APPLEBY

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21 March 2025

Attention: Breda Walsh

Dear Madam,

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Enforceability of the Liquidation, Set-Off and Credit Support Provisions of certain Futures Account Agreement and of Cleared Derivatives Addendum

We refer to your email instructions dated 26 July 2024 together with your instruction letter dated 2 October 2021 ("**Instruction**") pursuant to which you have requested our opinion as a matter of Bermuda law in relation to the enforceability under the laws of Bermuda of the Position Liquidation, Margin Liquidation and Determination of Account provisions (collectively, "**remedial provisions**") of a Covered Agreement (as defined below) pursuant to which a futures commission merchant (the "**FCM**") registered with the Commodity Futures Trading Commission (the "**CFTC**") clears Futures and/or Cleared Swaps for a customer located in your jurisdiction (the "**Covered Customer**").

Capitalized terms used but not defined in this letter have the meanings given such terms in the annex attached hereto (the "**Summary Annex**") and the Instruction.

A "**Covered Agreement**" generally consists of (1) a customer account agreement (a "**Base Account Agreement**") if the Covered Customer trades only Futures, and (2) a Base Account Agreement and a Cleared Derivatives Addendum substantially in the form published by FIA and ISDA in 2012 or 2018 (either, the "**CDA**") if the Covered Customer trades only Cleared Swaps or trades both Futures and Cleared Swaps. As each of the Base Account Agreement and CDA has its own remedial provisions, our opinion addresses the enforceability of the provisions of each of the Base Account Agreement and CDA that, upon an Event of Default with respect to the Covered Customer, provide the FCM the right to engage in Position Liquidation, Margin Liquidation and a Determination of Account to determine a single balance of account as between the FCM and the Covered Customer.

All statutory references are to statutes and laws of Bermuda.

Appleby (Bermuda) Limited (the Legal Practice) is a limited liability company incorporated in Bermuda and approved and recognised under the Bermuda Bar (Professional Companies) Rules 2009. "Partner" is a title referring to a director, shareholder or an employee of the Legal Practice. A list of such persons can be obtained from your relationship partner.

We provide this opinion in respect of a Covered Customer that is either:-

(i) a company incorporated by registration under the Companies Act 1981 (a "**Bermuda Company**" and the "**Companies Act**", respectively);

(ii) a Bermuda Company that is licensed to carry on insurance business (a "**Bermuda Insurance Company**"), as that term is understood under the Insurance Act 1978 (as amended) and the regulations promulgated thereunder (the "**Insurance Act**");

(iii) an exempted limited liability company (a "**Bermuda LLC**") that is formed under the applicable provisions of the Limited Liability Act 2016 (the "**LLC Act**");

(iv) an exempted general partnership or exempted limited partnership (each a "**Bermuda Partnership**"), that has been duly registered under the applicable provisions of the Exempted Partnerships Act 1992 and (where relevant) the Limited Partnership Act 1883[1];

(v) a Bermuda Company acting in its capacity as trustee (the "**Bermuda Trustee**") of a trust established in Bermuda[2] (a "**Bermuda Trust**"); or

(vi) one of the four banks in Bermuda that are licensed to carry on banking business in Bermuda each of which was incorporated pursuant to a Private Act: HSBC Bank Bermuda Limited, the Bank of N.T. Butterfield & Son Limited, the Bermuda Commercial Bank Limited and Capital G Bank Limited[3] (each a "**Bermuda Bank**").

We refer to the certain customer types listed in Appendix B hereto (each an "**Appendix B Customer**"). Where an Appendix B Customer is constituted as a Bermuda Company, a Bermuda Insurance Company, a Bermuda LLC or a Bermuda Partnership, then this opinion will have application. This opinion will also have application to an "overseas company" that has been granted a permit by the Bermuda Minister of Finance pursuant to Part XI of the Companies Act[4], i.e. a company incorporated outside Bermuda which seeks to "engage in or carry on any

[1] As a matter of Bermuda law, Bermuda Partnerships need not and generally do not have separate legal personality (however, see the discussion below concerning a Bermuda Partnership's ability to declare that it does have legal personality). Where the Bermuda Partnership has no legal personality, it is the partners who, pursuant to the powers granted by the terms of the partnership agreement, and in accordance with those terms and in its capacity as partner (or general partner in the case of a limited partnership) will take certain actions in relation to the Bermuda Partnership, to bind the assets of the Bermuda Partnership.

[2] Defined in the Trusts (Special Provisions) Act 1989 as a legal relationship established under Bermuda law by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose, and in this opinion includes a unit trust that is a "unit trust scheme" as defined in Section 1 of the Stamp Duties Act 1976 of Bermuda. As a matter of Bermuda law; trusts and unit trusts (as defined in Section 1 of the Stamp Duties Act 1976) do not have separate legal personality; it is the trustee of a trust that, pursuant to the powers granted by the terms of the trust deed or settlement establishing or governing the trust, in accordance with those terms and its capacity as trustee of the trust, will take certain actions in relation to the trust, to bind the assets of the trust.

[3] Current policy in Bermuda does not generally permit the issue of banking licences to banks organized under the laws of other jurisdictions.

[4] With regard to overseas companies, the provisions of the Companies Act that apply to the winding up of Bermuda Companies, namely Part XIII (Winding Up) of the Companies Act, also apply to overseas companies, save that those sections in Part XIII relating exclusively to members' voluntary liquidations shall not apply.

trade or business in Bermuda" (e.g. a subsidiary or branch of a company incorporated outside Bermuda).

However, this opinion does not extend to an Appendix B Customer that is:

(a) a company incorporated by a Private Act other than the Bermuda Banks, or a Bermuda Company that has adopted a Private Act[5]; or

(b) a Bermuda Company registered as a segregated accounts company under the Segregated Accounts Companies Act 2000 (as amended) where it is acting in respect of a segregated account.

Accordingly, Bermuda counsel should be sought in relation to Covered Agreements with an Appendix B Customer of the type listed in (a) or (b) above. We also add for clarification that if an Appendix B Customer is not constituted as a Bermuda Company, a Bermuda Insurance Company, Bermuda LLC, a Bermuda Partnership or is of the type listed as (a) or (b) above, then it is not known to Bermuda law. This opinion is provided as at the date set out above, and is provided on the basis of the assumptions set out in the Instruction and summarised below:

A. Covered Transactions/Contracts

The types of transactions that may be cleared for the Covered Customer pursuant to the Covered Agreement include US Futures, Foreign Futures and Cleared Swaps (together, "**Covered Transactions**" or "**Covered Contracts**").

B. Position Liquidation/Margin Liquidation

We note that (1) "**Position Liquidation**" includes hedging by the FCM of risk incurred by the FCM in connection with the Covered Customer's Event of Default (as well as the FCM's close-out or other liquidation, including book entry transfers, of the Covered Customer's open positions in Covered Contracts) and (2) "**Margin Liquidation**" refers to the sale, liquidation or other disposition of securities only (and not also to the sale, liquidation or other disposition of any non-cash assets other than securities).

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[5] A Private Act is an act of the Legislature of Bermuda having application to the petitioner only, and is not of general public application in Bermuda (or elsewhere). A Private Act may be enacted so as to incorporate a company, with the result that the Private Act serves as the Memorandum of Association of that company; or, a Private Act may be enacted so as to apply to a company which is incorporated under the Companies Act, but so as to provide for additional rights and powers attributable to the petitioning company, and is binding on those doing business with that company within the terms of the Private Act. The provisions of a Private Act may differ from, or derogate from, the provisions of an analogous Public Act. Accordingly, a company incorporated by, or which has adopted, a Private Act, together with any amending Acts, may include provisions which are inconsistent with and which prevail over public legislation which has general application. The Private Act of a Bermuda counterparty would need to be specifically reviewed to establish whether the provisions are inconsistent with statements made in this opinion in relation to a Bermuda Company.

Assumptions

In formulating the opinions herein we have considered such issues of Bermuda law, and have had due regard to such English law precedents (given that the ultimate court of appeal in Bermuda is the Judicial Committee of the Privy Council, which is comprised of the same judges that sit in the Supreme Court in England) as we have considered necessary as a basis for such opinions.

We have made the following general assumptions for the purposes of issuing this opinion, namely that:

a. the statements contained in the Instruction, the Summary Annex and the S&C Memo are true and correct;

b. each Covered Agreement is within the capacity and powers of, and has been validly authorised, executed and delivered by each party[6] thereto;

c. each Covered Agreement is valid and binding on each party thereto under the laws of such party's jurisdiction of incorporation or establishment, and that each such party acts in compliance with all applicable laws, when it enters into that Covered Agreement;

d. each party to a Covered Agreement (i) is the beneficial owner of the claims against the other party thereto that arises pursuant to that Covered Agreement, and is personally liable to the other party in respect of each transaction entered into pursuant thereto; (ii) neither party to such Covered Agreement has sought in any way to assign, charge or grant any other form of security interest over its rights under such Covered Agreement; and (iii) in cases where a party enters into a Transaction as agent then set off as outlined in this opinion is between the principals under the Transaction;

e. the Covered Agreement, thereunder, constitutes a valid and binding agreement of each party thereto, and is enforceable in accordance with its terms against such parties under the laws of the State of New York by which that Covered Agreement is to be expressed to be governed;

f. in so far as any obligation under a Covered Agreement is to be performed or observed in a jurisdiction outside Bermuda, such performance or observance will not be illegal or ineffective under the laws of that jurisdiction;

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[6] Where the relevant Covered Agreement is with a Covered Customer that is a Bermuda Partnership, a 'party' in respect of that Bermuda Partnership may include:

(i) the partner that executes the Covered Agreement, to bind the Bermuda Partnership together with the Bermuda Partnership itself; and

(ii) where the Bermuda Partnership is a limited partnership, the general partner thereof; and

(iii) in any other case, the Bermuda Partnership itself.

g. the Covered Agreement is entered into prior to the FCM having notice that the defaulting party[7] has committed an act of bankruptcy (as defined in Part 1 of Schedule 1 hereto);

h. any calculation required to be made pursuant to the Covered Agreement is made in good faith and in a commercially reasonable manner;

i. the Covered Agreement is entered into in good faith and for full value and not with a dominant intent to defraud or prefer unlawfully[8] any one previously unsecured creditor of: (i) the Bermuda Company; (ii) the Bermuda Insurance Company; (iii) the Bermuda LLC; (iv) the Bermuda Bank; or (v) (where relevant) the Bermuda Partnership or any of the partners of a Bermuda Partnership (as the case may be) in any case over their respective other creditors or to remove assets from within the reach of any party;

j. all Covered Transactions cleared pursuant to the Covered Agreement are limited to the type of Covered Transactions described in Appendix A hereto;

k. nothing under any applicable law (other than the law of Bermuda) has a material adverse effect upon any of the opinions expressed herein or Futures Transactions as defined above;

l. all factual representations, warranties and undertakings contained in the Covered Agreement are accurate and are complied with, and all preconditions of the parties[9] thereto are satisfied or duly waived;

m. neither party to the Covered Agreement has entered into it in breach of the unsolicited call provisions of the Investment Business Act 2003;

n. at the time of (a) entering into a Covered Agreement or any transaction in relation to a Covered Agreement, (b) creating or enhancing any security interest, or disposing of any asset in relation to any of the foregoing pursuant to a Covered Agreement, the Covered Customer [10]: (i) is able to pay its debts, taking into account contingent and prospective liabilities; and (ii) in the case of a party that is a Bermuda Insurance Company: (A) the value of its assets exceeds its liabilities,

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[7] Where the Covered Agreement is with a Covered Customer that is a Bermuda Partnership, a 'party' in respect of that Bermuda Partnership may mean any partner of the Bermuda Partnership and, where the Covered Customer is a Bermuda Partnership that is a limited partnership, the Bermuda Partnership itself.

[8] Parts 2, 3 and 4 of Schedule 1 outline the various doctrines whereby Covered Transactions are void or voidable against a Bermuda Company (including a Bermuda Insurance Company, and a Bermuda Bank), a Bermuda LLC, a Bermuda Partnership or an individual partner of a Bermuda Partnership

[9] Where the Covered Agreement is with a Covered Customer that is a Bermuda Partnership, a 'party' in respect of that Bermuda Partnership may mean *any* partner of the Bermuda Partnership and, where the Covered Customer is a Bermuda Partnership that is a limited partnership, the Bermuda Partnership itself.

[10] Where the Covered Agreement is with a Covered Customer that is a Bermuda Partnership, a 'party' in respect of that Bermuda Partnership may mean *any* partner of the Bermuda Partnership and, where the Bermuda Counterparty is a Bermuda Partnership that is a limited partnership, the Bermuda Partnership itself.

taking into account contingent and prospective liabilities (calculated according to the Insurance Act including any applicable regulations); and (B) it complies with applicable statutory financial tests applicable to that party including applicable statutory solvency requirements and liquidity ratios;

o. that any security interest granted pursuant to a Covered Agreement creates a valid charge under the laws of the State of New York as that term is understood under Bermuda law and no part of the assets charged consists of shares in a Bermuda company;

p. in the case of the Covered Agreement with a Bermuda Partnership, throughout the term of the Covered Agreement no change in the partners occurs;

q. where the Covered Customer is a Bermuda Partnership: (i) where the Bermuda Partnership is a general partnership, all of the partners of the Bermuda Partnership are incorporated, established or resident in Bermuda; and (ii) where the Bermuda Partnership is a limited partnership, the general partner of the Bermuda Partnership is incorporated, established or resident in Bermuda;

r. where the Covered Customer is a Bermuda Trustee in respect of a Bermuda Trust, that the Covered Agreement, (or other documentary evidence of a transaction entered into pursuant thereto): (i) is in accordance with the purposes of the Bermuda Trust as set out in the relevant trust deed(s) or settlement(s) establishing or governing the operation of that trust; (ii) is within the powers of the Bermuda Trustee granted to it as trustee of the Bermuda Trust by the relevant trust deed(s) or settlement(s) establishing or governing the operation of that trust; (iii) has been validly authorised, executed and delivered by the Bermuda Trustee in its capacity as trustee of the Bermuda Trust in accordance with the provisions of the relevant trust deed(s) or settlement(s) establishing or governing the operation of that trust; and (iv) is expressly stated as being entered into by the Bermuda Trustee in its capacity as trustee of the Bermuda Trust;

s. when the Covered Customer enters into a Covered Agreement that the Covered Agreement is valid and binding on the Bermuda Trustee in relation to the assets of the Bermuda Trust in accordance with the relevant trust deed(s) or settlement(s) establishing or governing the operation of that trust;

t. the Covered Agreement, constitutes a valid and binding agreement of the Bermuda Trustee both in its capacity as trustee of the Bermuda Trust in respect of the assets of the Bermuda Trust and in its corporate capacity (and does not exceed its corporate capacity);

u. that neither the Bermuda Company nor the Bermuda Trust is registered or required to be registered under the National Pension Scheme (Occupational Pensions) Act 1998, Contributory Pensions Acts 1967 and 1970 or the Pension Trust Funds Act 1966;

v. no admission, withdrawal, retirement, dissolution, or bankruptcy of the Bermuda Trustee will trigger the termination of the Bermuda Trust; and

w. where the Covered Customer is a Bermuda Bank, that

   i. save for the provisions of the relevant Private Act that relate to: (i) the capacity of the relevant Bermuda Bank to enter into a Covered Agreement; (ii) netting and set-off; and (iii) enforcement of judgments the relevant Private Act is consistent with public legislation in Bermuda of general application;

   ii. pursuant to the Exchange Control Act 1972 and the Exchange Control Regulations 1973 promulgated thereunder, the Bermuda Bank has, where applicable, received all requisite permissions from the Bermuda Monetary Authority to enter into the types of transactions contemplated by the Covered Agreement; and

   iii. the Bermuda Bank has received a licence from the Bermuda Monetary Authority to carry on deposit-taking business in or from within Bermuda pursuant to the Banks and Deposits Companies Act 1999 as amended.

I. Position Liquidation, Margin Liquidation and Determination of Account

A. Additional Assumptions

a. the FCM and Covered Customer enter into a Covered Agreement (consisting of a Base Account Agreement and CDA) pursuant to which the FCM establishes on its books and records in the Covered Customer's name, and the Covered Customer authorizes the FCM to execute, clear and carry US Futures, Cleared Swaps and/or Foreign Futures on behalf of the Covered Customer in, a US Futures Account, a Cleared Swaps Account and a Foreign Futures Account, respectively (individually or collectively, the "Customer Account" or the "Account");

b. each of the Base Account Agreement and the CDA is governed by New York law;

c. on the basis of the terms and conditions of the Covered Agreement and other relevant factors and acting in a manner consistent with the intentions stated in the Covered Agreement, over time, the Covered Customer trades a number of Covered Contracts that are cleared and carried in or credited to the Customer Account;

d. some of the Covered Contracts provide for an exchange of cash and others provide for the physical delivery of shares, bonds or commodities in exchange for cash;

e. after commencing trading and while the Covered Customer has open positions in Covered Contracts, the Covered Customer, becomes the subject of a formal bankruptcy, insolvency, liquidation, reorganization, administration or comparable proceeding (collectively, the "insolvency") under the insolvency laws of this jurisdiction and an Event of Default has accordingly occurred under each of the Base Account Agreement and CDA;

f. subsequent to the commencement of the insolvency, either the Covered Customer or an insolvency official seeks to challenge or otherwise prevent Position Liquidation, Margin Liquidation or operation of the Determination of Account (by, for example, assuming the profitable Covered Transactions for the Covered Customer and rejecting its unprofitable Covered Transactions);

B. Questions

1. *Would the parties' agreement on governing law and submission to jurisdiction set out in each of the Base Account Agreement and CDA be given effect by a court in your jurisdiction, and what would be the consequences if they were not?*

In any proceedings properly commenced by the FCM against the Covered Customer in a Bermuda court claiming enforcement of a Base Account Agreement and CDA governed by a law other than Bermuda law, the choice of that other law as the law by which the relevant Base Account Agreement and CDA is to be governed would be upheld as a valid choice of law and would be applied by the Bermuda court, except for those laws (i) which such court considers to be procedural in nature, (ii) which are revenue or penal laws or (iii) the application of which would be inconsistent with public policy, as such term is interpreted under Bermuda law.

