furthermore, OLA provides that notwithstanding the OLA Limitations, the FDIC, as a receiver of the Covered Financial Company is required to use its best efforts to meet all margin, collateral, and settlement obligations of such Covered Financial Company that arise under OLA QFCs that are cleared through a "clearing organization" (such as CFTC Futures Contracts and CFTC Cleared Swap Contracts), as required by the rules of such clearing organization when due. In the event the FDIC, as a receiver, fails to satisfy any such margin, collateral, or settlement obligations under the rules of the clearing organization, the clearing organization shall have the immediate right to exercise, and shall not be stayed from exercising, all of its rights and remedies under its rules and applicable law with respect to any OLA QFC of the Covered Financial Company, including, without limitation, the right to liquidate all OLA QFC positions and collateral of such Covered Financial Company held at the clearing organizaton, and suspend or cease to act for such Covered Financial Company, all in accordance with the rules of the clearing organization.[113]

6. DISCUSSION

We are of the opinions set out under paragraphs 5.1 through 5.7 because:

6.1. OLA creates special protections for OLA QFCs and which include "commodity contracts" and "swap agreements" (as those terms are defined in OLA). OLA provides that any master agreement for any "commodity contract" and "swap agreement" (as those terms are defined in OLA)[114] or any master agreement for such master agreement or agreements, together with all supplements to such master agreement, shall be treated as a single agreement and a single OLA QFC.[115] Further, if a master agreement contains provisions relating to agreements or transactions that are not themselves QFCs, the master agreement shall be deemed to be an OLA QFC with respect to those transactions that are themselves OLA QFCs.

OLA provides that the right of a counterparty to an OLA QFC with a Covered Financial Company or Receivership Covered Subsidiary to:

(1) terminate, liquidate or accelerate an OLA QFC,[116] and

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[113] Pub. L. No. 111-203, § 210(c)(8)(G).

[114] See fns. 96-97.

[115] Pub. L. No. 111-203, § 210(c)(8)(D)(viii).

[116] Pub. L. No. 111-203, § 210(c)(8)(A)(i).

(2) offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more OLA QFCs[117],

based on the appointment of the FDIC as a receiver, will not be stayed or prohibited, subject to the limitations set out under 5.1.7 above.

6.2 In addition, any rights and obligations of any party to an OLA QFC (as defined under OLA), with a Covered Broker-Dealer will be governed exclusively by OLA.[118] As a result, the close-out, netting and set-off laws applicable to OLA QFCs with Covered Broker-Dealers are the same as the close-out, netting and set-off laws applicable to OLA QFCs with Covered Financial Companies.

6.3 Further, OLA provides that notwithstanding any laws relating to the avoidance of preferential or fraudulent transfers, the FDIC (as a receiver of a Covered Financial Company) may not avoid any transfer in connection with an OLA QFC unless the FDIC finds that the transferee had actual intent to hinder, delay or defraud the Covered Financial Company, creditors of such Covered Financial Company, or receiver appointed for such Covered Financial Company.[119]

7. NETTING AND SET-OFF IN THE CODE PROCEEDINGS WITH RESPECT TO THE DEBTOR FCM

The following paragraph 7.3 is added:

7.3 In the event of commencement of Insolvency Proceedings under OLA with respect to the FCM, the FDIC, as a receiver for the FCM, would be required, by the terms of OLA, to "apply the provisions of subchapter IV of Chapter 7 the Bankruptcy Code, in respect of the distribution to any customer of all customer property and member property, as if such [C]overed [F]inancial [C]ompany ... were a debtor for purposes of such subchapter". Consequently, our discussions regarding netting and set-off pursuant to the Bankruptcy Code and CFTC Regulations in paragraphs 7.1 and 7.2 would also apply if the FCM becomes subject to Insolvency Proceedings under OLA. We note, however, that there has not yet been an OLA Proceeding in this jurisdiction, and its application remains untested.

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[117] Pub. L. No. 111-203, § 210(c)(8)(A)(i).

[118] Pub. L. No. 111-203, § 205(b)(4).

[119] Pub. L. No. 111-203, § 210(c)(8)(C).

8. NETTING AND SET-OFF IN THE INSOLVENCY PROCEEDINGS WITH RESPECT TO A FDICIA CLEARING ORGANIZATION

The following paragraph 8.3 is added:

8.3 In the event of commencement of Insolvency Proceedings under OLA with respect to a DCO, the FDIC, as a receiver for the DCO, would be required, by the terms of OLA, to "apply the provisions of subchapter IV of Chapter 7 the Bankruptcy Code, in respect of the distribution to any customer of all customer property and member property, as if such [C]overed [F]inancial [C]ompany ... were a debtor for purposes of such subchapter". Consequently, our discussions regarding netting and set-off pursuant to the Bankruptcy Code and CFTC Regulations in paragraphs 8.1 and 8.2 would also apply if a DCO becomes subject to Insolvency Proceedings under OLA. We note, however, that there has not yet been an OLA Proceeding in this jurisdiction, and its application remains untested.