2. *Would the Position Liquidation provisions of each of the Base Account Agreement and the CDA be enforceable under the laws of your jurisdiction and each of the Position Liquidation methods described in Section XI of the S&C Memo and paragraph 2.4 of the Summary Annex be recognized and upheld by a court in your jurisdiction? If a particular method would either not be upheld or may be challenged, please provide further detail and explain the reason for this.*

We believe that the Position Liquidation provisions of each of the Base Account Agreement and the CDA would be enforceable. Under Bermuda law, the parties are generally free to stipulate the conditions upon which a contract or obligations under it will terminate. While Bermuda insolvency law can affect the enforceability of the provisions of a contract with a Bermuda Company, Bermuda Insurance Company, Bermuda Bank, Bermuda LLC, Bermuda Partnership or Bermuda Trustee, Position Liquidation provisions are not affected.

3. *Would the FCM's holding of the Covered Contracts as an "agent-trustee" be recognized by a court in your jurisdiction as creating a valid trust over the Covered Contracts or would the court otherwise recognize the FCM's legal title to, and the Covered Customer's beneficial interest in, the Covered Contracts?*

Yes, provided that the "agent-trustee" is recognized under the governing law of the Covered Contract as creating a valid trust over the Covered Contracts and provided that the FCM's legal title to, and the Covered Customer's beneficial interest in, the Covered Contracts is recognized under such governing law.

(a) If so, would the court characterize Position Liquidation as the FCM's exercising its contractual rights as principal vis-à-vis the DCO under the relevant DCO rules (or vis-à-vis the Foreign Futures Broker under the clearing agreement between the FCM and Foreign Futures Broker) and not as the FCM's acting as the Covered Customer's agent or as the FCM's enforcing its security interest in the Covered Contracts?

A Bermuda court would likely characterize Position Liquidation as the FCM exercising its contractual rights as principal vis-à-vis the DCO under the relevant DCO rules (or vis-à-vis the Foreign Futures Broker under the clearing agreement between the FCM and Foreign Futures Broker) and not as the FCM's acting as the Covered Customer's agent or as the FCM's enforcing its security interest in the Covered Contracts provided that were the case under the relevant governing law.

(b) Could the FCM's holding of the Covered Customer's Contracts be characterized as some alternative arrangement, such as a commission agency or as a collateral security arrangement? If so, how would the FCM's Position Liquidation be characterized under the laws of your jurisdiction?

The FCM's holding of the Covered Customer's Contracts would not likely be recharacterized as some alternative arrangement under Bermuda law (such as a commission agency or as a collateral security arrangement) if no such recharacterization were to occur under the relevant governing law.

4. *Would a court in your jurisdiction recognize the statutory trust with respect to the Segregated Funds or Separate Account Funds of each Account Class as creating a valid trust over such Segregated Funds or Separate Account Funds, and that under the terms of that trust, the FCM holds the legal title to, and the Covered Customer holds a beneficial interest in, the statutory trust as a whole (as opposed to maintaining an interest in any specific assets under the trust)? Could the statutory trust with respect to the Segregated Funds or Separate Account Funds of any Account Class be characterized as some alternative arrangement (e.g., as a collateral security arrangement)?*

A Bermuda court would likely recognize the statutory trust with respect to the Segregated Funds or Separate Account Funds of each Account Class as creating a valid trust over such Segregated Funds or Separate Account Funds, and that under the terms of that trust, the FCM holds the legal title to, and the Covered Customer holds a beneficial interest in, the statutory trust as a whole (as opposed to maintaining an interest in any specific assets under the trust) if that were the case under the relevant governing law. The statutory trust with respect to the Segregated Funds or Separate Account Funds of any Account Class would not likely be characterized as some alternative arrangement (e.g. as a collateral security arrangement) if the statutory trust would not be thus characterized under the relevant governing law.

(a) *Would the Margin Liquidation provisions of each of the Base Account Agreement and CDA be enforceable under the laws of your jurisdiction and the FCM's Margin Liquidation in respect of each Account Class be recognized and upheld by a court in your jurisdiction? Could such Margin Liquidation be capable of exercise based on the FCM's exercise of its right under the applicable Customer Property Rules to withdraw and apply Segregated Funds or Separate Account Funds, as the case may be, for Permitted Uses (the FCM's "Permitted Uses Rights") rather than by the enforcement of its security interest in the Covered Customer's Collateral consisting of securities?*

We believe that the Margin Liquidation provisions of each of the Base Account Agreement and the CDA would be enforceable. Under Bermuda law, the parties are generally free to stipulate the conditions upon which a contract or obligations under it will terminate. While Bermuda insolvency law can affect the enforceability of the provisions of a contract with a Bermuda Company, Bermuda Insurance Company, Bermuda Bank, Bermuda LLC, Bermuda Partnership or Bermuda Trustee, Margin Liquidation provisions are not affected. Our further netting analysis set out in (2) above in relation to Position Liquidation would also apply to Margin Liquidation.

(b) *Would the Determination of Account provisions of each of the Base Account Agreement and CDA be enforceable under the laws of your jurisdiction and the FCM's Determination of Account in respect of (i) each Account Class and (ii) all Account Classes on a combined basis be recognized and upheld by a court in your jurisdiction and if so, how could each Determination of Account be characterized (e.g., contractual accounting, netting or set-off, enforcement of the security interest in cash Collateral or some combination of the foregoing)?*

We believe that the Determination of Account provisions of each of the Base Account Agreement and the CDA would be enforceable. Under Bermuda law, the parties are generally free to stipulate the conditions upon which a contract or obligations under it will terminate. While Bermuda insolvency law can affect the enforceability of the provisions of a contract with a Bermuda Company, Bermuda Insurance Company, Bermuda Bank, Bermuda LLC, Bermuda Partnership or Bermuda Trustee, Determination of Account provisions are not likely to be affected subject as provided below.

Bermuda Companies including Bermuda Banks

We are of the opinion on the basis of the analysis set out below that the provisions of the Covered Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Covered Customer (the "**Netting Provisions**") are enforceable under the law of Bermuda.

We believe that a court in Bermuda would recognise that upon the occurrence of an event of default (whether connected with the insolvency of a party or otherwise) one condition precedent to further performance on the part of the FCM has not been satisfied. On the assumptions set out in this opinion (particularly assumptions (h) and (m), on the basis of which no issues of preferences and illegal conveyances prior to insolvency should arise), we believe that the Netting Provisions would be enforced by a court in Bermuda where the netting of termination values occurs prior to the insolvent winding-up a Bermuda Company. In that event there should be no opportunity for insolvency set-off to apply because the FCM may be relieved by contract of obligations that would otherwise fall into set-off. In that sense, the defaulting party's right to receive payments and deliveries under the contract constitute a "flawed asset."

Even if in accordance with the Netting Provisions, the netting of termination values occurs after the commencement of an insolvent liquidation of the Bermuda Company[11], a court may enforce the Covered Agreements and CDA on their terms without reference to mandatory set-off provisions which become applicable in an insolvent liquidation in Bermuda. It should be noted that Insolvency set-off is subject to certain limitations:

(a) If an amount due between the parties does not constitute a provable debt, Insolvency Set-Off does not apply. A debt which is secured is not provable. Accordingly, if a net termination amount is secured, it would fall outside Insolvency set-off to the extent of the security.

(b) If an amount due between the parties is not "mutual" with any other amount due between them, Insolvency set-off does not apply. In particular, a net termination amount may not be mutual with any other debt, including another net termination amount, if it is held on trust or subject to a security interest.

If the analysis were to be made in accordance with Bermuda insolvency principles in respect of Bermuda Companies that are parties to a Covered Agreement it is our view the result would be as set out below.

[11] The commencement of liquidation occurs in case of a voluntary winding-up at the time of the passing of the resolution for voluntary winding-up and, in the case of a winding-up by the courts, the time of the presentation of the petition for the winding up by the court, or if earlier, the time of passing of a resolution for winding up.

Insolvent winding-up of a Bermuda Company (including a Bermuda Trustee) is governed by Part XIII of the Companies Act. Under the Companies Act, property of a Bermuda Company must, in its winding-up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, must be distributed among the members according to their rights and interests in the company.

Pursuant to Section 235 of the Companies Act, the rules that prevail under the law of bankruptcy with respect to the rights of secured and unsecured creditors, debts provable and the valuation of future and contingent liabilities also apply in the winding-up of an insolvent company. The most important of these rules, for the purposes of our analysis of the enforceability of the Netting Provisions and the Determination of Account provisions of the Covered Agreement and the FCM's Determination of Account in respect of (i) each Account Class and (ii) all Account Classes on a combined basis, is Section 37 of the Bankruptcy Act 1989 which provides:

> *"Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person is not entitled under this Section to claim the benefit of any set off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."*

Part 1 of Schedule 1 to this opinion sets out the circumstances in which an act of bankruptcy is committed under the Bankruptcy Act 1989. While strictly speaking, it is not possible to contract out of Section 235 of the Companies Act or Section 37 of the Bankruptcy Act, (e.g. parties probably could not agree to an arrangement that was expressly inconsistent with insolvency set-off, such as agreeing that claims between them would *not* be set off at all). While Section 37 of the Bankruptcy Act provides for mandatory set off, set-off under Section 37 is inclusive in character, in the sense that nearly all conceivable types of claim qualify for set off. Consequently, except as set out below, we are unaware of any substantive inconsistency between set-off in an insolvent liquidation pursuant to these provisions and the Netting Provisions under the Covered Agreements and CDA.

Notwithstanding that insolvency set-off should generally coincide with the Netting Provisions under the Covered Agreements and CDA, certain differences in terms of calculations and timing are possible. For example, there is an argument that in a liquidation of the insolvent company in Bermuda, contingent claims *by* the insolvent company against the solvent company might not fall into set-off because the statutory scheme permits estimation of contingent claims *against* the insolvent company but not those running in the other

direction. Another example is the requirement that calculation of foreign currency claims in an insolvent liquidation be made as at the date of the winding-up order against the insolvent company.

The other provision of Bermuda insolvency law that is relevant to enforceability of the Termination Provisions and the Netting Provisions is Section 240 of the Companies Act. Section 240 provides that a liquidator may, with the leave of the court, disclaim (among other things) any right under a contract which in his opinion is "onerous for the company to hold or is unprofitable or unsaleable". Before granting leave to disclaim, the court may require notice to be given to interested parties. On the application to disclaim, the court may make an order vesting or requiring delivery of the property to any persons entitled thereto or to any person "to whom it may seem just... by way of compensation for such liability...". We also hold the view that a liquidator of the defaulting party would not be in a position to "cherry pick" between transactions under a Covered Agreement, and could only disclaim the Covered Agreement as a whole. If a Covered Agreement as a whole were to be disclaimed, the FCM would be entitled to prove in the liquidation for the amount of its loss or damage. In a case where, after netting, a balance was owing to a FCM, the FCM's claim in the liquidation should be the same as it would have been without the disclaimer. Accordingly, there would in our view be little point in the liquidator applying to have the Covered Agreement disclaimed. In fact, in such a case the disclaimer right should not arise at all as such a right only applies to "assets" and a net obligation owing by the insolvent defaulting party could not in our view be described as an "asset", as required by Section 240 of the Companies Act. Rather, it is a liability. Conversely, in a case where the FCM is a net debtor (or for that matter if the liquidator sought to disclaim the insolvent's contractual rights in relation to a net creditor), then the sum due to the insolvent defaulting party would constitute an "asset"; however, it is inconceivable that a liquidator would take any steps to compromise that asset by disclaiming it or otherwise.

In addition, we are of the view that a liquidator could not exercise his rights to disclaim under Section 240 in respect of the Covered Agreement where the Non-defaulting Party exercises an option to terminate in those circumstances. At that time, there would be no ongoing obligations to disclaim.

Generally, and subject to the points discussed above and below relating to dates for conversion of foreign currencies into Bermuda dollars and exchange control, Bermuda law will permit recovery of amounts due in the currency of the obligation.

In the context of insolvency set-off, a potential issue may arise as to the obligation to deliver commodities. Such an obligation cannot be brought into the set-off account. However, in our opinion, while there is some uncertainty on this point, where an agreement provides for such an obligation to be converted into a pure monetary obligation a court is likely to recognise the conversion of the delivery obligation into a monetary obligation, in which

event: (a) either insolvency set-off does not arise at all (as per the discussion above); or (b) the monetary obligation will be brought into the mandatory insolvency set-off account.

To protect the priority of any security interests granted pursuant to the Covered Agreement and CDA we recommend that such security interests be registered as charges under the Companies Act.

Bermuda Insurance Companies

In Appleby's experience, Bermuda Insurance Companies are active in the derivatives industry. Whilst this opinion concerns the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Covered Customer, it is incumbent on us to note that Bermuda Insurance Companies operate in a complex legal and regulatory environment, and the precise netting analysis that applies to a given Bermuda Insurance Company can only be determined in light of the specific circumstances of that Covered Customer. Accordingly, in order for non-Bermuda counterparties to effectively structure their Transaction Documents, it is advisable to seek transactional advice rather than relying on generic advice.

Introduction

The Insurance Act provides that no person may carry on an insurance business in or from within Bermuda unless registered as an insurer under the Insurance Act by the Bermuda Monetary Authority. Under the Insurance Act, insurance business includes reinsurance business. The BMA, in deciding whether to grant registration, has broad discretion to act as it thinks fit in the public interest. It is required by the Insurance Act to determine whether the applicant is a fit and proper body to be engaged in the insurance business and, in particular, whether it has, or has available to it, adequate knowledge and expertise. The registration of an applicant as an insurer is subject to it complying with the terms of its registration and such other conditions as the Bermuda Monetary Authority may impose at any time.

There are five types of Bermuda Insurance Companies from a netting perspective, which is determined by the nature of the insurance business the Bermuda Insurance Company is licensed to carry on, or otherwise carries on:

(a) Bermuda Insurance Companies that carry on general business only (a "General Business Insurance Company");

(b) Bermuda Insurance Companies that carry on long-term business only (a "Long-term Business Insurance Company");

(c) Bermuda Insurance Companies that carry on both general and long-term business (a "Composite Insurance Company");

(d) Bermuda Insurance Companies that carry on special purpose business only (a "Special Purpose Insurance Company"); and

(e) Bermuda Insurance Companies that carry on special purpose business as "Collateralized Insurers".

Accordingly, the FCM should identify the type of business its Bermuda Insurance Company Customer is licensed to carry on and, in addition, whether the transaction(s) entered into pursuant to a Covered Agreement is attributable to a particular line of insurance business, be it general business, long-term business, or both general and long-term business for special purpose business. To this end, the FCM should obtain a copy of any conditions attached to the Bermuda Insurance Company's licence, which is issued by the Bermuda Monetary Authority.

General Business Insurance Companies

Our opinion as to the enforceability of the Covered Agreements and CDA relating to General Business Insurance Companies is as set out above in relation to a Bermuda Company, i.e. we are of the opinion that the Netting Provisions of the Covered Agreements and CDA providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a General Business Insurance Company are enforceable under the law of Bermuda.

Long-term Business Insurance Companies

Section 24 of the Insurance Act requires that a Long-term Business Insurance Company must maintain its accounts in respect of that long-term business separate from any accounts it has in respect of any other business. All receipts of a Long-term Business Insurance Company are required to be carried to, and form part of, a special fund with an appropriate name, referred to in the Insurance Act as the 'long-term business fund'. A Long-term Business Insurance Company is required to maintain books of account and other records such that the assets of its long-term business fund and the liabilities of its long-term business can be readily identified at any time. No payment from a Long-term Business Insurance Company's long-term business fund may be made directly or indirectly, other than for a purpose of the Long-term Business Insurance Company's long-term business; notwithstanding any arrangement for its subsequent repayment out of receipts of business, other than the long-term business, except insofar as such payment can be made out of any surplus certified by the Long-term Business Insurance Company's approved actuary to be available for distribution otherwise than to policyholders.

In addition, Section 36 of the Insurance Act applies in any winding up of a Bermuda Insurance Company which immediately before the winding up was carrying on or entitled to carry on long-term business, i.e. Section 36 applies in any winding up of a Long-term Business Insurance Company. Section 36 provides that on any such winding up:-

(a) the assets in the insurer's long-term business fund shall be available only for meeting the liabilities of the insurer attributable to its long-term business; and

(b) other assets of the insurer shall be available only for meeting the liabilities of the insurer attributable to its other business.

Where the value of the assets in (a) or (b) exceeds the amount of the liabilities mentioned in that paragraph, the restriction imposed does not apply to such of those assets as represents the excess.

Accordingly, subject to the possibility of there being a surplus, the assets in the insurer's long-term business fund shall only be available for meeting the liabilities of the insurer attributable to its long-term business[12]. Thus, for the purposes of close-out netting, in order to preserve the contractual effect of the provisions of the Covered Agreement, particularly in the insolvency of the Long-term Business Insurance Company, all Covered Transactions must either be attributable to the long-term business fund or all transactions must be attributable to the Long-term Business Insurance Company's other business. In other words, Transactions entered into under a Covered Agreement may only be netted and paid out of the fund to which those Transactions are attributed, be it the long-term business fund or the other assets (the general account) of the insurer.

Accordingly, where all Covered Transactions entered into pursuant to an Covered Agreement are attributable to the long-term business fund, then, and save as aforesaid, our opinion as to the enforceability of the Covered Agreement relating to Long-term Business Insurance Companies is as set out above in relation to a Bermuda Company: i.e. we are of the opinion that the Netting Provisions of the Covered Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Long-term Business Insurance Company are enforceable under the law of Bermuda.

Where, however, certain transactions are not attributable to the long-term business fund, then recourse will lie only as against the general account of the Long-term Business Insurer and as against such assets (if any) as may be credited to its general account at the relevant time. As regards all claims by and against the general account in respect of transactions not attributable to the long-term business fund, netting will apply.

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[12] It is of note, however, that, in the winding up of a Long-term Business Insurer, a liquidator must, unless the Supreme Court of Bermuda orders otherwise, carry on the long-term business of the insurer with a view to its being transferred as a going concern to another insurer, whether an existing insurer or an insurer formed for that purpose; and, in carrying on that business as aforesaid, the liquidator may agree to the variation of any contracts of insurance in existence when the winding up order is made, but may not effect any new contracts of insurance. Where the insurance business or any part of the insurance business of an insurer has been transferred to an insurer under an arrangement in pursuance of which the first mentioned insurer (the subsidiary insurer) or the creditors thereof has or have claims against the insurer to which the transfer was made (the principal insurer) then, if the principal insurer is being wound up by or under the supervision of the Supreme Court of Bermuda, the Supreme Court must, subject to Section 28 of the Insurance Act of Bermuda, order the subsidiary insurer to be wound up in conjunction with the principal insurer, and may by the same or any subsequent order appoint the same person to be liquidator for the two insurers, and make provision for such other matters as may seem to the Supreme Court of Bermuda to be necessary, with a view to the insurers being wound up as if they were one insurer

Composite Insurance Companies

In relation to Composite Insurance Companies, we repeat the statements made above in relation to General Business Insurance Companies and Long-term Business Insurance Companies and, for emphasis, we draw attention to the point that transactions entered into under a Covered Agreement may only be netted and paid out of the fund to which those transactions are attributed, be it the long-term business fund or the other assets (the general account) of the Composite Insurance Company.

Special Purpose Insurance Companies and Collateralized Insurers

A Special Purpose Insurer is an insurer that carries on special purpose business, which is defined as insurance business under which an insurer fully funds its liability to the insured through the proceeds of a debt issuance (where the right to repayment of lenders is subordinated to the rights of the insured) or of another financing method approved by the BMA, cash or time deposits.

A Bermuda Insurance Company that carries on special purpose business, but is not registrable as a Special Purpose Insurance Company, may be registered as a Collateralized Insurer.

Special Purpose Insurers and Collateralized Insurers are subject to the same regulation under Part III of the Insurance Act as General Business Insurance Companies and the enforceability of netting provisions under a Covered Agreement would be the same as for the latter, subject to any effect of arrangements for the subordination of debt referred to above.

Bermuda Insurance Companies – Summary of Conclusions

As stated above, it is important for the FCM to identify the type of business its Bermuda Insurance Company Customer is licensed to carry on and, in addition, whether the transaction(s) entered into pursuant to a Covered Agreement is attributable to a particular line of insurance business, be it general business or long-term business. As discussed, transactions entered into under a Covered Agreement may only be netted and paid out of the fund to which those transactions are attributed, be it the long-term business fund or the other assets (the general account) of the Bermuda Insurance Company Customer. In other words: (i) transactions attributable to the long-term business of the Bermuda Insurance Company Customer will net with other transactions attributable to such long-term business of the Bermuda Customer under a Covered Agreement; and (ii) transactions under the same Covered Agreement that are attributable to the general business of the Bermuda Customer will net with other transactions attributable to the general business of the Bermuda Insurance Company Counterparty. However, such transactions attributable to the long-term business of the Bermuda Insurance Company Counterparty will not net with such

transactions attributable to the general business of the Bermuda Insurance Company Counterparty.

Bermuda LLCs

As is the case with Bermuda Companies, the requirements of Section 37 are mandatory and self-executing. Any contract purporting to limit or enhance the scope of set-off as prescribed in section 37 is almost certainly void. The requirement of mutuality is met where the cross dealings between the parties have taken place in their respective personal capacity as debtor and creditor. The relevant date for calculating set-off rights is likely to be the date of the winding up order rather than the date of the petition to the court for the winding up of the Bermuda LLC. Whilst contingent claims against a Bermuda LLC in liquidation are provable in the liquidation, and will therefore be brought into account for the operation of insolvency set-off, contingent claims by the Bermuda LLC against the creditor most likely do not and therefore cannot be set off against the creditor's claims. This is regardless of there being a contractual provision to that effect. However should the contingency occur following the winding up, the claim may then be valued and become the subject of insolvency set-off. The other provision of Bermuda insolvency law that is relevant to enforceability of the netting provisions is Section 190 of the LLC Act. Section 190 provides that a liquidator may, with the leave of the court, disclaim (among other things) any right under a contract which in his opinion is "onerous for the limited liability company to hold or is unprofitable or unsaleable". Before granting leave to disclaim, the court may require notice to be given to interested parties. On the application to disclaim, the court may make an order vesting or requiring delivery of the property to any persons entitled thereto or to any person "to whom it may seem just... by way of compensation for such liability...". On the basis that all transactions concluded under a single Covered Agreement constitute a single contract, as is the case with Bermuda Companies as set out above, we are of the view that a liquidator of the defaulting party would not be in a position to "cherry pick" between transactions under a Covered Agreement, and could only disclaim the Covered Agreement as a whole. If the Covered Agreement as a whole were to be disclaimed, the Non-defaulting Party would be entitled to prove in the liquidation for the amount of its loss or damage. In a case where, after netting, a balance was owing to a Non-defaulting Party, the Non-defaulting Party's claim in the liquidation should be the same as it would have been without the disclaimer. Accordingly, there would in our view be little point in the liquidator applying to have the Covered Agreement disclaimed. In fact, in such a case the disclaimer right should not arise at all as such a right only applies to "assets" and a net obligation owing by the insolvent Defaulting Party could not in our view be described as an "asset", as required by Section 190 of the LLC Act. Rather, it is a liability. Conversely, in a case where the Non-defaulting Party is a net debtor (or for that matter if the liquidator sought to disclaim the insolvent party's contractual rights in relation to a net creditor), then the sum due to the insolvent Defaulting Party would constitute an "asset"; however, it is

inconceivable that a liquidator would take any steps to compromise that asset by disclaiming it or otherwise. By virtue of Section 36(4) of the Bankruptcy Act and Section 184 of the LLC Act, a liquidator of a Bermuda LLC is obliged to estimate the value of any claims against the Bermuda LLC which for any reason do not bear a certain value. It is conceivable that a liquidator's estimate may be different from the calculation conducted pursuant to the Covered Agreement. However, subject to the possibility that a court might determine that the formula amounts to or is akin to an unenforceable penalty, the liquidator's ability to interfere is limited since his own estimate would be made by reference to the Covered Agreement. Consequently, if the calculations made pursuant to the Covered Agreement are correct and supportable, and are made in good faith, a challenge by the liquidator should ultimately fail. The discussion set out above under the heading 'Bermuda Companies' relating to the conversion of delivery obligations and differences in terms of calculations and timing also apply to Bermuda LLCs.

Bermuda Partnerships

Notwithstanding the recent growth in limited partnerships as investment vehicles, there is no case law on the effect of netting provisions on Bermuda general or limited partnerships. It should also be noted that Bermuda Partnerships may elect to have 'legal personality' (a "Legal Personality Bermuda Partnership") pursuant to section 4A or 4B of the Partnership Act 1902, as amended, and our analysis and opinion as to the enforceability of the Netting Provisions of the Covered Agreement when entered into with a Legal Personality Bermuda Partnership immediately follows this section.

Unless the Bermuda Partnership is a Legal Personality Bermuda Partnership, as defined above, a Bermuda Partnership is not regarded as a separate legal entity under Bermuda law. As a matter of Bermuda law, there is no procedure as such for winding up a Bermuda Partnership; however, partners of a Bermuda Partnership may be the subject of bankruptcy, winding up or equivalent proceedings. Where the partners of the Bermuda Partnership are individuals present in Bermuda, or companies incorporated in Bermuda, they may be the subject of bankruptcy or insolvent winding up proceedings under Bermuda law.13 In such cases, partnership assets under such proceedings would be available, first, for creditors of the Bermuda Partnership, partner creditors, and then for distribution amongst the partners thus being available to discharge the separate liabilities of the partners. Similarly, non-partnership assets of a partner would be available first to that partner's creditors, with the surplus being available for unsatisfied partnership creditors.

We are of the view that where an event of default occurs prior to the commencement of insolvency or other bankruptcy proceedings against any partner of a Bermuda Partnership, on

[13] It is acknowledged that the partners of many Bermuda Partnerships will not be comprised entirely or at all of individuals resident in or companies established in Bermuda. For this reason, it is difficult to provide an opinion as to the enforceability of netting and set off provisions in the Covered Agreement as the ability to net and set off will depend on the position under laws other than Bermuda Law of the partners of a Bermuda Partnership, including their capacity, authority, powers, solvency and any applicable provisions relating to actions taken on the eve of insolvency.

the assumptions set out in this opinion, (particularly assumptions f, h and m on the basis of which no issues of preferences and illegal conveyances prior to insolvency should arise) the contractual analysis set out above in relation to Bermuda Companies, would have application to Bermuda Partnerships.

Even if the Event of Default occurs after the commencement of an insolvent liquidation of any partner of the Bermuda Partnership, a court may enforce the Covered Agreements on their terms without reference to mandatory set-off provisions which become applicable in an insolvent liquidation or bankruptcy in Bermuda. This is the same position as for Bermuda Companies and the discussion above concerning netting as regards Bermuda Companies apply equally to Bermuda Partnership.

If, however, the position would be determined by the application of insolvency set off principles, we would make the observations below:

When a party contracts with a Bermuda Partnership it is in fact contracting with each partner in the case of a general partnership, or with each general partner in the case of a limited partnership.

The basic problem in applying the insolvency set off principles set out above in the section entitled Bermuda Companies to Bermuda Partnerships is the requirement for mutuality in relation to debits and credits sought to be set off. Only claims owed by and against each general partner (or in the case of joint rights and obligations, group of the same) may be set off if the mutuality requirement is satisfied in respect of each partner (or group of the same). This mutuality requirement will be affected by changes in respect of partners of the partnership, brought about either by agreement amongst the partners (e.g. admissions or withdrawals), or by operation of law as a result of the dissolution, bankruptcy or death of a partner. The effect of such a change in the partnership can only be analyzed in the light of the agreement between the partners and the nature of the interests the relevant partners have in the partnership. However, it seems clear that transactions carried out under a Covered Agreement after such a change in a partnership will not be brought into the same insolvent set off account as those taking place prior to such change, unless:

a. the assets of the partnership prior to the change have been assigned to the partnership as constituted immediately after such change; and

b. the liabilities existing prior to such change have been novated so that they are liabilities of the partnership as constituted after that change.

Even where a Bermuda Partnership is structured to achieve the results set out in (a) and (b), we would note that this has not been tested by any judicial authority of which we are aware. However, provided that the necessary assignments and novations referred to in paragraphs (a) and (b) have been complied with, in our opinion, our analysis and opinion as to the enforceability of the Netting Provisions of the Covered Agreement should be as set

out in the insolvency analysis of the answer in this question two under the heading 'Bermuda Companies'.

In practice, the above complications with respect to maintaining mutuality have more relevance to Bermuda Partnerships that are general partnerships than where a Bermuda Partnership is a limited partnership. Where a Covered Agreement is made with a Bermuda Partnership that is a limited partnership, and a Bermuda Company as general partner executes the Covered Agreement and all Covered Transactions thereunder, mutuality would only be an issue when changes are made to the general partner of the Bermuda Partnership.

The discussion set out above under the heading 'Bermuda Companies' relating to the conversion of delivery obligations and differences in terms of calculations and timing would also apply to Bermuda Partnerships.

Legal Personality Bermuda Partnerships

It is now possible for Bermuda Partnerships to register a declaration upon formation to elect 'legal personality'. A Bermuda Partnership (general or limited) that registers a declaration stating that it has legal personality is a legal person separate from its partners with power to own and deal with its separate property in accordance with the partnership agreement and has unlimited capacity at law. Once made the 'legal personality' election is irrevocable. In addition, and subject to any agreement between the partners, a Legal Personality Bermuda Partnership is not dissolved by a change in the constitution of the partnership. Thus, for Legal Personality Bermuda Partnerships, the complications set out above in relation to Covered Transactions with Bermuda Partnerships regarding mutuality are obviated.

Accordingly, our opinions as to the enforceability of a Covered Agreement when entered into with a Legal Personality Bermuda Partnership together with associated issues therewith is as set out above in relation to a Bermuda Company.

Trusts

Introduction

An outline of the statutory framework within which Trusts in Bermuda are structured and operate, is set out in Annex A hereto, together with a description of the character authority and capacity of a Bermuda Trust and its Trustee. The principal statute governing trusts and their administration in Bermuda is the Trustee Act 1975, which is largely patterned on the English Trustee Act 1925. Another important statute in Bermuda is the Trusts (Special Provisions) Act 1989 which increased certainty on the conflict of laws rules in relation to the recognition of trusts. This Act also allows for the incorporation of statutory administrative powers into the trust deed and introduced the concept of the 'purpose trust'. Both Acts have undergone several amendments.

The Perpetuities and Accumulations Act 1989 makes it possible to stipulate a perpetuity period of a fixed term lasting for up to 100 years. This Act adopted the 'wait and see' rule whereby if there is a possibility of vesting occurring at too remote a time, the application of the rule against perpetuities is deferred until it becomes apparent that vesting will occur beyond the perpetuity period, if ever. It is possible however to draft an exclusively charitable trust or purpose trust that may last indefinitely. The Perpetuities and Accumulations Act 2009, however, has limited the application of the rule against perpetuities to estates or interests only to the extent that the property is land in Bermuda, but only in relation to instruments taking effect on or after the commencement day of the Act (1 August 2009).

The Trusts (Regulation of Trust Business) Act 2001 came into effect on 25 January 2002. It replaced the Trust Companies Act 1991 and provides that a company, partnership or individual shall not carry on trust business in or from within Bermuda without the appropriate licence. Trust business is defined in the Act as the provision of the services of a trustee as a business, trade, profession or vocation. The Government is committed to keeping information concerning trust business confidential, except in the event of a criminal investigation. The Act provides that no person carrying on business in or from Bermuda shall use any name which indicates that it is carrying on trust business, unless it is a licensed trustee or has received an exemption. This means that a private trust company which seeks to use 'trust' or 'trustee' in its name can only do so if it is licensed or has an exemption order. The Trusts (Regulation of Trust Business) Exemption Order 2002 took effect on 9 August 2002. The exemption order operates to exclude certain persons falling within a specified class from the requirements to hold a licence under the Act. Most private trust companies will be covered by an exemption order[14]

Bermuda Trusts are constituted by a trust deed. A trust has no separate legal capacity; it is a fiduciary relationship whereby a fund is held by the trustee that is subject to equitable obligations to deal with the fund under the terms of the trust instrument and in equity for the benefit of the beneficiaries who may enforce such equitable obligations. The Trusts (Special Provisions) Act 1989 is clear in that the assets of a Bermuda Trust constitute a separate fund and are not part of the trustee's own assets.

A Bermuda Trust therefore acts through its trustee, who is personally liable for the obligations it incurs; although, when obligations are incurred in that capacity, the trustee will have a right to discharge those obligations out of the funds of the Bermuda Trust (such indemnity may be excluded or limited in the trust deed). Assuming the trustee's right has not been excluded, where the Bermuda Trust's funds are insufficient to meet the liability in full, the trustee will be

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[14] A Bermuda Company is exempted from the requirement to hold a licence if it is authorised to provide the services of a trustee only to the trusts specified –

(a) in its memorandum of association; or

(b) in the case of an overseas company, in its permit;

and to such other trusts as the Minister may approve from time to time.

A Bermuda Company that is exempted from the requirement to hold a licence as aforesaid is required to certify to the Bermuda Monetary Authority that it qualifies for an exemption

personally liable to the relevant creditor for the balance. It is possible, however, for the trustee to enter into limited recourse provisions so as to limit liability contractually.

The Trusts (Special Provisions) Act 1989 makes clear that a Bermuda Trust has the following characteristics:

- the assets of a Bermuda Trust constitute a separate fund and are not part of the trustee's own estate;
- title to the Bermuda Trust's assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and
- the trustee has the power and the duty, in respect of which he or it is accountable to manage, employ or dispose of the assets in accordance with the terms of the Bermuda Trust and the special duties imposed upon him by law.

The trust deed will provide for the manner in which the Bermuda Trust is to be administered e.g. the appointment and removal of the trustee, investment and borrowing powers and restrictions, and the termination and winding up of the affairs of the Bermuda Trust.

There is no governmental consent or approval required to form a Bermuda Trust. All that is required is settlement of the terms of the trust deed and execution of the deed by the trustee.

We note, however, that under the Exchange Control Act 1972 and the regulations promulgated thereunder, Bermuda undertakings are to be regarded as resident or non-resident for exchange control purposes. As indicated above, if they are regarded as non-resident they will be free to trade in any currency other than the Bermuda dollar, and the rules in Bermuda regarding exchange control will not affect their obligations in currencies other than Bermuda dollars. Bermuda Trusts are Bermuda undertakings for the purposes of the Exchange Control Act 1972.

A Bermuda Trust may be designated as non-resident in Bermuda even where the trustee itself is resident for exchange control purposes. Any exchange control restrictions operating in relation to the trustee as resident for exchange control purposes would not affect any accounts held in the name of the trustee in respect of a Bermuda Trust that is non-resident for exchange control purposes. Accordingly, before entering into a Covered Agreement in respect of a Bermuda Trust, enquiries should be made as to whether or not the Bermuda Trust has received a designation letter (or equivalent documentary evidence) that indicates its designation as resident for Exchange Control purposes. In our experience, it would be unusual if the result of the enquiries that we are recommending in this connection was that a Bermuda Trust that was a unit trust was designated or regarded as "resident" for Exchange Control purposes. Should the mentioned result prove actually to be case, then an appropriate permission would need to be obtained from the Bermuda Monetary Authority, before any Covered Transactions were entered into in respect of the particular Bermuda Trust.

Capacity

In order to determine whether there is capacity or the power for a Bermuda Trustee to enter into derivative transactions to bind itself in relation to the Bermuda Trust, such capacity or power must be within the provisions or purposes of the Bermuda Trust, as set out in the terms of the Trust deed and settlements etc. and any actions taken by the Bermuda Trustee must be within its power/capacity.

Where a Bermuda Company enters into an Covered Agreement on behalf of a Bermuda Trust (and assuming the Bermuda Trustee is duly licensed or exempted as aforesaid), the power to enter the Covered Agreement must also be within the corporate capacity of the Bermuda Company.

Authority

The formation and operation of trusts are governed by the trust deed by which they are established. The Bermuda Trustee's (and any manager's) authority to carry out the terms and provisions of the specific trust will therefore very much depend on the drafting of the trust deed.