9. ENFORCEABILITY OF THE TITLE TRANSFER PROVISIONS

9.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party should not be stayed from exercising its rights under the Title Transfer Provisions upon occurrence of Insolvency Proceedings with respect to the Client, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision. These conclusions are based upon OLA provision that exempts from stay any right under any security agreement or arrangement or other credit enhancement related to one or more OLA QFCs.[120]

10 SINGLE AGREEMENT

The following paragraph 10.2 is hereby added:

10.2 OLA provides that any master agreement for any "commodity contract"[121] and "swap agreement"[122] (as those terms are defined in OLA) or any master agreement for such master agreement or agreements, together with all supplements to such master agreement, shall be treated as a single agreement and a single QFC.[123] Further, if a master agreement contains provisions relating to

[120] Pub. L. No. 111-203, § 210(c)(8)(A)(ii), (iii).

[121] The definition of the term "**commodity contract**" in OLA is set forth in fn. 97.

[122] The definition of the term "**swap agreement**" in OLA is set forth in fn. 96.

[123] Pub. L. No. 111-203, § 210(c)(8)(D)(viii).

agreements or transactions that are not themselves QFCs, the master agreement shall be deemed to be a QFC with respect to those transactions that are themselves QFCs.

4. ADDITIONAL QUALIFICATIONS

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

None.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 15 are deemed modified as follows.

None.

SCHEDULE 3

FINANCIAL INSTITUTIONS SUBJECT TO FDICIA

Subject to the modifications and additions set out in this Schedule 3 (*Financial Institutions Subject to FDICIA*), the opinions, assumptions and qualifications set out in this letter will also apply in respect of Parties which are FDICIA Financial Institutions.

For the purposes of this Schedule 3 (*Financial Institutions Subject to FDICIA*), "**FDICIA Financial Institution**" means a "financial institution" as such term is defined under FDICIA. The term "financial institution" is defined by FDICIA to include a U.S.-registered broker or dealer, a depository institution, a futures commission merchant and any other institution as determined by the Federal Reserve. "Depository institution" for these purposes includes (i) any bank, mutual savings bank, savings bank, credit union or savings association that is insured by the FDIC or that is eligible to apply to be insured by the FDIC, and any member of the Federal Home Loan Bank system, (ii) an uninsured national bank or an uninsured state bank that is a member of the Federal Reserve System, if the national bank or state member bank is not eligible to make application to become an insured bank under the FDIA, (iii) any branch or agency of a foreign bank, a foreign bank and any branch or agency of the foreign bank, or the foreign bank that established the branch or agency (as those terms are defined in the IBA), and (iv) any Edge corporation or (v) a corporation having an agreement or undertaking with the Federal Reserve under Section 25 of the Federal Reserve Act.

The Federal Reserve has determined by regulation that the term "financial institution" also includes any U.S. or non-U.S. person that represents, orally or in writing, that it will engage in financial contracts (i.e., any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement as defined in 12 U.S.C. §1821(e)(8)(D), and spot foreign exchange contract) as a counterparty on both sides of one or more financial markets, and on any day during the previous 15-month period, it: (i) had one or more financial contracts with unaffiliated counterparties of a total gross dollar value of at least U.S. $1 billion in notional principal amount outstanding; or (ii) incurred total gross mark-to-market positions of at least U.S. $100 million (aggregated across counterparties) in one or more financial contracts with unaffiliated counterparties.[124] Any person who qualifies under this definition on the date on which a contract is entered into will be considered a financial institution under FDICIA with respect to that contract for the remainder of its term, whether or not the person satisfies the definition on any subsequent date.[125]

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

Paragraph 1.8.27 is deemed deleted and replaced with the following:

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[124] 12 C.F.R. § 231.3(a).

[125] 12 C.F.R. § 231.3(b).

"Insolvency Proceedings" means the procedures applicable to Specified Companies, Banks, Federal Branches, New York Branches, Covered Financial Companies, and Broker-dealers, as applicable.

2. ADDITIONAL ASSUMPTIONS

We assume the following:

Paragraph 2.19 is deemed added:

That each Party is a FDICIA Financial Institution.

3. OTHER MODIFICATIONS

6. DISCUSSION

We are of this opinion because:

6.1 Subject to the discussions in this letter, if both Parties to the Agreement are FDICIA Financial Institutions and an Event of Default occurs because of Insolvency Proceedings with respect to either Party, the Netting Provisions will be enforceable except that (i) if the Defaulting Party is a Broker-dealer who is subject to a SIPA proceeding, any stay as it applies under SIPA (as discussed under Schedule 1 (*Broker-dealers*)) will still apply and (ii) any stay and limitation as it applies to the Defaulting Party under the FDIA (as discussed with respect to Banks above) will also apply.