Where the terms of the trust deed related to, and all relevant legislation applicable to, a Bermuda Trust permit the entry into derivative transactions to bind the assets of a Bermuda Trust, it is necessary to then determine whether the person/entity that executes the derivative transactions and performs the obligations to bind the Bermuda Trust has the authority to do so as regards both the terms of the trust deed of the Bermuda Trust and in terms of the corporate governance issues that are applicable to the party that purports to act in relation to the Bermuda Trust, in this case a Bermuda Company. This will generally be the Bermuda Trustee of the trust and, in the case of investment funds established as unit trusts, may also be the manager.

The question of authority of a Bermuda Trustee (or manager) to bind itself as trustee of a Bermuda Trust therefore requires an analysis of the constitutional and other arrangements relevant to the Bermuda Trustee (or manager) itself to establish whether there is authority at that level to bind the Bermuda Trustee (or manager) and whether the proposed transactions are within the terms of the trust deed applicable to the Bermuda Trust so as to bind the assets of the Bermuda Trust.

We note that it is now possible under the Trustee Amendment Act to have a managing trustee, often with the power of investment. Where a Bermuda Company is appointed as Trustee, it is possible to have just one trustee which will exercise all powers in its capacity as sole trustee. In the case of a unit trust where one manager is appointed, that manager will also carry out its duties under the trust deed in its sole capacity and third parties can deal directly with the sole trustee and/or sole manager.

Netting

Bermuda Trusts cannot become insolvent nor can they commit "acts of bankruptcy", as defined in Schedule 1; however, the Bermuda Trustee or the beneficiaries of a Bermuda Trust may become insolvent and commit "acts of bankruptcy". Whereas there is no concept of insolvency or bankruptcy for a Bermuda Trust, and therefore no rules in Bermuda regarding the distribution of a Bermuda Trust's assets in the "insolvency" scenario of a Bermuda Trust, which is to say that the liabilities of the Bermuda Trust exceed its assets, we would recommend that where entering into a Covered Agreement with a Bermuda Trust, if appropriate, an additional event of default be included in the Covered Agreement and CDA by reference to the financial position of the Bermuda Trust, e.g. a provision that permits the FCM to terminate all transactions in the event that the liabilities of the Bermuda Trust exceed its realizable assets (an "insolvent Bermuda Trust"). A provision of this kind would, in principle, be enforceable.

Whilst we are of the general opinion that the Netting Provisions of the Covered Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of a Covered Customer, being a Bermuda Trustee, are enforceable under the laws of Bermuda, we draw your attention to the following discussion and issues that may arise in practice.

Capacity in which a Trustee Contracts

Relevant to the following discussion is the capacity in which the Bermuda Trustee executes the Covered Agreement on behalf of the Bermuda Trust. For each Covered Agreement to be executed between a Bermuda Company acting as Bermuda Trustee for a Bermuda Trust, a determination should be made as to the capacity in which the Bermuda Company will execute the Covered Agreement. There are essentially three scenarios:

(i) The Bermuda Company executes as trustee so as to become personally liable because it is acting for its own account or profit and the FCM has recourse to the Bermuda Company's separate assets for its claim(s).

(ii) The Bermuda Company executes as trustee acting for and on behalf of the Bermuda Trust so as to undertake personal liability for the FCM's claims, on the basis that the Bermuda Company acquires a right of indemnity against the Bermuda Trust's assets (to the extent of these) that is equal to the amount of any claim(s) paid to the FCM's claim, with the result that (as in (i) above) the FCM's claim has recourse against the Bermuda Company's separate assets for any balance of its claim(s) that exceed the Bermuda Trust's assets.

(iii) The Bermuda Company executes as trustee as in (ii) but has contracted out of its residual personal liability, i.e. for any amount of the FCM's claim(s) that exceed the Bermuda Trust's assets available for the Bermuda Company's indemnity.

In the situations detailed in (i) and (ii) above, the Bermuda Trustee (the Bermuda Company) has personal liability for the FCM's claim, and therefore where there are insufficient assets in the Bermuda Trust to discharge the FCM's claim under the Covered Agreements, the Bermuda Trustee will be contractually liable for the shortfall (the situations described in (i) and (ii) being the "Personal Capacity Situations"). On the other hand, in the situations described in (iii) above, the Bermuda Trustee has contracted out of its personal liability with regard to the Bermuda Trust's assets, so that once the funds of the Bermuda Trust have been exhausted, there will be no further recourse available to the FCM under the Covered Agreement (the situations described in (iii) being the "Limited Recourse Situations").

The above discussion would also be applicable where the trustee of the Bermuda Trust is itself a Bermuda LLC, under Section 185 the LLC Act 1981, as it applies Section 37 of the Bankruptcy Act.

The analysis below reviews how contractual and insolvency set-off principles might operate in relation to some of scenarios outlined above. However, the general position is that, if insolvency set off applies at all, the mutuality requirement that it entails will be satisfied in any case where the claims sought to be set off arise uniformly under contracts entered into by the Bermuda Trustee in precisely the same capacity. If there is only one Covered Agreement between the Bermuda Trustee and the FCM, then the Bermuda Trustee must be acting throughout in only one of the four capacities described above and no issues should arise. Even if there are several Covered Agreement between the parties, no issues arise provided that in each case the contract is structured so that the Bermuda Trustee acts in the same capacity (i.e. in the same scenario outlined above) for each. Difficulties may arise, then, only where (a) there are several Covered Agreements and CDAs between the FCM and the Bermuda Trustee acting in respect of that particular Bermuda Trust and (b) they are structured in such a way that the Bermuda Trustee acts in different capacities in respect of different contracts. Rather than addressing this scenario at length for present purposes, we recommend that specific advice be sought in the event that this scenario should present itself.

Also pertinent is that generally a Bermuda Trustee will enter into contracts only in a Limited Recourse Situation. For present purposes we generally assume, therefore, that the Covered Agreement are entered into only in a Limited Recourse Situation and recommend that you obtain specific further advice in the event that any Covered Agreement is entered into by a Bermuda Trustee in a Personal Capacity Situation.

Solvent Bermuda Trust, Insolvent Trustee

Where the Bermuda Trustee is insolvent but the Bermuda Trust is solvent, which is to say that the assets of the Bermuda Trust exceed its liabilities, then we are of the opinion that the Netting Provisions of the Covered Agreement should be effective, either as a matter of contract or by operation of insolvency set-off. As indicated above, the result is substantially the same in either case.

In practice, the insolvency of the Bermuda Trustee would not typically affect the substantive rights of the parties under a Covered Agreement or a Credit Support Document where the Bermuda Trust is itself "solvent": either a liquidator would be appointed and would (by court order) obtain the authority to (a) administer the Covered Agreement or (b) transfer the obligations of the Bermuda Trustee to a third party; or, a new trustee may be appointed by the Bermuda Court pursuant to its powers under Section 31 of the Trustee Act 1975. In each case, the rights of the underlying parties (the beneficiaries) would survive.

Further, in these circumstances the assets of a Bermuda Trust constitute a separate fund and are not part of the Bermuda Trustee's own estate (providing they have not been comingled with the assets in the Bermuda Trustee's own estate). Accordingly, Bermuda insolvency rules that apply to the general assets and liabilities of the Bermuda Trustee should apply (if at all) separately to the Bermuda Trust's assets and liabilities[15]. Any liquidator appointed (under the terms of a court order of the kind described above) to administer both the general assets of the Bermuda Trustee and the assets of the Bermuda Trust would draw up one set of insolvency set off accounts between the Bermuda Trustee and each of its creditors at the general account level and another set of insolvency set off accounts between the Bermuda Trustee acting in respect of the Bermuda Trust and each of its creditors at the Bermuda Trust account level. The FCM would be entitled to exercise set-off rights and net its claims under any Covered Agreement because the claims in either direction (i.e. by or against the Bermuda Trustee and the FCM) satisfy the mutuality requirement in the insolvent liquidation of the Bermuda Trustee provided that (and as we assume is the case for the purposes of this advice) they all come into being while the Bermuda Trustee is acting in the same capacity vis-à-vis the FCM. Insolvency set-off under Bermuda law involves disregarding or looking through agencies and trusts and will only apply as between parties having the requisite beneficial entitlements under the relevant agreements. Accordingly, the insolvency analysis as set out in Part I above ("Questions relating to Netting under a Covered Agreement and a CDA") will apply.

Apart from, and in addition to, set off rights, the remaining net balance owing by the insolvent Bermuda Trustee to the creditors of the Bermuda Trust would be satisfied out of the funds in the Bermuda Trust (even if the general creditors of the Bermuda Trustee cannot be paid in full). These assets would remain available to meet the claims as against the Bermuda Trustee acting in respect of the Bermuda Trust, notwithstanding the insolvency of the Bermuda Trustee.

If instead of being administered by a liquidator, the assets of the Bermuda Trust are transferred to a third party trustee, then insolvency set off would not apply and netting would operate according to the contractual provisions of the Covered Agreement.

Insolvent Bermuda Trust, Solvent Trustee

[15] We note, however, that there may be potential issues where the Trustee has a contractual right under the trust deed or other agreement against the Bermuda Trust's assets, e.g. an indemnity for expenses. Whilst this should not create significant difficulties, we recommend that specific advice be obtained in such event.

Aside from the solvency of the Bermuda Trustee, there is the question of the "solvency" of the Bermuda Trust itself (though, as indicated, a Bermuda Trust does not have legal personality under the law of Bermuda). Where the Bermuda Trustee is solvent but the Bermuda Trust is insolvent, which is to say that the liabilities of the Bermuda Trust exceed its assets, then we are of the opinion that the Netting Provisions of the Covered Agreement should be effective simply as a matter of contract. Insolvency set-off cannot apply in these circumstances because, as indicated above, there are no statutory rules regarding the claims of competing unsecured creditors of a Bermuda Trust; this may be determined by the rules set out in the trust deed or such claims may be paid out by the Bermuda Trustee in the order that they are made.

To the extent the FCM has a valid security interest over the Bermuda Trust's assets, then (and on the basis that no issues of preferences and illegal conveyances prior to insolvency should arise, as outlined above), such a secured creditor should be able to realise his security out of the Bermuda Trust's assets ahead of the other (non-secured) creditors of the Bermuda Trust.

We also note that, in the Personal Capacity Situations, the Bermuda Trustee will be contractually liable for any shortfall in the FCM's claim against the assets in the Bermuda Trust, and so on the basis that the Bermuda Trustee is solvent the FCM should be able to realise its claim in full.

Insolvent Bermuda Trust, Insolvent Trustee

Where the Bermuda Trustee is insolvent and the Bermuda Trust is insolvent, which is to say that the liabilities of the Bermuda Trust exceed its assets, then we are of the opinion that the Netting Provisions of the Covered Agreement should be effective, in accordance with the analysis set out above under the heading 'Solvent Bermuda Trust, Insolvent Trustee'. Again, this is so, either as a matter of contract or by application of insolvency set-off.

In a case where both the Bermuda Trust and the Bermuda Trustee are insolvent and the Bermuda Trustee is the subject of insolvent liquidation proceedings, the net balance owing to any creditor of the Bermuda Trust would remain as a valid claim against the Bermuda Trust, as in the case where the Bermuda Trust remained solvent. If the Bermuda Trust is insolvent, however, obviously such claims could not be satisfied in full. In a case where the Bermuda Trust were being administered by a liquidator, creditors of the Bermuda Trust would be entitled to receive a pro rata distribution out of the assets of the Bermuda Trust to the extent of their net claims after applying set off.

Conclusion

Typically, a Bermuda Trustee will execute the Covered Agreement on the basis of one of the Limited Recourse Situations. In each of these typical cases, either: (a) Bermuda insolvency principles will not apply (i.e. where there are no insolvent liquidation proceedings in relation to the Bermuda Trustee) and close-out netting will operate in accordance with the contractual terms of the Covered Agreement; or (b) if there are insolvent liquidation proceedings in respect

of the Bermuda Trustee, insolvency set-off may apply but will not create difficulties because the mutuality requirement for insolvency set off will be satisfied, and so the insolvency analysis as set out in Part I above ('Questions relating to Netting under the Covered Agreement') will apply.

Save as aforesaid, our opinion as to the enforceability of the Covered Agreement relating to a Bermuda Trust where the named counterparty to the Covered Agreement is a Bermuda Trustee is as set out above in relation to a Bermuda Company, i.e. we are of the opinion that, *inter alia*, the provisions of the Covered Agreement providing for the netting of termination values in determining a single lump-sum termination amount upon the insolvency of the Bermuda Trust or the Bermuda Trustee are enforceable under the laws of Bermuda.

5. Are there any other circumstances in your jurisdiction, including any moratorium, stay, freeze or other consequence of the commencement of an insolvency proceeding, you can foresee that might affect the FCM's ability to exercise Position Liquidation, Margin Liquidation or a Determination of Account in respect of an Account Class or the overall Customer Account (comprising the three Account Classes)?

Under Bermuda law, a stay of proceedings arises in the event of an insolvent liquidation. Any such stay of proceedings would have no bearing on the right of a secured creditor to enforce its security interests provided the secured creditor does not require the assistance of the court to enforce such security interests and we see no reason for suspecting that court intervention would be required to enforce any security interest in this case. However, in the unlikely event, that a secured creditor must obtain assistance from the court to enforce its security interests, this will generally not be problematic as the courts will most likely grant leave to proceed in favour of a secured creditor.

6. Under the laws of your jurisdiction, are any rights or processes available to a creditor of a Covered Customer by which such creditor could make a claim against the Segregated Funds or Separate Account Funds held subject to the statutory trust (or otherwise in accordance with the Customer Property Rules) in respect of each Account Class or against the Covered Contracts (and any rights in respect thereof) held by the FCM as agent-trustee for the benefit of the Covered Customer and the FCM's other customers in such Account Class as opposed to only having recourse to the final cash balance or single net termination amount that constitutes the Determination of Account for such Account Class or the overall Customer Account (comprising the three Account Classes)?

Under Bermuda law there are no other rights or processes available to a creditor of a Covered Customer by which such creditor could make a claim against the Segregated Funds or Separate Account Funds held subject to the statutory trust (or otherwise in accordance with the Customer Property Rules) in respect of each Account Class or against the Covered Contracts

(and any rights in respect thereof) held by the FCM as agent-trustee for the benefit of the Covered Customer and the FCM's other customers in such Account Class as opposed to having recourse to the final cash balance or single net termination amount that constitutes the Determination of Account for such Account Class or the overall Customer Account (comprising the three Account Classes).

7. Assuming the parties have entered into the Covered Agreement, the Covered Customer is insolvent and the FCM has determined a lump-sum cash balance or net termination amount in a currency other than the currency of the jurisdiction in which the insolvent customer is organized:

(a) Would a court in your jurisdiction enforce a claim for the cash balance or net termination amount in the currency in which it was determined?

(b) Can a claim for the cash balance or net termination amount be proved in insolvency proceedings in your jurisdiction without conversion into the local currency?

If in either case the claim must be converted to local currency for purposes of enforcement or proof in insolvency proceedings, please set out the rules governing the timing and exchange rate for such conversion.

Assuming insolvent liquidation proceedings are pending in Bermuda, a statutory stay of proceedings comes into operation and court proceedings would not be available. The claim for the net termination amount would be provable in the liquidation. However, the claim would be converted into Bermuda or U.S. dollars as at the date of the winding-up order.

Generally, and subject to the points discussed below relating to the requirements for conversion of foreign currencies into Bermuda dollars and exchange control, Bermuda law permits a creditor to prove or file a claim in a Bermuda liquidation where the claim is in a foreign currency.

Where close-out takes place prior to and unconnected with any subsequent liquidation, it should give rise to a valid settlement based on the contractual conversion rate. While creditors' rights in liquidation become crystallised as at the date of the winding-up order, any payments made after the date of a petition are void unless approved by the court. Payments made even before the petition may of course be vulnerable but (on the assumptions set out above) should survive scrutiny. Therefore, but again subject to those assumptions, otherwise valid final settlement payments made after close-out but before the filing of a petition should be unaffected by the liquidation.

Under the law of Bermuda, the conversion of foreign currency for the purpose of determining the value of net claims against a Covered Customer which is a Bermuda Company in liquidation are probably to be calculated at the date of the winding-up order. Re. Dynamics Corporation of America [1976] 2 All ER 669; Re. Lines Brothers Limited [1983] Ch.1.

Under the terms of the Covered Agreement, a different date for converting foreign currencies may apply. In our opinion, the rates as at the date of the winding-up order will likely prevail over those on the contractual date, if these are different. We note that the conversion will have to be calculated by reference to the date of the relevant winding-up order, not only for the purposes of filing any proof of claim in respect of a liability of a Bermuda Company, Bermuda LLC or Bermuda Partnership, but probably also for the purposes of calculating rights of set-off.

The Bermuda currency is the Bermuda dollar, which by law is fixed at par with the United States dollar.

8. Are there any other local law considerations that you would recommend the FCM to consider in connection with the exercise of Position Liquidation, Margin Liquidation or a Determination of Account?

No

II. Creation, Perfection and Enforcement of FCM's Security Interest in Covered Collateral

A. *Fact Patterns Regarding Location of the Covered Customer and Covered Collateral*

The three principal fact patterns concern (a) whether or not the Location (as defined below) of the Covered Customer is Bermuda and (b) whether or not the Location of the Covered Collateral (as defined below) is in Bermuda.

With respect to each question in this section, we distinguish between the following three fact patterns:

I. The Location of the Covered Customer is in your jurisdiction and the Location of the Covered Collateral is outside your jurisdiction.

II. The Location of the Covered Customer is in your jurisdiction and the Location of the Covered Collateral is in your jurisdiction.

III. The Location of the Covered Customer is outside your jurisdiction and the Location of the Covered Collateral is in your jurisdiction.

For the foregoing purposes:

(a) the "Location" of the Covered Customer is in your jurisdiction if it resides, is incorporated or otherwise organized in your jurisdiction and/or if it has a branch or other place of business in your jurisdiction; and

(b) the "Location" of Covered Collateral is the place where an asset of that type is located under the private international law rules of your jurisdiction.

"**Located**" when used below in relation to a Covered Customer or any Covered Collateral should be construed accordingly.

B. *Additional Assumptions*

We assume the same facts as set forth in Part I above (as applicable) with the following modifications:

(a) "**Covered Collateral**" means the Covered Customer's Collateral consisting of (1) the Customer Account, (2) the Covered Customer's Covered Contracts, (3) cash credited to an account (as opposed to physical notes and coins) and (4) the types of securities that are identified below and that are Located or deemed Located either (i) in your jurisdiction or (ii) outside your jurisdiction.

(b) We assume that Covered Collateral in the form of cash is denominated in a freely convertible currency and is credited to an account under the "control" of the FCM for purposes of the New York Uniform Commercial Code (the "**UCC**"), as described in paragraph 1.40 of the Summary Annex.

(c) We understand that the expectation is that the FCM will normally hold debt securities in the form of intermediated debt securities rather than directly in one of the three forms mentioned in (i), (ii) and (iii) below. In this case, and as described in Section 1.41 of the Summary Annex, the FCM, acting as the Covered Customer's "securities intermediary," will credit "security entitlements" to those securities to the Account, which will constitute a "securities account" (as each of those terms is defined under Article 8 of the UCC). However, for purposes of the analysis, we assume that the following types of securities considered to be Covered Collateral are denominated in either the currency of your jurisdiction or any freely convertible currency and consist of (i) corporate debt securities whether or not the issuer is organized or located in your jurisdiction; (ii) debt securities issued by the government of your jurisdiction; and (iii) debt securities issued by the government of a member of the "G-10" group of countries, in one of the following forms:

(i) directly held bearer debt securities: by this we mean debt securities issued in certificated form, in bearer form (meaning that ownership is transferable by delivery of possession of the certificate) and, when held by the FCM as Collateral under the Covered Agreement, held directly in this form by the FCM (that is, not held by the FCM indirectly through an Intermediary (as defined below);

(ii) directly held registered debt securities: by this we mean debt securities issued in registered form and, when held by the FCM as Collateral under the Covered Agreement, held directly in this form by the FCM so that the FCM is shown as the relevant holder in the register for such securities (that is, not held by the FCM indirectly with an Intermediary);

(iii) directly held dematerialized debt securities: by this we mean debt securities issued in dematerialized form and, when held by the FCM as Collateral under the Covered Agreement, held directly in this form by the FCM so that the FCM is shown as the relevant holder in the electronic register for such securities (that is, not held by the FCM indirectly with an Intermediary);

(iv) intermediated debt securities: by this we mean a form of interest in debt securities recorded in fungible book-entry form in an account maintained by a financial intermediary (which could be a central securities depositary ("**CSD**") or a custodian, nominee or other form of financial intermediary, in each case an "**Intermediary**") in the name of the FCM where such interest has been credited to the account of the FCM in connection with a deposit of Collateral by the Covered Customer with the FCM under the Covered Agreement.

(d) In the case of questions 10 to 12 and 16 in Part C below, we also assume that after the Covered Customer commences clearing under the Covered Agreement and while it has open positions in Covered Contracts, an Event of Default occurs with respect to the Covered Customer, and/or, if applicable, the FCM has designated a date to begin closing out or otherwise liquidating the Covered Contracts as a result thereof (however, an insolvency proceeding has not been instituted, which is addressed separately in assumption (e) and questions 13 to 15 below).

(e) In the case of questions 13 to 15 in Part C below, we assume that the Covered Customer has become subject to insolvency proceedings in Bermuda.

(f) Regarding substitution of Covered Collateral consisting of cash or securities, we understand that Base Account Agreements typically provide that, following closure of an open position by a customer, a FCM is under no obligation to return the same assets (*e.g.*, a security with the same ISIN/CUSIP number) posted by the customer, but the FCM may agree to provide equivalent assets, if practicable. For example, if the customer posted 5-year treasuries, the FCM would endeavor to return 5-year treasuries if practicable, but not necessarily the same ISIN/CUSIP. In some cases, the FCM might agree to a more stringent obligation to return equivalent assets, if practicable. However, it is not market practice for a Base Account Agreement to provide for an unqualified obligation on a FCM to return the same asset (contrast this position with paragraph 4(d) of either the 1994 ISDA Credit Support Annex (Bilateral Form) or the 1995 ISDA Credit Support Deed (Bilateral Form – Security Interest)).

We also understand that, as a matter of market practice, FCMs often offer their customers the ability to manage the collateral posted by the customer, for example by allowing the customer to post 10-year treasuries and returning 5-year treasuries to the customer. However, this is

purely a matter of market practice, not a right of the customer explicitly provided in the agreement.

We further understand that Base Account Agreements typically do not include a right to substitute collateral.

C. *Questions*

Creation and perfection of the security interest

1. *Under the laws of your jurisdiction, what law governs the contractual aspects of the security interest in the various forms of Covered Collateral?*

   Under Bermuda law, the law governing the contractual aspects of a security interest entered into by a Covered Customer in the various forms of Covered Collateral identified is the governing law of the relevant Base Account Agreement pursuant to which the security interest is created.

2. *Under the laws of your jurisdiction, what law governs the proprietary aspects of the security interest in the different types of Covered Collateral (that is, the formalities required to protect the security interest against competing claims) granted by the Covered Customer (for example, the law of the jurisdiction of incorporation or organization of the Covered Customer, the jurisdiction where the Covered Collateral is Located or the jurisdiction of location of the FCM as the Covered Customer's Intermediary, in relation to Covered Collateral in the form of indirectly held securities)? What factors would be relevant to this question? If the Location (or deemed Location) of the Covered Collateral is the determining factor, please briefly describe the principles governing such determination under the law of your jurisdiction with respect to the different types of Covered Collateral. If relevant, please describe how the laws of your jurisdiction apply to each form in which securities Covered Collateral may be held as described in assumption (b) above.*

   Under Bermuda rules of private international law, the relevant law governing the proprietary aspects of a transfer of a movable asset is the law of the place of its location (the *lex situs*). As a result, the law governing the proprietary aspects of a security interest (including perfection and other formalities required to protect a security interest in Collateral against competing claims) is the *lex situs*.

   Although we understand that the position under English rules of private international law (which would be followed by a Bermuda court) is not free from doubt, it would seem that the better view of current law is that the location of each of the following types of assets will be the place:

   (a) in the case of a directly held bearer debt security, where the certificate is located;

(b) in the case of a directly held registered debt security, where the register is located;

(c) in the case of a directly held dematerialised debt security, in the jurisdiction of the law which establishes the statutory regime under which such dematerialised debt securities are issued;

(d) in the case of intermediated securities, as discussed below;

(e) in the case of cash Covered Collateral, where the entity with which such Covered Collateral is deposited is located (i.e. the FCM); and

(f) in the case of other intangible rights, a Bermuda court would generally consider where those rights may be enforced in determining the location of the Collateral for the purposes of perfection. It may be the case that more than one jurisdiction is of relevance, including in the case of contract rights the governing law of the underlying contract. In the case of any contract and payment rights and related proceeds subject to a security interest, locations which may be relevant will include New York as the law governing those rights, as well as the location of any cash or securities as determined above.

In the case of (d), there will frequently be a chain (or tiers) of intermediaries holding the "same" security or, more accurately, recording an interest in the security on their records in favour of the next intermediary down the chain down to the ultimate holder. When determining the location of a particular person's holding of an indirectly held security, the location is the place of the account, register or other recording in book-entry form of its interest by the most immediate intermediary, regardless of where other links in the chain (that is, the immediate intermediary's own custodian, the custodian's sub-custodian and so on) may be located. This rule is sometimes referred to as the "place of the relevant intermediary approach" or "PRIMA".

3. *Would the courts of your jurisdiction recognize the validity of a security interest in the different types of Covered Collateral, assuming it is valid under New York law? In answering this question, please bear in mind the different forms in which securities Covered Collateral may be held, as described in the assumptions above. Please indicate, in relation to cash Covered Collateral, if your answer depends on the location of the account in which the relevant deposit obligations are recorded and/or upon the currency of those obligations.*

Assuming that the choice of law in the Base Account Agreement is a valid and proper choice of law, the Bermuda courts would recognise the validity of a security interest created under a Base Account Agreement if that security interest was valid under the governing law of the Base Account Agreement.

In our opinion the Bermuda courts would recognise a security interest in each type of Covered Collateral created under each Covered Agreement, provided that the security interest was valid under the governing law of the Covered Agreement and provided also that any perfection requirements in relation to the Covered Collateral had been complied with in the place in which the Collateral was located (as to which see the answer to question 2 above).

Under Bermuda law, a security interest may be taken over cash deposited with the FCM to secure a debt owed to the secured party. The location of the account in which the relevant deposit obligations are recorded is not directly relevant to the question of recognition, but is directly relevant to the determination of the applicable law in relation to the proprietary aspects of the security interest as discussed in the answer to question 2. The currency of those obligations is not relevant to the question of recognition.

4. What is the effect, if any, under the laws of your jurisdiction of the fact that the amount secured or the amount of any cash or securities Covered Collateral subject to the security interest will fluctuate under the Covered Agreement (including as a result of entering into additional Covered Transactions from time to time)? In particular:

(a) Would the security interest be valid in relation to future obligations of the Covered Customer?

(b) Would the security interest be valid in relation to future Covered Collateral (that is, Covered Collateral not yet delivered to the FCM at the time of entry into the Covered Agreement)?

(c) Is there any difficulty with the concept of creating the security interest over a fluctuating pool of assets, for example, by reason of the impossibility of identifying in the Covered Agreement the specific assets deposited by the Covered Customer with the FCM?

(d) Is it necessary under the laws of your jurisdiction for the amount secured by the security interest to be a fixed amount or subject to a fixed maximum amount?

(e) Is it permissible under the laws of your jurisdiction for the FCM to hold Customer Collateral in excess of its actual exposure to the Covered Customer under the Covered Agreement?

In relation to (a), it is understood that the security interest in any specific Covered Collateral would only be relevant in relation to future obligations, if ever, at the time such future obligations arise and then only in relation to Covered Collateral held at that time. This question concerns whether it would be necessary for either party to perform any action at such time in order to ensure the effectiveness of the security interest as security for such obligations or whether the security interest would take effect in relation to those future obligations without further action by either party.

In relation to (b), it is understood that the security interest in the different types of Covered Collateral to be delivered at some point in the future after the time of entry into the Covered Agreement would not take effect in relation to such Covered Collateral until it had been delivered to the FCM in accordance with the Covered Agreement. This question concerns whether it would be necessary for either party to perform any action at such time in order to ensure the effectiveness of the security interest in relation to such Covered Collateral or whether the security interest in relation to such Covered Collateral would take effect without further action (other than the delivery) by either party.

In relation to (c), you may assume that each specific delivery to the FCM and return by the FCM of Covered Collateral consisting of cash or securities under the Covered Agreement from time to time would be properly recorded by the FCM, so that, while the pool of Collateral would change from time to time, at any specific time the composition of the pool of Collateral could be clearly identified by the FCM.

Under Bermuda law there are no adverse consequences arising from the fact that the amount secured or the amount of Covered Collateral subject to the security interest will fluctuate under the Covered Agreement, provided that it does so in accordance with the terms agreed between the parties.

Subject to the foregoing, we respond to the above questions as follows:

(a) Yes, the security interest would be valid in relation to future obligations of the Covered Customer provided that the future obligations are able to be identified with certainty as and when they arise, by reference to the terms of the Covered Agreement.

(b) Yes, the security interest would be valid in relation to the future Collateral provided that the future Collateral is able to be identified and ascertained as and when it is provided as Collateral. However, the fact that the security interest may attach to collateral that does not remain constant might give rise to arguments that assets held this way are subject to a floating rather than a fixed charge.

(c) No, provided that the pool of assets over which the security interest to be created is identified with sufficient clarity to identify the Collateral at any given time.

(d) No.

(e) Yes, provided it has been agreed by the parties that such excess Collateral may be so held.

5. Assuming that the courts of your jurisdiction would recognize the security interest in each type of Covered Collateral, is any action (filing, registration, notification, stamping, notarization or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval) required in your jurisdiction to

perfect the security interest? If so, please indicate what actions must be taken and how such actions may differ, if at all, depending upon the type of Covered Collateral which is subject to the security interest.

When we refer to perfection requirements under Bermuda law, we mean any further steps that need to be taken in relation to a security interest over Covered Collateral to ensure that the security interest attaches to the Covered Collateral and would be enforceable against the Covered Customer. While there are no strict perfection requirements as such under Bermuda law (except for security over land in Bermuda, Bermuda registered ships, aircraft and aircraft engines, and certain life insurance policies in Bermuda (the "**Asset Specific Security Regimes**") which are special cases that we do not consider in this opinion), there is a security registration regime which applies to the grant of any security interest by a company or partnership registered in Bermuda.

Under section 55 of the Companies Act 1981 (for companies) or section 4F of the Partnership Act 1902 (for partnerships) where a company or partnership which creates a security interest which is not subject to the Asset Specific Security Regimes (so, any other security interest), then that security interest may be registered under the relevant statute by making a filing with the Registrar. Once a charge is filed the priority is fixed as at the date of registration. Registration is not mandatory (although unregistered security will be subordinate in priority to registered security) and there is no applicable time limit.

Failure to register a security interest with the Registrar will not affect the validity of the security interest as against the company or partnership (or any liquidator upon insolvency), but it may affect priority.

Section 55 of the Companies Act 1981 of Bermuda (the "**1981 Act**") provides that the Registrar of Companies must keep with respect to each Bermuda company a register of charges on the assets of such company and that any person, including the company, interested in a charge on the assets of a Bermuda company may apply to have that charge registered and the Registrar of Companies is required to register the charge in such form as may be prescribed. The register of charges is available for inspection by a member of the public during normal working hours. Any charge registered has priority based on the date that it is registered and not the date of its creation and has such priority over any unregistered charge. The registration provisions in the 1981 Act extend also to charges on property in Bermuda which are created, and to charges on property in Bermuda which is acquired, by a company incorporated outside Bermuda. Registration is not compulsory and there are therefore no time limits within which registration under Section 55 must be effected. A fee of up to BD$700 is payable upon registration.

The registration provisions of the 1981 Act are only relevant where the issue of priority is governed by Bermuda law. In the case of Covered Collateral which is held outside Bermuda, the law governing the proprietary aspects of a security interest (such as priority) will almost

certainly not be Bermuda law (see the answer to question 2 above). We would nevertheless recommend registration as a precaution.

The Registrar of Companies also maintains a register of charges in respect of Bermuda LLCs. Any charge on the assets of a Bermuda LLC may be filed at the office of the Registrar of Companies for registration against that LLC. A charge includes any interest created in property by way of security, including any mortgage, assignment, pledge, lien or hypothecation. Any registered charge will have priority over any subsequently registered charge and any unregistered charge. Priority is based upon the date of registration and not the date of creation of the charge. Registration only goes to priority and there is no requirement for a charge to be registered in order to be effective.

6. If there are any other requirements to ensure the validity or perfection of the security interest in each type of Covered Collateral, please indicate the nature of such requirements. Are there any other documentary formalities that must be observed in order for the security interest in any type of Covered Collateral to be recognized as valid and perfected in your jurisdiction?

There are no particular additional requirements or formalities required under Bermuda law to ensure the validity or perfection of a security interest in relation to each type of Covered Collateral that may be delivered under a Covered Agreement. It is not necessary as a matter of formal validity that a Covered Agreement be expressed to be governed by Bermuda law. As the Covered Agreement are drafted in the English language, the question of translation does not arise.

7. Assuming that the FCM has obtained a valid and perfected security interest under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements set forth in your responses to questions C.1 to C.6 above, as applicable, will the FCM or the Covered Customer need to take any action thereafter to ensure that the security interest continues to be and/or remains perfected, particularly with respect to additional cash or securities Covered Collateral transferred from time to time when required pursuant to the Covered Agreement?

No additional actions of this kind will be required.

8. Are there any particular duties, obligations or limitations imposed on the FCM in relation to the care of the Covered Collateral held by it pursuant to the security interest?

Under Bermuda law the FCM as the secured party is under an obligation, established by English common law, to take reasonable steps to ensure the safe custody of any charged property in its possession. There is a field of Bermuda law which deals with the duties of a "mortgagee in possession" of collateral, and the duties on that person to protect and preserve the collateral.

However, these duties are framed principally with reference to physical collateral (i.e. real property and chattels), and are of limited application to financial collateral.

9. *Do the laws of your jurisdiction recognize the right of the FCM to use cash or securities Covered Collateral (as described in additional assumption II.B.(f) above) pursuant to an agreement with the Covered Customer? In particular, how does such use of the Covered Collateral affect, if at all, the validity, continuity, perfection or priority of the security interest otherwise validly created and perfected prior to such use? Are there any other obligations, duties or limitations imposed on the FCM with respect to its use of such Covered Collateral under the laws of your jurisdiction?*

The inclusion in a mortgage or charge of a right of the FCM as the secured party to deal with the mortgaged or charged property as though it were the owner (a "**Right of Use**"), including the right to sell or charge the securities to a third party, would be considered inconsistent with the limited nature of a security interest. (The more specific objection that such a clause would constitute a "clog on the equity of redemption" is discussed below).

The security interest of a FCM consists of a proprietary interest created out of the ownership interest of the Covered Customer in the relevant Collateral. Permitting the FCM to deal with security assets as though they were the outright property of the FCM is therefore, at least *prima facie*, conceptually inconsistent with the limited nature of a security interest.

In practical terms, once the Covered Customer ceases to own the security assets (or, more accurately, ceases to have an equity of redemption in those assets), the FCM's interest must also disappear, unless the third party purchaser of those assets agrees to purchase the assets subject to the security interest. In practice, this does not normally happen when securities are delivered as Collateral in the financial markets. Typically, such securities are sold or otherwise transferred outright (for example, under a securities repurchase (repo) or stock lending transaction), in connection with which the seller represents to the buyer that the securities are sold "free and clear" of any third party interest.

Thus, the FCM loses its security interest when it exercises its Right of Use to sell the Collateral. The FCM will normally, however, either (1) have to account to the Covered Customer for the proceeds of the securities or (2) re-deliver fungible equivalent securities. These obligations would normally be personal obligations of the FCM, sounding in debt, and therefore capable of being discharged by set-off.

Accordingly, if the FCM has not yet re-acquired fungible equivalent securities for delivery of the Covered Customer at the time of a default by the Covered Customer, the FCM would seek to set off the secured liabilities against the value at that time of the Collateral. A well-drafted security document would normally include an appropriate contractual set-off provision for this purpose.

Similarly, if the FCM itself were to become insolvent, the Covered Customer would be an unsecured creditor of the FCM in relation to the value of the securities sold by the Covered Customer pursuant to the Right of Use. The Covered Customer may, in such circumstances, seek to set off the value of the Collateral against its liabilities to the FCM under an appropriate contractual set-off provision.