FDICIA provides special treatment to certain "netting contracts" in the context of the insolvency of a qualifying counterparty. FDICIA provides that a "netting contract" between two FDICIA Financial Institutions will be enforceable, notwithstanding that a financial institution is a "failed financial institution".[126] FDICIA further provides that no stay, injunction, avoidance, moratorium or similar proceeding or order, whether issued or granted by a court, administrative agency, or otherwise shall limit or delay the termination, liquidation, acceleration or netting of otherwise enforceable netting contracts, with the exceptions that FDICIA does not (1) limit the FDIC's powers as a receiver or conservator as discussed with respect to Banks above or (2) avoid a stay order under SIPA as discussed in Schedule 1 (*Broker-dealers*).[127] The netting protections under FDICIA are also subject to the section in the FDIA that provides that

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[126] **"Failed financial institution"** is defined in FDICIA as a financial institution that: (a) fails to satisfy a covered contractual payment obligation when due; (b) has commenced or had commenced against it insolvency, liquidation, reorganization, receivership (including the appointment of a receiver), conservatorship, or similar proceedings; or (c) has generally ceased to meet its obligations when due. 12 U.S.C. § 4402(7).

[127] 12 U.S.C. §§ 4401-4407.

"walkaway"clauses are unenforceable if a Bank defaults, as discussed with respect to Banks above.

A "**netting contract**" is defined as a contract which provides for netting present or future payment obligations or payment entitlements (including liquidation or close-out values relating to the obligations or entitlements) between parties to the contract. The term "netting contract" does not include any contract that is invalid under or precluded by the federal laws of the United States.[128] FDICIA also provides that the provisions of any security agreement arrangement or other credit enhancement related to one or more netting contracts between any two financial institutions are enforceable in accordance with their terms, subject to the same limitations noted above as discussed in Schedule 1 (*Broker-dealers*) and with respect to Banks above.[129] As a result, based on the assumptions, discussion and qualifications contained herein, if the Parties to the Agreement are FDICIA Financial Institutions, the Agreement would be a "netting contract" under FDICIA and settlement amounts, determined under the Agreement and subject to the Netting Provisions of the Agreement, would be "contractual payment obligations" and "contractual payment entitlements" under a "netting contract" under FDICIA and the Netting Provisions would be enforceable in case of Insolvency Proceedings in respect of a Defaulting Party subject to the same limitations as they apply to Broker-dealers, Banks, Covered Financial Companies and Covered Broker-Dealers (each as discussed in more detail above).

9. ENFORCEABILITY OF THE TITLE TRANSFER PROVISIONS

9.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party should not be stayed from exercising its rights under the Title Transfer Provisions upon occurrence of Insolvency Proceedings with respect to the Client, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision. These conclusions are based upon Section 403(f) of the FDICIA, which provides that "the provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of [the Bankruptcy Code], and shall not be stayed, avoided, or otherwise limited by any State or Federal law

[128] 12 U.S.C. § 4402(14)(B).

[129] 12 U.S.C. § 4403(f).

(other than section 1821(e) of [FDIA], section 1787(c) of [the Federal Credit Union Act], and section 78eee(b)(2) of [SIPA]".[130]

4. ADDITIONAL QUALIFICATIONS

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

None.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 15 are deemed modified as follows.

None.

[130] 12 U.S.C. 4403(f).

ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX 2
List of Transactions

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

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

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

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

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

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

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

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

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

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

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

(E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC[131], including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

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

ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

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

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

(a) Clause 8(b) (*Clearing Member Events*), 8(c) (CCP Default) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

(a) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 8 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

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

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

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

(c) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.

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

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

(a) Clause 6.2 (*Firm Events*), 6.3 (*CCP Default*) and 6.4 (*Hierarchy of Events*) of the FOA Clearing Module; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

(a) Clause 6.5 (*Set-Off*) of the FOA Clearing Module; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

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

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

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

(a) for the purposes of paragraph 5.1 (*Enforceability of FOA Netting Provision*) and 3.6 (*Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;

(b) for the purposes of paragraph 5.2 (*Enforceability of the Clearing Module Netting Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value";

(c) for the purposes of paragraph 5.2 (*Enforceability of the Addendum Netting Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value";

(d) for the purposes of paragraph 5.2.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;

(e) for the purposes of paragraph 5.2.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;

(f) for the purposes of paragraph 5.3.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;

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

(h) for the purposes of paragraph 5.4 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;

(i) for the purposes of paragraph 9, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and

(j) for the purposes of paragraphs 9.3 and 9.4, the Title Transfer Provisions;