The inclusion of a Right of Use in a Covered Agreement, therefore would raise a potential question as to the proper characterisation of the Covered Agreement. If it is highly likely that the FCM will, in fact, use the Collateral provided, for example, to sell the Collateral under a repo transaction, then it may be that the Covered Agreement would be characterised by a Bermuda court as a title transfer collateral arrangement.

As mentioned above, it has been suggested that the inclusion of a Right of Use in a mortgage or charge could be considered a clog on the equity of redemption, which would render the Right of Use void. Under this doctrine, which is a corollary of the long-established principle "once a mortgage, always a mortgage", a mortgagor's equity of redemption may not be extinguished by any covenant or agreement made at the time of the mortgage and as part of the mortgage transaction.

We believe it to be the better view, based upon our understanding of the current position under English law, that the clog doctrine would not apply to a security interest created over dematerialised or immobilised securities in electronic form. In such a case, the security interest is created over co-proprietary rights in a fungible pool of securities. The assets in such a pool are, by their nature, shifting, and it is not possible for the Covered Customer to receive back the identical securities it originally transferred as Collateral. There is therefore no clog preventing the mortgagor in such circumstances getting back exactly what he mortgaged.

There is a related rule that a mortgagee may not stipulate for additional advantages in a mortgage beyond the mortgagor's covenant to pay the secured debt with interest. This is generally referred to as the rule against collateral advantages (using the term "collateral" in its original sense of "by the side of' (in this case, by the side of the main advantage) or perhaps "connected but subordinate").

The English cases, which would constitute highly persuasive legal authority for the purposes of Bermuda law, suggest that a collateral advantage of a mortgagee will only be struck down if the advantage is unfair or unconscionable (and not merely unreasonable). We do not believe that a Right of Use would, absent special circumstances, be considered unfair or unconscionable if freely agreed at arm's-length between commercial counterparties.

Enforcement of the security interest in Covered Collateral in the absence of an insolvency proceeding

Note the additional assumption in II.B.(d) above which applies to questions 10 through 12 below.

10. *Assuming that the FCM has obtained a valid and perfected security interest under the laws of your jurisdiction, to the extent such laws apply, by complying with the requirements set forth in your responses to questions 1 to 6 above, as applicable, what are the formalities (including the necessity to obtain a court order or conduct an auction), notification requirements (to the Covered Customer or any other person) or other procedures, if any, that the FCM must observe or undertake in enforcing its security interest as an FCM under the Covered Agreement? For example, is it free to sell the Covered Collateral (including to itself) and apply the proceeds to satisfy the Covered Customer's outstanding obligations under the Covered Agreement? Do such formalities or procedures differ depending on the type of Covered Collateral involved?*

There are four principal remedies for a mortgagee under Bermuda law. These are sale of the secured property, the appointment of a receiver, taking possession, and foreclosure. Of these, a mere chargee (that is, a holder of a charge that does not also constitute a mortgage) has only the remedies of sale of the secured property and appointment of a receiver.

Of these, in a financial markets context, the power of sale is the remedy typically exercised by a mortgagee or chargee in relation to Collateral in the form of securities. The appointment of a receiver (which is not a statutory right under Bermuda law) is generally not thought to confer any practical advantage in this context, and the mortgagee or chargee typically already has possession of the relevant securities.

Foreclosure is the process under which the mortgagor's equitable right to redeem the mortgaged property is declared by the court to be extinguished or destroyed and the mortgagee is left as owner of the property both at law and in equity (subject only to prior encumbrances). The mortgagee is then free to sell the property or to retain title to it. Foreclosure always requires a court action and a mortgagee cannot foreclose and keep the assets for itself without a court order. For this reason, it is often considered too time-consuming and cumbersome to be a practical remedy in the context of a financial market security arrangement. In addition, in certain circumstances, the court may re-open the foreclosure order, restoring the mortgagor's equitable right to redeem. For these reasons, foreclosure is rarely, if ever, used by a mortgagee of securities.

The exercise by the FCM of its rights contemplated by each Covered Agreement, including the right to "liquidate" Collateral by selling it, is permitted by Bermuda law. It is not necessary for any particular formalities to be followed by the FCM in exercising its right of sale in accordance with the terms agreed in the Covered Agreement. Accordingly, the FCM may, on enforcement of the Covered Agreement, sell the Collateral.

In particular, a court order or auction is not required and notice of sale need not be given to the Covered Customer as a matter of Bermuda law, although in practice secured creditors do often give a short period of notice before selling Collateral and this may be a requirement of

the relevant Covered Agreement. This does not differ depending on the type of Collateral involved.

In exercising its power of sale, the FCM is subject to a duty to take reasonable care to obtain the best price reasonably available at the time. This will normally be the current market value of Collateral comprising securities.

It is established that a mortgagee may sell mortgaged property to a company in which the mortgagee has an interest, provided that it can prove that the sale was in good faith and that it had taken reasonable steps to obtain the best price reasonably obtainable at that time. A fortiori, a mortgagee may sell mortgaged property to an affiliated company, subject to the same proviso.

In certain circumstances, rights of set-off can be subject to intervening claims and the issue of set-off against a deposit that has been attached or to which an intervener has made a claim is complex, but set-off will generally be available, provided that the FCM and the Covered Customer have agreed that the claims arising between them shall be set-off, and both claims were incurred prior to the FCM having notice of the attachment or intervention.

A court order which operates as a restraining injunction may prohibit the exercise of a right of set-off, unless this right is excluded from the effect of the order.

11. *Are there any laws or regulations in your jurisdiction that would limit or distinguish a creditor's enforcement rights with respect to the security interest in any type of Covered Collateral depending on (a) the type of transaction underlying the creditor's exposure, (b) the type of Collateral or (c) the nature of the creditor or the debtor? For example, are there any types of "statutory liens" that would be deemed to take precedence over a security interest?*

There are no rules or regulations in Bermuda of the kind mentioned in clauses (a), (b) or (c) of this question. The types of Covered Collateral involved should not have any effect on enforcement rights.

Certain debts are preferred by statute in Bermuda but only over (i) claims of unsecured creditors and (ii) claims of secured creditors who are holders of floating charges. These debts are not preferred over fixed charges.

Section 236 of The Companies Act 1981 provides, inter alia, that in a winding up there shall be paid in priority to all other debts:

(a) all taxes owing to the government and rates owing to a municipality at the relevant date;

(b) all wages or salary of any employee of the company in respect of services rendered to the company during four months next before the relevant date;

(c) all accrued holiday remuneration becoming payable to any employee on the termination of his employment before or by the effect of the winding up order or resolution;

(d) certain amounts due by the company as employer of any persons under the Contributory Pensions Act 1970 or any contract of insurance; and

(e) certain amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act 1965, being amounts which have accrued before the relevant date.

Section 33(3) of The Employment Act 2000 provides that in the case of employees covered by that Act (namely employees resident in Bermuda) in a winding up of a company or upon the appointment of a receiver, all wages and other contract payments shall be paid in priority to all other creditors, including the Crown. There is some doubt as to whether such payments take priority over the expenses of the liquidator (Rule 140 of the Companies (Winding-up) Rules 1982).

Subject to the doubts expressed above in relation to the Employment Act 2000, the Companies (Winding-Up) Rules 1982 provide that the costs and expenses of a liquidation will be similarly preferred.

12. How would your response to questions 10 and 11 change, if at all, assuming that an insolvency proceeding above has occurred with respect to the FCM (notwithstanding that the Covered Agreement may not provide for any events of default in respect of the FCM) rather than or in addition to the Covered Customer (for example, would this affect this ability of the FCM to enforce its security interest in Covered Collateral)?

If an insolvency proceeding has occurred in relation to the FCM rather than the Covered Customer, the FCM will be able to exercise its enforcement rights if there is also an Event of Default, subsisting in relation to the Covered Customer.

In any other case, the Clearing Member may not enforce its security.

Enforcement of the security in Covered Collateral after the commencement of an insolvency proceeding

Note the additional assumption in II.B.(e) above which applies to questions 13 through 15 below.

13. How are competing priorities between creditors determined in your jurisdiction? What conditions must be satisfied if the FCM's security interest in each type of Covered

Collateral is to have priority over all other claims (secured or unsecured) of an interest in the Covered Collateral?

In the case of Covered Collateral located outside Bermuda, a Bermuda court would determine the issue by applying the analysis described in the answer to question 2.

In the case of Covered Collateral located in Bermuda, competing priorities between creditors will be determined by reference to the following basic principles:

(a) Secured claims take precedence over unsecured claims.

(b) Secured claims take priority in the order in which the security interest is registered pursuant to Section 55 (see answer to question 5 above).

(c) Where there is a competition between a "legal" security interest and an "equitable" security interest and provided that neither is registered under Section 55, the legal security interest will take precedence over the equitable security interest irrespective of the time of its creation, provided that the legal security interest was taken for value without knowledge of the equitable security interest.

(d) In the case of competing equitable security interests none of which is registered under Section 55, priority will be based upon the time of their creation.

In view of the fact that priority over the charged interest is governed by the date of registration it is advisable that a security interest over Covered Collateral located in Bermuda should be registered under Section 55 as soon as practicable following its creation.

14. Would the FCM's enforcement of its security interest in any type of Covered Collateral be subject to any stay, moratorium or freeze or otherwise be affected by commencement of the insolvency (that is, how does the institution of an insolvency proceeding change your response to question 10 above, if at all)?

The FCM would not be subject to any stay or freeze imposed by a Bermuda court.

15. Will the Covered Customer (or its administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official) be able to recover any transfers of Covered Collateral consisting of cash or securities made to the FCM during a certain "suspect period" preceding the date of the insolvency as a result of such a transfer constituting a "preference," fraudulent transfer or transaction at an undervalue (however called and whether or not fraudulent) in favor of the FCM or on any other basis? If so, how long before the insolvency does this suspect period begin? Would the posting of additional margin (which could be required when an Account's net liquidating equity has fallen below the required margin level for the Account due to trading losses in respect of one or more Covered Transactions) during the suspect period be subject to avoidance, either because the Covered Collateral was considered to relate to an antecedent or pre-existing obligation or for some other reason?

The "suspect periods" applicable under Bermuda law are described in the following paragraphs.

Section 237 of The Companies Act 1981 provides, inter alia, that any conveyance, mortgage or payment or other act relating to property made or done by or against a company within six months before the commencement of its winding up which, had it been made or done by or against an individual within six months before the presentation of a bankruptcy petition on which he is judged bankrupt, would be deemed in his bankruptcy a fraudulent preference, shall in the event of the company being wound up be deemed a fraudulent preference of its creditors and be invalid accordingly.

Section 47 of The Bankruptcy Act 1989 provides, inter alia, that every conveyance or transfer of property or charge thereon made by any person unable to pay his debts as they become due in favour of any creditor with a view of giving the creditor a preference over the other creditors shall, if the person making, taking, paying or suffering the same, is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same be deemed fraudulent and void as against the trustee in bankruptcy.

Section 36C of The Conveyancing Act 1983 provides, inter alia, that every disposition of property (including the creation of a security interest) made with the requisite intention (that is, with the dominant purpose of putting the property beyond the reach of a person or a class of persons who is making or may at some time make a claim against him) and at an undervalue, will be voidable at the instance of an eligible creditor thereby prejudiced. An eligible creditor includes a person to whom on or within two years after the date the transferor owed an obligation and on the date of the action or proceeding to set aside the relevant disposition that obligation remains unsatisfied. Actions to set aside such transfers must generally be commenced within six years.

Section 239 of The Companies Act 1981 provides that where a company is being wound up, a floating charge on the undertaking or property of the company created within twelve months of the commencement of the winding up will, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the statutory rate (currently 7%) fixed under the Interest and Credit Charges (Regulation) Act 1975.

Substitution of collateral by a Covered Customer during the "suspect periods" referred to above would not invalidate an otherwise valid security interest if the substitute Collateral were of no greater value than the assets replaced.

The posting of additional “variation margin” during the "suspect periods" would not be subject to avoidance.

Note the additional assumption in II.B.(d) above which applies to question 16 below.

16. *Assuming that (a) pursuant to the laws of your jurisdiction, the laws of another jurisdiction govern the creation and/or perfection of the security interest (for example, because such Covered Collateral is Located or deemed Located outside your jurisdiction) and (b) the FCM has obtained a valid and perfected security interest under the laws of such other jurisdiction, are there any formalities, notification requirements or other procedures, if any, that the FCM must observe or undertake in your jurisdiction in enforcing its security interest in Covered Collateral?*

There is no further action required under Bermuda law to enforce such a security interest however, as set out in question 5 above, registration is recommended.

Additional considerations

17. *Are there any other local law considerations that you would recommend the FCM to consider in connection with enforcing its security interest in Covered Collateral?*

    No.

18. *Are there any other circumstances you can foresee that might affect the FCM's ability to enforce its security interest in the Covered Collateral in your jurisdiction?*

    No.

Reservations

a. Enforcement of the obligations of the Covered Customer under the Covered Agreement may be the subject of a statutory limitation of the time within which such proceedings may be brought.

b. We express no opinion as to any law other than Bermuda law and none of the opinions expressed herein relates to compliance with or matters governed by the laws of any jurisdiction except Bermuda. This opinion is limited to Bermuda law as applied by the courts of Bermuda at the date hereof.

c. Where an obligation is to be performed in a jurisdiction other than Bermuda, the courts of Bermuda may refuse to enforce it to the extent that such performance would be illegal under the laws of, or contrary to public policy of, such other jurisdiction.

d. We express no opinion as to the validity, binding effect or enforceability of any provision incorporated into the Covered Agreement by reference to a law other than that of Bermuda, or as to the availability in Bermuda of remedies which are available in other jurisdictions.

e. Where a person is vested with a discretion or may determine a matter in his or its opinion, such discretion may have to be exercised reasonably or such an opinion may have to be based on reasonable grounds.

f. Any provision in the Covered Agreement that certain calculations or certificates will be conclusive and binding will not be effective if such calculations or certificates are fraudulent or erroneous on their face and will not necessarily prevent juridical enquiries into the merits of any claim by an aggrieved party.

g. We express no opinion as to the validity or binding effect of any provision in the Covered Agreement for the payment of interest at a higher rate on overdue amounts than on amounts which are current, or that liquidated damages are or may be payable. Such a provision may not be enforceable if it could be established that the amount expressed as being payable was in the nature of a penalty; that is to say a requirement for a stipulated sum to be paid irrespective of, or necessarily greater than, the loss likely to be sustained. If it cannot be demonstrated to the Bermuda court that the higher payment was a reasonable pre-estimate of the loss suffered, the court will determine and award what it considers to be reasonable damages. Section 9 of the Interest and Credit Charges (Regulations) Act 1975 provides that the Bermuda courts have discretion as to the amount of interest, if any, payable on the amount of a judgment after date of judgment. If the court does not exercise that discretion, then interest will accrue at the statutory rate which is currently 7% per annum.

h. We express no opinion as to the validity or binding effect of any provision of the Covered Agreement which provides for the severance of illegal, invalid or unenforceable provisions.

i. A Bermuda court may refuse to give effect to any provisions of the Covered Agreement in respect of costs of unsuccessful litigation brought before the Bermuda court or where that court has itself made an order for costs.

This opinion is addressed to you solely for your benefit and the benefit of your members and is neither to be transmitted to any other person, nor relied upon by any other person or for any other purpose nor quoted or referred to in any public document nor filed with any governmental agency or person, without our prior written consent, except as may be required by law or regulatory authority. A copy of this opinion may, however, be provided to (but not relied upon by): (a) ISDA's and FIA'S auditor's and advisors; (b) ISDA's and FIA's members advisors and auditors; and (c) ISDA's and FIA's members' regulatory authorities and supervisory bodies. Further, this opinion speaks as of its date and is strictly limited to the matters stated herein and we assume no obligation to review or update this opinion if applicable law or the existing facts or circumstances should change.

This opinion is governed by and is to be construed in accordance with Bermuda law. It is given on the basis that it will not give rise to any legal proceedings with respect thereto in any jurisdiction other than Bermuda.

Yours faithfully

Appleby (Bermuda) Limited

ANNEX A

The principal statute governing trusts and their administration in Bermuda is the Trustee Act 1975, which is largely patterned on the English Trustee Act 1925. Another important statute in Bermuda is the Trusts (Special Provisions) Act 1989 which increased certainty on the conflict of laws rules in relation to the recognition of trusts. This Act also allows for the incorporation of statutory administrative powers into the trust deed and introduced the concept of the 'purpose trust'. Both Acts have undergone several amendments.

The Perpetuities and Accumulations Act 1989 makes it possible to stipulate a perpetuity period of a fixed term lasting for up to 100 years. This Act adopted the 'wait and see' rule whereby if there is a possibility of vesting occurring at too remote a time, the application of the rule against perpetuities is deferred until it becomes apparent that vesting will occur beyond the perpetuity period, if ever. It is possible however to draft an exclusively charitable trust or purpose trust that may last indefinitely. The Perpetuities and Accumulations Act 2009, however, has limited the application of the rule against perpetuities to estates or interests only to the extent that the property is land in Bermuda, but only in relation to instruments taking effect on or after the commencement day of the Act (1 August 2009).

The Trusts (Regulation of Trust Business) Act 2001 came into effect on 25 January 2002. It replaced the Trust Companies Act 1991 and provides that a company, partnership or individual shall not carry on trust business in or from within Bermuda without the appropriate licence. Trust business is defined in the Act as the provision of the services of a trustee as a business, trade, profession or vocation. The Government is committed to keeping information concerning trust business confidential, except in the event of a criminal investigation. The Act provides that no person carrying on business in or from Bermuda shall use any name which indicates that it is carrying on trust business, unless it is a licensed trustee or has received an exemption. This means that a private trust company which seeks to use 'trust' or 'trustee' in its name can only do so if it is licensed or has an exemption order. The Trusts (Regulation of Trust Business) Exemption Order 2002 took effect on 9 August 2002. The exemption order operates to exclude certain persons falling within a specified class from the requirements to hold a licence under the Act. Most private trust companies will be covered by an exemption order[16]

Bermuda Trusts are constituted by a trust deed. A trust has no separate legal capacity; it is a fiduciary relationship whereby a fund is held by the trustee that is subject to equitable obligations to deal with the fund under the terms of the trust instrument and in equity for the

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[16] A Bermuda Company is exempted from the requirement to hold a licence if it is authorised to provide the services of a trustee only to the trusts specified –

(c) in its memorandum of association; or

(d) in the case of an overseas company, in its permit;

and to such other trusts as the Minister may approve from time to time.

A Bermuda Company that is exempted from the requirement to hold a licence as aforesaid is required to certify to the Bermuda Monetary Authority that it qualifies for an exemption

benefit of the beneficiaries who may enforce such equitable obligations. The Trusts (Special Provisions) Act 1989 is clear in that the assets of a Bermuda Trust constitute a separate fund and are not part of the trustee's own assets.

A Bermuda Trust therefore acts through its trustee, who is personally liable for the obligations it incurs; although, when obligations are incurred in that capacity, the trustee will have a right to discharge those obligations out of the funds of the Bermuda Trust (such indemnity may be excluded or limited in the trust deed). Assuming the trustee's right has not been excluded, where the Bermuda Trust's funds are insufficient to meet the liability in full, the trustee will be personally liable to the relevant creditor for the balance. It is possible, however, for the trustee to enter into limited recourse provisions so as to limit liability contractually.

The Trusts (Special Provisions) Act 1989 makes clear that a Bermuda Trust has the following characteristics:

- the assets of a Bermuda Trust constitute a separate fund and are not part of the trustee's own estate;

- title to the Bermuda Trust's assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and

- the trustee has the power and the duty, in respect of which he or it is accountable to manage, employ or dispose of the assets in accordance with the terms of the Bermuda Trust and the special duties imposed upon him by law.

The trust deed will provide for the manner in which the Bermuda Trust is to be administered e.g. the appointment and removal of the trustee, investment and borrowing powers and restrictions, and the termination and winding up of the affairs of the Bermuda Trust.

There is no governmental consent or approval required to form a Bermuda Trust. All that is required is settlement of the terms of the trust deed and execution of the deed by the trustee.

We note, however, that under the Exchange Control Act 1972 and the regulations promulgated thereunder, Bermuda undertakings are to be regarded as resident or non-resident for exchange control purposes. As indicated above, if they are regarded as non-resident they will be free to trade in any currency other than the Bermuda dollar, and the rules in Bermuda regarding exchange control will not affect their obligations in currencies other than Bermuda dollars. Bermuda Trusts are Bermuda undertakings for the purposes of the Exchange Control Act 1972.

A Bermuda Trust may be designated as non-resident in Bermuda even where the trustee itself is resident for exchange control purposes. Any exchange control restrictions operating in relation to the trustee as resident for exchange control purposes would not affect any accounts held in the name of the trustee in respect of a Bermuda Trust that is non-resident for exchange control purposes. Accordingly, before entering into a Covered Agreement in respect of a

Bermuda Trust, enquiries should be made as to whether or not the Bermuda Trust has received a designation letter (or equivalent documentary evidence) that indicates its designation as resident for Exchange Control purposes. In our experience, it would be unusual if the result of the enquiries that we are recommending in this connection was that a Bermuda Trust that was a unit trust was designated or regarded as "resident" for Exchange Control purposes. Should the mentioned result prove actually to be case, then an appropriate permission would need to be obtained from the Bermuda Monetary Authority, before any Covered Transactions were entered into in respect of the particular Bermuda Trust.

Capacity

In order to determine whether there is capacity or the power for a Bermuda Trustee to enter into derivative transactions to bind itself in relation to the Bermuda Trust, such capacity or power must be within the provisions or purposes of the Bermuda Trust, as set out in the terms of the Trust deed and settlements etc. and any actions taken by the Bermuda Trustee must be within its power/capacity.

Where a Bermuda Company enters into an Covered Agreement on behalf of a Bermuda Trust (and assuming the Bermuda Trustee is duly licensed or exempted as aforesaid), the power to enter the Covered Agreement must also be within the corporate capacity of the Bermuda Company.

SCHEDULE 1

PART 1

Acts of Bankruptcy – Bermuda Companies (including Bermuda Insurance Companies), Bermuda LLCs and Partners of a Bermuda Partnership that are either Bermuda Companies or individuals in respect of whom a Bermuda court may assert jurisdictions[17].

The existence of an "act of bankruptcy" and knowledge thereof is relevant to the application of set off under Section 37 of the Bankruptcy Act 1989 (the '1989 Act'). Pursuant to the 1989 Act, the following matters are within the contemplation of the expression "act of bankruptcy":

An "act of bankruptcy" is an act committed by a debtor under the laws of Bermuda if, when in this jurisdiction or elsewhere, in any of the following cases, such debtor:

(a) makes a conveyance or assignment of his (or its) property to a trustee or trustees for the benefit of his (or its) creditors generally;

(b) makes a fraudulent conveyance, gift, delivery, or transfer of his (or its) property, or of any part thereof;

(c) makes any conveyance or transfer of his (or its) property or part thereof, or creates any charge thereon, which would under this or any other Act of Bermuda be void as a fraudulent preference;

(d) if with intent to defeat or delay his creditors, the debtor departs out of Bermuda, or being out of Bermuda remains out of Bermuda, or otherwise absents himself or begins to keep house outside of Bermuda;

(e) if execution against the debtor has been levied by seizure of his (or its) goods in an action or any civil proceeding in the Bermuda Court, and the goods have been sold or held by the Provost Marshal General of Bermuda or other officer for 21 days (the time elapsing between the date of the summons and the date at which the proceedings on the summons are disposed shall be discounted in calculating such period of 21 days where an interpleader summons has been taken out in regard to the goods seized);

(f) if the debtor files in the Court a declaration of his (or its) inability to pay his (or its) debts or presents a bankruptcy petition against himself (or itself);

(g) if a creditor has obtained a final judgment or final order against the debtor for any amount, and, execution thereon not having been stayed, has served on him in Bermuda, or, by leave of the Court, elsewhere, a bankruptcy notice under the 1989 Act, and the debtor does not, within 14 days after service of the notice (where the

[17] A debtor who is either personally present in Bermuda, ordinarily resided or had a place of residence in Bermuda, was carrying on business in Bermuda personally or by means of an agent or manager or was a member of a firm or partnership which carried on business in Bermuda.

service is effected in Bermuda) or within the time limited by the order giving leave to effect the service (where the service is effected elsewhere), either comply with the requirements of the notice or satisfy the Court that he (or it) has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which the debtor could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained any person who is, for the time being, entitled to enforce a final judgment or final order, is deemed to be a creditor who has obtained final judgment or final order; or

(h) if the debtor gives notice to any of his (or its) creditors that he (or it) has suspended, or that he (or it) is about to suspend payment of his (or its) debts.

The summaries in Parts 2, 3 and 4 below, list the main types of Transaction which are void or voidable particularly in an insolvency:

PART 2

Bermuda Companies (including Bermuda Insurance Companies, Bermuda Banks and Bermuda Trustees)

(a) A disposition in favour of a creditor by an insolvent company, within six months prior to the filing of a petition for the winding-up of the company and for the purpose of preferring the creditor is void. An express statutory exemption protects the interests of any person obtaining title to property through or under a creditor of the insolvent company in good faith and for valuable consideration. See Section 237 of the Companies Act which incorporates by reference Section 47 of the Bankruptcy Act, 1989.

(b) Within certain limits, a disposition of property by the Bermuda company

(i) made with the dominant intention of putting property beyond the reach of a person (or class of persons) who has a claim or may at some time have a claim against the transferor; and

(ii) without adequate consideration

is voidable at the instance of certain eligible creditors. This rule applies within or outside liquidation (and in fact a liquidator appears not to have standing in relation to this particular jurisdiction). Insolvency is not a prerequisite. A creditor will be an eligible creditor if it falls into one of the following categories: (a) person to whom on, or within two years after, the date of the transfer the transferor owed an obligation which obligation remains unsatisfied on the date of the action or proceeding; (b) a person to whom, on the date of the transfer, the transferor owed a contingent liability and since that date the contingency has fallen in, with the liability remaining unsatisfied; or (c) a person to whom the transferor owed an obligation in consequence

of a claim that he made against the transferor, where the cause of action giving rise to the claim occurred prior to, or within two years of, the transfer. See part IV A of the Conveyancing Act 1983.

(c) A void disposition under Bermuda law is any disposition of the property of a company after the filing of a petition for the winding-up of a company. Such a disposition is void unless approved by the court. See Section 166 of the Companies Act.

(d) There is under our law a concept of fraudulent trading. This entails the carrying on of the business of a company with intent to defraud creditors of the company or for any other fraudulent purpose. Any person ("the respondent" or "defendants") found by a court to have been conducting business in this way may be held personally liable for any or all of the debts of the company. It must be proven that the respondent was knowingly a party to the carrying on of such business. Positive steps in relation to the carrying on of the business of the company with intent to defraud must have been taken by the person sought to be held liable. Actual dishonesty must be proven, although it may be enough to demonstrate that the company continued to incur debt at a time when the respondents knew that there was no reasonable prospect of the creditors ever being paid. If the respondents can demonstrate that they genuinely believed that the company would come out of its financial difficulties, however, they may be exonerated. See Section 246 of the Companies Act.

(e) There is statutory jurisdiction for a court to compel repayment or compensation from any director or officer who has misapplied any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company. See Section 247 of the Companies Act. This provision is not thought to provide any substantive remedies which would not otherwise exist but provides a summary mechanism.

(f) A floating charge granted by a company while it was insolvent and within 12 months prior to the presentation of a petition is void, except to the extent of cash advances made in consideration for the floating charge. See Section 39 of the Companies Act.

(g) A conveyance or assignment by a company of all its property to trustees for the benefit of its creditors shall be void for all intents. See Section 237(2) of the Companies Act.

(h) A liquidator on behalf of a company in liquidation may set aside a Transaction in any case in which the company outside of liquidation could have done so. For example, if there are questions of ultra vires, authority, or breach of fiduciary duties, the liquidator on behalf of the company may initiate proceedings.

(i) A Transaction is void to the extent that it purports to convey, assign, charge, anticipate or give as security:

(a) a right to receive money payable under a pension plan; or

(b) assets being transferred from a pension fund.

See Section 44(3) of the National Pension Scheme (Occupational Pensions) Act 1998.

(j) In any case where—

(a) any warrant of distress is executed against the property of an employer and the property is seized or sold in pursuance of the execution; or

(b) on the application of a secured creditor the property of an employer is sold,

the proceeds of the sale of the property shall not be distributed to any person entitled thereto until the court ordering the sale has made provision for the payment into a pension fund of any amounts due in respect of contributions payable by the employer. See Section 25 of the National Pension Scheme (Occupational Pensions) Act 1998.

PART 3

1. A disposition in favour of a creditor by an insolvent Bermuda LLC, within six months prior to the filing of a petition for the winding-up of the Bermuda LLC and for the purpose of preferring the creditor is void. An express statutory exemption protects the interests of any person obtaining title to property through or under a creditor of the insolvent Bermuda LLC in good faith and for valuable consideration. See Section 187 of the LLC Act cross refers to Section 47 of the Bankruptcy Act.

2. Within certain limits, a disposition of property by the Bermuda LLC

(a) made with the dominant intention of putting property beyond the reach of a person (or class of persons) who has a claim or may at some time have a claim against the transferor; and

(b) without adequate consideration

is voidable at the instance of certain eligible creditors.

This rule applies within or outside liquidation (and in fact a liquidator appears not to have standing in relation to this particular jurisdiction). Insolvency is not a prerequisite. A creditor will be an eligible creditor if it falls into one of the following categories: (a) person to whom on, or within two years after, the date of the transfer the transferor owed an obligation which obligation remains unsatisfied on the date of the action or proceeding; (b) a person to whom, on the date of the transfer, the transferor owed a contingent liability and since that date the contingency has fallen in, with the liability remaining unsatisfied; or (c) a person to whom the transferor owed an obligation in consequence of a claim that he made against the transferor, where the cause of action giving rise to the claim occurred prior to, or within two years of, the transfer. See part IV A of the Conveyancing Act1983. This may extend up to 8

years, as eligible creditors have 6 years within which to initiate proceedings, calculated from when the cause of action occurred.

3. A void disposition under Bermuda law is any disposition of the property of a Bermuda LLC after the filing of a petition for the winding-up of a Bermuda LLC. Such a disposition is void unless approved by the court. See Section 113 of the LLC Act.

4. The concept of fraudulent trading also applies to Bermuda LLCs. This entails the carrying on of the business of a Bermuda LLC with intent to defraud creditors of the Bermuda LLC or for any other fraudulent purpose. Any person found by a court to have been conducting business in this way may be held personally liable for any or all of the debts or other liability of the Bermuda LLC. See Section 196 of the LLC Act.

5. There is statutory jurisdiction for a court to compel repayment or compensation from any director or officer who has misapplied any money or property of the Bermuda LLC or has been guilty of any misfeasance or breach of trust in relation to the Bermuda LLC. See Section 197 of the LLC Act. This provision is not thought to provide any substantive remedies which would not otherwise exist but provides a summary mechanism.

6. A floating charge granted by a Bermuda LLC while it was insolvent and within 12 months prior to the presentation of a petition is void, except to the extent of cash advances made in consideration for the floating charge. See Section 189 of the LLC Act.

7. A conveyance or assignment by a Bermuda LLC of all its property to trustees for the benefit of its creditors shall be void for all intents. See Section 187(2) of the LLC Act.

8. A liquidator on behalf of a Bermuda LLC in liquidation may set aside a Transaction in any case in which the Bermuda LLC outside of liquidation could have done so. For example if there are questions of ultra vires, authority, or breach of fiduciary duties, the liquidator on behalf of the Bermuda LLC may initiate proceedings.

9. A Transaction is void to the extent that it purports to convey, assign, charge, anticipate or give as security:
   (a) a right to receive money payable under a pension plan; or
   (b) assets being transferred from a pension fund.
   See Section 44(3) of the National Pension Scheme (Occupational Pensions) Act 1998.

10. In any case where—
   (a) any warrant of distress is executed against the property of an employer and the property is seized or sold in pursuance of the execution; or
   (b) on the application of a secured creditor the property of an employer is sold, the proceeds of the sale of the property shall not be distributed to any person entitled thereto until the court ordering the sale has made provision for the payment into a pension fund of any amounts due in respect of contributions payable by the employer. See Section 25 of the National Pension Scheme (Occupational

Pensions) Act 1998.

PART 4

Partners of a Bermuda Partnership that are individuals and in respect of whom a Bermuda court may assert jurisdiction[18]

a. A settlement of property made within two years prior to the bankruptcy of the settlor becomes bankrupt (or five years prior to any subsequent bankruptcy of the settlor) is void as against the trustee in bankruptcy unless the settlor was, at the time of the settlement able to pay his debts without the aid of the property comprised in the settlement, Section 45(1) of the 1989 Act;

b. Certain settlements in consideration of marriage are void as against a trustee in bankruptcy of the settlor. A payment of money under such a contract is void unless (among other exceptions) the payment was made more than two years prior to the bankruptcy or that the debtor was able to pay his debts without the aid of the property settled: Section 45(2) of the 1989 Act;

c. An assignment by a person in any trade or business of his existing or future book debts who subsequently becomes bankrupt is void as against the trustee in bankruptcy, unless the debts are due from specified debtors or under specified contracts or where the assignment is included in a transfer of a business made *bona fide* and for value or for the benefit of creditors generally: Section 46 of the 1989 Act;

d. A payment made or obligation incurred by a person unable to pay his debts as they fall due for the purpose of preferring a creditor over other creditors is void if the person is adjudged bankrupt on a petition filed within six months from the time when the payment is made or the obligation is incurred. This does not affect the position of any person obtaining title in good faith and for value under or through a creditor of the bankrupt: Section 47 of the 1989 Act;

e. A disposition for no consideration or for insufficient consideration for the purpose of putting property beyond the reach of a person (or class of persons) who (or which) has a claim or may within two years of the disposition have a claim against the debtor under Part IV A of the Conveyancing Act 1994.

Acts of Bankruptcy – in respect of a Bermuda Partnership that is an exempted limited partnership

Pursuant to Section 14 of the Limited Partnership Act 1883, every assignment or transfer of the property of a limited partnership made when the limited partnership is actually insolvent,

[18] See Footnote 10

or is made in contemplation of insolvency of the limited partnership, or after or in contemplation of the insolvency of any partner, with intent to prefer a creditor of the partnership over any other creditor, is void against creditors of the partnership. There is no time limit applicable provided the necessary intent is established.

SCHEDULE 2

The Investment Business Act 2003 defines "investment business" by reference to the following activities in respect of investments:

- buying, selling, subscribing for, or underwriting investments, or offering or agreeing to do so either as principal or agent;

- making or offering or agreeing to make arrangements with a view to: (1) another person buying, selling, subscribing for or underwriting a particular investment, being arrangements which bring about the transaction in question; or (2) a person who participates in the arrangements buying, selling, subscribing for or underwriting investments;

- managing or offering, or agreeing to manage assets belonging to another person, where those assets consist of or include investments;

- giving or offering, or agreeing to give or offer, to persons in their capacity as clients or potential clients, advice on the merits of their purchasing, selling, subscribing for or underwriting, an investment, or exercising any right conferred by an investment to acquire, dispose of, underwrite or convert such investment; and

- safeguarding and administering or arranging for the safeguarding and administration of or offering to safeguard and administer assets belonging to another where the assets comprise or include investments.

"Investments" are defined as shares, stock, debentures (including debenture stock, loan stock, bonds, certificates of deposit, securities issued by a body corporate, government, public authority or other body), warrants giving entitlement to investments, rights to participate in unit trust schemes, certificates representing investments, options, futures, contracts for differences, interests in partnerships and rights and interests in investments.

APPENDIX A
June 2023
CERTAIN DERIVATIVES TRANSACTIONS

Basis Swap. A transaction in which one party pays periodic amounts of a given currency based on a floating rate and the other party pays periodic amounts of the same currency based on another floating rate, with both rates reset periodically; all calculations are based on a notional amount of the given currency.