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

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

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

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

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

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

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

(a) on the terms of the forms specified in Annex 1 to this letter or which has broadly similar function to any of them, when not used in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum and/or a Clearing Module Netting Provision and/or an Addendum Netting Provision;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or

(b) the "**Margin Cash Set-off Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (***Set-off on default***);

(ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (***Set-off upon default or termination***);

(iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (***Set-off on default***),

(iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (***Set-off upon default or termination***);

(v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (***Set-off on default***);

(vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (***Set-off upon default or termination***); or

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

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

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

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

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

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

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

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

(vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and

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

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

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

(iii) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or

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

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

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

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

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

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

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

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

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

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

"**Rehypothecation Clause**" means:

(e) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);

(f) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);

(g) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); or

(h) any modified version of such clauses provided that it includes at least those parts of paragraph 4 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) the "**Power of Sale Clause**", being:

(i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (***Power of sale***);

(ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (***Power of sale***);

(iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (***Power of sale***);

(iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (***Power of sale***);

(v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (***Power of sale***);

(vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (***Power of sale***);

(vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (***Power of sale***);

(viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (***Power of sale***);

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

(x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version); or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

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

ANNEX 4

PART 1
CORE PROVISIONS

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

1. FOA Netting Provision:

a) **"Liquidation date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, then the other party (the **"Non-Defaulting Party"**) may, by notice to the party in default (the **"Defaulting Party"**), specify a date (the **"Liquidation Date"**) for the termination and liquidation of Netting Transactions in accordance with this clause.

b) **Calculation of Liquidation Amount:** Upon the occurrence of a Liquidation Date:

i. neither party shall be obliged to make any further payments or deliveries under any Netting Transactions which would, but for this clause, have fallen due for performance on or after the Liquidation Date and such obligations shall be satisfied by settlement (whether by payment, set-off or otherwise) of the Liquidation Amount;

ii. the Non-Defaulting Party shall as soon as reasonably practicable determine (discounting if appropriate), in respect of each Netting Transaction referred to in paragraph (a), the total cost, loss or, as the case may be, gain, in each case expressed in the Base Currency specified by the Non-Defaulting Party as such in the Individually Agreed Terms Schedule as a result of the termination, pursuant to this Agreement, of each payment or delivery which would otherwise have been required to be made under such Netting Transaction; and

iii. the Non-Defaulting Party shall treat each such cost or loss to it as a positive amount and each such gain by it as a negative amount and aggregate all such amounts to produce a single, net positive or negative amount, denominated in the Non-Defaulting Party's Base Currency (the **"Liquidation Amount"**).

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

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

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

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

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

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

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

"The following shall constitute Events of Default:

i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];

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

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

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

"The following shall constitute Events of Default:

i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];

ii. you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)."

5. Title Transfer Provisions:

a) "**Default:** If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date *will* be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "**Default Margin Amount**" means the amount, calculated in the Base Currency of the aggregate value as at the relevant Liquidation Date (as determined by us) of the Transferred Margin.

b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge,

lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

6. Clearing Module Netting Provision / Addendum Netting Provision:

a) [Firm Trigger Event/CM Trigger Event]

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

(a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];

(b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;

(c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on

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

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

b) CCP Default

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

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

2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate

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

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

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

c) Hierarchy of Events

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

Or

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

Or

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

d) Definitions

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

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

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

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

(a) is attributable to such Client Transactions;

(b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and

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

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

7. Clearing Module Set-Off Provision

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

This Clause shall apply to the exclusion of all Disapplied Set-off Provisions in so far as they relate to Client Transactions; provided that, nothing in this Clause shall prejudice or

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

8. Addendum Set-Off Provision

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

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

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

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

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

(iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in

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

PART 2
NON-MATERIAL AMENDMENTS

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

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

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

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

5. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), where such addition may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, and such addition may be expressed to apply to one only of the Parties.[132]

6. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the agreement, Transactions, or both, is endangered.[132]

7. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or

[132] Counsel to delete and if any such provisions would alter agreement so as to prevent opinion from applying.

termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.[132]

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

9. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).[132]

10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.

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

12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.

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

14. Any change to the FOA Set-Off Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the scope of the provision where a Party acts as agent, (iv) the use of currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.

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

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

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

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

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

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

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with equivalent effect to, clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.

20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in an FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).

21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).

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

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

PART 3
SECURITY INTEREST PROVISIONS

1. Security Interest Clause:

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

2. Power of Sale Clause:

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

3. Client Money Additional Security Clause

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

4. Rehypothecation Clause

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

cash margin) that would be received by you in respect of such non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid.".

ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

1. Necessary amendments

   None.

2. Desirable amendments

   None

3. Additional wording to be treated as part of the Core Provisions

   None