Bond Forward. A transaction in which one party agrees to pay an agreed price for a specified amount of a bond of an issuer or a basket of bonds of several issuers at a future date and the other party agrees to pay a price for the same amount of the same bond to be set on a specified date in the future. The payment calculation is based on the amount of the bond and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Bond Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a bond of an issuer, such as Kingdom of Sweden or Unilever N.V., at a specified strike price. The bond option can be settled by physical delivery of the bonds in exchange for the strike price or may be cash settled based on the difference between the market price of the bonds on the exercise date and the strike price.

Bullion Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of Ounces of Bullion at a specified strike price. The option may be settled by physical delivery of Bullion in exchange for the strike price or may be cash settled based on the difference between the market price of Bullion on the exercise date and the strike price.

Bullion Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency calculated by reference to a Bullion reference price (for example, Gold-COMEX on the COMEX Division of the New York Mercantile Exchange) or another method specified by the parties. Bullion swaps include cap, collar or floor transactions in respect of Bullion.

Bullion Trade. A transaction in which one party agrees to buy from or sell to the other party a specified number of Ounces of Bullion at a specified price for settlement either on a "spot" or two-day basis or on a specified future date. A Bullion Trade may be settled by physical delivery of Bullion in exchange for a specified price or may be cash settled based on the difference between the market price of Bullion on the settlement date and the specified price.

For purposes of Bullion Trades, Bullion Options and Bullion Swaps, "Bullion" means gold, silver, platinum or palladium and "Ounce" means, in the case of gold, a fine troy ounce, and in the case of silver, platinum and palladium, a troy ounce (or in the case of reference prices not expressed in Ounces, the relevant Units of gold, silver, platinum or palladium).

Buy/Sell-Back Transaction. A transaction in which one party purchases a security (in consideration for a cash payment) and agrees to sell back that security (or in some cases an equivalent security) to the other party (in consideration for the original cash payment plus a premium).

Cap Transaction. A transaction in which one party pays a single or periodic fixed amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified floating rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap) in each case that is reset periodically over a specified per annum rate (in the case of an interest rate cap), rate or index (in the case of an economic statistic cap) or commodity price (in the case of a commodity cap).

Collar Transaction. A collar is a combination of a cap and a floor where one party is the floating rate, floating index or floating commodity price payer on the cap and the other party is the floating rate, floating index or floating commodity price payer on the floor.

Commodity Forward. A transaction in which one party agrees to purchase a specified quantity of a commodity at a future date at an agreed fixed or floating price, and the other party agrees to deliver such quantity in exchange for payment at such price on a specified date in the future.

Commodity Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index based on the price of one or more commodities.

Commodity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the

Bermuda ■ British Virgin Islands ■ Cayman Islands ■ Guernsey ■ Hong Kong ■ Isle of Man ■ Jersey ■ London ■ Mauritius ■ Seychelles ■ Shanghai ■ Zurich

case of a call) or sell (in the case of a put) a specified quantity of a commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the commodity on the exercise date and the strike price.

Commodity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a commodity, such as natural gas or gold, or a futures contract on a commodity (e.g., West Texas Intermediate Light Sweet Crude Oil on the New York Mercantile Exchange); all calculations are based on a notional quantity of the commodity.

Contingent Credit Default Swap. A Credit Default Swap Transaction under which the calculation amounts applicable to one or both parties may vary over time by reference to the mark-to-market value of a hypothetical swap transaction.

Credit Default Swap Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to enter into a Credit Default Swap.

Credit Default Swap. A transaction in which one party pays either a single fixed amount or periodic fixed amounts or floating amounts determined by reference to a specified notional amount, and the other party (the credit protection seller) pays either a fixed amount or an amount determined by reference to the value of one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity") upon the occurrence of one or more specified credit events with respect to the Reference Entity (for example, bankruptcy or payment default). The amount payable by the credit protection seller is typically determined based upon the market value of one or more debt securities or other debt instruments issued, guaranteed or otherwise entered into by the Reference Entity. A Credit Default Swap may also be physically settled by payment of a specified fixed amount by one party against delivery of specified obligations ("Deliverable Obligations") by the other party. A Credit Default Swap may also refer to a "basket" (typically ten or less) or a "portfolio" (eleven or more) of Reference Entities or may be an index transaction consisting of a series of component Credit Default Swaps.

Credit Derivative Transaction on Asset-Backed Securities. A Credit Default Swap for which the Reference Obligation is a cash or synthetic asset-backed security. Such a transaction may, but need not necessarily, include "pay as you go" settlements, meaning that the credit

protection seller makes payments relating to interest shortfalls, principal shortfalls and write-downs arising on the Reference Obligation and the credit protection buyer makes additional fixed payments of reimbursements of such shortfalls or write-downs.

Credit Spread Transaction. A transaction involving either a forward or an option where the value of the transaction is calculated based on the credit spread implicit in the price of the underlying instrument.

Cross Currency Rate Swap. A transaction in which one party pays periodic amounts in one currency based on a specified fixed rate (or a floating rate that is reset periodically) and the other party pays periodic amounts in another currency based on a floating rate that is reset periodically. All calculations are determined on predetermined notional amounts of the two currencies; often such swaps will involve initial and or final exchanges of amounts corresponding to the notional amounts.

Currency Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified amount of a given currency at a specified strike price.

Currency Swap. A transaction in which one party pays fixed periodic amounts of one currency and the other party pays fixed periodic amounts of another currency. Payments are calculated on a notional amount. Such swaps may involve initial and or final payments that correspond to the notional amount.

Economic Statistic Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency by reference to interest rates or other factors and the other party pays or may pay an amount or periodic amounts of a currency based on a specified rate or index pertaining to statistical data on economic conditions, which may include economic growth, retail sales, inflation, consumer prices, consumer sentiment, unemployment and housing.

Emissions Allowance Transaction. A transaction in which one party agrees to buy from or sell to the other party a specified quantity of emissions allowances or reductions at a specified price for settlement either on a "spot" basis or on a specified future date. An Emissions Allowance Transaction may also constitute a swap of emissions allowances or reductions or an option whereby one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by

which the specified quantity of emissions allowances or reductions exceeds or is less than a specified strike. An Emissions Allowance Transaction may be physically settled by delivery of emissions allowances or reductions in exchange for a specified price, differing vintage years or differing emissions products or may be cash settled based on the difference between the market price of emissions allowances or reductions on the settlement date and the specified price.

Equity Forward. A transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same quantity and shares to be set on a specified date in the future. The payment calculation is based on the number of shares and can be physically-settled (where delivery occurs in exchange for payment) or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement).

Equity Index Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified number of shares of an issuer or a basket of shares of several issuers at a specified strike price. The share option may be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity Swap. A transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed or floating rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer, a basket of shares of several issuers or an equity index, such as the Standard and Poor’s 500 Index.

Floor Transaction. A transaction in which one party pays a single or periodic amount and the other party pays periodic amounts of the same currency based on the excess, if any, of a specified per annum rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor) over a specified floating rate (in the case of an interest rate floor), rate or index level (in the case of an economic statistic floor) or commodity price (in the case of a commodity floor).

Foreign Exchange Transaction. A deliverable or non-deliverable transaction providing for the purchase of one currency with another currency providing for settlement either on a "spot" or two-day basis or a specified future date.

Forward Rate Transaction. A transaction in which one party agrees to pay a fixed rate for a defined period and the other party agrees to pay a rate to be set on a specified date in the future. The payment calculation is based on a notional amount and is settled based, among other things, on the difference between the agreed forward rate and the prevailing market rate at the time of settlement.

Freight Transaction. A transaction in which one party pays an amount or periodic amounts of a given currency based on a fixed price and the other party pays an amount or periodic amounts of the same currency based on the price of chartering a ship to transport wet or dry freight from one port to another; all calculations are based either on a notional quantity of freight or, in the case of time charter transactions, on a notional number of days.

Fund Option Transaction: A transaction in which one party grants to the other party (for an agreed payment or other consideration) the right, but not the obligation, to receive a payment based on the redemption value of a specified amount of an interest issued to or held by an investor in a fund, pooled investment vehicle or any other interest identified as such in the relevant Confirmation (a “Fund Interest”), whether i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests in relation to a specified strike price. The Fund Option Transactions will generally be cash settled (where settlement occurs based on the excess of such redemption value over such specified strike price (in the case of a call) or the excess of such specified strike price over such redemption value (in the case of a put) as measured on the valuation date or dates relating to the exercise date).

Fund Forward Transaction: A transaction in which one party agrees to pay an agreed price for the redemption value of a specified amount of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests at a future date and the other party agrees to pay a price for the redemption value of the same amount of the same Fund Interests to be set on a specified date in the future. The payment calculation is based on the amount of the redemption value relating to such Fund Interest and generally cash-settled (where settlement occurs based on the difference between the agreed forward price and the redemption value measured as of the applicable valuation date or dates).

Fund Swap Transaction: A transaction a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays

periodic amounts of the same currency based on the redemption value of i) a single class of Fund Interest of a Single Reference Fund or ii) a basket of Fund Interests.

Interest Rate Option. A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to receive a payment equal to the amount by which an interest rate either exceeds (in the case of a call option) or is less than (in the case of a put option) a specified strike rate.

Interest Rate Swap. A transaction in which one party pays periodic amounts of a given currency based on a specified fixed rate and the other party pays periodic amounts of the same currency based on a specified floating rate that is reset periodically, such as the London inter-bank offered rate; all calculations are based on a notional amount of the given currency.

Longevity/Mortality Transaction. (a) A transaction employing a derivative instrument, such as a forward, a swap or an option, that is valued according to expected variation in a reference index of observed demographic trends, as exhibited by a specified population, relating to aging, morbidity, and mortality/longevity, or (b) A transaction that references the payment profile underlying a specific portfolio of longevity- or mortality- contingent obligations, e.g. a pool of pension liabilities or life insurance policies (either the actual claims payments or a synthetic basket referencing the profile of claims payments).

Physical Commodity Transaction. A transaction which provides for the purchase of an amount of a commodity, such as oil including oil products, coal, electricity or gas, at a fixed or floating price for actual delivery on one or more dates.

Property Index Derivative Transaction. A transaction, often structured in the form of a forward, option or total return swap, between two parties in which the underlying value of the transaction is based on a rate or index based on residential or commercial property prices for a specified local, regional or national area.

Repurchase Transaction. A transaction in which one party agrees to sell securities to the other party and such party has the right to repurchase those securities (or in some cases equivalent securities) from such other party at a future date.

Securities Lending Transaction. A transaction in which one party transfers securities to a party acting as the borrower in exchange for a payment or a series of payments from the borrower and the borrower's obligation to replace the securities at a defined date with identical securities.

Swap Deliverable Contingent Credit Default Swap. A Contingent Credit Default Swap under which one of the Deliverable Obligations is a claim against the Reference Entity under an ISDA Master Agreement with respect to which an Early Termination Date (as defined therein) has occurred.

Swap Option. A transaction in which one party grants to the other party the right (in consideration for a premium payment), but not the obligation, to enter into a swap with certain specified terms. In some cases the swap option may be settled with a cash payment equal to the market value of the underlying swap at the time of the exercise.

Total Return Swap. A transaction in which one party pays either a single amount or periodic amounts based on the total return on one or more loans, debt securities or other financial instruments (each a "Reference Obligation") issued, guaranteed or otherwise entered into by a third party (the "Reference Entity"), calculated by reference to interest, dividend and fee payments and any appreciation in the market value of each Reference Obligation, and the other party pays either a single amount or periodic amounts determined by reference to a specified notional amount and any depreciation in the market value of each Reference Obligation.

A total return swap may (but need not) provide for acceleration of its termination date upon the occurrence of one or more specified events with respect to a Reference Entity or a Reference Obligation with a termination payment made by one party to the other calculated by reference to the value of the Reference Obligation.

Weather Index Transaction. A transaction, structured in the form of a swap, cap, collar, floor, option or some combination thereof, between two parties in which the underlying value of the transaction is based on a rate or index pertaining to weather conditions, which may include measurements of heating, cooling, precipitation and wind.

APPENDIX B
SEPTEMBER 2009

CUSTOMER TYPES[19]

Description	**Covered by opinion**	**Legal form(s)**[20]
Bank/Credit Institution. A legal entity, which may be organized as a corporation, partnership or in some other form, that conducts commercial banking activities, that is, whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) making loans to private individual and/or corporate borrowers. This type of entity is sometimes referred to as a "commercial bank" or, if its business also includes investment banking and trading activities, a "universal bank". (If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm/Broker Dealer" category below.) This type of entity is referred to as a "credit institution" in European Community (**EC**) legislation. This category may include specialised types of bank, such as a mortgage savings bank (provided that the relevant entity accepts deposits and makes loans), or such an entity may be considered in the local jurisdiction to constitute a separate category of legal entity (as in the case of a building society in the United Kingdom (**UK**)).	No. Currently there are only four banks in Bermuda each of which were incorporated by Private Act of the Bermuda Legislature.	
Central Bank. A legal entity that performs the function of a central bank for a Sovereign or for an area of monetary union (as in the case of the European Central Bank in respect of the euro zone).	No.	

[19] In these definitions, the term "legal entity" means an entity with legal personality, other than a private individual.

[20] If appropriate, please indicate, as discussed in the instruction letter, any naming convention or rule that would help a reader of the opinion to identify and classify the entity.

Bermuda ■ British Virgin Islands ■ Cayman Islands ■ Guernsey ■ Hong Kong ■ Isle of Man ■ Jersey ■ London ■ Mauritius ■ Seychelles ■ Shanghai ■ Zurich

Description	Covered by opinion	Legal form(s)[20]
Corporation. A legal entity that is organized as a corporation or company rather than a partnership, is engaged in industrial and/or commercial activities and does not fall within one of the other categories in this Appendix B.	Yes.	
Hedge Fund/Proprietary Trader. A legal entity, which may be organized as a corporation, partnership or in some other legal form, the principal business of which is to deal in and/or manage securities and/or other financial instruments and/or otherwise to carry on investment business (as set out in Schedule 2) predominantly or exclusively as principal for its own account.	Yes.	
Insurance Company. A legal entity, which may be organised as a corporation, partnership or in some other legal form (for example, a friendly society or industrial & provident society in the UK), that is licensed to carry on insurance business, and is typically subject to a special regulatory regime and a special insolvency regime in order to protect the interests of policyholders.	Yes.	
International Organization. An organization of Sovereigns established by treaty entered into between the Sovereigns, including the International Bank for Reconstruction and Development (the World Bank), regional development banks and similar organizations established by treaty.	No.	

Description	Covered by opinion	Legal form(s)[20]
Investment Firm/Broker Dealer. A legal entity, which may be organized as a corporation, partnership or in some other form, that does not conduct commercial banking activities but deals in and/or manages securities and/or other financial instruments as an agent for third parties. It may also conduct such activities as principal (but if it does so exclusively as principal, then it most likely falls within the "Hedge Fund/Proprietary Trader" category above.) Its business normally includes holding securities and/or other financial instruments for third parties and operating related cash accounts. This type of entity is referred to as a "broker-dealer" in US legislation and as an "investment firm" in EC legislation.	Yes.	
Investment Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide investors with a share in profits or income arising from property acquired, held, managed or disposed of by the manager(s) of the legal entity or arrangement or a right to payment determined by reference to such profits or income. This type of entity or arrangement is referred to as a "collective investment scheme" in EC legislation. It may be regulated or unregulated. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by general law and/or, typically in the case of regulated Investment Funds, financial services legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Investment Fund (for example, a trustee of a unit trust) contract on behalf of the Investment Fund, are owed the rights and owe the obligations provided for in the contract and are entitled to	Yes.	

Description	Covered by opinion	Legal form(s)[20]
be indemnified out of the assets comprised in the arrangement.		
Local Authority. A legal entity established to administer the functions of local government in a particular region within a Sovereign or State of a Federal Sovereign, for example, a city, county, borough or similar area.	No.	
Partnership. A legal entity or form of arrangement without legal personality that is (a) organised as a general, limited or some other form of partnership and (b) does not fall within one of the other categories in this Appendix B. If it does not have legal personality, it may nonetheless be treated as though it were a legal person for certain purposes (for example, for insolvency purposes) and not for other purposes (for example, tax or personal liability).	Yes.	

Description	**Covered by opinion**	**Legal form(s)**[20]
Pension Fund. A legal entity or an arrangement without legal personality (for example, a common law trust) established to provide pension benefits to a specific class of beneficiaries, normally sponsored by an employer or group of employers. It is typically administered by one or more persons (who may be private individuals and/or corporate entities) who have various rights and obligations governed by pensions legislation. Where the arrangement does not have separate legal personality, one or more representatives of the Pension Fund (for example, a trustee of a pension scheme in the form of a common law trust) contract on behalf of the Pension Fund and are owed the rights and owe the obligations provided for in the contract and are entitled to be indemnified out of the assets comprised in the arrangement.	No.	
Sovereign. A sovereign nation state recognized internationally as such, typically acting through a direct agency or instrumentality of the central government without separate legal personality, for example, the ministry of finance, treasury or national debt office. This category does not include a State of a Federal Sovereign or other political sub-division of a sovereign nation state if the sub-division has separate legal personality (for example, a Local Authority) and it does not include any legal entity owned by a sovereign nation state (see "Sovereign-owned Entity").	No.	

Description	Covered by opinion	Legal form(s)[20]
Sovereign Wealth Fund. A legal entity, often created by a special statute and normally wholly owned by a Sovereign, established to manage assets of or on behalf of the Sovereign, which may or may not hold those assets in its own name. Such an entity is often referred to as an "investment authority". For certain Sovereigns, this function is performed by the Central Bank, however for purposes of this Appendix B the term "Sovereign Wealth Fund" excludes a Central Bank.	No.	
Sovereign-Owned Entity. A legal entity wholly or majority-owned by a Sovereign, other than a Central Bank, or by a State of a Federal Sovereign, which may or may not benefit from any immunity enjoyed by the Sovereign or State of a Federal Sovereign from legal proceedings or execution against its assets. This category may include entities active entirely in the private sector without any specific public duties or public sector mission as well as statutory bodies with public duties (for example, a statutory body charged with regulatory responsibility over a sector of the domestic economy). This category does not include local governmental authorities (see "Local Authority").	No.	
State of a Federal Sovereign. The principal political sub-division of a federal Sovereign, such as Australia (for example, Queensland), Canada (for example, Ontario), Germany (for example, Nordrhein-Westfalen) or the United States of America (for example, Pennsylvania). This category does not include a Local Authority.	No.	